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**STATEMENT OF GLENDA H. OWENS, DEPUTY DIRECTOR,
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U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON,
D.C.**

Ms. OWENS. Thank you, Mr. Chairman. Good morning, Mr. Chairman and members of the Committee.

I am pleased to appear before you today, along with Mr. Earl Bandy, on behalf of the Office of Surface Mining Reclamation and Enforcement on the occasion of the 30th anniversary of the enactment of the Surface Mining Control and Reclamation Act of 1977, or SMCRA.

I have been Deputy Director of the Office of Surface Mining Reclamation and Enforcement since 2001. Before that, I was an assistant solicitor for surface mining in the Solicitor's Office at the Department of the Interior, where I worked on various legal issues associated with the Surface Mining Program....

The CHAIRMAN. Deputy Director Owens, what is the status of your implementing the National Research Council's recommendations on the use of coal power plant waste in mine reclamation?

Ms. OWENS. Mr. Chairman, OSM published an advanced notice of proposed rulemaking in March of 2007. The comment period of that notice closed in June. We are currently reviewing comments, and our plan is to get a proposed rule out by the end of the year.

The CHAIRMAN. Is this going the way of your agency's reaction to the National Academy's Coal Waste Empowerment Study? The number of National Academy assigned studies? The Office of Surface Mining is ignoring or starting to stack up, it appears, like building blocks.

Ms. OWENS. We have no intention of ignoring it, sir. In fact, as I said, our every intention is to have the rule published by the end of the year.

The CHAIRMAN. OK. You spoke of the cooperative Federalism with respect to a relationship between the agency and the states. My fear is that this may have evolved into cooperative cronyism. Enforcing SMCRA is not about winning a popularity contest. For instance, does deferring to a state's 10-day notice response constitute independent oversight that the Act envisioned?

Ms. OWENS. Sir, I think that the Act requires, because of the way that the Act is constructed, and that is what the state's taking primacy

and having primary regulatory responsibility, and OSM functioning in an oversight capacity, it is our responsibility to allow the states to take the corrective action that is necessary, which is why the Act provides for the 10-day notice process.

The CHAIRMAN. But that does not preclude Federal enforcement. Is that correct? Would you agree with that statement?

Ms. OWENS. Certainly not, sir, it does not. In the event where the determination is made that the state has not taken appropriate action, OSM will take necessary action.

The CHAIRMAN. OK. Deputy Director Owens, in 1998 I publicly expressed concern with a report that the majority of mountaintop removal mines in West Virginia were given permits without AOC variances. A great deal of litigation and policy changes have taken place since that time. However, my concern remains. And I touched upon this in my opening remarks. And that is, to what extent are mining operations that are viewed as mountaintop removal technically not categorized as such?

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They may use a combination of point removal, area mining, and contour cuts. And for all intents and purposes have the character of a mountaintop removal operation, but have not received an AOC variance, and have not submitted a post-mining land use plan that includes those higher uses that would benefit the economies of coalfield communities, the better post-mining uses to which I referred. I would expect your agency has looked into this matter as part of its oversight. Would you care to comment?

Ms. OWENS. Mr. Chairman, that is, in fact, correct. OSM is very much aware of the issues associated with mountaintop mining. As you mentioned, there has been litigation on the issue since 1998. We have engaged in rulemaking, and in fact currently we are working cooperatively with state and Federal regulators in the development of guidance on certain issues related to mountaintop mining, such as AOC, the variances, the post-mining land uses, and return of mined land to useful and productive hardwood forestry. We have also engaged in a national rulemaking on two of the issues associated with mountaintop mining: extreme buffer zone and excess spoiled fuel rule. We have a proposal that is in final review, and it should be published in the near future.

The CHAIRMAN. Well, I would only respond that it has been a little over 10 years I think since we last had our oversight hearing, where I asked a similar question and got a similar answer.

Ms. OWENS. Well, I wasn't here 10 years ago. But I can tell you that I was in the Solicitor's Office at that time, and I was involved in the litigation on mountaintop mining. I know that it has been a struggle getting through these issues because of the controversies and the confusion that the regulation has wrought, which is why OSM now feels that a national rulemaking on these issues is appropriate.

The CHAIRMAN. But does OSM have a definition of AOC, approximate

original contour?

Ms. OWENS. We do not have a definition at this point. We are, in fact, working on a definition, looking into whether the definition at this time is appropriate.

The CHAIRMAN. Thirty years, and we are still looking for a definition of AOC.

Ms. OWENS. I am sorry. Yes, sir. I thought that was a statement.

The CHAIRMAN. And your response is yes. OK. Let me ask one more question. Turning to the recently enacted amendments to the Abandoned Mine Reclamation Program, is it the agency's view that as a result of those amendments, the states cannot use their AML grants for non-coal mine reclamation.

Ms. OWENS. That is an issue that we are currently working with our solicitors on, to make sure that we follow the law as written. So we are, a decision has not been made, but we are working with our solicitors on that issue.

The CHAIRMAN. Continuing on this issue, and I have already taken issue with Brent Wahlquist on this when he was Acting Director, the Office of Surface Mining has taken the position that the minimum program states will not receive the full \$3 million minimum program amount until Fiscal Year 2010. This is a great in-

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justice; it is not how I read the law. And I would appreciate if you would elaborate on how this position is being taken.

Ms. OWENS. Again, Mr. Chairman, that issue, we understand the position of the Chair. We are looking at and working with our solicitors to make sure that we follow the written law.

The CHAIRMAN. That you follow, I am sorry, the written law?

Ms. OWENS. Written law. The law as it is written.

The CHAIRMAN. Are you talking about the amendments that we enacted end of last session?

Ms. OWENS. Yes, I am, sir.

The CHAIRMAN. Have you perhaps not read them yet?

Ms. OWENS. I have read them.

The CHAIRMAN. Perhaps we have a disagreement of the intent of that legislation, then. My time is up. I will yield to the Ranking Member, Mr. Pearce.

The CHAIRMAN. Jim, let us see. Let me recognize in order in

which you came in. Mr. Grijalva, Mr. Inslee.

Mr. INSLEE. Yes. A few months ago I talked to a lady from Marsh Fork Hollow. And she told me about the destruction of her community by mountaintop mining. And as someone who is not personally familiar with it, it was really distressing. She told about her son going out; the first time it really got bad is in the creek behind their house, a place that they had played for generations, becoming just, the water just looked threatening. Not a place where a kid could play any more.

Then they started talking about the dust. Then they talked about the dam, that she couldn't sleep at night because they all had to sleep in one room. They were worried it was going to collapse. And they eventually had to leave. And this whole community basically, not on the land that was owned by the mine, but adjacent to it. And they all left.

And listening to her, it was apparent to me that Federal policy had failed to protect Americans from some of the devastation caused by this particular kind of mining.

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I am not as familiar with the specifics as the Chairman and the other members of the Committee. I am concerned when I hear that there has apparently been a violation of a failure by the Federal government to protect against the destruction of streams by this, by issuing permits, if you will, at the same time that we are destroying these stream beds.

It seems to me like there needs to be some significant review of the performance of the Executive Branch, and/or a change in the law, given the destruction that at least I have been told is occurring. Could you both comment on that?

Ms. OWENS. Mr. Congressman, as I mentioned earlier, OSM is painfully aware of the issues associated with mountaintop mining. And in an effort to address many of those issues, we have been and continue to work cooperatively with the state and Federal regulators. One of the things that we are currently doing is working with the EPA, the Corps of Engineers, the Fish and Wildlife Service, to come up with ways to ensure that we issue better permits; that there is coordination between those agencies—in particular, the Corps of Engineers—that have responsibility to ensure that the Clean Water Act requirements are met.

In the stream buffer zone regulation that we are proposing, one of the issues we are addressing is to clarify the conditions under which mining activities can occur in or near streams. So we are looking at those issues and attempting to address them.

Mr. INSLEE. What is the status of this? At one time there was litigation, I think last year, where the Administration was allowing mining that they were aware were filling in stream beds, and actually physically destroying the stream bed. And my understanding is that the Administration allowed that to occur. There was litigation, and my understanding is the court issued an injunction or stopped the Administration somehow from doing that. What is the status of that?

Ms. OWENS. Well, I think you are referring to a District Court decision, which the District Court Judge did not allow the decision; said that there could be no placement of spoil in perennial streams. However, the Fourth Circuit Court of Appeals overturned that. Notwithstanding that fact, we recognize that there are issues, and we have begun to address them in the proposed rulemaking.

Mr. INSLEE. Well, maybe you can tell me. Do you think it should be the law that mountaintop mining could result in destroying these streams? Do you think that should be the law?

Ms. OWENS. No, I don't.

Mr. INSLEE. And under the current law, are they allowed to do so?

Ms. OWENS. The law does not allow for destroying of the streams. In fact, one of the issues associated with the stream buffer zone rule is some of the confusion we realized through the course of the litigation over this is that there was confusion over the interpretation of the rule, which is why we have——

Mr. INSLEE. Do we need a statutory change to clarify that? I mean, if you are telling me that you think they shouldn't be destroyed, but the Fourth Circuit Court allowed the mining to go through, which dumped spoils in a stream bed and literally de-

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stroyed it, does that suggest we need a statutory change? Or is the Executive just not applying the statute correctly?

Ms. OWENS. I think our regulations have attempted to apply the law correctly. We have, however, as I said, as a result of litigation and the different results that came out of that litigation, our regulation now attempts to add some clarity to the confusion that exists.

Mr. INSLEE. And have those then issued? Is there a proposed regulation out?

Ms. OWENS. No. The proposed regulation is in final review, and we expect that it will be issued soon. In the near future.

Mr. INSLEE. Well, we hope to see it. Thank you.....

The CHAIRMAN. OK. Before we let you go, let me just go back one more time to the definition of AOC. You are saying 30 years now, we still don't have a definition of approximate original contour. I would seriously, seriously ask you, how do you expect anybody to comply with the law if 30 years later you still don't have a definition of what one of the basic tenets of that law, return to AOC, approximate original contour?

Ms. OWENS. Mr. Chairman, I think you are aware that there is a statutory definition of approximate original contour, and that is the definition that we follow.

The CHAIRMAN. I have in front of me the original SMCRA Act, 1977. My copy. My notes I wrote on it 30 years ago. I wish I still had a picture of what I looked like at that time to put in here, as well.

[Laughter.]

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The CHAIRMAN. But here are my notes. “Strong bill.” And “requiring return to approximate original contour.” My eyesight is not as good as it was 30 years ago, either. Well, my handwriting has gotten worse, that is for sure.

The bottom line is I wrote on here, “approximate original contour and better post-mining uses of the land.” This bill was supposed to address the problems of small operators and permits, the states’ rights if the states meet Federal guidelines. This is a note I must have written for a press interview or something. But anyway, approximate original contour. And we still don’t have a definition.

Ms. OWENS. Well, Mr. Chairman, unfortunately we didn’t have the benefit of your handwritten notes. We only have the statutory definition, which we have attempted to follow over the years.

The CHAIRMAN. Well, I would hope we could get something more definite than a statutory definition, so that we know what is legal and how to comply, the operators know how to comply with the law. I think the agency must have a definition.

Ms. OWENS. Well, we are, in fact, now working with the state and Federal regulators to provide guidance. We are working to develop guidance on AOC and the variances and post-mining land uses.

The CHAIRMAN. OK. Thank you both for your testimony today.

Ms. OWENS. Thank you, Mr. Chairman.