Letter coming under signature of Kathy Karpan, Director, Office of Surface Mining
March 10, 2000

Mr. John Spotila
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Old Executive Office Building, Room 350
Washington, DC 20503

Dear Mr. Spotila:

I am writing to inform you of my very serious concerns with a regulatory determination that the Environmental Protection Agency (EPA) is scheduled to issue today. Mr. Peter Eglinton of your Office's Natural Resources Branch provided us with a preliminary copy of the EPA's Regulatory Determination on Wastes from the Combustion of Fossil Fuels. Members of my staff have been working with Mr. Eglinton and other Federal agency officials as part of an interagency review of the EPA action under the auspices of the Office of Management and Budget.

While we have not yet completed our technical review of the 91-page determination, which EPA only made available earlier this week, it is clear that EPA's action would lead to significant restrictions on the handling of certain coal combustion byproducts (CCBs) under the Resource Conservation and Recovery Act (RCRA). We believe strongly that restrictions of the scope that EPA is considering would have serious adverse impacts on certain elements of the U.S. coal industry. Further, because EPA's determination would lead to drastic changes in the way certain CCBs are currently used in coal mine reclamation, it could lead to the elimination of an environmentally beneficial use of these materials in the control of acid mine drainage at active and abandoned coal mines.

As you may know, the Surface Mining Control and Reclamation Act establishes State and Federal programs for the reclamation of abandoned mine lands and the regulation of active mining and reclamation. These programs are designed to address the serious health, safety and environmental effects of past and current mining. With the limited resources available to meet these responsibilities, it is increasingly important that we find better ways to reclaim land and water damaged by mining. The use of CCBs has shown great promise for improved reclamation.

It appears that EPA's determination reflects a major departure from the agency's original conclusions in its Report to Congress on March 31, 1999, and a radical departure from the direction we understood EPA was heading based on recent discussions during the initial stages of the Federal interagency review. Because of these apparent and surprising shifts of position, I

requested that EPA seek a reasonable extension of the court-ordered deadline. The affected Federal agencies need to continue our review so that we can fully apprise EPA of the wide-ranging effects of the determination before it becomes final. In the meantime, I wanted to let you know of my continued concern about how this issue is unfolding.

If you have any questions or would like to discuss this issue, please call me on 202-208-4006, or Mary Josie Blanchard, Assistant Director, Program Support, on 202-208-4264.

Respectfully yours,

Kathy Karpan
Director

Mr. Jacob J. Lew, Director
Office of Management and Budget
Old Executive Office Building, Room 252
Washington, DC 20503

Dear Mr. Lew:

On March 5, 2000, the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM) received an Environmental Protection Agency (EPA) draft regulatory determination from the Office of Management and Budget. EPA has apparently determined that it must regulate the products of coal combustion at electric power generating stations as wastes under Subtitle C of the Resource Conservation and Recovery Act (RCRA). I am writing to alert you to our concerns which are described in more detail in the enclosed summary prepared by OSM.

As a result of its review, OSM found that EPA's regulatory determination is not adequately supported by sound scientific evidence. This is especially troubling considering the potential adverse environmental and economic consequences that could arise from implementation of regulations on the determination. The determination does not properly consider geographic, geologic, and hydrologic variations or the differences between reclamation at active and abandoned mines, surface and underground mines, and coal and non-coal mines.

Despite the obvious environmental and economic implications of its position, OSM's review found no indication that EPA's determination will be subject to compliance with the National Environmental Policy Act (NEPA) or evaluated for its effect on small businesses, many of which are engaged in coal mining and related support industries and services. It is surprising that a Federal agency could render a decision with a potential environmental effect of this magnitude without consideration of the environmental impacts under NEPA. The lack of NEPA review is even more remarkable in light of the significant environmental reclamation benefits that result from certain uses of coal combustion by-products in coal mine reclamation. The uniform approach suggested by EPA threatens an entire emerging technology which recycles coal combustion by-products for beneficial environmental uses including the control of acid mine drainage, reclamation of abandoned mine sites, and subsidence control.

EPA's regulatory determination on fossil fuel combustion waste would unnecessarily complicate implementation of the Surface Mining Control and Reclamation Act (SMCRA) by OSM and its State regulatory partners by overlaying RCRA requirements on top of the existing reclamation bond release requirements of SMCRA. In addition, EPA would place this new burden for hazard determination on parties conducting mine reclamation rather than on the producers of the coal combustion by-products.

I am also concerned about the implications of the regulatory determination on the Federal coal leasing program administered by the Department's Bureau of Land Management. Any reduction in this program could have serious economic consequences for western coal-producing States and the small communities that are supported by coal mining activities.

I am particularly troubled by the lack of sufficient time for adequate Federal review of EPA's determination. EPA's current position appears to be a radical departure from the position it stated in its report to Congress on this subject in March 1999. Since the new position was released on March 6, 2000, there has been no practical opportunity for review and comment. This lack of meaningful review is counter to the intent of the OMB-sponsored interagency review in which the Departments of the Interior, Energy and Agriculture have been involved, and presupposes decisions that would more appropriately be made as part of a public rulemaking process. I urge you to explore ways that our concerns may be more fully addressed before this determination is issued formally.

If you have any questions or would like to discuss this issue further, please call Margy White, Acting Director of OSM, at 202-208-4006.

Sincerely,

Sylvia V. Baca
Assistant Secretary, Land and
Minerals Management

Enclosure

CC: Mr. John Spotila
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Old Executive Office Building, Room 350
Washington, DC 20503