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Testimony Regarding the Development and Potential Implementation of the Office of Surface Mining, Reclamation, and Enforcement's Proposed Stream Restoration Rule
before the
United States Senate's Committee on Energy and Natural Resources

October 27, 2015

Madam Chair and members of the committee,

Good morning. My name is Randy Huffman and I serve as the Cabinet Secretary of the West Virginia Department of Environmental Protection (WVDEP), the executive agency in West Virginia that is responsible for the environmental regulation of the mining industry.

Thank you for the opportunity to speak on behalf of West Virginia concerning the Office of Surface Mining's (OSM's) Proposed Stream Protection Rule, published on July 27, 2015. This measure will have a huge impact on both the Mountain State and the nation, as coal mining provides a significant portion of the nation's energy supply and exports significant amounts of metallurgical coal, and this proposal will severely restrict the coal industry's ability to provide these invaluable services.

West Virginia is uniquely qualified to speak to this issue, as we have been a "primacy state" since 1981, which means that WVDEP or its predecessor agencies have implemented and administered the Surface Mining Control and Reclamation Act (SMCRA) since then, with OSM providing oversight. Dating back to the 1930s, West Virginia has had a set of laws addressing the environmental ramifications of mining. In fact, SMCRA itself, passed by Congress in 1977, borrowed heavily from the preexisting state programs of West Virginia and Pennsylvania.

OSM worked on the proposed rule and its accompanying Draft Environmental Impact Statement (EIS) and Draft Regulatory Impact Analysis (RIA) for over five years. These documents together constitute over 3000 pages of complex, technical material that represents significant departures from the current regulations.[1] Additionally, there are references to over 55 various "scientific" studies. Based on initial review of these documents, it is obvious they represent – by far – the most significant rulemaking since promulgation of the permanent program regulations in 1979. This proposed rule involves a significant re-write of many portions of OSM's current regulations (and some regulations that are not within OSM's purview) in a number of critical areas that impact the implementation of SMCRA.

OSM's proposed rule is an ill-conceived overreach that exceeds its lawful authority in many ways. First, it is a subversion of a long-standing act of Congress and, as such, it should not

[1] 80 Fed. Reg. 44700

be adopted without a new mandate from Congress. In enacting SMCRA almost four decades ago, Congress made an express finding that "expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment. . . ."[2] Accordingly, it established that one of the express purposes of SMCRA is to "assure that the coal supply essential to the Nation's energy requirements and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy. . . ."[3]

However, with this proposed Stream Rule, it is clear that OSM has lost its way and strayed from the roadmap Congress gave it in 1977. Thirty-eight years later, OSM is proposing a multiplicity of changes to the regulations that impose costly new regulatory burdens without any established record that would indicate its necessity. In the regulations adopted in the late 1970s and early 1980s, OSM drew a line between environmental protection and increased coal production that reflects the balance Congress meant to strike when it adopted SMCRA. Now, enveloped in the rhetoric of the 2010s, OSM proposed to redraw that line in a place that provides no balance at all, where no impacts from coal mining are acceptable. Congress called for balance in SMCRA. The Stream Rule will destroy this balance; it is contrary to the purposes and very spirit of SMCRA and, therefore, is illegal.

One of the shortcomings of the Stream Rule is that it is full of unlawful conflicts with federal and state clean water laws. Section 702 of SMCRA provides that "[n]othing in this Act shall be construed as superseding, amending, modifying or repealing . . . the Federal Water Pollution Control Act, as amended, [or] the state laws enacted pursuant thereto. . . ."[4] Thus, any water quality protections provided in SMCRA cannot conflict with the Clean Water Act or state laws adopted to implement it. In this area, notwithstanding the Supremacy Clause of the Constitution, the express language of SMCRA makes it subordinate to both federal and state laws. SMCRA must yield to application of these laws where there are conflicts. Importantly, Section 303 of the Clean Water Act allocates primary responsibility for development of water quality standards to the states.[5] These water quality standards consist of designated uses of the waters of the state and water quality criteria based on such uses,[6] as well as an anti-degradation policy.[7] At a minimum, the designated uses the states must consider in developing water quality standards include public water supplies, propagation of fish and wildlife, recreation, agriculture, and industrial use.[8] The federal Environmental Protection Agency (EPA), not OSM, can promulgate a water quality standard for a state, and then only in limited circumstances and after following the process specified in the Clean Water Act.[9] "Congress meant exactly what it said in

[2] 30 U.S.C. § 1201(d)
[3] 30 U.S.C. § 1201(f)
[4] 30 U.S.C. § 1292
[5] 33 U.S.C. § 1313(a) – (c)
[6] 33 U.S.C. § 1313(c)(2)(A)
[7] 40 C.F.R. §§ 131.6(d) and 131.12
[8] Id.
[9] 33 U.S.C. § 1313(c)(3) – (4)

Section 702(a)(3) of the Act, that where there is an overlap of regulation, the Surface Mining Act is not to be interpreted as altering in any fashion the Federal Water Pollution Control Act."[10]

Whatever the extent of OSM's authority to prescribe standards for regulation of water quality under such provisions of SMCRA as those requiring prevention of "material damage to the hydrologic balance outside the permit area" may be, it is clear that, when doing so, OSM cannot interfere with the application of federal and state clean water laws. The Stream Rule's proposed definition of this term contains two parts. Although the first part of the definition is not without problems,[11] the second part of the definition is particularly troubling, as it declares "material damage" to be any discharge that impacts a threatened or endangered species or adversely affects such species' habitat(s). If this part of the definition is intended to insert the federal Fish & Wildlife Service (FWS) into state-level permit decisions by allowing it to set water quality thresholds for the protection of threatened or endangered species, it is contrary to SMCRA in two ways. First, as discussed below, SMCRA vests exclusive regulatory authority in primacy states, and any attempt to insert FWS or any other agency of the federal government into the state's permitting processes contravenes SMCRA in this regard.[12] Second, state water quality standards are set at levels that are intended to protect propagation of fish and wildlife. In applying these standards, a state must support the most sensitive use.[13] Accordingly, the second part of the definition is unnecessary, because protection of all aquatic life is a part of the designated uses protected by state water quality standards.

The manner in which the Stream Rule would apply the material damage definition in its cumulative hydrologic impact assessment (CHIA) regulations is also problematic. The Rule calls for the preparer of a CHIA to develop criteria defining material damage in numeric concentrations.[14] There is no requirement that these criteria correspond either to water quality criteria developed by state water quality regulators for protection of designated uses or to effluent limitations those regulators develop. State water quality regulators, not SMCRA regulators, have Clean Water Act authority to set water quality criteria and determine effluent

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[10] *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1366 (D.C. Cir. 1980) (rejecting effluent limitations and water quality standards OSM had promulgated that were more stringent than those promulgated by EPA under the Clean Water Act).

[11] First, the Clean Water Act sanctions the use of compliance schedules comprised of a set of "remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition or standard." See, 33 U.S.C. § 1362(17). TO the extent that a discharge is in lawful compliance with a Clean Water Act compliance schedule, it cannot be considered to be unlawful under SMCRA as precluding a designated use. Second, the Clean Water Act regulations allow a state, under specified circumstances, to remove a designated use. *See*, 40 C.F.R. § 131.10(g). A removed use is no longer considered in permitting under clean water laws. Discharges that do not protect removed uses are lawful under clean water laws. The proposed definition would categorize such discharges as unlawful material damage under SMCRA; however, SMCRA does not permit this result. *See*, 30 U.S.C. § 1292. Finally, as with the use removal example, there are locations where a state, with the blessing of EPA, has granted variances from water quality standards and approved mixing zones. A discharge that is lawful in accordance with a variance or mixing zone cannot be rendered unlawful by an OSM regulation. However, that is what the proposed material damage definition would do.

[12] In addition, any attempt to to insert FWS into the setting of such standards runs afoul of the states' rightful role in setting them under the Clean Water Act.

[13] 40 C.F.R. § 131.11(a)(1)

[14] *See*, 30 C.F.R. §§ 780.21(b)(6) and 784.21(b)(6)

limitations that will protect them. This CHIA regulation amounts to a usurpation of the authority of state water quality regulators and, therefore, violates SMCRA.[15]

The Stream Rule also requires the CHIA to document that at no time in the life of a proposed mining operation will there be an exceedance of water quality standards in any stream outside the permit area.[16] This contradicts the Clean Water Act in several ways. First, the Clean Water Act and state laws protect water quality downstream of a discharge point through the establishment of effluent limitations. It is with these effluent limitations that the permittee must comply at the discharge point, not water quality standards. Second, a permittee whose discharge is compliant with the effluent limitations in its clean water permit is protected from contentions that water quality standards are violated somewhere down stream by the "permit as a shield" that exists under federal and state clean water laws. Therefore, SMCRA cannot impose sanctions against a permittee who is entitled to the permit shield, because it would be superseding clean water laws by doing so. Third, this required documentation or finding would effectively prohibit new mining operations from being permitted on streams that are not meeting water quality standards in cases where the Clean Water Act may otherwise allow them. Where a stream is not complying with designated uses, the Clean Water Act requires the state to identify it on a list of impaired streams prepared pursuant to section 303(d) of the Clean Water Act.[17] As a consequence of such a listing, the state must prepare a "total maximum daily load" (TMDL) for the stream, which establishes requirements for subsequent Clean Water Act permitting of discharges into that stream.[18] Discharges that can comply with the constraints imposed by the TMDL are lawful and may be permitted under the Clean Water Act. Thus, a mining operation that is capable of complying with a TMDL would be lawful under the Clean Water Act. The provision proposed in this rule would effectively ban such lawful operations, contrary to SMCRA.[19]

The Stream Rule's one-size-fits-all attempt to regulate biological condition and ecologic function is also squarely in conflict with state clean water laws. To the extent that biologic condition and ecologic function are not protected by numeric water quality criteria, there are narrative criteria to protect them which vary from state to state, with no two states' criteria being the same. States have developed assessment tools for measuring stream conditions under these water quality criteria, which also vary from state to state. The manner in which these criteria are to be applied has been one of the more prominent issues in contention between EPA and state water regulators in recent years. OSM cannot make up its own standards and program for regulating in this area without unlawfully usurping the prerogative of state clean water regulators to determine what these criteria should be and how to apply them, subject only to EPA oversight within the limitations established in the Clean Water Act. OSM's attempt to regulate biological condition and ecologic function, therefore, violates SMCRA.[20]

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[15] 30 U.S.C. § 1292
[16] *See*, 30 C.F.R. §§ 780.21(b)(8)(i)(B) and 784.21(b)(8)(i)(B)
[17] 33 U.S.C. § 1313(d)
[18] Id.
[19] 30 U.S.C. § 1292
[20] Id.

OSM solicited comment on the possibility of establishing "corrective action thresholds."[21] As we understand this concept, threshold concentrations for various pollutant parameters would be established at levels lower than applicable water quality standards or effluent limitations. The permittee and regulatory authority would monitor discharge concentrations and, if an otherwise lawful discharge exceeded a corrective action threshold or there appeared to be a trend in that direction, the permit would require remedial action of the permittee. These thresholds would be enforced in the same manner as any other permit condition. Such a scheme would also run afoul of state laws under the Clean Water Act. As stated above, a component of state water quality standards is an anti-degradation policy. Anti-degradation policies are used to establish the effluent limitations or other clean water permit requirements to protect waters whose quality exceeds that necessary to protect existing uses, to keep such waters from being degraded. Such policies also specify the extent to which limited degradation of such high quality waters may be allowed. The "corrective action threshold" proposal would unlawfully attach additional regulatory consequences, beyond what is specified in a state's anti-degradation policy, to discharges into high quality waters. Again, SMCRA does not allow OSM to interfere with the operation of clean water laws in this manner.[22]

A last general comment regarding conflict of the Stream Rule with federal and state clean water laws is that the WVDEP sees serious conflict arising from OSM's apparent intention to totally merge state NPDES permit requirements into SMCRA permits. State clean water regulators are subject to federal oversight by EPA under the Clean Water Act. OSM has no authority to oversee these regulators' actions under clean water laws. However, OSM can rightfully conduct oversight of state-issued SMCRA permits. It is inevitable that, as part of SMCRA permit oversight, OSM will unlawfully seek to oversee these "merged" provisions from state water quality permits. The merger of NPDES and SMCRA permits OSM seeks is extreme overreach that SMCRA simply does not allow.

Additionally, the permit process OSM seeks to establish with this rule violates SMCRA by eliminating the states' exclusive regulatory jurisdiction. The relationship between OSM and state regulatory authorities under SMCRA is much different than the co-regulator relationship that exists between EPA and states under other environmental statutes. The courts have recognized that:

> Under SMCRA, in contrast to [the Clean Water Act] Congress designed a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the State regulatory authority, depending on whether the State elects to regulate itself or to submit to federal regulation. Because West Virginia is a primacy state, its regulation of surface coal mining on nonfederal lands within its borders is "exclusive." See, 30 U.S.C. § 1253(a); 30 C.F.R. § 948.10. This federal policy of encouraging "exclusive" State regulation was careful and deliberate.[23]

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[21] 80 Fed. Reg 44502

[22] 30 U.S. C. § 1292

[23] *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001)

Further, "SMCRA provides for either State regulation of surface coal mining within its borders or federal regulation, but not both."[24] As to permitting, the D. C. Circuit explained the exclusive jurisdiction states enjoy under SMCRA as follows:

> [T]he state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. *See*, Act §§ 506, 510. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. *See*, Act § 510(b).[25]

The "careful and deliberate" policy of Congress to encourage states to operate regulatory programs has important consequences beyond the realm of SMCRA. For example, among other things, opting for exclusive state regulatory jurisdiction prevents day-to-day decisions on permitting and other regulatory matters by a state under SMCRA from triggering an EIS or other obligations under NEPA and avoids the obligation to perform a formal consultation with FWS under Section 7 of the Endangered Species Act with respect to such decisions.

On their face, the Stream Rule violates SMCRA by eliminating the exclusive regulatory authority SMCRA confers on states.[26] Subsection (e)(2) vitiates the exclusive state decision-making authority on permits that SMCRA granted by creating a formal process for FWS to review and approve the protection and enhancement plans (PEPs) that must be in every permit. Subsection (e)(2)(iv) requires a state regulatory authority to obtain FWS's written approval before the state can issue a permit, effectively giving FWS (and the Interior Department) veto authority over state permit decisions. Subsection (e)(2)(iii) also contravenes the states' exclusive decision-making authority by inserting OSM and higher levels at FWS into the permitting process. It establishes a process to "elevate" disagreements between a state and FWS over a PEP to higher levels of FWS and OSM for resolution. The courts have said that SMCRA provides for regulation by *either* a state *or* the federal government, not both.[27] OSM's attempt to insert itself and its sister Interior Department agency into state permitting decisions – when OSM itself is specifically prohibited from such involvement – is patently illegal.

Next, the Stream Rule is an unnecessary, uncalled for political gesture. From where does OSM get the impetus for its massive rewrite of the details of a mature regulatory program? Not from thousands of inspections in its role of oversight over the state regulatory agencies to which SMCRA gives exclusive regulatory jurisdiction. Not from 30-plus years of annual evaluations of state regulatory programs. Not from any demands from Congressional overseers that OSM conform to Congressional intent. Not from any outcry from state regulators demanding fixes for broken regulatory programs. The combined administrative record developed throughout the history of mining regulation under SMCRA is totally devoid of any indication of a need for this

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[24] *Pennsylvania Federation of Sportsmen v. Hess*, 297 F.3d 310, 318 (3d Cir. 2002) (quoting *Bragg*, 248 F.3d at 289) (emphasis in original).

[25] *In re Permanent Surface Mining Litigation*, 653 F.2d 514, 519 (D.C. Cir. 2981)

[26] Specifically, proposed 30 C.F.R. §§ 780.16 and 784.16

[27] *Bragg, Pennsylvania Federation*, supra.

radical rewrite of the regulations governing the way coal is mined in America. Although OSM attempts to dress up this rule in the clothing of "advances in science,"[28] this is just pretext, since a number of the studies referenced in the 2015 Draft EIS actually predate 2010.

In reality, before OSM ever started culling the record laid out by the most prominent expert witnesses for environmental groups in their lawsuits against industry defendants for its "advances in science," it received direction from a new administration that had taken office less than five months earlier. The administration's first order of business for OSM, even before appointing an OSM Director, was to bring the new Secretary of the Interior, new EPA Administrator, and Acting Assistant Secretary of the Army together to sign a Memorandum of Understanding (MOU) dated June 11, 2009, which binds OSM, EPA, and the Army Corps of Engineers (Corps) to change the way they regulate coal mining in the Appalachian region. Among other things, it called for OSM to make "[r]evisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone rule and Approximate Original Contour (AOC) requirements[.]" Concurrent with the MOU, the Executive Office of the President issued a press release in which Nancy Sutley, Chair of the White House Council on Environmental Quality, explained the administration's purpose in entering into the MOU was to "represent[] federal agencies working together to take the President's message on mountaintop coal mining into action[.]"[29] Far from the adjustment of surface mining rules to take newly developed science into account that OSM portrays it to be, the Stream Rule is simply OSM's response, albeit six years later, to the expressed political will of a newly elected administration. If this rulemaking is finalized, the courts will certainly recognize it as purely a politically motivated gesture when the inevitable legal challenges are filed and deal with it accordingly.

Finally, in developing this rule, OSM flouted the cooperating agency process and excluded the states from participating in this rulemaking, even though this rule will drastically affect how those states regulate the mining industry. OSM correctly realized that its planned Stream Protection Measures rulemaking was sufficient in scope to require the preparation of an environmental impact statement (EIS) in accordance with the National Environmental Policy Act (NEPA). It also appeared to recognize that state assistance in this effort would be essential when it formally enlisted ten state regulatory agencies, including WVDEP, as cooperating agencies (CAs) in the summer of 2010. The primary purpose of involving CAs is to bring into the process knowledge, expertise, and familiarity with matters being considered. However, it soon became apparent that the states were brought into this effort merely as window dressing in OSM's effort to carry out its 2009 mandate, as described in the preceding paragraph.

In contrast to the transparency and the hard look at environmental consequences EPA envisions, OSM's initial EIS efforts in the fall of 2010 were conducted in such a manner as to foreclose meaningful participation by cooperating agencies. OSM's schedule for the Stream Protection Measures EIS was totally inadequate for the undertaking involved. CAs on the EIS were not allowed to comment on Chapter 1 ("Purpose and Need for Federal Action") of OSM's preliminary Draft EIS. The time OSM allowed the CAs to comment on hundreds of pages of material in Chapter 2 ("Description of Alternatives"), Chapter 3 ("Affected Environment"), and Chapter 4 ("Environmental Consequences") was five, four, and nine business days, respectively.

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[28] 80 Fed. Reg. 44436

[29] *See*, June 11, 2009 press release, attached hereto and incorporated herein by reference as Exhibit 1.

OSM has either allowed the time commitments it made to turn what should have been an open, transparent EIS process into a sham, or it has intentionally designed a process so as to avoid a transparent, hard look at the consequences of its proposed actions. As a result, on November 23, 2010, the CAs collectively sent a letter to OSM Director Pizarchik registering their complaints about the lack of meaningful opportunity to review draft EIS chapters, as well as the general lack of quality, accuracy, and completeness of the material OSM provided to the cooperating states.

Shortly after OSM received the states' comments on Chapter 4, in January 2011, which repeated concerns similar to those expressed in the November 23, 2010 letter, OSM terminated its contractor for the EIS and, shortly thereafter, entirely ceased communicating with the states regarding this EIS and rulemaking. Trying to gain some degree of participation, on July 3, 2013, the CAs again collectively sent a letter to Director Pizarchik seeking to re-engage as CAs on the EIS. This was to no avail; the letter provoked absolutely no response from OSM. Finally, on February 23, 2015, the states again collectively sent a letter to Director Pizarchik, asserting that OSM was failing to properly conduct the EIS by failing to allow the cooperating agency states to have any role in it. In each of the three letters the states sent, they raised the possibility that individual states might terminate their participation as CAs, because OSM was failing to properly include them in EIS development.[30]

Subsequently, West Virginia and other states, by letters dated from February 2015 to May 2015, informed OSM that they were withdrawing as cooperating agencies.[31] From our discussions with other CAs, it is apparent they also felt disenfranchised by the OSM approach. The states all agree that the reasons for termination and withdrawal include very short review times, failure to provide reports and relevant data, substantial revision of the working draft without the input of the CAs, unwillingness to meaningfully engage the CAs, the overall quality of the work product, missing reference material and the overall expansive nature of the rulemaking effort.

OSM provided no response to the eight withdrawal letters until it sent a letter on October 7, 2015 requesting that West Virginia and other states re-engage as cooperators at this late date.[32] This October 7 letter contained no specific recommendations or information as to how communication would be more effective between the states and OSM or any indication that the states would be provided an opportunity to meaningfully contribute to this extensive regulatory re-write. In sum, OSM's offer to re-engage the states seems, at best, disingenuous.

OSM has failed to meet its obligations under NEPA in the most fundamental way. From January 2011 through publication of the Draft EIS, OSM conducted the NEPA process for this rule for more than four years under a veil of darkness, completely ignoring any need for transparency or to consider opinions other than its own. This contravenes Council on Environmental Quality (CEQ) regulations addressing cooperating agency status,[33] which specifically implement the NEPA mandate that federal agencies responsible for preparing NEPA

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[30] *See*, November 23, 2010, July 3, 2013, and February 23, 2015 letters, attached hereto and incorporated herein by reference collectively as Exhibit 2.

[31] *See*, various states' letters, attached hereto and incorporated herein by reference collectively as Exhibit 3.

[32] *See*, 10/7/15 letter from OSM, attached hereto as Exhibit 4.

[33] *See*, 40 C.F.R. §§ 1501.6 and 1508.5

analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise.[34] It also contravenes the interpretation of a lead agency's duties with respect to cooperating agencies made by the courts. As the U.S. District Court for the District of Wyoming has held in a case involving another bureau of the Interior Department:

> The purpose of having cooperating agencies is to emphasize agency cooperation early in the NEPA process. 40 C.F.R. § 1501.6 (2004). Federal agencies are required to invite the participation of impacted states and provide them with an opportunity for participation in preparing an EIS. 40 C.F.R. § 1501.7 (2004). "When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful."[35]

Cooperation must be meaningful, not perfunctory, as OSM's treatment of the states was during the brief time it shared even limited EIS information in the fall of 2010. The cooperation certainly cannot be non-existent, as it was from January 2011 through publication of the Draft EIS, when OSM conducted the NEPA process for the Stream Rule for more than four years by itself in secret. Transparency has been totally absent in this process. The only opinions considered beyond those of OSM senior management were those OSM paid contractors to render, without the benefit of review, comment or challenge by long-term state regulators who were ready, willing, and able to participate. This is fatal to this EIS and rulemaking.

The need for intimate state involvement in the EIS process for the Stream Rule is even greater than it would be in other NEPA scenarios, because OSM is undertaking a comprehensive re-write of a regulatory program that, by and large, it does not operate on a day-to-day basis. Since OSM finished approving state applications for SMCRA primacy in 1983, the states have amassed 766 years of combined experience as the frontline regulators under SMCRA's permanent regulatory program. In comparison, OSM has only 34 years of combined experience as a frontline regulator in this time, mostly through its operation of a federal regulatory program in Tennessee, a state that produces only 0.08% of the nation's coal.[36] In the history of SMCRA's permanent regulatory program, OSM has essentially been relegated to the role of backseat driver, second-guessing difficult regulatory decisions the states must make in the heat of the moment every day. The absence of the important "hands on" perspective of the state agencies that actually carry out the regulatory program on a daily basis is painfully obvious throughout the proposed rule, the Draft EIS, and the Draft RIA.

In conclusion, the proposed Stream Rule is illegal in several respects. It subverts federal statutory authority, and it upsets the balance Congress intended to create between environmental protection and increased coal production. It also eliminates exclusive state jurisdiction and is

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[34] *See*, Memorandum for the Heads of Federal Agencies dated January 30, 2002 entitled "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act"

[35] *International Snowmobile Mfrs. Ass'n v. Norton*, 340 F.Supp.2d 1249, 1262 (D. Wyo., 2004) (citations omitted)

[36] Tennessee produced 839,000 short tons of coal out of the total of 999,651,000 short tons produced in the Unites States as a whole in 2014. *See*, http://www.eia.gov/coal/production/quarterly/pdf/0121144q.pdf at page 3.

teeming with conflicts with federal and state clean water laws. Beyond these insurmountable legal problems, it is also ill-conceived.

The consequences of OSM's refusal to include experienced state regulatory agencies in the development of both this rule and the RIA and EIS are present on every page. OSM began this process with only pro forma inclusion of states, and then spent almost five years entirely excluding them. This violates NEPA. By allowing only 91 days for comment on this massive (more than 3000 pages) re-write of SMCRA's core regulations, OSM has arbitrarily and capriciously subverted the purposes of the federal Administrative Procedures Act and SMCRA itself.

Therefore, WVDEP wholeheartedly believes OSM should withdraw this rule and abandon this rulemaking effort.

FOR IMMEDIATE RELEASE:
June 11, 2009

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Obama Administration Takes Unprecedented Steps to Reduce Environmental Impacts of Mountaintop Coal Mining, Announces Interagency Action Plan to Implement Reforms

Federal agencies take coordinated action to strengthen oversight and regulation, minimize adverse environmental consequences of mountaintop coal mining

WASHINGTON, DC – Obama Administration officials announced today that they are taking unprecedented steps to reduce the environmental impacts of mountaintop coal mining in the six Appalachian states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia through a coordinated approach between the Environmental Protection Agency (EPA), Department of the Interior (DOI) and Army Corps of Engineers.

Through a Memorandum of Understanding signed by Lisa P. Jackson, Administrator of the Environmental Protection Agency; Ken Salazar, Secretary of the Interior; and Terrence "Rock" Salt, Acting Assistant Secretary of the Army for Civil Works, the Administration will implement an Interagency Action Plan on mountaintop coal mining that will:

- Minimize the adverse environmental consequences of mountaintop coal mining through short-term actions to be completed in 2009;
- Undertake longer-term actions to tighten the regulation of mountaintop coal mining;
- Ensure coordinated and stringent environmental reviews of permit applications under the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act of 1977 (SMCRA);
- Engage the public through outreach events in the Appalachian region to help inform the development of Federal policy; and
- Federal Agencies will work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities.

"Mountaintop coal mining cannot be predicated on the assumption of minimal oversight of its environmental impacts, and its permanent degradation of water quality. Stronger reviews and protections will safeguard the health of local waters, and thousands of acres of watersheds in Appalachia," said EPA Administrator Lisa P. Jackson. "Our announcement today reaffirms EPA's fundamental responsibility for protecting the water quality and environmental integrity of streams,

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rivers, and wetlands under the Clean Water Act. Getting this right is important to coalfield communities that count on a livable environment, both during mining and after coal companies move to other sites."

"The Army is pleased to support interagency efforts to increase environmental protection requirements and factual considerations for mountaintop coal mining activities in Appalachia," said Terrence "Rock" Salt, Acting Assistant Secretary of the Army for Civil Works. "The initiative being announced today will allow us to move forward on a number of important permit applications while providing improved certainty and transparency to permit applicants and the public."

"The steps we are taking today are a firm departure from the previous Administration's approach to mountaintop coal mining, which failed to protect our communities, water, and wildlife in Appalachia," said Secretary Salazar. "By toughening enforcement standards, by looking for common-sense improvements to our rules and regulations, and by coordinating our efforts with other agencies, we will immediately make progress toward reducing the environmental impacts of mountaintop coal mining."

"This agreement represents federal agencies working together to take the President's message on mountaintop coal mining into action," said Nancy Sutley, Chair of the White House Council on Environmental Quality. "We are committed to powering our country while protecting health and welfare in the Appalachian region, securing access to clean streams and safe drinking water, and honoring our clean water laws."

In close coordination, EPA, DOI, and the Corps will take several short-term actions to reform the regulation of mountaintop coal mining under the two primary environmental laws governing this mining practice.

The Army Corps of Engineers and the Environmental Protection Agency will take immediate steps under the CWA to minimize environmental harm by taking the following actions in 2009:

- Requiring more stringent environmental reviews for future permit applications for mountaintop coal mining;
- Within 30 days of the date of the 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;
- Strengthening permit reviews under CWA regulations (Section 404(b)(1)) to reduce the harmful direct and cumulative environmental impacts of mountaintop coal mining on streams and watersheds;
- Strengthening EPA coordination with states on water pollution permits for discharges from valley fills and state water quality certifications for mountaintop coal mining operations; and
- Improving stream mitigation projects to increase ecological performance and compensate for losses of these important waters of the United States.

The Department of Interior will also take the following steps:

- Reevaluate and determine how the Office of Surface Mining Reclamation and Enforcement (OSM) will more effectively conduct oversight of state permitting, state enforcement, and regulatory activities under SMCRA;

- Ensure the protection of wildlife resources and endangered species by coordinating the development of CWA guidance with the U.S. Fish and Wildlife Service (FWS); and
- If the U.S. District Court vacates the 2008 Stream Buffer Zone Rule, as requested by the Secretary of the Interior on April 27, 2009, Interior will issue guidance clarifying the application of stream buffer zone provisions in a preexisting 1983 SMCRA regulation to ensure mining activities will occur in a more environmentally protective way in or near Appalachian streams.

Concurrent with these short-term actions, the three agencies will embark on a comprehensive, coordinated review of their existing respective regulations and procedures governing mountaintop coal mining under existing law. The agencies will also create an interagency working group to promote ongoing Federal collaboration and ensure the Action Plan achieves results. As these reforms are implemented, the agencies will seek to involve the public and guide Federal actions through robust public comment and outreach.

EPA and the Army Corps of Engineers are today taking steps to enhance coordination in the environmental review of pending Clean Water Act permits for surface coal mining activities in Appalachian States. Administrator Jackson and Acting Assistant Secretary Salt have directed EPA and Corps field offices to coordinate under new procedures to ensure Clean Water Act permit decisions are fully consistent with sound science and the law, reduce adverse environmental impacts, provide greater public participation and transparency, and address pending permits in a more timely manner.

The Federal agencies will also work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities. This interagency effort will have a special focus on stimulating clean enterprise and green jobs development, encouraging better coordination among existing federal efforts, and supporting innovative new ideas and initiatives.

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November 23, 2010

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining, Reclamation and Enforcement
U.S. Department of the Interior
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

We are writing to you as cooperating agencies that are participating in the Office of Surface Mining's development of a draft Environmental Impact Statement (EIS) to accompany a soon-to-be-proposed rule on stream protection. Our role as cooperating agencies, as defined by the memoranda of understanding that each of us entered into with your agency, is to review and comment on those Chapters of the draft EIS that are made available to us (at present, Chapters 2 and 3). Based on our participation to date, we have several serious concerns that we feel compelled to bring to your attention for resolution.

Without rehashing our previously articulated concerns about the need and justification for both the proposed rule and the accompanying EIS, we must object to the quality, completeness and accuracy of those portions of the draft EIS that we have had the opportunity to review and comment on so far. As indicated in the detailed comments we have submitted to date, there are sections of the draft EIS that are often nonsensical and difficult to follow. Given that the draft EIS and proposed rule are intended to be national in scope, we are also mystified by the paucity of information and analysis for those areas of the country beyond central Appalachia and the related tendency to simply expand the latter regional experience to the rest of the country in an effort to appear complete and comprehensive. In many respects, the draft EIS appears very much like a cut-and-paste exercise utilizing sometimes unrelated pieces from existing documents in an attempt to create a novel approach to the subject matter. The result so far has been a disjointed, unhelpful exercise that will do little to support OSM's rulemaking or survive legal challenges to the rule or the EIS.

We also have serious concerns regarding the constrained timeframes under which we have been operating to provide comments on these flawed documents. As we have stated from the outset, and as members of Congress have also recently noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with only five working days to review the material, some of which is fairly technical in nature. In order to comply with these deadlines, we have had to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business such as permit reviews. While we were prepared to reallocate resources to review and comment on the draft EIS Chapters, additional time would have allowed for a more efficient use of those resources and for the development of more in depth comments.

There is also the matter of completeness of the draft Chapters that we have reviewed. In the case of both Chapters 2 and 3, there are several attachments, exhibits and studies that were not provided to us as part of that review. Some of these are critical to a full and complete analysis of OSM's discussion in the chapters. OSM has developed a SharePoint site that will supposedly include many of the draft materials, but to date the site is either inoperable or incomplete.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. The first of those reconciliations (which was focused on Chapter 2) occurred via conference call on October 14. The call involved little in the way of actual reconciliation but amounted to more of an update on progress concerning the draft EIS. There was talk about another reconciliation session, but to date this has not occurred. There were also several agreements by OSM during the call to provide additional documents to the states for their review, including a document indicating which comments on Chapter 2 from cooperating agencies were accepted and passed on to the contractor, as well as comments provided by OSM. OSM also agreed to consider providing us a copy of a document indicating those comments that were not accepted. To date, neither of these documents has been provided to us. And even though a draft of Chapter 3 has now been distributed and comments have been provided to OSM, we are still awaiting a reconciliation session on this chapter.[1]

Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately. We are therefore requesting that these revised Chapters be provided to us as soon as practicable.

We understand that OSM is considering further adjustments to the time table for review of additional Chapters of the draft EIS. We are hopeful that in doing so, the agency will incorporate additional time for review by the cooperating agencies, especially given the size and complexity of Chapter 4 and the full draft EIS. Pushing back the time for the completion of these drafts by OSM without additional time being provided for review by the cooperating agencies would be wholly inappropriate. We request that you please provide us with these new time tables as soon as possible so that we can begin our own internal planning.

[1] We also understand that OSM had planned to contact the states to provide estimates of the additional time and resources that would be required to review/process a permit under the proposed rule. This information would be used by OSM to prepare at least one of the burden analyses that are required by various executive orders as part of federal rulemakings. We now understand that OSM plans to generate these estimates on its own. We are somewhat mystified about how OSM intends to accomplish this without direct state input and urge the agency to reconsider the methodology under which they are currently operating.

Ex. 2, p. 2

You should know that, as we continue our work with OSM on the development of the draft EIS, some of us may find it necessary to reconsider our continued participation as cooperating agencies pursuant to the 30-day renegotiation/termination provision in our MOUs. Under the NEPA guidance concerning the status of cooperating agencies, some of the identified reasons for terminating that status include the inability to participate throughout the preparation of the analysis and documentation as necessary to meet process milestones; the inability to assist in preparing portions of the review and analysis and help resolve significant environmental issues in a timely manner; or the inability to provide resources to support scheduling and critical milestones. As is evident from much of the discussion above, these are some of the very issues with which many of the cooperating agencies are struggling given OSM's time schedule for the EIS and the content of the documents distributed to date. We continue to do our best to meet our commitments under the MOUs but based on our experience to date, this has become exceedingly difficult.

Finally, as you have likely noted throughout the submission of comments by many of the cooperating agencies, there is great concern about how our comments (limited as some of them are due to time constraints for review) will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", given what we have seen so far of the draft EIS we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are wrestling with the consequences of their names appearing on the EIS, as it would assume tacit approval independent of the comments that have/have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore request an opportunity to jointly draft a statement with you that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

Sincerely,

Randall C. Johnson
Director
Alabama Surface Mining Commission

Bruce Stevens
Director
Division of Reclamation
Indiana Department of Natural Resources

Carl E. Campbell
Commissioner
Kentucky Department for Natural Resources

John Caudle
Director
Surface Mining and Reclamation Division
Railroad Commission of Texas

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines Minerals and Energy

Thomas L. Clarke
Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

John Corra
Director
Wyoming Department of Environmental Quality

July 3, 2013

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining, Reclamation and Enforcement
U.S. Department of the Interior
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

We are writing to you as cooperating agencies that are participating in the Office of Surface Mining's development of a draft Environmental Impact Statement (EIS) to accompany a proposed rule on stream protection. Our role as cooperating agencies, as defined by the memoranda of understanding that each of us entered into with your agency, is to review and comment on those chapters of the draft EIS that are made available to us. Since the initiation of the EIS process in 2010, the states have had the opportunity to comment on three initial draft chapters (numbers 2, 3 and 4).

Over the course of the past two years, OSM's draft EIS development process has seen several fits and starts, largely due to issues related to the work of various contractors OSM engaged to assist the agency with the draft EIS. Our understanding is that OSM has now addressed these issues and is once again moving forward with the development of the draft EIS. As a result, we would like to re-engage with the process and request an opportunity to review draft chapters and other related documents as they become available, pursuant to the MOU's we have in place with the agency. In doing so, we have a few requests.

In the past, we had serious concerns regarding the constrained timeframes under which we were operating to provide comments on draft documents. As we have stated from the outset, and as members of Congress have also noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with limited working days to review the material, some of which can be fairly technical in nature. In order to comply with the deadlines, we have to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business. While we are prepared to reallocate resources to review and comment on the draft EIS Chapters, adequate time will allow for a more efficient use of those resources and for the development of more in depth comments.

There is also the matter of completeness of the draft chapters that we will review. In the case of Chapters 2, 3 and 4, several attachments, exhibits and studies were not provided to us as part of that review. Some of these were critical to a full and complete analysis of OSM's discussion in the chapters. It is important for us to receive all applicable documents that are referenced in draft chapters in order to conduct a meaningful review.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. Our experience with the reconciliation process to date has not been particularly positive or meaningful. We are hopeful that as we reinitiate the EIS review and comment process, OSM will engage in a robust reconciliation process. Among other things, we believe it should include an explanation of which comments were accepted, which were not, and why. Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately. We are therefore requesting that the revised Chapters be provided to us as soon as practicable after their completion.

As OSM considers re-initiation of the review process for cooperating state agencies, it would be helpful if the agency would provide us with new time tables as soon as possible so that we can begin our own internal planning.

Finally, as we noted during the submission of comments by many of the cooperating agencies in the early rounds of the EIS development process, there is great concern about how our comments will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are uncertain whether their names will appear on the draft EIS, which was originally anticipated. This of course would imply tacit approval independent of the state comments that have/have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore request an opportunity to jointly draft a statement with you that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

In order to move forward expeditiously, we would appreciate a response to our request to re-engage with the EIS process no later than July 10. If we have not heard from you by then, we will contact via phone to further discuss the matter.

Sincerely,

Ex. 2.0.7

Randall C. Johnson
Director
Alabama Surface Mining Commission

Bruce Stevens
Director
Division of Reclamation
Indiana Department of Natural Resources

Steve Hohmann
Commissioner
Kentucky Department for Natural Resources

John Caudle
Director
Surface Mining and Reclamation Division
Railroad Commission of Texas

Ex 2, p. 8

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines Minerals and Energy

Thomas L. Clarke
Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

Todd Parfitt
Director
Wyoming Department of Environmental Quality

February 23, 2015

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

We are writing to you as cooperating agency states pursuant to the Memoranda of Understanding that we negotiated with your agency concerning the development of an environmental impact statement (EIS) to accompany a proposed rule on stream protection expected to be published by the Office of Surface Mining (OSM) sometime this spring. As you know, during the summer of 2010, OSM offered the opportunity to states who were interested in participating as cooperating agencies as part of the development of an EIS to accompany a new rule on stream protection that would replace the 2008 stream buffer zone rule. OSM committed to replace this rule as part of an interagency effort to address stream protection as it relates to mountaintop mining operations in Appalachia. (See the June 11, 2009 Memorandum of Understanding between the U.S. Environmental Protection Agency, the Office of Surface Mining and the U.S. Army Corps of Engineers.) OSM also agreed to propose a new rule on stream protection pursuant to a settlement agreement with several environmental groups that had challenged the 2008 rule. The settlement agreement was approved by a U.S. District Court in Washington, DC on April 2, 2010. More recently, the Court vacated the 2008 rule and OSM last month published a notice vacating the 2008 rule.

Ten states (UT, NM, KY, TX, MT, WY, WV, AL, IN and VA) originally agreed to serve as cooperating agencies, with the state of Ohio agreeing to participate as a state commenter in the process. MOUs were negotiated with most of these states and the first chapter of the draft EIS (Chapter 2) was shared with the states for comment in September of 2010. Chapter 3 was shared with the states in October of 2010 and Chapter 4 was shared with the states in January of 2011. In each case, comment periods were exceedingly short and, while "reconciliation meetings" were supposed to be held on each of the chapters, only one such meeting was held. Following the receipt of state comments on Chapter 4 in January of 2011, no additional outreach to the cooperating agency states has occurred. Since that time, OSM has significantly revised the draft EIS and we understand that several new alternatives are being considered and that each of the chapters has been significantly revised.

The cooperating agency states have sent two letters to you expressing our concerns with the EIS process and our role as cooperators. The first, on November 23, 2010, expressed concerns about the quality, completeness and accuracy of the draft EIS; the constrained timeframes for the submission of comments on draft EIS chapters; the reconciliation process; and the need for additional comment on revised chapters. The letter also alerted OSM to the potential of some states reconsidering their continued participation as cooperating agency states pursuant to NEPA guidance concerning the status of cooperators. The letter also expressed concern about how the comments of the cooperating agency states will be used or referred to by OSM in the final draft EIS and requested the opportunity to draft an appropriate statement to accompany the draft EIS setting out the role that the states have played as cooperating agencies. OSM responded to this letter on January 24, 2011 and made a number of commitments regarding continued, robust participation by the cooperating agency states in the EIS development process. However, shortly thereafter, the agency terminated that involvement without explanation.

The cooperating agency states sent a second letter to you on July 3, 2013 requesting an opportunity to re-engage with the EIS development process following several fits and starts by OSM, largely due to issues related to the work of the various contractors OSM engaged to assist the agency with the draft EIS. In requesting an opportunity to review revised draft chapters of the draft EIS, the states requested expanded timeframes for commenting on the chapters; an opportunity to review any attachments and exhibits that are appended to the chapters; a meaningful, robust reconciliation process; and a timetable for review of draft chapters. The letter reiterated the concern of the states regarding how their comments will be used or referenced by OSM in the final draft EIS, including an appropriate characterization of their comments and participation. OSM never responded to this letter and to date no further opportunities have been provided by OSM for participation by the cooperating agency states. In fact, OSM has, on several occasions (at meetings of the Interstate Mining Compact Commission and other OSM/state meetings), indicated that it does not envision re-engaging with the states on the draft EIS and at most would provide a briefing, coincident with release of the draft EIS and proposed rule, regarding how the comments that were originally submitted by the states were addressed in the final draft EIS. Even this latter opportunity for engagement now appears to have evaporated.

As noted in a Memorandum for the Heads of Federal Agencies dated January 30, 2002 entitled "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act", the Council on Environmental Quality(CEQ) regulations addressing cooperating agency status (40 C.F.R. Sections 1501.6 and 1508.5) specifically implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. The Memorandum goes on to note that the benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal or local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and inter-governmental trust and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents.

In litigation interpreting how the federal government must meet its obligation to cooperating agencies, the U.S. District Court for the District of Wyoming in *International Snowmobile Manufacturers Association et al v. Norton*, 340 F. Supp. 2d 1249 (D.Wyo.2004) ruled as follows:

the purpose of having cooperating agencies is to emphasize agency cooperation early in the NEPA process. 40 C.F.R. Section 1501.6 (2004). Federal agencies are required to invite the participation of impacted states and provide them with an opportunity for participation in preparing the EIS. 40 C.F.R. Section 1501.7 (2004). "When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful." Wyoming v. USDA, 277 F. Supp. 2d 1197, 1219 (D.Wyo.2003).

Based on our experience to date with OSM's development of the draft EIS for the stream protection rule, we assert that OSM has not provided for meaningful participation by the cooperating agency states in the preparation of the EIS and it seems unlikely that the agency will do so prior to release of the draft EIS and proposed rule this spring. The cooperating agency states are therefore left with a decision about whether and when to withdraw from the process in order to protect our interests and to craft an appropriate statement for inclusion in the draft EIS regarding the nature and level of our participation and our decision to withdraw. CEQ's regulations provide sample reasons for why a cooperating agency might end its status as a cooperator, including that the cooperating agency is unable to

identify significant issues, eliminate minor issues, identify issues previously studied, or identify conflicts with the objectives of regional , State and local land use plans, policies and controls in a timely manner; is unable to assist in preparing portions of the review and analysis and resolving significant environmental issues in a timely manner; is unable to consistently participate in meetings or respond in a timely fashion after adequate time for review of documents, issues and analyses; is unable to accept the leads agency's decision making authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action or to develop information/analysis of alternatives they favor or disfavor; or is unable to provide data and rationale underlying the analyses or assessment of alternatives.

While the cooperating agency states were, for the most part, actually able and willing to do all of these things, OSM's unwillingness to share revised and new draft chapters of the EIS with the states has precluded the states from doing so and hence has undermined their status as cooperating agencies and the meaningfulness of their participation. Consequently, the states appear to have more than adequate reasons for withdrawing from the process and terminating their status as cooperators based on CEQ's regulations. We are therefore alerting you that, by separate actions pursuant to the provisions of our respective MOU's with your agency, several of us are seriously contemplating withdrawing from the EIS development process. Regardless of individual state determinations regarding withdrawal, we hereby request that the attached statement be included in a conspicuous place at the front of the draft EIS explaining the role of the cooperating agency states and any individual state decisions to withdraw. It is also likely that those states who choose to continue on as cooperating agency states will request that their state seal not appear on the cover of the draft EIS. We welcome the opportunity to discuss and potentially adjust this statement, but it is critical that we receive assurances from you that the statement will appear in the draft EIS at an appropriate place.

Should you have any questions or wish to discuss the matter further, please communicate with Greg Conrad, Executive Director of the Interstate Mining Compact Commission, who is assisting us with the matter.

Sincerely,

Randall C. Johnson
Director
Alabama Surface Mining Commission

Steve Weinzapfel
Director
Division of Reclamation
Indiana Department of Natural Resources

Steve Hohmann
Commissioner
Kentucky Department for Natural Resources

Ed Coleman
Chief
Industrial and Energy Minerals Bureau
Montana Department of Environmental Quality

Fernando Martinez
Director
Division of Mining and Minerals
New Mexico Department of Energy, Minerals & Natural Resources

Lanny Erdos
Chief
Division of Mineral Resources Management
Ohio Department of Natural Resources

John E. Caudle
Director
Surface Mining and Reclamation Division
Railroad Commission of Texas

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines, Minerals & Energy

Harold Ward
Acting Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Todd Parfitt
Director
Wyoming Department of Environmental Quality

Attachment

Ex 2. p. 14

Statement from Cooperating Agency States

Pursuant to Memoranda of Understanding with the Office of Surface Mining, several states that implement regulatory programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) have participated as cooperating agencies in the development of this draft environmental impact statement for the proposed stream protection rule. These states include: Alabama, Indiana, Kentucky, New Mexico, Texas, Utah, Virginia, West Virginia and Wyoming. The state of Montana and Ohio have also participated in an unofficial review role during the process. Early in the development of the draft EIS in late 2010 and early 2011, the cooperating agency states were provided an opportunity to review three initial draft chapters of the EIS (then chapters 2, 3 and 4). The states, under very constrained timeframes, provided comments on these draft chapters and engaged in one reconciliation meeting with OSM. The states also alerted the agency to several serious concerns that they were encountering with the process via letter of November 23, 2010. Since January of 2011, the cooperating agencies states have not been involved in the EIS development process, despite requests to re-engage with the agency. (See letter dated July 3, 2013). Some of this was due to difficulties encountered by OSM with its contractors, which resulted in a full scale revamping of the draft EIS. But in large measure, OSM simply chose not to pursue further involvement of the cooperating states in the process, in direct contravention of the states' MOUs with the agency, as well as the Council of Environmental Quality (CEQ) regulations and guidelines concerning the role of cooperating agencies. As a result, some cooperating agency states, via letters dated [list dates of individual state letters], formally withdrew from the EIS process as cooperators. Others [list the states] remained as cooperators, but only to preserve their rights as cooperating agencies. As a result of these decisions, any reference to the role of the cooperating agency states should be understood to embrace only the early, limited opportunities provided to them to comment on draft chapters 2, 3 and 4 in late 2010 and early 2011. It should also be noted that the states did not have an opportunity for full reconciliation regarding their comments and have not been informed of how and to what extent their comments were taken into account and incorporated in the draft EIS. This limited, constrained role of the cooperating agency states must be understood as such and should not be read as an endorsement of any portion of the draft EIS.

west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street, SE, Charleston, WV 25304
Phone: (304) 926-0490 Fax: (304) 926-0456

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
dep.wv.gov

May 19, 2015

The Honorable Joseph G. Pizarchik, Director
Office of Surface Mining
U.S. Department of Interior
1951 Constitution Avenue, NW
Washington, DC 20240

Re: Cooperating Agency Status

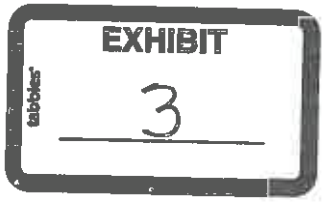
Dear Director Pizarchik:

It is with disappointment, the West Virginia Department of Environmental Protection (WVDEP) informs you that WVDEP terminates its cooperating agency status with the Office of Surface Mining Reclamation and Enforcement (OSM) in the preparation of a draft Environmental Impact Statement (EIS) as outlined in the "Memorandum of Understanding between OSM and WVDEP for EIS activities under NEPA for Stream Protection rulemaking".

In August 2010, WVDEP signed the MOU with OSM in good faith, fully expecting to be engaged with OSM as the lead agency proceeded with the development of the draft EIS, described in the MOU. However, OSM has consistently failed to meet the terms of the MOU and related federal regulations regarding cooperating agency status.

As we learned at a recent briefing by OSM on the EIS preparation and proposed rulemaking on April 27, 2015, OSM has, among other things, substantially revised the draft EIS to expand the range of alternatives from four to nine, selected a preferred alternative and gone beyond the original scope in examining the federal stream buffer zone rule. These revisions were undertaken without meaningful input from West Virginia and other states that agreed to participate in the EIS as cooperating agencies. At this same briefing, OSM informed the cooperating agencies there would be no further opportunities for cooperation , unless OSM needed information in response to public comments, and the states would see the draft EIS once it is published for public comment.

Because of the lack of fundamental engagement, WVDEP believes it is no longer in the best interest of the environmental regulatory programs it implements and the State of West Virginia to continue as a cooperating agency.



It is requested that references indicating WVDEP as a cooperating agency be removed from any published draft EIS as well as related documents. It is also requested that the WV state seal not appear on the cover or within the draft EIS or publication of it in the *Federal Register*.

WVDEP values its working relationship with OSM and looks forward to cooperating with OSM and all federal agencies in order to accomplish effective environmental regulation for stream protection and all other matters even though it is regrettable WVDEP will participate in this matter as something other than a cooperating agency.

Sincerely,

Harold D. Ward
Acting Director

Ex 3 p.2

ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR NATURAL RESOURCES

Steven L. Beshear
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Leonard K. Peters
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Steve Hohmann
Commissioner

May 13, 2015

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

RE: Termination of MOU as a Cooperating State Agency

Dear Director Pizarchik:

This letter serves as the required thirty (30) day notice informing the Office of Surface Mining Reclamation and Enforcement (OSMRE) that Kentucky is terminating its cooperating agency status pursuant to the Memoranda of Understanding with your agency signed on August 24, 2011. The MOU with OSMRE engaged Kentucky as a cooperating agency under the National Environmental Policy Act (NEPA) for the development of a draft environmental impact statement (EIS) which is to accompany a proposed rule on stream protection. OSMRE has stated the rule is likely to be published sometime this year.

The MOU states that "OSM will provide the cooperator with copies of key or relevant documents underlying the EIS that OSM identifies as pertinent to the Cooperator's jurisdictional responsibility or special expertise, including technical reports, data, information, analyses, comments received, and working drafts relative to the environmental reviews, draft and final EIS". However, OSMRE has had little to no interaction with Kentucky, or other cooperating agency states, concerning the draft EIS since January 31, 2011. Over the past four years the only information we have received from OSMRE was an updated estimate of the anticipated release date for the proposed rule and draft EIS twice per year at Interstate Mining Compact Commission meetings. Those "updates" did not include documents, reports, information, or data for us to review or analyze.

Based on your briefing to the cooperating state agencies on April 27, 2015 in Baltimore, we learned OSMRE has revised the draft EIS by adding a number of additional alternatives, and the draft EIS has been significantly changed in other respects since the last time we reviewed it in 2011. However, Kentucky and the other cooperating agency states have not been afforded the opportunity to provide review and meaningful input concerning the new alternatives or any of the significant changes. In fact, you informed us that the cooperating agency states would not be offered any future opportunities to review the draft EIS and that we would see it when it is published for public comment. And although you stated that your agency may contact the cooperating agency states "if needed" after the public comment period closes, it is very difficult to envision that happening given the absence of outreach from OSMRE over the past four years.

Kentucky believes OSMRE's continued refusal to share the revised draft chapters of the EIS with us has undermined our status as a cooperating agency and severely curtailed the meaningfulness of our participation. We have therefore concluded that it is no longer in the best interest of the Commonwealth of Kentucky to continue as a cooperating agency. We request that you remove any references to our participation as a cooperating agency from the proposed EIS, and that our state seal not appear on the cover of the draft EIS prior to publication in the *Federal Register*.

Sincerely,

Steve Hohmann
Commissioner

Ex 3 0.4

GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Oil, Gas & Mining

MICHAEL R. STYLER
Executive Director

JOHN R. BAZA
Division Director

February 23, 2015

The Honorable Joseph G. Pizarchik, Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

SUBJECT: NOTICE OF TERMINATION OF MOU BETWEEN OSM AND UTAH DOGM FOR EIS ACTIVITIES UNDER NEPA FOR STREAM PROTECTION RULEMAKING

Dear Director Pizarchik:

In September of 2010, the Utah Division of Oil, Gas and Mining (the Division) entered into a Memorandum of Understanding with the Office of Surface Mining Reclamation and Enforcement (OSM). The MOU designated the Division as a cooperating agency under the National Environmental Policy Act (NEPA) and the Council of Environmental Quality's (CEQ) regulations and guidance. Specifically, it established responsibilities for both agencies regarding preparation of the environmental impact statement (EIS) concerning OSM's ongoing stream protection rulemaking.

Both NEPA itself and CEQ's implementing regulations and guidance recognize the benefits of enhanced agency cooperation. The Division also recognizes the mutual benefit conferred by engaging federal agencies as a stakeholder in the regulatory process. Since signing the MOU however, the Division has become increasing frustrated with OSM's reluctance or refusal to cooperatively engage with the Division. OSM has consistently failed in its obligations under the MOU and under CEQ regulation.

For instance, the Division understands from sources outside OSM that the draft stream protection rule and its associated draft EIS will be released this year. However, OSM has not contacted the Division about the EIS since January 2011, even though the review process has been ongoing. Additionally, OSM has never given the Division enough time to participate in a meaningful review of the EIS. As just one example of the compressed review schedule, OSM gave the Division only five business days to reply and comment on draft Chapter 3 of the EIS. The draft of that

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chapter was 961 pages long. As you know, it is impossible to provide substantive comments on a document of that length in such a constricted time period.

The benefits of cooperation envisioned by CEQ are nonexistent when OSM fails to provide a meaningful opportunity for the Division to actually cooperate. Because it has had no opportunity to contribute, the Division does not wish to ratify the draft EIS by signing on as a cooperating agency. Further, the Division wishes to remove its name from the EIS undertaking to protect the general public and Utah's citizenry from the incorrect assumption that the Division actually took part in the EIS's development.

As CEQ's guidance articulates, OSM's failure to engage the Division constitutes good cause to terminate the MOU and end the relationship. That said, the Division is hopeful that its experience in this case is merely an aberration. The Division hopes to cooperate with OSM in the future and remains open to future discussions and future collaboration assuming OSM were to provide meaningful opportunities for engagement.

For these reasons, please be advised that the Utah Division of Oil, Gas and Mining will terminate the referenced MOU on March 25, 2015. Also, please remove all references to the Division from the draft EIS.

Sincerely,

John R. Baza
Division Director

JRB:jrj:er

cc: Gregory E. Conrad, IMCC
Horst Greczmiel, CEQ
David Berry, OSM Western Region
Dana Dean, OGM

P:/Groups/Admin/JRB/OSM

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SW 3 D.5

RAILROAD COMMISSION OF TEXAS

SURFACE MINING AND RECLAMATION DIVISION

March 12, 2015

Sent by Email and First Class Mail
Joe Pizarchik, Director
Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue, NW, MS 202-SIB
Washington, DC 20240

RE: Notice of Termination of Memorandum of Understanding as a Cooperating Agency
Draft Environmental Impact Statement for the Proposed Stream Protection Rule

Dear Director Pizarchik:

On August 25, 2010, I signed, on behalf of the Surface Mining and Reclamation Division of the Railroad Commission of Texas, a Memorandum of Understanding (MOU) to act as a cooperating agency in the development of an Environmental Impact Statement (EIS) in support of a proposed change to OSMRE's rules on stream protection. We participated in the review of three draft chapters of the proposed EIS in 2010 and 2011 even though we were afforded very short review times. We also participated in the one reconciliation conference call that was held after cooperating agency comments were received from review of the first chapter (Chapter 2). After receiving Chapter 4 for review, no further documents were shared with cooperating agencies for review and comment. I understand that, even though there has been no sharing of documents with cooperating agencies, OSMRE has continued to work on the draft EIS and that alternatives are being considered other than those shared with cooperating agencies in 2010 and early 2011.

By letters dated November 23, 2010 and July 3, 2013, I and several other cooperating agency representatives expressed frustration with the EIS process and our roles as cooperating agencies. In the July 3rd letter, we asked for an opportunity to re-engage with OSMRE in the development of the EIS. To date, OSMRE has not provided any opportunities to the cooperating agencies for further participation in the EIS process.

I entered into the MOU in good faith, fully able and willing to participate in review of the draft EIS and provide comments on the chapters that were made available for review. I remained committed to this task throughout 2011 until now, in 2015. At this time, however, I feel that OSMRE's failure to allow further participation of my agency in the process constitutes just cause for termination of the MOU. In accordance with the *Terms and Conditions* of the MOU, I am providing you the required 30-day notice that the Surface Mining and Reclamation Division of the Railroad Commission of Texas is terminating its participation in the EIS process under the MOU. I also request that OSMRE not identify either the

Ex 3 p.1

Surface Mining and Reclamation Division or the Railroad Commission of Texas by name or seal as cooperating agencies when the draft EIS is published.

I am committed to further participation in review of the draft EIS once it is published. I am hopeful that the lack of engagement with the cooperating agencies is not an indication that OSMRE does not desire cooperation with State regulatory authorities in the EIS process. I remain available for future discussions on this issue if OSMRE were to provide a meaningful opportunity for such discussions.

Sincerely,

John E. Caudle, Director
Surface Mining and Reclamation Division

pdfc: Ervin Barchenger, Director, Mid-Continent Region, OSMRE
Elaine Ramsey, Director, Tulsa Field Office, OSMRE
Greg Conrad, Executive Director, IMCC
Milton Rister, Executive Director, RCT

STATE OF ALABAMA

SURFACE MINING COMMISSION

P.O. BOX 2390 • JASPER, ALABAMA 35502-2390
(205) 221-4130 • FAX: (205) 221-0077

February 10, 2016

Joseph Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

On August 24, 2010, the Alabama Surface Mining Commission signed a Memorandum of Understanding (MOU) to participate as a Cooperating Agency in the development of an Environmental Impact Statement (EIS) to support a proposed stream protection rule. Since that time we have participated diligently in that process, but with increasing concern and reservation.

We and other state cooperating agencies have expressed concerns regarding the piecemeal approach, the lack of adequate time for review and comment, the overall quality of the product, major deficiencies, inconsistencies, and missing reference material evidenced in the draft documents. Federal cooperating agencies have verbally echoed similar concerns during reconciliation conference calls. Almost four years have now passed since our last interaction on the EIS.

I have concluded that it is no longer in the best interest of the Alabama Surface Mining Commission to continue as a cooperating agency. I hereby give notice to you of my decision to terminate the MOU. I request that any references to our participation as a cooperating agency be removed from the proposed EIS and its notice prior to publication in the Federal Register.

Sincerely

Randall C. Johnson
Director

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State of New Mexico
Energy, Minerals and Natural Resources Department

Susana Martinez
Governor

David Martin
Cabinet Secretary

Brett F. Woods, Ph.D.
Deputy Cabinet Secretary

February 20, 2015

The Honorable Joseph G. Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

RE: September, 2010 Memorandum of Understanding, For EIS Activities Under NEPA for Stream Protection Rulemaking: Notice of Termination

Dear Director Pizarchik:

I am Secretary of New Mexico Energy, Minerals and Natural Resources Department ("EMNRD"), a cooperating agency under the above referenced Memorandum of Understanding ("MOU"). The MOU sets forth the respective responsibilities of the Office of Surface Mining Reclamation and Enforcement ("OSM") and EMNRD in the development of an environmental impact statement ("EIS"), which is being undertaken in service of a rulemaking on stream protection. The rule is contemplated as a replacement for the 2008 stream buffer zone rule. Several other coal-producing states have entered into similar Memoranda of Understanding.

The first chapter of the draft EIS (Chapter 2) was shared with the states for comment in September of 2010. Chapter 3 was shared with the states in October of 2010. Chapter 4 was shared with the states in January of 2011. In each case, comment periods were exceedingly short. Additionally, reconciliation meetings were supposed to be held on each of the chapters, but only one such meeting was held. Following the receipt of state comments on Chapter 4 in January of 2011, OSM made no further contact with EMNRD. Since that time, OSM has significantly revised each of the chapters, and it is our understanding that several new alternatives are being considered, as well.

On two occasions, several of the cooperating agency states sent letters to OSM, expressing concerns with the EIS process and the states' role as cooperators. Those letters were dated November 23, 2010 and July 3, 2013, and we direct your attention to them. In the first letter, the states expressed concerns about the quality, completeness and accuracy of the draft EIS; the

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abbreviated timeframes for the submission of comments on draft EIS chapters; the reconciliation process; and the need for additional comment opportunities on revised chapters.

Following several fits and starts by OSM—largely due to the work of contractors that OSM had hired—in the July 3, 2013 letter the states requested an opportunity to re-engage in development of the EIS. The states asked for an opportunity to review revised draft chapters of the draft EIS, with expanded timeframes sufficient for comment; an opportunity to review any attachments and exhibits to the chapters; and a meaningful, robust reconciliation process. To date OSM has provided no further opportunities for participation by EMNRD or other cooperating agency states.

From the date that the MOU became effective, EMNRD has been able and willing to meet all of its responsibilities as a cooperating agency. Unfortunately, the absence of meaningful opportunities for EMNRD to participate in the EIS process has frustrated the purpose of the MOU and has undermined EMNRD's status as a cooperating agency.

Pursuant to Section C.2. of the MOU, EMNRD hereby provides notice that it is terminating the MOU as of thirty (30) days from the date of this letter. Further, we request that neither the New Mexico Energy, Minerals and Natural Resources Department nor its Mining and Minerals Division be identified by name or by logo as a cooperating agency within the draft EIS.

Termination of the MOU is not intended to imply EMNRD's disagreement with the eventual draft EIS or the eventual stream protection rule. EMNRD has not been provided with information sufficient to form a considered opinion on either the draft EIS or the eventual rule.

We hope that we are able to work with OSM on more successful ventures in the future.

Very truly yours,

David Martin

David Martin
Cabinet Secretary
Energy Minerals and Natural Resources Department
State of New Mexico

DEQ
Montana Department
of Environmental Quality

July 9, 2015

The Honorable Joseph G. Pizarchik, Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

I am writing to you today to request that the Montana Department of Environmental Quality (MDEQ) cease to be considered a cooperating agency on the Stream Protection Rule Environmental Impact Statement (EIS). To clarify the record, on August 30, 2010, I sent John Craynon, Chief of OSMRE's Division of Regulatory Support, an email identifying that MDEQ was very interested in becoming a cooperating agency on the aforementioned EIS. However, due to Montana's public records disclosure laws, MDEQ requested specific modifications be made to the proposed Memorandum of Understanding. MDEQ never received a response to that email/request for modification to the MOU, but MDEQ was subsequently treated as a cooperator, so we actively participated.

The first chapter of the draft EIS (Chapter 2) was shared with MDEQ for comment in September of 2010. Chapter 3 was shared in October of 2010 and Chapter 4 was shared in January of 2011. To the best of my knowledge, January of 2011 was the last time MDEQ or any of the other cooperating agencies had the opportunity to provide comment on the draft EIS. Furthermore, it has been indicated that MDEQ would not be provided an opportunity to view or comment on the revised draft EIS until it is released to the public. Based on MDEQ's limited ability to participate in the process, we would no longer like to be considered a cooperating agency.

Thank you for your time and please feel free to contact me if you have any questions.

Sincerely,

Edward L. Coleman
Chief, Industrial and Energy Minerals Bureau
Department of Environmental Quality
(406) 444-4973; Fax (406) 444-4988
ecoleman@mt.gov

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United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

Mr. Harold D. Ward
Acting Director
West Virginia Department of Environmental Protection
Division of Mining and Reclamation
601 57th Street, SE
Charleston, West Virginia 25304

OCT 7 2015

Mr. Ward:

We have received your letter dated May 19, 2015, terminating your agency's participation as a cooperating agency for the Stream Protection Rule (SPR) Environmental Impact Statement (EIS). Pursuant to the Terms and Conditions of the Memorandum of Understanding executed on September 13, 2010, your termination was effective June 18, 2015.

In your letter, you raised concerns about the initial development of the Draft EIS. OSMRE has worked diligently to consider and incorporate your agency's comments and those of other cooperating agencies as it prepared the Draft EIS that was released to the public in July 2015. As you review the Draft EIS, we hope that you recognize your agency's prior, valuable contributions to the document.

Although you have terminated your agency's status as a cooperating agency on the project, Office of Surface Mining Reclamation and Enforcement (OSMRE) values your continued participation in the process of developing a Final EIS. As with any entity, you are welcome to take advantage of the public comment period on the proposed SPR, associated Draft EIS, and associated Draft Regulatory Impact Analysis. Please note, in response to requests for an extension of the comment period, the public comment period on the proposed rule, Draft EIS, and draft regulatory impact analysis will now close on October 26, 2015.

In addition to providing comments during the public comment period, your agency is invited to re-engage with OSMRE as a cooperating agency as OSMRE develops a Final EIS. In that capacity, you could share your agency's expertise with OSMRE beyond the close of the public comment period for the Draft EIS. In considering re-engagement, we would like to provide more clarity about your potential involvement in the process moving forward. OSMRE anticipates that cooperating agencies would be called upon to review draft responses to public comments received on the Draft EIS specific to your state or region; update or provide specific data relevant to your state; share any recent, relevant studies or research; and answer specific questions or provide other information about your jurisdiction or your specific area of expertise.

ORIGINAL MAILED TO ADDRESSEE(S)
FROM DIRECTOR'S OFFICE

EXHIBIT
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When OSMRE makes a request of you, it will provide you with reasonable time to respond consistent with our regulatory obligations.

If you decide to re-engage as a cooperating agency, please sign the concurrence at the end of this letter and return a signed copy to Harry Payne, Chief, Division of Regulatory Support, OSMRE in Washington, DC by October 23, 2015.

By re-engaging as a cooperating agency, your agency will agree to respond timely to requests for assistance from OSMRE. In addition, as provided for in the original Memorandum of Understanding and as set forth in the Department of the Interior National Environmental Policy Act regulations at 43 C.F.R. § 46.225(d), your agency commits to maintain the confidentiality of documents and deliberations, including drafts, that are shared prior to the public release of the Final EIS. In the event that your agency receives a request for public release of Final EIS-related documents, your agency agrees to consult with OSMRE, through OSMRE's Office of Communications before a decision is made to release any documents. This consultation requirement applies to requests for information pursuant to your State Freedom of Information Act/Sunshine laws and must be carried out before any statutorily mandated release of such information. If your agency chooses not to re-engage as a cooperator, the Final EIS will note that, at your request, your cooperating agency status terminated on June 18, 2015.

If you have any questions about the process moving forward, please contact Harry Payne, Chief, Division of Regulatory Support at hpayne@osmre.gov or (202) 208-2895.

Sincerely,

Joseph G. Pizarchik
Director

As set forth in this letter the West Virginia Department of Environmental Protection, Division of Mining and Reclamation, accepts OSMRE's invitation to re-engage as a cooperating agency to assist OSMRE in preparing a Final EIS for the Stream Protection Rule.

_____ Date: _____

Harold D. Ward, Acting Director
West Virginia Department of Environmental Protection
Division of Mining and Reclamation