Statement of Walton D. Morris, Jr., Attorney-at-Law
to the Committee on Natural Resources
United States House of Representatives
"The Surface Mining Control and Reclamation Act of 1977: A 30th Anniversary Review"
July 25, 2007

I am Walton Morris, an attorney based in Charlottesville, Virginia. For the past seventeen years, I have practiced law on behalf of environmental organizations and residents of America's coalfields in cases arising under the Surface Mining Control and Reclamation Act of 1977 ("the Surface Mining Act"). Earlier in my career, I served for nine years in the Solicitor's Office of the Department of the Interior. During that time I litigated, or supervised other lawyers who litigated, most of the important early cases involving the Surface Mining Act.

Introduction

This Committee's report on the bill that became the Surface Mining Act concluded that:

> The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so may inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. . . . Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital factor in the regulatory program as established by the act.

With that conviction in mind, and mindful also that "increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal [state] enforcement are not repeated," Congress established a broad range of public participation procedures meant to empower coalfield citizens to supplement governmental regulatory efforts and ensure effective oversight of approved state programs. These procedures implement the public's statutory rights:

(1) to comment on proposed regulations and obtain judicial review of final rulemaking;

(2) to comment on proposed state program provisions and to obtain judicial review of decisions to approve them;

(3) to review and obtain copies of permit applications, inspection materials, and other information obtained or developed by the regulatory authority;

(4) to comment on permit applications and obtain administrative and judicial review of permitting decisions;

(5) to notify federal officials of violations of the Surface Mining Act or its implementing regulations, to participate in inspections conducted as a result of such notices, and to obtain review of adverse inspection or enforcement decisions; and

(6) to bring civil actions to compel coal operators to obey the law or to compel regulatory officials to perform any of the mandatory, non-discretionary duties the statute imposes on them.

Soon after Congress enacted the Surface Mining Act, coalfield citizens began to use the statute's public participation provisions to play precisely the role that Congress expected. Citizen comments on OSM's initial and permanent program regulations helped shape those rules into effective tools which ended many of the abuses that bedeviled America's coalfields. In litigation challenging rules that OSM improperly adopted, coalfield citizens further ensured that federal surface mining regulations accurately reflected Congress's intent.

In other litigation coalfield citizens reached settlements with OSM which led to correction of the coal industry's gross abuse of the so-called "two acre" exemption and to creation of OSM's Applicant/Violator System Office, which began the process of holding major coal producers accountable for environmental violations committed by business entities that those producers owned or controlled – generally, their "contract miners." Additionally, citizens prosecuted civil actions that ultimately caused State officials to strengthen state regulatory programs that had fallen far short of "minimum floor" that Congress meant the Surface Mining Act to establish.

In the administrative sphere, citizens filed inspection and enforcement requests and appeals to the Interior Board of Surface Mining Appeals (later the Board of Land Appeals) that ultimately led OSM and state regulators to compel major coal producers to reclaim mines that their contract miners had abandoned and to pay delinquent abandoned mine land fees associated with those mines. These and many other citizen successes proved the wisdom and practicality of Congress's plan to supplement governmental enforcement of the Surface Mining Act with the efforts of empowered coalfield citizens.

The Current Impairment of Public Participation Under the Surface Mining Act

Even as citizens used the Surface Mining Act's public participation provisions to achieve numerous successes, obstacles to effective public participation began to appear. Rather than valuing the help citizens provide, OSM became hostile to public prodding and has remained so – even to the point of stonewalling or unreasonably delaying response to the public's requests for basic information in instances where OSM is the regulatory authority. Inspection and enforcement requests on both the state and federal level are turned aside for entirely unjustified reasons or ignored altogether. To compound matters, a host of misguided administrative and judicial decisions have curtailed the public's ability to compel inspection or enforcement action or to correct state program deficiencies through actions in federal court. As a result, public participation under the Surface

Mining Act has become so hobbled that, as a practical matter, citizens can no longer play the important supporting role that Congress envisioned. For example:

* Today, OSM continues to withhold copies of permit application materials from New Mexico citizens despite a January 11, 2007, administrative decision directing OSM to make the requested documents available no later than twenty working days from that date;

* Today, OSM, as the regulatory authority in Tennessee, routinely delays citizen requests to review permit applications and inspection documents, and the agency refuses to allow citizens to speak to mine inspectors regarding the conditions they have observed on the ground;

* Today, the state regulatory authority in Virginia continues to refuse to investigate citizen allegations that a coal operator is conducting mining operations without a permit – on the incredible theory that the State has no obligation to inspect because it has not issued a permit for the mine;

* Today, OSM's Virginia field office continues to ignore a citizen request for inspection and enforcement in the same matter, even though the time for responding under OSM's regulations has long since expired, and OSM continues to question in other proceedings whether the agency must make any response at all to a citizen complaint that OSM deems insufficient – even a response that simply informs the complainant of OSM's view;

* Today, coalfield citizens in West Virginia face the crippling expense and uncertainty of a second round of administrative hearings in two appeals before a so-called "multiple interest" board, solely because the testimony of State and industry witnesses in the initial hearings did not support legal arguments that the state regulatory authority subsequently dreamed up in a desperate attempt to prevail;

* Today, citizens throughout America's coalfields are compelled to address environmental problems caused by surface coal mining operations under the Clean Water Act, the Resource Conservation and Recovery Act, or other federal statutes because the courts have foreclosed the use of the Surface Mining Act's citizen suit provision against state regulators who fail to perform mandatory duties that the Surface Mining Act imposes on them.

To restore public participation as an effective supplement to governmental regulatory efforts and a means for securing appropriate oversight of state programs, I urge this Committee and the Congress as whole to investigate and then counteract agency stonewalling of information requests, unwarranted deference to state regulators by federal officials charged with oversight of state

programs, the injustice of administrative review before state "multiple interest" boards, and judicial misinterpretation of the statute. I address each of these problems in turn.

Stonewalling Information Requests

Without ready access to permit applications, inspection reports, enforcement citations, and other documents generated in the regulatory process, the public cannot effectively participate in the regulatory scheme. For the most part, state regulatory authorities provide documents on request without significant delay and in convenient formats for the public's use. In marked contrast, OSM currently appears engaged in a puzzling effort to hamper citizen participation by denying information requests that state regulatory authorities fulfill routinely as a matter of ordinary business. As mentioned above, the agency continues to ignore its clear duty to produce permitting materials for New Mexico citizens concerned about mining operations on Indian lands in that State, where OSM is the regulatory authority.

In Tennessee, where OSM also is the regulatory authority, the agency has imposed an arbitrary two-day waiting period before it will allow any citizen to review permitting, inspection, or enforcement materials. Far worse, the agency has refused to allow citizens to speak with mining inspectors regarding on-the-ground conditions at mines that may adversely affect the citizens' interests. Conversations between citizens and mine inspectors employed by state regulatory authorities are commonplace and highly beneficial to all concerned, because mine inspectors often correct misunderstandings and, in other instances, confirm facts on which citizens subsequently rely in making inspection or enforcement requests.

The only conceivable reason for OSM's stonewalling of citizen requests for information about specific mining operations is to curtail or misdirect efforts by the public to participate in the regulatory scheme in the manner Congress expressly intended. In the interest of effective public participation, I ask this Committee to investigate the marked differences between OSM's performance in this area and that of state regulatory authorities and then to take appropriate action to cause OSM to provide requested information without undue delay or restriction.

OSM's Unwarranted Deference to State Regulators

After noting that "[e]ffective enforcement is central to the success for the surface mining control program contemplated by H.R. 2," this Committee's report on the bill that became the Surface Mining Act emphasized that "a limited Federal oversight role as well as increased opportunities for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal [State] enforcement are not repeated." The essence of both effective Federal oversight and citizen supplementation of governmental enforcement is a thorough, independent assessment by OSM of whether a violation exists and whether prescribed remedial measures are adequate to correct it.

To oversee a state enforcement program effectively in the context of a citizen's request for inspection and enforcement, OSM must take a critical, independent look at the State's response to each ten-day notice. Where any doubt remains whether an alleged violation actually exists or whether prescribed remedial action is sufficient to correct a violation, OSM can meet the Surface Mining Act's enforcement mandate only by conducting a federal inspection and deciding the matter on the basis of OSM's independent evaluation of the facts and the law. If OSM merely defers to the State in resolving doubts about the validity of a citizen complaint, the agency will, for that reason alone, overlook a multitude of violations that an independent assessment of the facts and the law would detect.

Despite this straightforward principle, OSM in 1988 formally adopted the "arbitrary or capricious" standard for evaluating the responses of state regulatory authorities to ten-day notices that OSM issues in response to citizen requests for inspection and enforcement action. From that point forward, OSM has systematically relied on the "arbitrary and capricious" standard as a basis for preferring a State's paper denial that a violation exists over a citizen's assertion to the contrary. In such situations OSM refuses to conduct the federal inspection necessary to a make a thorough, fully informed, and independent assessment of whether the citizen's complaint is valid. Indeed, under OSM's current standard for evaluating state responses to citizen complaints, the agency rarely, if ever, permits the complaining citizen to rebut the State's assertions. As a result, citizen efforts to supplement or strengthen enforcement of the Surface Mining Act are often stymied without the federal inspection that Congress intended OSM generally to make.

Section 521(a) of the Surface Mining Act, which prescribes the ten-day notice process, contains not one word authorizing OSM to defer to the response of a state regulatory authority where doubt remains regarding the existence of a violation or the effectiveness of remedial action that a State has ordered where the violation is not in doubt. The statute authorizes OSM to decline to inspect only where a State's response to a ten-day notice firmly establishes either that the State has taken appropriate action to cause the violation to be corrected or that the State has "good cause" for failing to take such action.

Deference to the views of state regulatory officials is inherently incompatible with the vigorous, independent oversight process that Section 521(a) prescribes. This is so because deference requires OSM to accept a State's ten-day notice response even where, on balance, OSM would decide the matter differently. Both OSM's role as watchdog of America's coalfields and the need for effective citizen participation in enforcing the Surface Mining Act demand that OSM inspect in such circumstances and respond based on conditions on the ground rather than simply defer to whatever view State officials may express on paper.

To revive effective public participation in overseeing state efforts to enforce the requirements of the Surface Mining Act, I urge this Committee and Congress to consider and enact an amendment to the statute which forbids OSM from deferring to the responses of state regulatory authorities to ten-day notices. The Committee and Congress should require instead that OSM conduct a federal

inspection wherever a State's response does not demonstrate to a certainty that an alleged violation does not exist or that there is no need for additional remedial measures.

The Injustice of Administrative Review Before State "Multiple Interest" Boards

Where OSM is the regulatory authority or acts in its oversight capacity, citizens may obtain administrative review of adverse agency decisions before full-time administrative law judges who are free of any conflict of interest in matters that come before them and who generally have sufficient training and resources to provide effective review consistent with the due process of law. In marked contrast, administrative review of the decisions of many state regulatory authorities occurs before "multiple interest" boards whose members are not "employees" of the regulatory authority for conflict-of-interest purposes and who, in fact, own coal mines or are employed by those who do. Although such boards typically have one or more members drawn from environmental protection organizations, State multiple interest boards are generally, if not uniformly, dominated by majorities drawn from the coal industry, consultants to the coal industry, and other pro-development interests. As a result, citizens are compelled to seek administrative review of adverse permitting or enforcement decisions before tribunals that are manifestly biased against them.

Wholly apart from pro-industry bias, State multiple interest boards typically do not have a majority of members who have the necessary training or experience to conduct evidentiary hearings or to issue review decisions in a manner consistent with the requirements of applicable administrative procedure statutes. Consequently, citizens who seek review before these boards are often prohibited from introducing vital evidence or else see the board wholly ignore citizens' evidence in reaching a decision. The procedural errors that these boards routinely commit in conducting hearings and issuing decisions trigger judicial review in an inordinately large number of cases, no matter who prevails before the board. Judicial review in such circumstances results only in remand to the multiple interest board for yet another hearing and decision, with no promise that the second round will not end up as procedurally flawed as the first.

For all these reasons, state multiple interest boards are where public participation in state regulatory programs comes to die. The substantial financial expense and time investment necessary to pursue administrative review in the first place becomes overwhelming to citizens where review results in procedurally flawed decisions that must be reviewed again once they are overturned on judicial review. As mentioned earlier, one multiple interest board has recently ordered a second round of hearings in two appeals for the sole stated reason that the record made in the first round of hearings did not support arguments that the State's lawyers later decided to make. Add to all this the fatal anti-citizen bias of these boards and it is easy to see why citizen participation in States that have multiple interest boards does not accomplish what Congress hoped.

To secure the benefit of meaningful public participation in all state regulatory programs, I urge this Committee to investigate the role of multiple interest boards in stifling effective citizen involvement. Based on that investigation, I urge the Committee and the Congress to amend the Surface Mining Act to prohibit multiple interest boards from conducting administrative review of

the decisions of state regulatory authorities and to require instead that administrative review occur before administrative law judges who are free of conflicts of interest and who are adequately trained to conduct hearings in accordance with state administrative procedure requirements.

Judicial Misinterpretation of the Surface Mining Act's Citizen Suit Provision

In reporting the bill that became the Surface Mining Act, this Committee found that "providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act." Accordingly, the Surface Mining Act includes a provision authorizing any adversely affected person to bring an action in federal court to compel "the appropriate State regulatory authority" to perform any act or duty under the statute which is not discretionary.

From enactment of the statute until 2003, citizens brought actions under the Surface Mining Act's citizen suit provision which resulted in settlements or court orders that corrected a host of shortfalls on the state level and strengthened overall administration of the statute. Beginning in 2003, however, a string of judicial decisions has misinterpreted the scope of the citizen suit provision and rendered its authorization of actions against state regulatory authorities virtually a dead letter.

These decisions mistakenly construe state regulatory programs that implement the Surface Mining Act as purely state law rather than as both state law and federal law by virtue of the Secretary's approval of them and their codification in the Code of Federal Regulations. Based on the misinterpretation of state regulatory programs as purely state law, the pertinent judicial decisions reason that the Eleventh Amendment bars actions that the Surface Mining Act expressly authorizes citizens to bring against State officials. Accordingly, these decisions close the federal courts to citizen suits that would otherwise identify regulatory lapses on the part of State officials and compel them to correct those lapses.

To restore the ability of citizens "keep regulators on their toes" and ensure implementation of state regulatory programs in accordance with the requirements of the Surface Mining Act, I urge this Committee and Congress as whole to consider and enact appropriate amendments to correct, in any one of several possible ways, the judicial misinterpretation of statute I have just described. The viability of public participation in the oversight of state programs depends on the enactment of such an amendment as soon as possible.

Conclusion

I thank the Committee for the opportunity to address these issues, and I look forward with hope to the Committee's response. If I may provide additional information, I will be pleased to do so on request.