

October 26, 2004

Bruce Alberts  
President  
National Academy of Sciences  
500 5<sup>th</sup> Street, NW  
Room NAS 215  
Washington, D.C. 20001

Re: Objections to the Composition of the Committee to Study Mine Placement of Coal Combustion Wastes (BESR-U-04-A)

Dear Mr. President:

On behalf of the undersigned environmental and citizens organizations, we are writing to express our serious concerns regarding the apparent violation of federal rules governing conflict of interest, bias and balance in the appointment of experts to the National Academy of Sciences' (NAS) Committee to Study Mine Placement of Coal Combustion Wastes (CCW). We believe that NAS has appointed individuals with conflicts of interest and that NAS has failed to balance the backgrounds and viewpoints of committee members in violation of the Federal Advisory Committee Act, 5 U.S.C. App. 2 §15(b)(1). We also believe that NAS has acted in violation of its own policies that require that the Academy avoid persons with strong bias.

Whether CCW disposal in mines is destructive to the environment is a politically charged question that has substantial economic implications for this nation's coal-fired utilities and the coal mining industry. Consequently, it is absolutely essential that this NAS panel avoid conflicts of interest and bias to the fullest extent possible. Unfortunately, we believe that NAS has neither complied with federal law nor its own policy. To illustrate, nearly half of the provisional panel consists of individuals with clear ties to the mining and utility industries, but only one scientist who has documented damage from CCW was appointed. The NAS appointed this grossly unbalanced committee despite their receipt of the names of 20 experts who studied the adverse impacts of CCW, many in the mining context.

While the economic stakes are high for utilities and mine operators, the stakes are even higher for communities threatened by the dumping of millions of tons of toxic waste in mines. The undersigned believe that this practice poses serious threats to the environment and public health. However, a fair and unbiased study of these threats *cannot* be produced by a committee in which a substantial proportion of the members have ties to parties having financial interests in the outcome of the study.

We believe that conflicts of interest, bias and lack of balance will irretrievably undermine this study, and the study will fail to serve the goals of Congress. According to Senator Robert C. Byrd of West Virginia, these goals are: “to answer important questions about the impact of disposing of coal combustion waste in coal mines” and to provide “timely information to EPA policy makers as these experts continue to assess the need for regulations governing this practice.”<sup>1</sup> If the public lacks confidence in the impartiality of the committee, however, its conclusions will fail to resolve this critical conflict. The result will be a large and continuing threat to water resources in coalfield communities and continuing paralysis at EPA.

In sum, we ask you to take the following three actions:

1. **Comply with FACA and remove** from the final Committee any individuals with significant conflicts of interest including those that have current client relationships to coal companies, those who are employed by coal-fired electric utilities, and those who derive significant financial support from coal companies. For example, NAS must immediately remove a prominent mining industry lobbyist and an electric utility employee from the panel.
2. **Change and balance** the committee composition to reflect a more even-handed perspective on CCW disposal to achieve the goal articulated by Congress. The committee is seriously flawed because it includes only one scientist who acknowledges damage from CCW dumping and because it contains no representatives of citizen or environmental groups. We wish to make absolutely clear that this imbalance cannot be cured with a cosmetic change of an additional panel member. Balance *means* balance, and token representation is not an adequate substitute under FACA. Under the present configuration at least four members must be added to the committee.
3. **Postpone** the October 27-28, 2004 meeting of the provisional committee to provide the time necessary to adjust committee membership to eliminate conflicts of interest, bias and lack of balance.

In making these comments, we are not questioning the integrity or competence of the experts named to the provisional panel nor their right to hold the viewpoints or associations they do. What we are seriously questioning is the extent to which the panel complies with federal law and how such a panel can examine this controversial issue with effectiveness, fairness and credibility.

Our comments on specific committee members follow.

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<sup>1</sup> Statements of Senator Robert Byrd from the Senate floor, November 12, 2003.

## Background: The Federal Advisory Committee Act and the NAS

Subsection 15(b)(1) of FACA requires in relevant part that NAS must “make its best efforts to ensure that .... no individual appointed to serve on the committee has a conflict of interest that is relevant to the functions to be performed, unless such conflict is unavoidable.” Secondly, and also critical to the matter at hand, is that FACA requires the NAS ensure that “the committee membership is fairly balanced.”

To comply with the above provisions of FACA, we understand that the NAS adheres to the disclosure and conflicts policy adopted on May 12, 2003 entitled “Policy on Committee Composition and Balance and Conflicts of Interest for Committees Used in the Development of Reports.” This 2003 policy recognizes that the need for integrity and public confidence in NAS studies and thus makes consideration of conflicts a paramount concern. The NAS’ goals are to create a committee report that is free of any significant conflict of interest and not compromised by bias. The policy also acknowledges that whether the conflict *in fact* shades the participation of a committee member, the *perception* or appearance of any significant conflict of interest can undermine public confidence, as well. The Policy states:

... if a report is to be not only sound but also effective as measured by its acceptance in quarters where it should be influential, the report must be, and must be perceived to be, not only highly competent but also the result of a process that is fairly balanced in terms of the knowledge, experience, and perspectives utilized to produce it and free of any significant conflict of interest. Conclusions by fully competent committees can be undermined by allegations of conflict of interest of lack of balance and objectivity.

National Academies Policy, May 12, 2003

Consequently, to ensure a study where allegations of lack of objectivity will not mar the outcome, we ask the Academy to examine for significant conflicts of interest, bias and lack of balance the participation of the following individuals:

**Edward M. Green, Crowell and Moring LLP.** Mr. Green is a self-described “longtime representative of US mining industry.” He worked for 16 years as general counsel and secretary of the American Mining Congress, predecessor to the National Mining Association and the primary lobbying association for American mining interests.<sup>2</sup> Since 1993, Mr. Green has worked for Crowell and

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<sup>2</sup> In fact, Mr. Green in 1988 represented the American Mining Congress, intervening in support of EPA’s determination not to regulate mining waste as a hazardous waste. Mining waste from the extraction and beneficiation stages of mining is a “Bevill” waste, as is coal combustion waste. Its relegation to solid waste status by EPA means almost certainly a long, indefinite hiatus from further federal regulation.

Moring LLP, “one of the leading mine safety, health and environmental regulatory law practices” in the U.S. Their website states: “Our work for the leading companies and trade associations in the mining industry includes legislative representation, litigation, administrative proceedings and counseling. We have participated actively in most of the critical judicial cases, legislative and rulemaking affecting the mining industry over the past two decades.”<sup>3</sup>

It is important to note, however, that Mr. Green and his firm, Crowell and Moring, LLP, most often argue, lobby and litigate for the purposes of *opposing* regulation of mining. Crowell and Moring LLP has represented mining interests in actions to contest federal mining regulations on numerous occasions. In the last 15 years, Mr. Green filed actions challenging environmental regulations on behalf of the mining industry on at least three occasions.<sup>4</sup> Also in that time period, Mr Green filed at least seven amicus briefs on behalf of the mining industry in federal court.<sup>5</sup>

For at least the last six years, Ed Green has lobbied the federal government on behalf of both coal and hard-rock mining companies. In this capacity, Mr. Green receives a substantial portion of his income directly from mining companies. For instance, in 2000, he was paid up to \$90,000 to represent the following mining companies: AngloGold North American, Inc., Franco-Nevada Mining Corp., Homestake Mining Co., Place Dome US, and RAG American Coal Co. This work continues today. In 2004, Mr. Green has already reported to the US Senate Clerk his lobbying activities in Congress for AngloGold North American, Inc., Energy West Mining Company, and Kennecott Corporation. Last month, the Charleston Gazette reported that Mr. Green, “a mining industry lobbyist,” traveled to West Virginia to lobby for relaxed coal-dust rules in underground mines on behalf of Energy West.<sup>6</sup>

FACA and the NAS Policy require that Mr. Green be removed from the Committee because of his significant conflict of interest. The NAS defines conflict

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<sup>3</sup> See [www.crowell.com](http://www.crowell.com).

<sup>4</sup> Mobil Oil Corporation, et al., Petitioners v. U.S. EPA, 35 F.3d 579 (D.C. Cir. 1994). (Challenge to EPA rule addressing treatment of solid waste mixed with, or derived from, hazardous waste). Horsehead Resource Development Co., Inc. v. Browner, 16 F.3d 1246 (D.C. Cir.1994). (Challenge to EPA emission requirements for boilers and industrial furnaces burning hazardous waste as fuel). American Petroleum Institute v. U.S. E.P.A., 906 F.2d 729 (D.C. Cir. 1990). (Challenge to land disposal prohibitions and treatment standards for certain wastes, including petroleum)

<sup>5</sup> Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447 (10th Cir. 1990). American Iron and Steel Institute v. U.S. EPA, 886 F.2d 390 (D.C.Cir. 1989). Chemical Waste Management, Inc. v. U.S.E.P.A., 869 F.2d 1526 (D.C.Cir. 1989). Asarco, Inc.-Northwestern Min. Dept. v. Federal Mine Safety and Health Review Com'n, 868 F.2d 1195 (10th Cir. 1989). Consolidation Coal Co. v. Federal Mine Safety and Health Review Com'n, 824 F.2d 1071 (D.C.Cir. 1987). Brock on Behalf of Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C.Cir. 1987). Phelps Dodge Min. Co., Tyrone Branch v. N.L.R.B., 22 F.3d 1493 (10th Cir. 1994).

<sup>6</sup> Ken Ward, Coal dust proposal factors into presidential race in West Virginia, Charleston Gazette, September 19, 2004.

of interest as “any financial or other interest which conflicts with the service of the individual because it (1) could significantly impair the individual’s objectivity or (2) could create an unfair competitive advantage for any person or organization.” The Policy goes on to state that “The term “conflict of interest” applies not only to the personal interests of the individual but also to the interest of others with whom the individual has substantial common financial interests if these interests are relevant to the functions to be performed.”

Certainly the mining companies that Mr. Green and his firm represent have financial interests in the outcome of the study. According to the Project Scope, one of the elements to be determined by the committee is the extent to which federal regulations, under SMCRA or RCRA, should address the placement of CCW in mines.<sup>7</sup> Federal regulations currently do not require safeguards, such as longterm groundwater monitoring, liners, deed restrictions, corrective action or financial assurance for CCW minefilling. Imposition of such requirements will make disposal of waste in mines more costly. Currently, disposing of CCW in mines has clear advantages for mine operators. To attract buyers, mine operators offer “haul back” agreements wherein they agree to take back the power plant waste from utilities that purchase their coal. This is very attractive to utilities, because waste disposal in lined landfills can cost \$25 - \$50 a ton. Consequently, a typical power plant can save approximately \$6 million –\$14 million dollars per year in landfilling costs, a powerful incentive.<sup>8</sup>

When NAS studies are commissioned to inform a regulatory process, as this study clearly was, the NAS is even more explicit in its definition of conflicts of interest. The NAS Policy states: “... *the focus of the conflict of interest inquiry is on the identification and assessment of any interests that may be directly affected by the use of such reports in the regulatory process.* ... The concern is that if an individual (or others with whom the individual has substantial common financial interests) has specific interests that could be directly affected by the regulatory process, the individual’s objectivity would be impaired.”<sup>9</sup> Clearly the NAS must take into consideration Mr. Green’s long and close ties with the mining industry and must apply its own policy, as well as federal law, to remove Mr. Green from the committee.

The undersigned also believe that the Academy should remove Mr. Green from the committee on the basis of bias. The NAS policy approaches bias in the following way, “It is essential that the work of committees that are used by the institution in the development of reports not be compromised by issues of bias

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<sup>7</sup> See

<http://www4.nas.edu/webcr.nsf/5c50571a75df494485256a95007a091e/a213e9117f5e438885256f11004bf7ba?OpenDocument>

<sup>8</sup> Typical Plant defined as follows: 780 MW, 4,500,000 MWh; 220,000 tons of coal ash produced; 145,000 tons of coal ash disposed; 165,000 - 220,000 tons scrubber sludge produced

<sup>9</sup> National Academies, Background Information and Confidential Conflict of Interest Disclosure for Studies Related to Government Regulation, May 2003.

and lack of objectivity.... Questions of lack of objectivity and bias ordinarily relate to views stated or positions taken that are largely intellectually motivated or that arise from the close identification or association of an individual with a particular point of view or the positions or perspectives of a particular group.”

An examination of Mr. Green’s published writings indicates a clear intellectual proclivity to favor a minimum of government regulation of the mining industry. In one published speech, Mr. Green referred lightly to his “checkered past,” alluding to those years he spent as an attorney for the federal government enforcing mine safety regulations. According to the biographical sketch provided by NAS, Mr. Green did receive “personal recognition” from President Nixon for his work on legal issues relating to the formation of SMCRA. However, the ink was barely dry on the legislation before Mr. Green was challenging SMCRA regulations in federal court on behalf of the AMC in 1978. (In re Surface Min. Regulation Litigation, 452 F. Supp. 327 (D.D.C, 1978).

In 1998, Mr. Green made the following statements regarding government regulation of mining:

“We all need to work hard at preventing the unfettered boot of government from stifling innovative ideas and new solutions.”

“But let us not play the fool. There are bad guys out there. I leave it to each of you to sort out who in industry, government and labor are the good, the bad and ugly. With that knowledge in hand, we must redouble our efforts to win over the bad and to prevent the ugly.”

Ed M. Green. “The Good the Bad and The Ugly,” Minesafe International, September 28, 1998

Furthermore, in 2004, Ed Green wrote an article entitled “Regulation of the Mining Industry – The Past is Prologue,” that was posted on the Crowell & Moring LLP website. This article states in part:

“Thus, for example, at the Department of the Interior, radical Clinton Administration efforts to change longstanding interpretations of the Mining Law of 1872 administratively have been softened and legal attacks by environmental groups on longwall and mountaintop mining techniques have been thwarted or modified in their impact. At the Department of Labor, industry, labor, and federal partnerships have been developed to address some important miner health issues collaboratively, whereas the previous administration had focused on these issues almost entirely through enforcement. And at EPA, market-driven cap and trade policies for multi-pollutant control have been proposed in the Administration's "Clear Skies" legislation, and through creative use of existing authority under the Clean Air Act in a proposal

for a cap and trade program for control of mercury from coal-fired electric generating units.

Indeed, in contrast to the previous Administration, the current Administration has been balanced in its approach towards issues affecting the mining industry, and generally favorable toward natural resources development, particularly the role of the U.S. mining industry as a staple of a strong economy.”<sup>10</sup>

Mr. Green’s bias against additional regulatory burdens on the mining industry will result in a lack of objectivity to the task at hand. EPA must determine how placement of coal combustion waste will be regulated. EPA has stated publicly that they are awaiting the results of this study to inform their regulatory decisionmaking. It appears that Mr. Green’s mind has been made up for decades. He has served the mining industry well by keeping regulatory reform at bay. There is no reason to believe that Mr. Green would not bring this intellectual bias and philosophical mindset to the NAS study. It doesn’t matter if Mr. Green is right or wrong. Simply knowing that he holds this bias is enough. The NAS should abide by their policy and immediately remove Mr. Green from the committee.

**Robin Mills Ridgeway, Environmental regulatory consultant and environmental engineer providing technical guidance and assistance to Wade Utility, Purdue University**

Employed by the Physical Facilities Radiological and Environmental Management/Utilities at Purdue University, Dr. Ridgeway provides technical guidance to Purdue’s coal-fired electric plant, Wade Utility. In her role as the Environmental Regulatory Consultant, she is responsible for compliance issues such as clean air, clean water and environmental permits. Completed in 1961, the Wade Utility plant provides electricity to the city-sized campus of almost 40,000 students. The Wade Plant is made up of three coal-fired boilers and one gas/oil-fired boiler. The plant burns approximately 150,000 tons of coal annually, yielding 30,000 tons a year of CCW.

Since 1993, Purdue University has used its CCW from the Wade Plant, as well as pharmaceutical biosolids, municipal yard waste, and animal bedding, to produce a soil substitute to reclaim the large gravel pit on university property. The Purdue gravel pit operated as a sand and gravel quarry until 1998. Purdue University is reclaiming the area, which “looks in places like a war zone where mines exploded.”<sup>11</sup> According to the development coordinator of the project,

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<http://www.crowell.com/content/resources/publications/browsebyPracticeGroup/Mining/mineregpa st.htm>

<sup>11</sup> Inside Purdue, Multiple Projects Working Small Miracle on Gravel Pit, May 24,

Purdue can nearly double the size of its campus by filling the area.<sup>12</sup> Use of CCW and other wastes in manufactured “soil” is necessary because the cost of buying soil to reclaim the area would be prohibitive.<sup>13</sup> The purpose of the project is not only to reclaim campus property but to “develop innovations in land reclamation.” In fact, in 1997 more than 600 tons of the CCW fill material was shipped to the Chinook Mines in Brasil, IN for use in reclamation. It is anticipated that a full-scale operation at Purdue would produce about 20,000-30,000 tons of CCW product a year for use in mine reclamation and fill projects.<sup>14</sup>

While the full extent of Wade Utility’s waste disposal and reclamation practices is known only to the NAS, presumably through the confidential forms that must be completed pursuant to NAS policy, the appearance of a significant conflict of interest is certainly present for Dr. Ridgeway. We believe that any individual who is currently employed by a corporation with direct financial interests in the maintenance of the status quo is precluded by FACA from serving on the committee for the following reasons:

- Any recommendations of the study that call for implementation of federal regulation under RCRA will result in direct adverse financial impact on the individual’s employer and will thus create a conflict in which the committee member may be reluctant to propose such changes because of those potential adverse impacts; and
- The full and frank evaluation of the safety of the practice of employing CCW for reclamation would be compromised by the participation on the committee of representatives of corporations that have used and are currently using this method of waste disposal/reuse.

While we don’t question Dr. Ridgeway’s professionalism or integrity, her employer’s waste disposal practices makes her appointment a violation of FACA and NAS policy.

**Patricia A. Buffler, Ph.D., dean emerita and professor of epidemiology at the School of Public Health, University of California, Berkeley**

Patricia Buffler’s industry ties and her experience as an electric utility consultant seriously call into question her objectivity. Dr. Buffler is a paid consultant and scientific advisor for the Electric Power Research Institute (EPRI). Since 1987, Dr Buffler has chaired a committee of scientists that commissions and reviews studies on the health effects of electromagnetic fields for EPRI. Dr. Buffler has

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<sup>12</sup> Inside Purdue, Multiple Projects Working Small Miracle on Gravel Pit, May 24, 2001. <http://www.purdue.edu/PER/insidepurdue/ip2001/010424.gravel.html>

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

testified numerous times that electromagnetic fields pose an insignificant hazard to public health, a position supported by EPRI.

EPRI also has strong opinions about the nature of coal combustion waste. EPRI has concluded that the health risks from coal ash are minimal. And there is no ambiguity as to EPRI's position on the mine placement of coal combustion wastes. Regarding minefilling, EPRI writes:

Many power plants in the eastern United States are located on or near abandoned underground coal mines, with acid mine drainage and subsurface subsidence issues. EPRI has shown that CCPs can abate surface subsidence and reduce acid mine drainage in a cost effective manner. By 2006, EPA is expected to issue criteria for the reclamation of abandoned mines. Recognizing that environmental groups and some states are resisting the use of CCPs as mine backfill, especially for mines below the water table, there is a need for information and data to support these beneficial reuse options. Therefore, in 2006 EPRI will prepare a Resource Document on the environmental findings from its earlier studies on CCP use in mine reclamation, as well as additional experience it can find and evaluate. Anticipating a positive determination by EPA, EPRI will build upon the experience base of the successful demonstration projects to recommend procedures for selecting mix designs and injection equipment/parameters for the successful injection of grouts into mine voids.

*Outreach to Promote Use of Coal Combustion Products*<sup>15</sup>

Dr. Buffler has also worked as a paid consultant and expert witness for Pacific Gas & Electric Company (PG&E). In 1997, she joined other scientists to file an amicus curiae brief on behalf of PG&E in a suit concerning electromagnetic fields.

In addition, Dr. Buffler has served on the Board of Directors of the FMC Corporation since 1994. FMC Corp is one of the world's foremost, diversified chemical companies with leading positions in agricultural, industrial and consumer markets. The company was founded in 1883, and today has annual sales in excess of \$5 billion. As part of their diverse holdings and operations, FMC Corporation is involved in surface mining.

We are not contesting Dr. Buffler's qualifications to serve on this panel. Nevertheless, her longterm consulting relationship with EPRI and her position as a member of the Board of Directors of FMC Corporation raise significant issues of bias. According to FACA, the committee must be balanced and free of substantial bias. We suggest that the addition of a scientist who has acted as a

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<sup>15</sup> <http://www.epri.com/destinations/product.aspx?id=134&area=3&type=2>

consultant to a citizen or environmental group would help to balance Dr. Buffler's extensive experience as a consultant to the electric utility industry.

**Richard Sweigard, Chairman of the Department of Mining Engineering at the University of Kentucky, Advisory Board Member of Center for Applied Energy Research**

As Chairman of the Department of Mining Engineering at the University of Kentucky, Dr. Sweigard is a member of the Advisory Board of the Center for Applied Energy Research (CAER) at the University of Kentucky. CAER operates a research division on Coal/Ash and has sponsored numerous studies of the application of CCW in mines. It is not known how much of this research is paid for by the coal industry or coal ash industry.

What *is* known is that since 1995, CAER has been holding symposia called the International Ash Utilization Series on a biennial basis. According to CAER, these multi-day symposia, "provide a forum for the transfer of information and new ideas to benefit the innovative utilization, handling, storage and disposal of coal combustion by-products." Accordingly, the participants, presentations and agenda of every symposium serve primarily the interests and the perspective of those who produce CCW and those who utilize it. The environmental, public health or social costs and impacts of CCW use, when addressed, are usually from the perspective of promotion of use. In fact, it was only at CAER's fifth symposium, in 2003, that a representative from an environmental organization was invited to make a presentation. Next year CAER's symposium will be merged with American Coal Ash Association's International Symposium as well as the annual Coal Combustion Byproducts meeting of the U.S. Office of Surface Mining. There is no reason to expect that the April 2005 symposium, now called World of Coal Ash, will include increased representation of citizen, environmental or public health perspectives.

Although Dr. Sweigard has demonstrated considerable leadership in the area of coal ash research and mining, we have seen no evidence that his interest or expertise has been directed the environmental impacts of CCW use. On the contrary, research projects and educational conferences at the University of Kentucky have shown a distinctly industry-friendly and promotional bent.

Certainly, there is an appearance of a significant bias that must be balanced with an expert who has researched the environmental impacts of coal combustion wastes. Unless this occurs, public confidence in the study will be undermined.

**Y.P. Chugh, professor in the Department of Mining and Mineral Resource Engineering, and Director of the Combustion Byproducts Recycling Consortium- Midwestern Region, Southern Illinois University.**

Dr. Y.P. Chugh has demonstrated significant leadership in the area of research pertaining to the use and disposal of CCW in mines. Dr. Chugh published at

least nine papers since 1993 on the topic of CCW reuse in mines. He previously chaired the Department of Mineral Resources Engineering at Southern Illinois University for 16 years.

Dr. Chugh holds two patents that have direct relevance to the topic of this study. These patents, assigned to the Board of Trustees of Southern Illinois University, are for “stabilization of coal wastes and coal combustion by-products” (U.S. Patent 6,544,888) and “coal combustion by-products-based lightweight structural materials and processes for making them” (U.S. Patent 6,277,189). Any determination on the safety and advisability of placing CCW in mines could have a significant impact on the financial success of these patents.

We ask that the NAS promptly and publicly disclose details of Dr. Chugh’s patents and investigate fully whether a conflict of interest exists. If a significant conflict of interest does not exist, the NAS must take into consideration the nature of Dr. Chugh’s research and provide balance with an additional expert who has researched the environmental impacts of coal combustion wastes.

**Thomas O’Neil, former president and CEO of Cleveland Cliffs Iron Company and Cliffs Mining Company**

As a recently retired mining executive, Dr. O’Neil brings a perspective to the committee that is informed by his experiences as Chief Executive Officer of Cleveland Cliffs Iron Company and Cliffs Mining Company, Chief Executive Officer of Cliffs International, Vice-President –Engineering and Development of Cyprus Amax Minerals Company, member of the Board of Directors of Hecla Mining Company and other key operating and development positions in the mining industry. Dr. O’Neil also headed the Department of Mining and Geological Engineering at the University of Arizona.

Dr. O’Neil’s industry ties raise significant questions regarding a real or perceived conflict of interest and bias. Once again, NAS must publicly disclose much more information concerning Dr. O’Neil and determine if his participation is in compliance with FACA and NAS policy. At the very least, Dr. O’Neil, even in retirement, is a representative of the coal and mining industries and his participation on the panel must be balanced with a representative from an environmental organization.

Clearly the last six listed committee members have direct ties to the mining and utility industries. These ties must be further investigated by the NAS to determine whether they constitute a conflict of interest as defined by FACA and NAS Policy. If a real or perceived conflict is found, the NAS must adjust the panel accordingly. At this point in time and subject to further review, the remainder of the panel appears to be qualified and unbiased.

### The Provisional Committee Lacks the Balance Required by FACA and NAS Policy

We believe that the composition of the panel is unbalanced in such a way as to give great advantage to those who promote the practice of CCW minefilling. It appears that the above-described six panel members have litigated, lobbied, researched, or gained financial advantage from proponents of CCW minefilling. As stated above, only one scientist on the panel has demonstrated a knowledge of CCW-produced damage. The remaining seven members of the panel appear to have had little experience in the specific field of coal combustion waste. Granted that it may be difficult to identify neutral parties within academia and industry on this topic, *NAS has been provided with the names of twenty highly qualified professionals who would bring a different prospective to the panel.* We are submitting again a list of such professionals as Appendix A to this letter.

NAS cannot ignore the federal mandate to balance the committee composition. Clear domination by one side of the issue is contrary to the requirements of FACA and contrary to the intent of Congress in allocating these study funds. There can be no credibility to a one-sided process, and the public will not, nor should EPA, have any confidence in the outcome of the study if the NAS does not take immediate steps to balance this skewed panel.

### Work by the Provisional Committee Should be Suspended Pending Final Approval in Compliance with FACA and NAS Policy

A final concern of the undersigned is that the NAS is violating the spirit, if not the letter, of section 15 of FACA, as amended, that requires that the NAS "provide a reasonable opportunity for the public to comment on [study committee] appointments before they are made." In this instance, the Provisional Committee will meet to begin substantive work prior to consideration of public comments on the committee composition. A two-day substantive meeting is planned for October 27-28, 2004. The period for public comment on the provisional panel is due to expire *on the day of the panel's first meeting.* The scheduling of this meeting on the day that the public comment period closes makes a mockery of the opportunity for public input.

We believe that NAS must take a swift and dramatic step to cure this problem. As suggested above, meetings of the committee should be suspended for a period of at least two weeks following the expiration of the public comment period, pending adjustments to the committee makeup. Without this adjustment in scheduling, NAS is demonstrating that the Academy considers public comment on committee appointments simply a pro forma requirement.

## CONCLUSION

Disposal of coal combustion waste in mines has been highly controversial in coal-producing states. In the minds of many, placement of CCW in mines is defended not because it is the best available technology to address reclamation and acid mine drainage, but because it is cheapest in the short-term. The coal industry has always been a “bottom-line” industry and should this study conclude that CCW poses environmental threats worthy of federal regulation, it will be extremely controversial.

It is essential therefore that the public have a high degree of confidence that the investigation will be a fair, thorough and uncompromising assessment of the threats posed by CCW in coal mines. A balanced, unbiased and conflict-free committee, in full compliance with federal law and NAS policy, is essential to gaining this confidence.

We thank you for considering these comments and look forward to your response.

Sincerely,

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