Testimony of Mr. Tom Mackall
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Subcommittee on Regulatory Affairs, Stimulus Oversight & Government Spending
Field Hearing
"The Green Agenda & the War on Coal: Perspectives from the Ohio Valley"
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Introduction

Chairman Jordan, and members of the Subcommittee, good morning.

My name is Tom Mackall, and I am President of East Fairfield Coal Company. I appreciate the opportunity to appear before you once again.

East Fairfield Coal Company has operations in both Ohio and Pennsylvania, and we employ over 160 hardworking Americans. We mine underground for clay, coal, and limestone. We are a small business, and I'm proud to say that my father worked for the company when it was started in 1934. I have been with the company for over 40 years, and my son works there today.

In 2008, then-Senator Obama stated in a press interview that under his preferred policy of cap and trade, anyone who wanted to build a new coal-fired power plant would go bankrupt in the process. He stated that under his cap and trade plan, electricity prices would necessarily skyrocket. He left out the fact that it would put thousands of people out of work. Later that year, then-Senator Joe Biden stated that he and Mr. Obama wanted, "No coal plants here in America!" Many thought that those were just statements made during a political campaign and that no president would really try and kill coal in America, but that is exactly what this Administration has done for the last four years. They have systematically waged a War on Coal, attacking the industry on multiple fronts, and to date they are being very successful.

What I would like to address today are the details of the War on Coal, specifically:

- On Permitting, they continue to raise new obstacles,
- On Mining, their goal is to throw up as many regulatory hurdles as possible,
- On Burning coal, they seem intent on punishing any utility that dares to burn coal,
- On Waste, they are ignoring decades of state laws and programs to make residual use a crime.

Through the Corps of Engineers and the Environmental Protection Agency, the Obama Administration is imposing more and greater obstacles to permitting through the guise of protecting our waters. Through the Mine Safety and Health Administration and the Office of Surface Mining, the Administration is trying to make it uneconomical to mine for coal by imposing cost-prohibitive requirements ostensibly in the name of public safety and

environmental protections. EPA's Office of Air and Radiation is also hard at work on regulations that will shut down dozens of coal-fired power plants and bring hundreds of megawatts offline. Then on the disposal side, the EPA is considering designating coal fly ash as a hazardous substance, which would lead to the shutdown of even more coal-fired power plants and would also destroy the beneficial use market for coal ash.

On top of all of this I fully expect that a second Obama term would focus on Cap and Trade. While the President is following through on his promise to enact Cap and Trade by regulation, if Congress failed, his allies in the Senate haven't given up on legislation. It's my understanding that Senator Boxer is holding a Climate Change hearing in Washington DC tomorrow. I wouldn't be a bit surprised to see them try and move climate legislation next year. I would like to say one word on CO2. One of my biggest clients operates large industrial-sized greenhouses in Michigan. In order to promote quicker growth they operate large CO2 generators which raise the concentration of CO2 in the greenhouses from the naturally occurring 340 parts per million to over 1,000 parts per million. All of this CO2 is absorbed by the plants. If they turn off the generators, by the next morning the CO2 concentration levels are back to normal. I don't believe that CO2 is really a problem in the natural world.

On Permitting, they continue to raise obstacles

Through the use of administrative guidance, the Administration has effectively implemented a policy where isolated, non-navigable waters would receive the full protections of the Clean Water Act. Several years ago, the Supreme Court threw out EPA and Corps regulations that essentially did the same thing. The Court said that the Clean Water Act did not provide the government with authority to be as restrictive with its permitting as it had become over the previous few decades. When Democrats in Congress tried to overturn that ruling, they failed resoundingly and the sponsors of that legislation in the House and Senate, both of whom had been considered relatively safe for reelection, were defeated in the 2010 election. However, the Administration appears not to have gotten the message because it is now doing through guidance what it could not get done through regulation or in Congress. The Administration claims that ambiguity in the Supreme Court opinions was confusing enough to require new direction from the Administration, but I fail to see how what they are doing now is any different from what has been rejected by the Supreme Court and Congress.

Additionally, early this year the Corps announced that it was eliminating the most commonly used nationwide permit for coal mining, known as NWP 21. This will substantially increase the number of proposed coal mines that are subject to delay and litigation under the individual permit process. For years, the general permit process was key to ensuring that a mine permit application could be timely and efficiently evaluated. However, that is not to say that general permitting allowed the industry to avoid compliance with environmental regulations. You still had to be in compliance with all state and federal environmental laws in order to get a permit, but for some reason, the Administration concluded that that responsible, streamlined process was insufficient.

The third permitting issue that I want to highlight is the Administration's enhanced coordination policy. This has allowed EPA to set aside permit applications for further review, subjecting the applicant to uncertainty and, in some cases, leading to the withdrawal of the application. The Clean Water Act's Section 404 gives EPA authority to veto permits issued by the Army Corps

for dredge and fill projects in wetlands and waterways. However, under this so-called enhanced coordination policy, EPA was essentially holding permits hostage by pushing them off to the side without going through public notice and comment procedures. EPA set aside 79 mining projects for enhanced review, and of those, the Corps issued eight permits. Two dozen or so projects remained under review until a federal district judge threw out the policy. During the court proceedings, that judge stated that "The role EPA is playing now is significantly different that it was in the past", and that "EPA is basically running the show." What the judge identified was a fundamental shift in the relationship between the two agencies in their rule of issuing permits. It used to be, and was supposed to be, that the Corps would make the decisions and that the EPA would consult in order to help avoid real, serious environmental impacts. Instead, EPA was essentially becoming the main permitting agency. Not long after the judge made those statements, he threw out the policy, ruling that EPA had exceeded its statutory authority afforded to it by the Clean Water Act." He called EPA's actions "unlawful."

The last issue I want to mention on permitting is the Administration's use of the retroactive veto and the Obama Administration's decision in 2011 that retroactively vetoed a Section 404 Clean Water Act permit for one of Arch Coal's mines in West Virginia, which had already been operating for nearly four years. A federal court ruled against the EPA, telling them they can not retroactively veto a permit because such action provides no business certainty. Unfortunately the Obama Administration hasn't given up, they have announced their intent to appeal. The fact that the Administration wants to have this fight is disconcerting enough, but what is even more incredible is the argument that the government attorney who was assigned the case made in his brief before a federal appeals court. This individual wrote that, "Contrary to the claims of industry and several states, there was precedent for EPA's decision to revoke the permit retroactively." His examples? He cited a case in 1981 where EPA stopped a city from filling wetlands with garbage, and another case in 1992 where EPA retroactively vetoed a construction permit for a reservoir in Virginia. Mr. Chairman, I don't know what is more discouraging: the fact that EPA is saying they are justified in doing something because they have done it twice before or the fact that the agency is spending more time and limited resources on fighting a mine that employs people and helps provide for our nation's energy needs. Let me say that this is a fight worth having. Just imagine the message that it would send to industry if EPA could retroactively stop mining and other industrial activities years after they had first been permitted.

On Mining, their goal is to throw up as many regulatory hurdles as possible

In the case of the Stream Buffer Zone Rule, the Administration undertook it after the Bush Administration spent years and millions of dollars updating it to make it more efficient and effective. The Administration decided almost immediately after taking office that the Bush-era rule was not good enough and got to work rewriting it. This process has been conducted behind closed doors and the only information that has been made public by the Administration showed that it would result in the loss of thousands of jobs in the coal mining industry. Despite several inquiries by Congress and two subpoenas for additional documents, the Administration has provided almost no information on what it intends to do with this rule and what its impacts will be. From what we can tell, this regulation will majorly curtail coal mining wherever there may be a presence of water, regardless of its location and hydrological significance.

One type of mining, common in the Ohio Valley is longwall mining. This proposed Stream Buffer Zone regulation would drive this practice out of business. In longwall mining you shear off the coal in long strips. The SBZ proposal would require the stopping and moving of the equipment whenever you get within so many feet of a stream or even a rain ditch, even though the process is occurring well under ground. Moving the equipment costs hundreds of thousands of dollars making this mining technique cost prohibitive. Internal documents from the Obama Administration pointed out there would be thousands of job losses in Appalachia, but that would be alright because new jobs would be created in Wyoming. That is little comfort here in the Ohio Valley.

It is important that you understand exactly what this regulation will do and what the impacts will be. It appears very likely that the proposal will prohibit mining in, through or near intermittent streams and within 100 feet of those streams. It will impose substantial restrictions on where excess spoil fill can be placed, and it will fundamentally redefine 'material damage' in these areas. It is impossible for longwall mines to avoid many of these impacts –these so-called streams which, again, often do not have any water in them, can be found in many places in the regions that we mine and our mines are oftentimes directly under them. If we are prohibited from moving the earth where in those locations, we will not be able to mine for coal.

A large coal mining company recently conducted an engineering analysis of the impacts of this rule in the draft from that was released by the Obama Administration. That analysis used a moderate interpretation of a protected stream. That analysis concluded that the Stream Buffer Zone Rule would result in a 40 percent loss of their coal that they would be allowed to mine – over 1 billion tons. The company projects that this would lead to a loss in future revenues by over $66 billion. But that would not be the only problem for this company and many others like it under this regulation. As I briefly mention above, when one of these so-called streams crosses over where we are mining for coal, we would be required to literally stop mining in that location. Now, the Administration says that we would just have to avoid that area and could resume mining where the stream ceases to be impacted. However, that exhibits either blatant dishonesty or a fundamental misunderstanding of longwall mining. The equipment that we use in this kind of mining is some of the largest machinery imaginable, incredibly expensive, and takes lots of time and resources to assemble and disassemble. We cannot mine one area of a longwall, stop, disassemble, move the equipment and then reassemble it and start again. It just doesn't work that way. What that means is that it would become uneconomical to mine that entire coal seam. In the case of the company I referenced above, it projects that this proposal could further reduce annual production by 25 to 30 percent. For that one company alone, that would mean that it would have to shut down many of its longwall mines because they would simply be unprofitable.

I would also like to discuss briefly how irrational it is that the Administration is going to such great lengths to protect ditches, intermittent streams and creeks that run dry most of the year. The Surface Mine Control and Reclamation Act, known as SMCRA, was intended to strike a balance between environmental protections and the nation's need for reliable, affordable electricity. Yet this proposal essentially says that you cannot mine underground if that mining would have any single impact on the environment. That doesn't sound like a balance to me. You simply cannot mine for coal underground and have absolutely no impact on the ground above you. But at the same time, that does not mean that we are destroying the environment. To the contrary, these waters the Administration is focusing on sit above areas that have been mined for

decades. It has been done in accordance with state and federal law and regulations. There are very few cases where that mining has resulted in impacts on the surface and when they have, industry has taken the necessary actions to fix the problem.

Let us also briefly discuss what this will mean for jobs in our region and other places where coal is mined in the Eastern United States. The Administration has gone to great lengths to say that it has not actually completed its analysis or a draft rule yet and, therefore, that it cannot make an informed projection on job losses that would result from the rule. Yet there is plenty of evidence to demonstrate that the impacts will be substantial. One of the parties that expressed concerns about how the Administration was conducting its analysis was the contractor that OSM hired to help them. The contractor was concerned that some of the assumptions that OSM wanted them to use in the analysis were going to minimize the potential job loss projections. When the contractor refused to go along, there were basically fired. Not long after these events unfolded, a report commissioned by the National Mining Association found that the rule would jeopardize more than 100,000 jobs. Relying on 2010 draft language that was circulated by OSM, the analysis concluded that between 55,120 and 79,870 direct mining jobs were at risk. Counting jobs related to coal mining, the analyst said that more than 100,000 were in jeopardy. To conclude on the issue of the Stream Buffer Zone rule, the impacts will be tremendous.

MSHA's Mine Dust Regulation provides yet another example of the Administration's War on Coal and its attempts to limit coal mining. In addition to lowering the already low, existing limits for respirable coal mine dust and applying standards beyond measuring the exposure to the miner, it would mandate that we employ continuous personal dust monitors that are unaffordable and unproven. Simply put, MSHA is proposing to set a standard for respirable dust that cannot be met. MSHA estimates the cost of this proposal to be only $40-70 million. In reality, it will force alterations to production schedules and impose other requirements that will lead to estimated costs of $1 billion to the industry.

MSHA also relies on flawed science as confirmed by preliminary review of unbiased scientific experts. The rule is based on misleading data, ignoring the continual decline of black lung cases. The agency has refused to release the study data, under the Data Quality Act, that formed the basis of their decision. MSHA has also failed to demonstrate causation and is selectively interpreting the data. The statistical analysis must be based in sound science, and, at a minimum, be able to demonstrate causation between dust exposure level trends and incidence of black lung.

Despite serious concerns from Congress and industry, and multiple efforts to resolve issues with MSHA's analysis and how it went about writing the rule, MSHA is moving ahead with it nonetheless. There is one example of this that is particularly egregious. Last year, Representative Denny Rehberg of Montana worked with his Republican colleagues in the House and Senate on inserting language in an appropriations bill that would require a study from the Government Accountability Office on how MSHA was going about writing the rule. The amendment also made explicitly clear that MSHA was not to finalize the rule until the study was completed. As everyone here knows, getting a rider into an appropriations over the last few years has not been an easy process, and it took considerable effort in Congress to strike an agreement on this. Congressional intent was clearly to have MSHA slow down and make sure that they were doing this properly, and what better entity to look into that than the GAO? Nevertheless, MSHA has continued the rulemaking process without the benefit of the GAO

report. When questioned about this development, MSHA responded that "The rider does not restrict MSHA's ability to promulgate the rule, only MSHA's ability to implement or enforce the rule." Mr. Chairman, if there is a better example out there of typical Washington shenanigans, I would be hard pressed to find it. Congress clearly intended for the Administration to stop what it was doing for the time being, yet MSHA continues to move forward under whatever wiggle room it could find in the law.

This year, Mr. Rehberg has proposed a rider that would prohibit any funds from being used to do anything on this proposal. I cannot express to you how important it is that you follow Mr. Rehberg's lead and force the Senate and president to accept this language. MSHA is doing everything it can to help the Obama Administration win the War on Coal and if Congress fails to step in with proactive legislation like this, I fear that it will be one more nail in the coffin for the coal industry. This regulation is yet another proposal designed to stop coal production. The Administration is clearly and intentionally setting standards that it knows cannot be met. We will be forced to shut our doors.

<u>On Burning Coal, they seem intent on punishing any utility that dares to burn coal</u>

Perhaps the most expansive and most visible attack on the coal industry over the last few years has been the Administration's efforts to drastically curtail the percentage of our electricity that is generated from coal. There is little question that their efforts are working: in response to the Cross State Air Pollution Rule and the Utility MACT regulation, at least 57 coal-fired power plants in the United States are expected to shut their doors early or entirely, because of these EPA regulations. This represents 25.1 GW of electricity that have gone on the chopping block in addition to 29,000 people who will lose their jobs. Additional plants will close because of age or fuel switching, but the 25.1 GW will close due to the regulations. Electricity prices are going to go up and the electric grid will be stretched even further, posing serious challenges for reliability. According to the Electric Power Research Institute, these and other EPA regulations when combined with low natural gas prices could result in the retirement of more than one third of our coal-generating capacity by 2020. Furthermore, EPRI projects that compliance with these rules will cost the U.S. economy up to $275 billion from 2010 to 2035 or about $11 billion a year. These aren't just numbers and academic projections, Mr. Chairman. These are real impacts that are going to happen to real people. For example - and I know that you have seen these numbers, Mr. Chairman - of the 25.1 GW that I mentioned earlier, nearly 6,000 MW will come from Ohio. That represents 11 units at 9 different locations in our state. The War on Coal is going to hit us hard here in Ohio.

The costs of these regulations are tremendous problems, but equally problematic is that the Administration is employing false advertising in order to justify them. For example, the Administration likes to say that Utility MACT is a mercury reduction rule, but it isn't. We agree that reducing mercury pollution is important, but EPA's own regulatory impact analysis shows that an overwhelming majority of the benefits that EPA predicts will occur under the rule will come from reductions in pollutants other than mercury, and specifically from fine particulate matter or PM. EPA's data show that of the $10 billion in annual costs of the rule, the benefits from mercury reductions would be $6 million or less, but instead of trying to improve the rule and reduce its costs, EPA refers to these additional reductions as a "co-benefit" of Utility MACT. EPA is clearly double-counting benefits in order to justify the Utility MACT, which is going to

be cost prohibitive and extremely difficult to achieve. We must also not forget that EPA already regulates PM under the National Ambient Air Quality Standard and just recently proposed a new revision to that standard which will further reduce the existing limits for PM. That is expected to go final this December.

On Wastes, they are ignoring decades of State laws and programs to make residual use a crime

Last but not least is the issue of coal fly ash or coal ash. When you burn coal, you are left with combustion residuals that must be disposed of in a manner that protects the environment and public health. We believe that the states already do an adequate job of ensuring that coal-ash disposed of onsite is adequately controlled, but not long after the Administration took office it started considering whether or not coal ash should be designated as a hazardous substance, which would impose much stricter controls on the disposal of this material. Coal ash also has many beneficial uses in the construction and agriculture industries, but the prospect of a hazardous material designation is already discouraging some customers from using products that contain coal ash. Let me be clear on this: if coal ash is designated as a hazardous material, the requirements and costs for managing it are going to go up substantially, thereby providing utilities with yet another reason to either shut down their coal-fired units or convert them to natural gas. If demand for coal decreases, more coal jobs will be lost. There is strong bipartisan support in Congress for legislation that would stop the EPA from moving forward with a hazardous material designation, and the House of Representatives has passed bipartisan legislation to do just that. But the White House, driven by the unwarranted and inaccurate scare tactics of environmentalists has apparently not gotten the message.

I also want to be clear about the dangers of this proposal for the beneficial use market and that market's role in the larger economy. Fly ash has been used in concrete and cement to build roads and highways in the United States for over half a century. Coal ash is also used to make gypsum, which in turn is used in drywall for home construction. If coal ash is designated as hazardous, companies would likely be forced to stop using gypsum because customers will not want to buy wallboard that contains it, due to its association with coal ash. Companies that use it would also be at increased risk of lawsuits. Obviously, they would then have to look for gypsum from another source, which will increase costs and impose yet more financial burdens on these companies. Coal ash is a key ingredient in our nation's transportation and residential housing markets. And somehow, EPA and its environmentalist allies see nothing wrong with putting that important market and the many jobs it provides across this country at risk.

Conclusion

Mr. Chairman, I also want to briefly mention that the Administration is not the only player in the War on Coal. Well-funded environmental groups have done everything in their power to kill coal in America. For example, one of America's largest environmental groups teamed up with one of America's largest natural gas producers on the so-called "Beyond Coal" campaign. In fact, it was recently discovered that that natural gas company donated $26 million to the environmental group in a joint effort to destroy the coal industry. This alliance was not to be, however, as that same environmental group just announced a new campaign entitled "Beyond Natural Gas." Now that the environmentalists are succeeding in their efforts with the

Administration to win the War on Coal, they no longer need to cooperate with the natural gas industry and are turning their sights on them. I don't want to be too critical of natural gas now that the tables have turned, but let me just say that they are in for a ride. One needs to look no further than the increasing number and complexity of rulemakings coming out of the Administration to regulate hydraulic fracturing. I would also be remiss if I did not mention the abhorrent ads being run by some of these environmental groups that show babies coughing and with inhalers strapped to their faces. These are scare tactics, pure and simple.

Mr. Chairman, the War on Coal is real and is doing tremendous damage to our industry. The Obama Administration and its environmentalist allies are doing everything they can to stop coal from being permitted, to make it uneconomical to mine at the ones that are already operating, to stop utilities from burning it, and to discourage the use of its bi-products for beneficial uses. This a highly-coordinated, aggressive effort to literally destroy the industry by attacking coal at every point of its lifecycle.

The Administration's multi-pronged approach to permitting reform will have an impact on many industries, but it is clearly aimed at making it more difficult to start new coal mines. From scaling back general permits to retroactively vetoing permits for mines that are already in operations, these permitting reforms are a major obstacle to developing our coal resources.

The Mine Dust Rule and the Stream Buffer Zone Rule, if not stopped, will put thousands of coal miners out of work by shutting down mines across the country. These rules aren't meant to protect the environment or public safety: they are clearly designed to make it uneconomical to mine, and to lead coal companies to the inevitable conclusion that it would be cheaper to close down than to keep people working.

CSAPR and Utility MACT were designed and intended to discourage the continued use of coal in electricity generation, and they are working. When an Administration sets standards in statutes that are unachievable for coal, utilities have no choice but to switch to natural gas. But let me be clear, Mr. Chairman: utilities are switching from coal to natural gas due to regulations like CSAPR and Utility MACT. These are fuel-switching regulations, pure and simple. The administration likes to say that low natural gas prices are responsible for a large majority of these negative impacts to the coal industry, but that is simply untrue and the Administration is starting to see the impacts of these decisions. And designating coal ash as a hazardous substance is just one more example, Mr. Chairman. Wherever the opportunity exists to attack coal, this Administration will take it.

The most effective way to understand what these regulations will mean for the coal industry and the country will be to consider the cumulative impact of all of them. We are already seeing substantial negative impacts resulting from these regulations. Coal plants and coal mines are shutting their doors, leaving hard-working Americans out of work and driving up electricity prices, requiring working families to spend more of their hard-earned money on their electricity bills than they have in the past.

The Obama Administration's War on Coal is a tragedy for the coal industry and the thousands of Americans that our industry employs and who rely on us to provide affordable electricity. On behalf of myself, East Fairfield Coal Company and the many thousands of people in our region who rely on coal for their livelihoods, thank you for supporting us and conducting vigorous

oversight of the Obama Administration and its War on Coal. I have to remind you, though, that if definitive action is not taken soon to reverse the above-referenced policies, this industry is going to be in deep, deep trouble.

Again, thank you for the opportunity to testify before you today. I look forward to answering your questions.