Grassroots Progress Report

The Obama Administration's Successes and Shortfalls in Addressing the Impacts of Mountaintop Removal and Investing in a Just and Sustainable Economy in Appalachia

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Introduction

In 2009 the White House Council on Environmental Quality convened an interagency meeting between the U.S. Army Corps of Engineers, the Department of the Interior, and the Environmental Protection Agency; from that meeting came the *Memorandum of Understanding (MOU) of 2009 with regard to implementing the interagency action plan on Appalachian Surface Coal Mining*. According to the MOU, the Interagency Action Plan was "designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law." In the plan, beyond addressing the impacts of mountaintop removal, the administration also made commitments to "work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy."

To be clear, the completion of the steps outlined in this MOU would not fully end the practice of mountaintop removal or other destructive and dangerous coal technologies in Central Appalachia, and it would not ensure a just and sustainable economy in our region. However, our citizen groups saw this MOU as a small, though significant step in the Obama Administration taking much needed federal-level action to address the intersecting health, environmental, political and economic challenges our region faced.

Appalachia Today

Since this 2009 convening and the release of this MOU, our region has continued to evolve and the many conditions that the MOU set out to address have become worse. Profound and long-felt health and environmental impacts of coal industry operations, an increasingly weak regional economy, compromised elected officials themselves on the side of a destructive and failing industry, and now the impacts of climate

change have made the difficulties our region faces all the more stark. Below, some of the features of this landscape are outlined further.

Mining Continues

Large scale surface coal mining is still a huge problem in Central Appalachia. Although the pace has slowed due to the declining coal economy, many new permits are issued every year. In 2013 Virginia issued 9 new surface mining permits and 2 acreage expansions, West Virginia issued 25 new permits, and Kentucky issued 30. Only Tennessee issued no new permits.

Legacy Costs

Impaired streams, unsafe drinking water, and poorly reclaimed or abandoned mine lands present significant barriers to realizing a bright future for our region. Beyond this, the psychological and financial costs of coping with the coal industry's impacts can be debilitating, leading some to move out of the region altogether.

Compromised Health

More than 20 peer-reviewed scientific studies confirm what our people already know: Mountaintop removal and other destructive mining practices are dangerous to human health. Even when controlling for lifestyle factors, these studies show that people living near mountaintop removal site are 50% more likely to die of cancer and 42% more likely to be born with birth defect compared with other people in Appalachia. This year, a new study shows that mining dust from mountaintop removal sites near residential communities causes the development of lung cancer in humans.

A Gutted Economy

The coal industry has long dominated the economy and culture of Central Appalachia. Throughout the last century, the industry has shown disregard for the regions' people and places--including its negative economic impacts on our people. Cycles of boom and bust have left towns for dead, the demolition of our land has made millions of acres unsuitable for sustaining life, and mechanization has put miners out of work. As the industry continues to decline--due to a number of factors, including inefficient coal-burning infrastructure, cheaper energy alternatives (particularly natural gas), diminished quality coal reserves, and the impact of much-needed and long-neglected (and still insufficient) health and environmental regulations--it will leave a further dwindling economy in its wake.

Administrative Inaction

For too long this administration has been silent on the issues facing our region. Since 2009, little has been accomplished. We have seen The Council on Environmental Quality (CEQ), The Environmental Protection Agency (EPA), The Office of Surface Mining Enforcement and Reclamation (OSMRE) and other federal agencies shy away from addressing these issues in any meaningful way. Officials in this administration will point to other institutions of power that challenge their authority--industry-backed politicians, industry lawsuits, and more--to explain away their inaction. Yet, it remains the authority and the legal responsibility of these agencies to protect our health and our environment. We expect action.

What We Want

This administration has an opportunity, now, to follow through on its 2009 plan--to act in the best interest of our communities. If this administration does not find the political courage to create and enforce effective regulations to protect our communities and our environment, widespread pollution will remain unaddressed, hindering efforts aimed at improving the region's economic outlook and further impairing our region's ability to build a viable, diverse economy and respond to the compounding impacts of the coal industry's acute legacy costs and climate change.

We want this administration to follow through on its 2009 MOU promises and to implement new, scientifically based rulemakings that protect and restore the long-term viability of our region's human and economic health.

Below, we cite specific areas for action, include four policy changes we need the Administration to make. These changes include: 1) a Selenium Standard to ensure that citizens maintain the ability to test for selenium pollution in their own water, 2) a strong Conductivity Rule based on scientific research US EPA has already conducted because we, and our federal agencies, know that high conductivity can be a key measure of dangerous water, 3) a Stream Protection Rule that preserves a strong stream buffer zone requirement so that mining waste can no longer be dumped into our streams, and D) a strong Minefill Rule to address the currently unregulated dumping of coal burning waste into abandoned mine sites.

These four policy changes will not solve the problems our region faces--but they are key steps to ensuring a safe and viable future for our people. With so much at stake for the future of Central Appalachia now, nearing the end of this current administration, we cannot overstate the significance of this Administration's decisions in the next two years. It is our aim to work with the Obama Administration to protect our health, our access to clean and safe drinking water and air, and to encourage long-term economic resilience and sustainability that promotes rather than annihilates the heritage and beauty of our Appalachian region.

Purpose

The purposes of what follows is to: 1) evaluate what progress has been made in implementing the Memorandum of Understanding (MOU) of 2009 with regard to the interagency action plan on Appalachian Surface Coal Mining over time, 2) to discuss serious lapses in regulation, enforcement, and oversight of mountaintop removal mining operations, 3) to begin to foster a collaborative dialogue around solutions and mitigation for adverse impacts caused by mountaintop removal mining operations—especially with regard to four key Obama Administration decisions in 2015, and 4) to invite this Administration to reopen a dialogue regarding what is next for the future of the Appalachian economy.

Evaluation of the MOU Over Time

As stated previously, the federal government has done little to follow through on its commitment as expressed through the MOU. The Environmental Protection Agency has halted permit reviews under Clean Water Section 402 (via the National Pollutant Discharge Elimination System or NPDES), despite the fact that EPA's Clean Water Act guidance on conductivity was upheld by the D.C. Circuit. EPA has only vetoed one Clean Water Act Section 404 permit for a mountaintop removal mine (for the Spruce Mine No. 1 Permit). And the administration has made costly little progress on SMCRA de-delegation and CWA de-delegation petitions.

In order to evaluate the progress that this administration has made with regard to the implementation of the MOU, we have outlined each of the key regulatory enforcement and permitting areas that the MOU addresses, in turn. Below, find summaries of progress with regard to each:

As outlined in the MOU, **before the end of 2009**, **the Corps and EPA were to take the following steps:**

Commitment: Within 30 days of the date of this MOU, the Corps will issue a public notice pursuant to 33 C.F.R. § 330.5 proposing to modify 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, and will seek public comment on the proposed action.

> **Actual action:** NWP 21 was modified. There is no longer a blanket permitting process for mountaintop removal permits under NWP 21, after a series of public meetings and a public comment period.

Commitment: EPA and the Corps, in coordination with DOI's Fish and Wildlife Service (FWS), will jointly develop guidance to strengthen the environmental review of proposed surface coal mining projects in Appalachia under the CWA Section 404(b)(1) Guidelines.

> **Actual action:** This commitment resulted in the EPA's *Enhanced Coordination Process* (ECP), which held up dozens of 404 permits to a much stronger lens and may have stopped some of the most egregious proposed permits from moving forward. Unfortunately, pressure from industry-backed congresspeople in the form of numerous congressional hearings has made EPA, OSMRE, and other agencies pull back on this stronger, much-needed scrutiny.

Commitment: Recognizing that the regulation of surface coal mining extends beyond CWA Section 404, EPA will improve and strengthen oversight and review of water pollution permits for discharges from valley fills under CWA Section 402, and of state water quality certifications under CWA Section 401, by taking appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting of surface mining operations under these programs.

> **Actual action:** Although EPA initially took important steps to follow-through on this commitment--including objecting to many proposed NPDES permits that failed to include adequate pollution protections--the agency has since backed away from taking meaningful action to compel states to protect streams and communities from mining pollution. Now that the guidance is back in effect, EPA should use its authority to issue specific objections to NPDES permits that fail to set limits on conductivity or otherwise fail to ensure mines will not violate water quality standards. West

Virginia is working to change permits to remove the condition to comply with narrative water quality standards; EPA should not allow West Virginia or other states to do so.

Moreover, EPA now issues very few permit objections, and recently allowed Kentucky to move forward with two very flawed actions. First, EPA authorized Kentucky's decision to replace its straightforward selenium water quality standard with a new standard based on fish-tissue concentrations that is effectively unenforceable. Second, EPA failed to object to Kentucky's general NPDES permits for coal mining; this flawed permit allows the state to authorize discharges without the necessary pollution controls and essentially prevents any public participation in the permitting process.

Beyond this, EPA has never responded to the petitions that various groups have filed urging EPA to withdraw Kentucky's and West Virginia's Clean Water Act NPDES permit programs. One of those petitions is more than 5 years old and merits a response.

Commitment: The Corps and EPA, in coordination with FWS and consistent with the agencies' regulations governing compensatory mitigation, will jointly issue guidance clarifying how impacts to streams should be evaluated and how to evaluate proposed mitigation projects to improve the ecological performance of such mitigation implemented to compensate for losses of waters of the United States authorized by Section 404 permits.

Actual action: These actions are not sufficient; data continues to illustrate that mitigation is largely failing. The EPA and the Corps must follow through on their commitment to address the failures of mitigation and protect Appalachian waters from further irreparable harm.

Commitment: EPA, in coordination with the Corps, will clarify the applicability of the CWA waste treatment exemption for treatment facilities constructed in waters of the United States in order to minimize the temporary impacts of mining operations on streams.

Actual action: Worse, they are currently proposing in the Waters of the United States rule to codify the waste treatment exclusion without limiting its application to man made facilities outside of waters, as originally intended. The agencies must fix this problem, not make things worse.

As outlined in the MOU, **before the end of 2009**, **DOI was to take the following steps:**

Commitment: If the 2008 Stream Buffer Zone Rule (SBZ) is vacated by the U.S. District Court for the District of Columbia in Coal River Mountain Watch et al v. Kempthorne, 1:08-cv-02212-HHK C, as requested by the Secretary of the Interior on April 27, 2009, the Office of Surface Mining Reclamation and Enforcement (OSM) will issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts.

Actual action: The harmful 2008 rule was vacated and the stronger 1983 rule is now back in force. However, OSMRE has so far failed to ensure enforcement of the reinstated 1983 rule.

Commitment: OSM will reevaluate and determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA. OSM will remove impediments to its ability to require correction of permit defects in SMCRA primacy states.

Actual action: OSMRE has determined—correctly—that its oversight authority under SMCRA includes permit defects. OSMRE's record on correcting these defects has been mixed at best.

More Progress is Needed

It is the responsibility of the federal agencies to ensure the enforcement of the Clean Water Protection Act, the Surface Mine Control and Reclamation Act and other federal law aimed at protecting human and environmental health. The day to day enforcement of these laws in overseen by state and regional entities. These state and regional entities consistently fail to enforce the law and sometimes undermine the regulatory enforcement process altogether. Moreover, federal agencies themselves often stall in or fall short of their duties. We need this administration to ensure that federal law is fully enforced. Below are some examples of these shortfalls.

Enhance Federal Oversight

The regulatory agencies in the States of Tennessee, West Virginia, Kentucky and Virginia all fail to adequately enforce mining regulations. We have numerous examples, but for the purposes of this report, we cite two from Virginia and one from Kentucky.

Our first example is from Virginia and is an example of the state's failure to monitor waste load allocations in watersheds:

In Virginia, the Department of Mines Minerals and Energy (DMME) monitors coal-related National Pollutant Discharge Elimination System (NPDES) permits. In one case a single discharger -- the Moss 3 coal preparation plant in Dumps Creek -- was discharging more than was allowed for all the discharges in the entire watershed. It wasn't until a citizen group threatened to sue the plant operator, Alpha Natural Resources, that DMME began to rectify this issue by imposing a compliance schedule. However, the Environmental Protection Agency (EPA) stated that the compliance schedule is not valid unless it includes a permit requirement to comply with the Dumps Creek Total Maximum Daily Load. Thus, the action taken by state agencies was not sufficient under federal law.

Our second example occurred in Kentucky and concerns the EPA-approved renewal of the KPDES (Kentucky Pollutant Discharge Elimination System) General Permit for coal mining; this permit renewal will be in effect for the next 5 years.

General permits are considered a blanket approval mechanism. Authorization to discharge under general permits requires less scrutiny than individual permit applications and does not compel site-specific environmental assessments nor allow for individual public comment processes. Although the new General permit includes some of the more stringent requirements necessary to assure compliance with the Clean Water Act than have previously been part of the individual permit process, this is not enough to ensure meaningful protections for our communities.

Earlier this year the Kentucky Division of Water stated in a meeting with citizens that they also believe that most permits do merit individual scrutiny, but they had to instead use the General Permit because they do not have enough staff to process the number of permits that individual scrutiny would warrant. To further complicate the matter, the Kentucky state legislature has once again reduced the budget for the mining enforcement sectors of Kentucky government. This effectively leaves Kentucky without the ability to effectively enforce the Clean Water Act as it pertains to mining activity.

On occasions where federal authorities have exercised their oversight responsibility, they have often failed to allow the citizen inspections required by law. In our third example, both the Office of Surface Mining

Reclamation and Enforcement (OSMRE) and the Virginia DMME failed to grant citizen inspections when they were lawfully required to do so.

A citizen requested an inspection in January of 2014, due to findings of selenium referenced during a permit renewal in which an instream monitoring point had levels above the chronic selenium standard. The DMME refused to allow the inspection, saying one exceedance did not constitute a chronic violation. However, both our citizen experts as well as the OSMRE know that selenium tends to be ever-present in the water column, and when it is found, it will likely be there in perpetuity unless steps are taken to mitigate its presence. OSMRE agreed that the finding represented a potential water quality violation and took a water sample while inspecting an adjacent mine. That single sample showed selenium levels to be above the chronic violation limits. As a result, OSMRE issued a Ten Day Notice to DMME and ruled their decision to be arbitrary and capricious. The DMME appealed that decision to the OSMRE regional office in Pittsburgh. Before their appeal, DMME took water samples of the pond in question and obtained their own selenium results.

During the back and forth between DMME and OSMRE, the permit came up for renewal and DMME changed the permit so that it included selenium limits and the Pittsburgh office of OSMRE ruled that DMME had fixed the problem. However, OSMRE also noted that it had not granted the citizen inspection that had been requested. Although the underlying problem was partially fixed in the permit, both agencies failed in their duty to grant a citizens inspection which is a right under the Surface Mining Control and Reclamation Act.

Our example shows there are sometimes flaws in an agency's enforcement of the law. For this reason, citizen inspections are a crucial measure of accountability that must be allowed.

In short, be it for matters of convenience, corruption, or staffing limitations, Central Appalachian state regulators fail again and again to meaningfully enforce the Surface Mine Control and Reclamation Act and the Clean Water Act in our communities.

Clean Water Act 404 Permitting

Clean Water Act Section 404 permits issued by the U.S. Army Corps of Engineers for mountaintop removal mines continue to allow mining that destroy streams and pollute downstream communities. This problem is compounded by the fact that individual states have few guidelines and little accountability when determining the issuance of certifications under section 401 of the Clean Water Act, which is a precursor to the Corps issuing 404 permits. All too often there is a question concerning how the evaluation is reviewed and to what extent the state should have authority in permitting new mines that will impact streams.

As an example of the damage that can be caused by lack of clarity in permitting authority, we will use the example of Mill Creek, a community in Southeast Kentucky that has been left without a potable water supply. The headwaters of local streams were destroyed, having been buried under mining spoil, an impact seemingly allowed under the Kentucky Pollutant Discharge Elimination System General Permit. When citizens asked if there would be a Clean Water Act 404 permit, they were told “all the coal company did was a little work up there back in 2002,” and that there was no 404 issued on this site. As a result of lapses in proper permitting, the valley was filled in, adversely impacting the water supply that supported the community of 97 families. When the state of Kentucky was approached for assistance, the state officials used various excuses to deny the community assistance in accessing a safe water supply. Despite

abundant evidence given by local residents that pointed to the mining and subsequent valley fills as the cause for the water pollution, the Mill Creek community has been left as a casualty of mountaintop removal. This is an example of just one headwater that was removed. A list of other degraded streams on this mountain range alone include Appletree Branch, Big John's Branch, and Low Gap.

Similar stories of impacts to residents' drinking water quality and quantity occur throughout the region. The people of Central Appalachia should be protected under the Safe Drinking Water Act and The Clean Water Act. In addition, current 404 permitting practice includes The Army Corps issuing permits that allow permanent and severe harm to streams, largely on the basis of bogus mitigation claims. The MOU stated that EPA and The Corps were supposed to address "how to evaluate proposed mitigation projects to improve the ecological performance of such mitigation implemented to compensate for losses of waters of the United States authorized by Section 404 permits." These agencies have not addressed this issue. Meanwhile, data continues to illustrate that mitigation is largely failing. The EPA and the Corps must follow through on their commitment to address the failures of mitigation and protect Appalachian waters from irreparable harm.

NWP21 Permitting

One success of the MOU was significant reduction in the use of Nationwide Permit 21, including the end of its use to authorize large new mountaintop removal mines. This change had a very positive impact for the residents in Appalachia. For example, it led to the Ison Rock Ridge permit being denied. This is an example of the good that can be achieved from concrete policy changes informed by sound science, though it should be noted that The Corp still uses the NWP21 permit for mine-throughs and for grandfathered projects.

NEPA Implementation

On August 22, 2014, the White House Council on Environmental Quality released draft National Environmental Policy Act (NEPA) guidance on when and how Federal agencies can effectively use NEPA programmatic reviews. The guidance addresses how agencies can prepare such reviews to ensure the reviews are conducted in an efficient and timely manner and provide information that is useful for advancing decision-making.

The guidance on programmatic reviews, however, does not address the fundamental problem with the Corps' approach to NEPA when it issues Clean Water Act Section 404 permits -- the sharply truncated scope of review. Groups within the Alliance for Appalachia submitted a formal petition in 2012 detailing the legal authority and obligation of CEQ, EPA, and the Corps to fix the Corps' approach. This formal petition clearly demonstrates that the Corps' current practice--as evidenced by recent permitting decisions--of limiting its NEPA review to filled jurisdictional waters and adjacent riparian areas, regardless of what other environmental impacts resulted from the issuance of the permits, is contrary to the fundamental purpose and text of NEPA, CEQ regulations for implementing NEPA, and decisions of the United States Supreme Court. This petition, filed in 2012, still has no response from CEQ, EPA, or the Corps and warrants one.

The result of the Corps' flawed approach to NEPA is that *no agency*, state or federal, is fully analyzing the human health and environmental consequences of mountaintop removal mines. The relevant decision makers are ignoring the increasingly robust science showing that mountaintop removal may increase rates of cancer, birth defects, heart, lung, and kidney disease, and early mortality, This failure undermines

reasoned agency decisionmaking and puts the people of Central Appalachia at grave risk.

Public Engagement

Residents near mountaintop removal mines need to be informed early and often about potential impacts to their communities from mining activities. A recent example in West Virginia shows that, all too often, the state regulatory agency is not ensuring that adequate notice is given to residents. In the case of the Keystone #2 mine that is adjacent to the Kanawha State Forest, residents of Loudendale, West Virginia did not notice the formal notice in the newspaper for the informal conference. In these times, when few people receive their news by a printed newspaper, it does not make sense that written publication in a local newspaper is the primary way that citizens are made aware of a mine in the area. In this case, even if residents had proper notice, the informal conference itself was held some 30 miles away from the most directly impacted community. Robust public participation is a key right under the concept of environmental justice. In many cases, what is done to inform residents of potential mining minimizes the intent of the law: to ensure strong public knowledge in directly impacted communities.

The MOU committed to "engage in robust public participation, through public comment mechanisms and Appalachian public outreach events." Residents near mountaintop removal mines need complete and timely information about potential impacts to their communities from the mining activities. A recent example in West Virginia shows that, all too often, the State regulatory agency is not ensuring that adequate notice is given to residents. In the case of the Keystone #2 mine that is adjacent to the Kanawha State Forest, residents of Loudendale were not aware of the formal notice in the newspaper for the informal conference.

This incident is just one example of the lack of public engagement that is endemic throughout the mining process. In these times, when few people receive their news by a printed newspaper, it does not make sense that written publication in a local newspaper is the primary way that citizens are made aware of a mine in the area. In this case, even if residents had received proper notice, the informal conference itself was held some 30 miles away from the most directly impacted community. Further, the Army Corps fails to provide sufficient detail about proposed impacts and proposed mitigation to allow meaningful public comment, and frequently issues permits with notice to the surrounding community that would be impacted by mining. These harmful practices long predate the MOU, however, the administration has the opportunity to institute simple fixes that could vastly improve public engagement.

Robust public participation is a key component of the concept of environmental justice and a cornerstone of our environmental laws. Yet, in too many cases, inadequate efforts to inform residents of potential mining undermines the goal of robust participation by directly impacted communities.

What The Administration Can Do in 2015

Four federal rule and standardmakings are currently being considered by agency officials. Below we have outlined what we hope and need these policy changes to achieve.

1) **Stream Protection Rule**

We need a Stream Protection Rule that includes enforceable and measurable standards that will help ensure healthy streams and mountain communities. This must include a strong stream buffer zone

regulation that, like the 1983 rule, clearly prohibits adverse impacts to perennial and intermittent streams. Variances that allow pollution or any adverse impacts to streams should not be allowed under the Stream Protection Rule. To ensure stakeholder engagement, OSMRE should identify a benchmark in the rulemaking process that clarifies where and when OSMRE can share specific details and language for the proposed Stream Protection Rule. In addition to regulatory requirements that are *at least as* protective as the 1983 rule, the Stream Protection Rule must provide for robust environmental reviews, monitoring, reporting, and enforcement.

2) Conductivity Rule

We need federal water quality standards for conductivity, not merely guidance or recommended criteria, so that state regulators will provide the protections guaranteed by the Clean Water Act and by SMCRA. Without this rule, stream health will continue to be compromised and species will continue to be extirpated until our streams are simply dead.

Elevated conductivity, and the ionic concentration pollution it indicates, is a serious direct threat to aquatic life. EPA research and peer reviewed research all support this. The 2011 EPA conductivity guidance certainly supported this. But a *guidance*, even as upheld by the courts, is not enough. States do not abide by *guidance* and that was made quite clear when Kentucky and West Virginia sued to effectively say "we do not have to." Despite the guidance, states continue to issue permits and TMDLs without conductivity limits.

We need EPA to promulgate a water quality standard for conductivity (or its constituents). EPA and others have done extensive work showing that mountaintop removal mining always results in violations of water quality standards; unfortunately, no state has taken any action to implement that guidance. If EPA's actions are to be effective, it is now clear that EPA must engage in a rulemaking and adopt a water quality standard that states must incorporate into their NPDES permits, rather than continuing to wait for states to do it voluntarily.

For years now, US EPA has known that conductivity is a critical measure of a stream's health. In fact U.S. District Judge Robert Chambers recently concluded that conductivity pollution from mines in southern West Virginia, "caused or materially contributed to a significant adverse impact" to nearby streams. The US EPA's authority under the Clean Water Act to make a rule is clear, yet the agency has failed to address this issue meaningfully and has been slow to promulgate even symbolic measures, such as the conductivity criteria that were to be drafted this past winter.

3) Selenium Standards

We need a protective and enforceable federal selenium pollution standard. There is strong and continued evidence that elevated selenium levels can cause reproductive issues in fish, birds, and reptiles as the substance bioaccumulates within the animals. Selenium can also cause health problems in humans.

Officials in Kentucky have adopted, with EPA Region 4 approval, a standard with serious scientific flaws that is insufficiently protective of sensitive species and effectively unenforceable. Without an enforceable federal limit, citizen monitoring and enforcement under the Clean Water Act will be seriously compromised.

US EPA has already begun the process of revising its current standard. This standard must be enforceable and allow for citizen participation.

There are several issues with the fish-tissue based standard that the EPA approved for KY. By the time

selenium accumulates in fish tissue at levels exceeding the standard, the ecosystem has already been harmed. The macroinvertebrate population is affected by high selenium levels before the fish population. This is a primary source of food for larger animals. Additionally, selenium accumulates in the streambed and is not easily removed. By waiting until selenium levels are high in fish tissue, rather than addressing the problem immediately upon high discharge into the water column, more selenium is deposited with longer term effects. By using a water column based standard, the accumulation of selenium in fish tissue, the macroinvertebrate population and the streambed is minimized, limiting the effects of long-term selenium exposure and allowing the stream to potentially recover from the lesser exposure.

Simply finding fish at or near the discharge point can also be a problem. Many streams are affected by contaminants like mercury, acid mine drainage, high amounts particulates, etc. Because these contaminants affect fish both indirectly by eliminating food sources, and directly through reproductive issues and fish kills, there may be no fish present in the stream. Some of the streams are also headwaters, which do not naturally support the species that are tested. The answer that has been given to this problem is to move downstream until fish are found. This method brings up a myriad of difficulties. Downstream fish may not have high levels of selenium because the contamination has been diluted by the confluence of other streams. Fish move. A particular fish that is sampled could be from anywhere in the larger watershed, making it difficult to pinpoint where the contamination came from if tissues levels are high in selenium, or missing high levels of selenium from a particular discharge because the fish spent most of its time in an unaffected part of the watershed. In addition, downstream waters may be affected by multiple permits. If there are several discharge points upstream from where samples are collected, which one is responsible? We have seen this problem go unresolved with air quality: if several mining companies are using the same road to haul coal, it is impossible to prove who is violating air quality standards. Therefore no one can be issued a violation, the hauling goes on as before, and dust continues to affect residents' health. We foresee the same pattern happening with fish-tissue based selenium standards when the samples are taken from below multiple discharge points.

Finally, fish tissue sampling is a technical and expensive process. Relatively few experts are familiar with the techniques, the standard operating procedure is complex, and few labs can process the sample. This eliminates the potential for citizen monitoring, which is crucial to upholding water quality standards. By their own admission, state DEPs do not have enough staff to properly carry out regulation and enforcement. Citizens who are concerned about the streams in their own community--where they get drinking water, or water for their gardens, or fish or play--are frequently the ones who recognize a problem initially and bring it to the attention of officials. If they are excluded from the testing process because it is too technical and expensive, a key player in monitoring water quality will be eliminated. Regulation and enforcement will be diminished, leading to further degradation of our waterways.

For these reasons, the EPA needs to implement a protective, enforceable, water column based selenium standard that is enforceable by citizens as soon as possible.

4) Mine fill Rule

Coal Combustion Residue (CCR) has been proven to contain numerous toxic pollutants that should never be allowed to impact the people of Appalachia. Storage of CCR in and on mine sites has not been regulated and needs to be addressed with strong, enforceable, and measurable standards that will be protective of the the Appalachian people and communities and also be compatible with EPA's guidance for CCR's.

Fostering a Collaborative Dialogue

Economic Transition

So much work is to be done to revitalize our economy and the time is now. A historically weak regional economy has become worse in the last several years as mechanisation, out-dated infrastructure, market shifts and some much-needed (though still insufficient) regulation have caused the industry employment and the industry itself to contract. Now is a critical juncture to invest in our region. Standing federal funds like the Abandoned Mine Lands Fund could be reimagined to couple workforce development and the environmental restoration our region needs. Investments in education and job-training and telecommunications infrasture could make our communities viable for our young people to remain. This administration once, though very briefly, took up the charge of job creation and investment in our region--and should do so again and far more completely.

Stakeholder Engagement

Administration officials have offered to meet with representatives of The Alliance for Appalachia in bi-annual meetings and monthly conference calls to ensure that these concerns are addressed and yet have taken no action to do so. Representatives from all agencies involved in the surface coal mining process should be in attendance at these promised gatherings. These participants should include, but not be limited to, enforcement, environmental justice, water quality, and legal staff of pertinent agencies.This is the minimum engagement needed. For truly effective stakeholder engagement, agencies should be meeting with impacted communities on the ground near affected sites. It is a significant expense and hardship for residents to continually travel to Washington, DC to meet with agencies. We have extended an ongoing invitation open to all agencies to visit the Appalachian region to meet with mountain residents in person.

Beyond engagement with the federal agencies responsible for the oversight of this issue, there is a persistent need for meaningful engagement of community members in the permitting process, starting with effective notice that goes beyond newspaper notices and sufficient information about proposed mines. Community stakeholders must have advanced warning about, and input into, the mining practices that are affecting their day to day lives.

Additional Immediate Actions

In addition to addressing the federal oversight and rule and standardmakings outline above, we recommend several actions that the Obama administration take immediately: 1) Restore USGS funding for health studies in Appalachian Communities, 2) Grant the 2012 petition to improve NEPA review of Clean Water Act 404 permits, 3) Order the Army Corp of Engineers to consider health impacts in their permitting decisions and 4) Implement strong stakeholder engagement.

Summary

Much work is needed to complete the MOU process, to ensure effective regulatory enforcement in our region, to create sound rule-makings, to strengthen citizen engagement and to invest in a bright future for Central Appalachia. We are a coalition of organizations that represent thousands of citizens who are ready to work. This report is a measure, an invitation and a call for the Obama Administration to do the same.

The Alliance for Appalachia

Appalachian Voices – Coal River Mountain Watch – Gainesville Loves Mountains – Hands Off Appalachia
Heartwood – Highlander Research and Education Center – Keepers of the Mountains
Foundation – Kentuckians For The Commonwealth – Ohio Valley Environmental Coalition
Statewide Organizing for Community eMpowerment – Stay Together Appalachian Youth
Sierra Club Environmental Justice – Southern Appalachian Mountain Stewards – SouthWings
West Virginia Highlands Conservancy