Institute *for* Policy Integrity
New York University School of Law

VIA EMAIL AND FAX

November 19, 2008

Hon. Stephen Johnson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Fax: (202) 501-1450

Subject: Cost-Benefit Analysis Required for EPA Concurrence on Proposed Mining Regulations

cc: Assistant Administrator for Water Programs Benjamin H. Grumbles

Dear Administrator Johnson:

As an organization dedicated to improving the quality of governmental decision-making, we write to encourage you to withhold your concurrence on the Office of Surface Mining's proposed rule on excess spoil, coal mine waste, and stream buffer zones until an adequate cost-benefit analysis is completed.

Because EPA's concurrence is a mandatory step of inter-agency coordination for the adoption of the proposed rule, EPA has an independent obligation to ensure compliance with the requirements under Executive Order 12,866 that subject all "significant regulatory actions" to a cost-benefit test. Since the Office of Surface Mining has not properly conducted such an analysis, EPA must withhold its concurrence until the analysis is completed in full.

Background on the Proposed Rule Changes

The Department of the Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") proposed changes to its rules on excess spoil, coal mine waste, and stream buffer zones on August 24, 2007.[1] These rule changes were promulgated under Title V of the Surface Mining Control and Reclamation Act of 1977. According to that statute, before such regulations can be finalized, OSM must:

> obtain[ ] the written concurrence of the Administrator of the Environmental Protection Agency with respect to those regulations promulgated under this section which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act [known as the Clean Water Act], as amended (33 U.S.C. 1151-1175); and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).[2]

In October 2008, OSM published its Final Environmental Impact Statement on the new regulations and formally requested written concurrence from EPA that the proposed rule changes were consistent with Clean Water Act and Clean Air Act regulations.[3]

EPA Has an Independent Obligation Under EO 12,866

By statutory requirement, no rule may be promulgated under Title V of the Surface Mining Control and Reclamation Act of 1977 without EPA's concurrence that the rule is consistent with regulations, protections, and rights under the Clean Water Act and the Clean Air Act.[4] Because of this mandatory, coordinating role in OSM's rulemaking process, EPA has an independent obligation under Executive Order 12,866 to ensure that an adequate cost-benefit analysis of the rule has been conducted.[5]

OSM has already determined its proposed regulations "may raise novel legal or policy issues" and therefore is a "significant regulatory action" under Executive Order 12,866.[6] The White House Office of Management and Budget ("OMB") agrees and has consistently labeled OSM's rulemaking actions on this matter as "significant."[7] For each significant regulatory action, agencies must submit for OMB's review "[a]n assessment of the potential

---

[1] Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States, 72 Fed. Reg. 48890 (proposed Aug. 24, 2007) (RIN 1029-AC04).

[2] *See* Surface Mining Control and Reclamation Act of 1977 [hereinafter SMCRA] § 501(b), 30 U.S.C. § 1251(b) (2006) (referring to "the procedures in section 501(a)").

[3] *See* U.S. OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, DEP'T OF INTERIOR, STREAM BUFFER ZONE RULE: FREQUENTLY ASKED QUESTIONS 1 (2008), *available at* http://www.osmre.gov/news/082407faq.pdf ("OSM seeks EPA concurrence on rules related to Clean Water Act jurisdiction.").

[4] *See* SMCRA §§501(a)-(b) ("shall not be promulgated and published by the Secretary until…").

[5] *See*, *e.g.*, Exec. Order No. 12,866 § 1(b)(6), 58 Fed. Reg. 51735, (1993) ("Each agency shall assess both the costs and the benefits of the intended regulation.") (modifications by Executive Orders 13,258 and 13,422 do not affect these provisions of Executive Order 12,866).

[6] Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States, 72 Fed. Reg. at 48915.

[7] *See*, *e.g.*, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, EO 12866 Regulatory Review of RIN 1029-AC04, Placement of Excess Soil (2007), http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=279913 (categorizing the priority level as "other significant").

costs and benefits of the regulatory action."[8] The Executive Order explains the type of information normally developed to assess potential costs and benefits:

> (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action…together with, to the extent feasible, a quantification of those benefits;
>
> (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action…together with, to the extent feasible, a quantification of those costs; and
>
> (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.[9]

If OSM has not developed a thorough assessment of costs and benefits on which EPA can rely in making its concurrence, EPA has an obligation, under Executive Order 12,866, to withhold its concurrence.

Deficiencies in OSM's Cost-Benefit Analysis

OMB's *Circular A-4* guides agencies through the process of conducting a proper cost-benefit analysis under Executive Order 12,866.[10] OSM did submit to OMB a basic assessment of costs, benefits, and alternatives.[11] Unfortunately, OSM's assessment overlooked many of the principal considerations laid out in *Circular A-4* and, more importantly, failed to provide the kind of rigorous analysis required for sound decision-making under Executive Order 12,866.[12]

---

[8] Exec. Order No. 12866 § 6(a)(3)(B)(ii).

[9] *Id*. § 6(a)(3)(C).

[10] OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 1 (2003) ("This Circular provides the Office of Management and Budget's (OMB's) guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(c) of Executive Order12866.").

[11] The following critique of OSM's cost-benefit analysis for its rule on excess spoil, coal mine waste, and stream buffer zones, is based on materials made available in two sources: (1) OMB's website, where its initial review of the proposed rule is posted (http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=279913); and (2) OSM's Final Environmental Impact Statement on the proposed rule, which – like a cost-benefit analysis – looks at the consequences of the proposed rule and possible alternatives, U.S. OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, DEP'T OF INTERIOR, OSM-EIS-34, FINAL ENVIRONMENTAL IMPACT STATEMENT: EXCESS STREAM MINIMIZATION, STREAM BUFFER ZONES, BOOK ONE [hereinafter "FEIS Book One"] (2008). We have asked OSM to release all its documents assessing, analyzing, and quantifying the costs and benefits of its proposed rule (public release of such information is required by Exec. Order No. 12,866 § 6(a)(3)(E)(i)), but so far we have not received any additional materials.

[12] *See* Exec. Order No. 12,866 § 1(b)(6)-(7) ("Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."; Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document.").

Inappropriately Narrow Baseline

The potential benefits and costs of a proposed regulatory action must be measured against an appropriate baseline. *Circular A-4* concedes that "normally [this] will be a 'no action' baseline: what the world will be like if the proposed rule is not adopted."[13] OSM purportedly uses such a "no action" baseline in its assessment, assuming that the world absent the proposed regulatory changes will look *exactly* like the present: the same rules, the same policies, and the same level of enforcement.[14] But *Circular A-4* cautions that while "[i]t *may* be reasonable to forecast that the world absent regulation will resemble the present," agencies must also consider factors such as the evolution of markets, changes in external factors, changes in other government programs and policies, and the degree of compliance with regulations.[15]

In fact, *Circular A-4* notes the importance of using multiple baselines to "analyze the effects on benefits and costs of…the degree of compliance with [the agency's] own existing rules."[16] *Circular A-4* cites a 1998 EPA rule as a model for the proper selection of baselines:

> EPA used several alternate baselines, each reflecting a different interpretation of existing regulatory requirements. The use of multiple baselines illustrated the substantial effect changes in EPA's implementation policy could have on the cost of a regulatory program.[17]

The main motivation for OSM's rulemaking was to resolve the "considerable controversy over the proper interpretation" of the existing rules.[18] In other words, the existing regulations could be interpreted and enforced in several different ways. Although OSM insists its interpretation and enforcement of the rules have been consistent and correct,[19] the existence of alternate interpretations – some of which have been supported by the courts[20] – suggests that future enforcement of current regulations could change. Indeed, another office in the Department of the Interior commented that "the existing stream

---

[13] CIRCULAR A-4, *supra* note 10, at 2.

[14] *See* FEIS Book One, *supra* note 11, at II-18 (explaining that under a "no action" alternative, "OSM would not adopt any new rules or policies to further minimize the generation of excess spoil and the adverse impacts stemming from excess fills and coal processing waste facilities and impoundments. Similarly, OSM would not adopt any new rules or policies to clarify the requirements when coal mining activities are proposed or approved to be conducted within 100 feet of an intermittent or perennial stream."); *see also* U.S. OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, DEP'T OF INTERIOR, OSM-EIS-34, FINAL ENVIRONMENTAL IMPACT STATEMENT: EXCESS STREAM MINIMIZATION, STREAM BUFFER ZONES, BOOK TWO [hereinafter "FEIS Book Two"] C-97 (2008) ("The No Action Alternative is consistent with the manner in which OSM and state regulatory authorities historically have applied and interpreted the 1983 stream buffer zone rule over the past 25 years.").

[15] CIRCULAR A-4, *supra* note 10, at 15.

[16] *Id*.

[17] *Id.*

[18] Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States, 72 Fed. Reg. at 48892.

[19] See FEIS Book Two, *supra* note 14, at C-97 ("The No Action Alternative is consistent with the manner in which OSM and state regulatory authorities historically have applied and interpreted the 1983 stream buffer zone rule over the past 25 years.").

[20] *See*, *e.g.*, Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D.W.Va. 1999), *reversed on other grounds*, 248 F.3d 275 (4th Cir. 2001) (interpreting the stream buffer zone rule more strictly than OSM). *See also* FEIS Book One, *supra* note 11, at I-3.

protection rules *have not been consistently enforced*."[21] Multiple baselines should have been used to reflect all reasonable interpretations of existing rules. In particular, OSM should have analyzed an alternate baseline that assumed a stricter enforcement of the rules, especially since such an interpretation is supported by some court rulings. By failing to do so, OSM may have misrepresented the potential costs and benefits of the proposed regulatory action.

Failure to Analyze Reasonable Alternatives

A meaningful assessment of all reasonable regulatory alternatives is a crucial step in sound decision-making. Executive Order 12,866 prescribes that a proper cost-benefit analysis should include:

> An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.[22]

OSM chose to analyze in-depth only four alternatives: Alternative One is OSM's preferred changes to the regulations; Alternative Two is a set of proposed regulatory changes OSM published in 2004 (which OSM called "essentially" the same as Alternative One); Alternative Three is one half of OSM's preferred changes (i.e., half of Alternative One); and Alternative Four is the other half.[23] Though OSM considered analyzing twelve other alternative scenarios, the agency rejected them all as unsupported by science, logic, or statutory requirements, and so did not fully analyze their potential costs and benefits.[24] For example, OSM refused to consider a more stringent interpretation and enforcement of current regulations because it felt "this alternative is not authorized by [the Surface Mining Control and Reclamation Act], and is inconsistent with one of Congress' explicit purposes."[25]

However, *Circular A-4* does not instruct agencies to automatically eliminate all alternatives outside the agency's jurisdiction. Instead, it instructs agencies to:

> discuss the statutory requirements that affect the selection of regulatory approaches. If legal constraints prevent the selection of a regulatory action that

---

[21] Letter from Nat'l Park Serv. (Big South Fork), Dep't of Interior, to Office of Surface Mining Reclamation & Enforcement, Comments on Draft Environmental Impact Statement (2007) (reprinted at FEIS Book Two, *supra* note 14, at B-7) (emphasis added).

[22] Exec. Order No. 12,866 § 6(a)(3)(C)(iii).

[23] *See* Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, EO 12866 Regulatory Review of RIN 1029-AC04, Placement of Excess Soil (2007), http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=279913 ("Alternative 2…OSM would change the excess spoil regulations essentially as described in Alternative 1 but would change the stream buffer zone regulations…as described in the January 7, 2004 Federal Register notice….Alternative 3…OSM would change the excess spoil regulations as described in Alternative 1….Alternative 4…OSM would change the stream buffer zone regulations as described in Alternative 1.") "Alternative 5" is the "no action" baseline. *Id*.

[24] *See* FEIS Book One, *supra* note 11, at II-24 to II-33; FEIS Book Two, *supra* note 14, at C-98.

[25] FEIS Book One, *supra* note 11, at II-27.

> best satisfies the philosophy and principles of Executive Order 12,866, you should identify these constraints and estimate their opportunity costs.[26]

The most detailed assessment of alternatives published by OSM so far appears in analysis conducted by the agency under the National Environmental Policy Act ("NEPA"). Regulations under NEPA contain similar instructions on the consideration of alternatives:

> [Agencies shall] include reasonable alternatives not within the jurisdiction of the lead agency.[27]
>
> An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the [NEPA Environmental Impact Statement] if it is reasonable. *A potential conflict with local or federal law does not necessarily render an alternative unreasonable*, although such conflicts must be considered. Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the [Environmental Impact Statement] if they are reasonable.[28]

For example, when the Department of Energy proposed new energy efficiency standards for fluorescent lamps in 1999, the agency conducted a quantitative analysis of five regulatory alternatives that would have required new enabling legislation or statutory amendments.[29] In short, OSM should not have excluded otherwise-reasonable alternatives simply because the agency believed they were not authorized by statute – especially when courts have disagreed with OSM over proper interpretation of the statute.

Moreover, the alternatives OSM chose to analyze were so similar that they do not provide a useful basis for comparison. The four "alternatives" OSM studied were essentially slight variations on a single proposal.[30] *Circular A-4* instructs that agencies should analyze alternative options for all "key attributes or provisions,"[31] such as different stringencies ("at least three options," including more and less stringent levels), different requirements for different geographic regions, and different enforcement methods.[32] Yet OSM analyzed none of those alternatives. For the size of the stream buffer zones – an extremely "key" attribute of the rules – OSM refused to look at more stringent or less stringent options.[33] Although OSM admits the rules "may have the most significant effects in the central

---

[26] CIRCULAR A-4, *supra* note 10, at 17.

[27] Council on Envtl. Quality, Envtl. Impact Statement Rules, 40 C.F.R. § 1502.14(c) (2007).

[28] COUNCIL ON ENVTL. QUALITY, FORTY MOST ASKED QUESTIONS CONCERNING CEQ'S NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS (1981) (emphasis added), *available at* www.nepa.gov/nepa/regs/40/1-10.htm#1. OSM cites this document as support for its limited analysis of alternatives, *see* FEIS Book Two, *supra* note 14, at C-42, but the memorandum actually prescribes just the opposite.

[29] OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, REGULATORY IMPACT ANALYSIS: ENERGY CONSERVATION STANDARDS FOR FLUORESCENT LAMP BALLASTS (1999), *available at* http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/phppX.pdf (eleven alternatives plus a baseline scenario analyzed in total).

[30] The fact that OSM predicts no major on-the-ground consequences under any of its four alternatives suggests the narrowness of the scope of OSM's analysis. *See* FEIS Book One, *supra* note 11, at S-6.

[31] CIRCULAR A-4, *supra* note 10, at 16.

[32] *Id*. at 7-9, 16. These are just a few of the categories of alternatives actions that *Circular A-4* suggests agencies "should consider."

[33] FEIS Book One, *supra* note 11, at II-33 (saying there is "no sound scientific basis" for increasing the size of the stream buffer zone, even though OSM does not analyze the costs and benefits of such an option).

Appalachian coal fields,"[34] it adopts a uniform, national rule and does not look at regionally-tailored options. And OSM never considers whether fees, insurance requirements, or some other market-oriented approach could substitute for direct regulatory controls.

Beyond OSM's obligation to consider alternatives, EPA may have an additional obligation to examine alternative actions that might be more consistent with the regulations, protections, and rights under the Clean Water Act and the Clean Air Act.

Failure to Assess Ancillary Benefits of Reasonable Alternatives

Executive Order 12,866 directs agencies to calculate the costs and benefits of reasonable alternatives,[35] including indirect or "ancillary" benefits.[36] Beyond failing to quantify the potential costs and benefits of reasonable alternatives (see above), OSM categorically refuses to consider crucial ancillary benefits. OSM admits that more stringent enforcement of current regulations could reduce the total recovery of coal in certain areas by nearly 170 million tons.[37] If the supply of coal drops, the price will rise, and some users of coal (like power plants) will switch to other, now-cheaper fuels (like natural gas). These substitute fuels may burn cleaner than coal, thereby achieving ancillary environmental benefits: for example, greenhouse gas emissions from natural gas are about half those from coal.[38] OSM implies that it need not consider the benefits of potential greenhouse gas reductions because the agency has no authority over the *use* of coal, only over its mining.[39] However, the very nature of "ancillary" benefits suggests that agencies will not always have direct control over them. Yet their secondary nature does not diminish their importance to analysis:

> In some cases the mere consideration of these secondary effects may help in the generation of a superior regulatory alternative with strong ancillary benefits and fewer countervailing risks.[40]

Indeed, EPA has recently calculated just how important the consideration of greenhouse gas reductions can be.[41] Moreover, last year a federal appellate court ruled that the failure to consider ancillary greenhouse gas reductions in a cost-benefit analysis is arbitrary and capricious.[42]

---

[34] FEIS Book One, *supra* note 11, at S-6.
[35] Exec. Order No. 12,866 § 6(a)(3)(C)(iii).
[36] CIRCULAR A-4, *supra* note 10, at 26.
[37] FEIS Book One, *supra* note 11, at II-25.
[38] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-601R, ECONOMIC AND OTHER IMPLICATIONS OF SWITCHING FROM COAL TO NATURAL GAS AT THE CAPITOL POWER PLANT AND AT ELECTRICITY-GENERATING UNITS NATIONWIDE 2 (2008).
[39] FEIS Book Two, *supra* note 14, at C-51.
[40] CIRCULAR A-4, *supra* note 10, at 26.
[41] *See* U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT ON BENEFITS OF REDUCING GHG EMISSIONS (2008).
[42] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Administration, 508 F.3d 508, 535 (9th Cir. 2007).

Failure to Quantify

Executive Order 12,866 instructs agencies to quantify costs and benefits "to the extent feasible."[43] Quantification greatly facilitates the weighing of costs and benefits and improves the quality of the rulemaking. *Circular A-4* admits that some costs and benefits will be difficult to monetize, but directs agencies to consider other means of quantification when possible.[44] If there is uncertainty, agencies should report estimates reflecting the probability distribution of potential consequences.[45] For example, in its recent proposed revision to the national ambient air quality standards for lead, EPA made a substantial effort to quantify as many health benefits as possible, conducting a sensitivity analysis to determine how different assumptions and data inputs affect the range of potential benefits.[46]

However, while OSM alludes generally to potential environmental benefits of its proposed rule, it does not provide sufficient quantification. When commenting on OSM's draft environmental impact statement, EPA faulted OSM for not presenting:

> a quantitative estimate of what reduction might be expected to occur based on current levels of mining under the preferred alternatives….For example, how many fewer acres of fill there will be, or fewer impaired streams, increased miles of stream habitat, increased biotic diversity, or other commonly used metrics.[47]

OSM's response to these comments was:

> [W]e cannot quantify the environmental impacts of the alternatives because of the significant variations in terrain, geology, mining techniques, and the effectiveness of current policies. Further, we cannot reliably project the number, type, location, size, timing, etc., of new mining operations.[48]

Even though quantification may be challenging, Executive Order 12,866, *Circular A-4*, and – so it seems – EPA itself all demand more analysis than what OSM has provided.

Lack of Supplemental Analysis

Finally, there is no indication that OSM attempted to conduct a distributional analysis of regulatory impacts or a cost-effectiveness analysis, as prescribed by *Circular A-4*.[49] The

---

[43] Exec. Order No. 12,866 § 6(a)(3)(C).
[44] CIRCULAR A-4, *supra* note 10, at 26.
[45] *Id*. at 18.
[46] EPA, REGULATORY IMPACT ANALYSIS OF THE PROPOSED REVISIONS TO THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR LEAD 36 (2008).
[47] Letter from EPA, to Office of Surface Mining Reclamation & Enforcement, Comments on Draft Environmental Impact Statement (2007) (reprinted at FEIS Book Two, *supra* note 14, at B-3).
[48] FEIS Book Two, *supra* note 14, at C-2.
[49] CIRCULAR A-4, *supra* note 10, at 9, 11 ("Specifically, you should prepare a [cost-effectiveness analysis] for all major rulemakings for which the primary benefits are improved public health and safety to the extent that a valid effectiveness measure can be developed to represent expected health and safety outcomes."); *id.* at 14 ("Your regulatory analysis should provide a separate description of distributional effects….Executive Order 12866 authorizes this approach.").

distributional analysis would be especially important given the varying regional impacts of the proposed rule.[50]

Conclusion

Executive Order 12,866 and *Circular A-4* design a procedure for sound decision-making. OSM should not have taken significant regulatory actions to promulgate new rule changes without following that procedure; neither should EPA. EPA should withhold its concurrence on OSM's proposed rule on excess spoil, coal mine waste, and stream buffer zones, until a full and proper cost-benefit analysis is conducted.

Thank you for your prompt attention to this matter.

Sincerely,

Michael A. Livermore
Executive Director

Jason Schwartz
Legal Fellow

[50] FEIS Book One, *supra* note 11, at S-6 (explaining that the rule "may have the most significant effects in the central Appalachian coal fields").