

Statement of J. Steven Gardner, PE
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Subcommittee on Energy and Mineral Resources
U.S. House of Representatives

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My name is Steve Gardner. I am President and CEO of ECSI, LLC, an engineering consulting group based in Lexington, Kentucky. ECSI's core business is mining, in particular coal mining in the United States. ECSI was subcontracted by Polu Kai Services (PKS) as subject matter experts to assist with the EIS for the Stream Protection Rule.

Approximately 2 years ago, I received a call from someone at OSM who asked if ECSI would be interested in being involved in drafting the Stream Protection Rule EIS that was going to be contracted. He stated that the reason ECSI was being approached as a recommended subcontractor was our reputation with both regulatory and regulated community. OSM intended the process to be a minority/small business set aside contract so that they could issue quickly. OSM was recommending subcontractor teams to be ECSI, a national geotechnical firm, and Morgan Worldwide (recognized for their work in the environmental community).

In conversations with OSM personnel, it was our understanding that OSM had a preferred, minority business contractor who would contact ECSI. In due course, we received a call from PKS who was responding to an RFP issued by OSM to perform an Environmental Impact Statement on the Proposed Stream Protection Rule. PKS advised us that they were assembling a team of consultants to perform this complicated, nationwide programmatic EIS and that they were looking at our firm to be the mining experts on the team. They were also retaining MACTEC, a large national consulting group to perform geotechnical and environmental aspects, Morgan Worldwide to contribute their mining and environmental expertise to complement and balance our involvement, and Plexus Scientific for their NEPA experience, project management, logistics and final EIS drafting. ECSI assisted PKS in preparing the proposal and budget, and eventually a contract was issued to PKS. We assembled a team of experts in mining. These included nationally recognized academic experts in mining, hydrology, and reclamation (some of whom are experts that OSM has utilized on a routine basis).

The EIS project kicked off in June 2010 with a meeting in DC between PKS, the subcontractors and OSM's team. During that meeting, we learned that OSM had two teams assembled. One was a rule writing team and the other an EIS team. An immediate issue that came up was the short timeframe within which OSM wanted the EIS prepared. PKS and the subcontractors voiced their collective concern that the accelerated timeframe was overly ambitious. OSM team members agreed and advised that there would likely be time extensions granted and budget increases to adequately prepare an EIS of this

magnitude. The original date for delivery of the Draft EIS was February 2, 2011. The assignments were allocated and ECSI was charged with reviewing the concepts of the proposed rule and predict production impacts nationwide. A copy of the draft rule dated May 25, 2010 was provided to the PKS team at that time.

There were two key issues that the PKS team brought to OSM's attention during that kickoff meeting, pertinent to the EIS and NEPA process:

- OSM did not believe that public meetings were necessary, and that the Notice of Intent (NOI) and request for public input within the NOI, as published in the Federal Register, was adequate. Virtually everyone on the PKS team agreed that the NEPA process called for public meetings to be held so that affected communities could comment. The PKS team convinced OSM of the necessity of public meetings, which added approximately 4 months to the process. Public meetings (termed "open houses") were held across the country. These meetings were poster sessions where the various alternatives for the rule were outlined and the public was given the opportunity to submit written comments or oral statements.
- It was unclear to the PKS team if the proposed rule applied to underground coal mining methods. That question was repeatedly posed to OSM, and several months into the project at a team meeting in Atlanta, the PKS team was informed that the decision had been made that the proposed rule would be applied to underground mining. This took both the PKS team and many of the OSM personnel present by surprise. The PKS team received a letter dated October 7, 2010 from OSM stating that it was disingenuous to suggest that the rule did not apply to underground mining. The PKS team felt that the last minute inclusion of underground mining impacts was a major change in scope and schedule to the EIS, and requested additional time and budget to properly evaluate the impacts. OSM denied this request and insisted that underground mining had been part of the original scope of work all along and that the contractors were well aware of this. This disagreement is well documented in the record.

After this initial 4 month delay for scoping meetings, OSM began to embed its own engineering and science personnel in the various contractor EIS working groups, ostensibly to speed up the process.

To determine impacts on coal production under the various Alternatives, including the proposed rule (termed the "Preferred Alternative"), ECSI planned an analysis of production impacts utilizing "typical mine" models of all mining methods from each coal producing region, and applying Alternatives to those mines to determine production impacts. However, that effort proved to be impossible within the prescribed schedule and budget. As an alternative to the "typical mine" analysis, an Expert Elicitation methodology was proposed and approved by OSM. That methodology and the major assumptions are described in detail within the Draft EIS at Section 4.0.6.1, as submitted by PKS on February 23, 2011. A subgroup was formed to perform the expert elicitation production impact analysis, which included members of ECSI, Morgan Worldwide, PKS, and OSM personnel. As an additional validation of the elicitation process, ECSI proposed that selected coal companies from each coal region be surveyed on

what they believed the production impacts would be under each Alternative. OSM originally approved of this approach, but hours prior to sending the survey out, OSM withdrew its approval.

Coal production impacts under each Alternative were forecast and the results were distributed to the rest of the PKS team, including the team members performing economic analyses. The production impact numbers were then utilized to predict job impacts nationwide.

A joint PKS and OSM team meeting was held in February in OSM's offices in DC. During this meeting, OSM "suggested" that the PKS team revisit the production impacts and associated job loss numbers, and with different assumptions that would then change the final outcome to show less of an impact. The EIS team unanimously told OSM that it was not appropriate to change assumptions just to get a different answer. The team was also very concerned with the specific instruction from OSM to make the assumption that the 2008 Stream Buffer Zone (SBZ) Rule was in effect and being enforced across the U.S., which was not true. No state with an approved SMCRA program had promulgated the 2008 SBZ Rule, especially since the rule itself was subject to the litigation which brought about the SPR. If the PKS team assumed that the 2008 SBZ was in effect as part of the baseline existing environment, the nexus from the SBZ to the SPR would show less production, and therefore less job loss impact. The PKS team unanimously refused to use a "fabricated" baseline scenario to soften the production loss numbers.

In order to meet the revised February 23, 2011, deadline for submission of a Preliminary Draft EIS, the PKS team inserted "placeholders" in the narrative of the document and a general disclaimer into the document to succinctly describe the situation with respect to OSM's change in instructions to the PKS team, assumptions and baseline data:

"[NOTE- As a direct result of recent instructions from OSM, the production impact analysis with a baseline thermal energy balance adjustment using the 2008 EIA production figures will be changed to a production/benefits analysis using the 2010 EIA dynamic production forecast as the baseline without a static thermal balance component. Section 4.06, Methodology, will be revised to reflect the new OSM-approved methodology. In addition, OSM has indicated that:

- the SPR implementation timeline should be shortened from the previously approved 12 years to 8½ years;*
- that Chapter 2 may be further modified (Alternative 5 as previously approved may not reflect the current rule provisions and other Alternatives may have to be modified to reflect these changes); and*
- that the production impacts/benefits should be tested by applying the alternative analysis to typical mines for each Region.*

These new instructions will likely require substantial changes to Chapter 4, as well as changes to Chapter 2.]"

It is important to note that Chapter 2 of the EIS is the description of all Alternatives, including the "Preferred Alternative," upon which the entire EIS impacts analysis is based.

Shortly after the February meeting with OSM in DC, the PKS team received a notice that the contract with PKS was not going to be renewed.

I had the opportunity to review the testimony of Joseph G. Pizarchik, Director of OSM during the November 4, 2011, Subcommittee on Energy and Mineral Resources Hearing and would like to address comments made during the hearing:

1. Mr. Pizarchik made the statement that the job loss numbers were “placeholders” and were “fabricated.” As I have previously stated, the EIS team, which included OSM personnel, performed the analysis to the best of its ability given the deadline and budget. When OSM did not like the result of the analysis, OSM asked that the team change the baseline conditions and use alternative assumptions to alter the coal production and job loss numbers.
2. Plagiarism was alleged against the PKS team in drafting the EIS. Under NEPA, it is preferred that the drafters of an EIS utilize as much existing information as possible and not “reinvent the wheel.” While I cannot speak for the entire PKS team, ECSI utilized text from previous EIS documents, as directed by OSM, where appropriate and cited those documents in its references. In fact, ECSI posed the question to OSM personnel of whether we should simply cite previous EIS documents or if we should put the actual text in the SPR EIS. ECSI was directed by OSM to put the text in the SPR EIS rather than merely cite to another document for ease of the reader.
3. Despite Mr. Pizarchik’s claim that OSM was at “arms length” during the process, OSM personnel were intimately involved in the EIS throughout.

Thank you for the opportunity to appear before the Committee today to testify about our involvement with the Stream Protection Rule EIS.