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Congress of the United States House of Representatives

August 4, 2009

Mr. Terrence C. "Rock" Salt
Acting Assistant Secretary of the Army, Civil Works
United States Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, D.C. 20310-0108

Dear Mr. Salt:

I am writing to express my strong concern with key aspects of the Memorandum of Understanding (MoU) among the U.S. Department of the Army, the U.S. Department of the Interior and the U.S. Environmental Protection Agency (EPA), "Implementing the Interagency Action Plan on Appalachian Surface Coal Mining," issued June 11, 2009, and to offer suggestions for your consideration.

Mining in the Appalachian Region creates some of the highest paying jobs in the local economy, and the products and services purchased in the course of mining operations create thousands of additional jobs in support industries. Tax revenues from the extraction of coal provide funding for schools, roads and other essential services, and the coal produced at these operations provides affordable and reliable electricity for residents, businesses and industry. The mining industry is the cornerstone of the economy of Virginia's coal producing region, and sweeping changes in policy that affect this industry should be carefully weighed before being implemented.

An appropriate balance must be struck between protecting the environment and allowing essential coal mining activities that support economic growth in the Appalachian region. It appears that the policy underlying the MoU fails to strike that balance and that implementation of the MoU will materially harm the economy of the region and the lives of its citizens without offering significant advantages in terms of natural resource protection.

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In pursuit of a proper balance, I suggest the following:

1. I am especially concerned with the proposal to modify the Nationwide Permit (NWP 21) to “preclude its use to authorize the discharge of fill material into streams for surface coal mining activities in the Appalachian Region.” In Virginia, the NWP 21 process has been used successfully to assure the implementation of responsible environmental practices at surface mining operations. It has offered an effective, streamlined review of permit applications under Section 404 of the Clean Water Act for projects that have “minimal impacts.” Combined with permit reviews under the Surface Mining Control and Reclamation Act (SMCRA) performed by the state agency, the NWP 21 has allowed surface mining operations in Virginia that are shown to have “minimal impacts” to move forward without the time consuming, expensive and sometimes duplicative requirements imposed by the Individual Permit process, which is required for projects that have larger implications for the environment.

* Rather than precluding the use of NWP 21 for all surface mining operations as proposed in the June 11, 2009 MoU, I am asking that that the USACE allow the continued use of the NWP 21 for projects with “minimal impacts” that are defined by specific criteria, such as upward limits on the maximum number of linear feet of stream affected or on the maximum amount of acreage affected. Ephemeral stream and intermittent stream impacts should, for example, be deemed minimal. This use of NWP 21 would enable surface mining operations to take place in a timely manner and in an environmentally responsible fashion.

* For mid-sized operations, I am asking that the USACE explore the potential of creating and implementing a new Appalachian Regional Permit that recognizes and possibly incorporates the SMCRA permitting process as part of the application process. Perhaps shared public notices and a joint review by both agencies (leading to separate decision making) could occur, but the Section 404 review would stop short of the requirements of the Individual Permit process.

* Operations exceeding the threshold for the Appalachian Regional Permit, suggested above, would be permitted under the Individual Permit process.

2. The USACE and the EPA should establish a predictable process upon which the coal industry can rely in providing information to the permitting agencies to assist them in more efficiently and expeditiously performing their reviews. In order to eliminate redundancy to the greatest degree possible, this process should include greater coordination with the SMCRA permitting agency, which in Virginia is the Division of Mines, Minerals and Energy.
3. The Environmental Protection Agency and the U.S. Fish and Wildlife Service should be required to adhere to established timeframes in providing comment on pending applications. The EPA's practice of commenting on pending applications well after the established comment period has closed is unacceptable. Comments received after the comment period closes should in the future be disregarded.
4. Applicants should be required to submit the information necessary to obtain the permit and should not be required to address broader issues that do not reside within the scope of the permitting process.
5. As the regulatory authority for issuance of Section 404 Permits, the USACE should adhere to the regulatory timeframes for the approval or denial of permit applications in order to allow the applicants to either proceed with mining operations or move forward with the appropriate appeals process.
6. I am advised that the Multi-Criteria Integrated Resource Assessment Tool (MIRA), a matrix developed in 1995 to assist the EPA in its decision making processes, will be modified for use as a screening tool to evaluate which of the 108 surface mining applications identified in the June 11, 2009 MoU for further scrutiny will receive "enhanced review." I strongly urge that the National Mining Association and the Coal Associations of the six Appalachian States be consulted in the development of MIRA as a screening tool for this specific purpose.
7. Those mining operations for which the NWP 21 has already been issued but which have not yet been completed should be allowed to proceed to

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completion under their existing permits even if the USACE ultimately decides to revoke the use of the NWP 21 for surface mining operations that affect streams.

I appreciate your attention to these comments. With kind regards, I am

Sincerely,

A handwritten signature in black ink, appearing to be 'RB' with a stylized flourish.

Rick Boucher
Member of Congress

C: Stephen Walz, Director, Virginia Division of Mines, Minerals and Energy
Butch Lambert, Deputy Director, Virginia Division of Mines, Minerals and Energy
Barbara Altizer, Director, Eastern Coal Council
Bill Bledsoe, Executive Director, Virginia Mining Association

RB/bc