

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



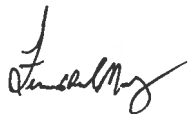
Steve Weinzapfel
Director
Division of Reclamation
Indiana Department of Natural Resources



Steve Hohmann
Commissioner
Kentucky Department for Natural Resources




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



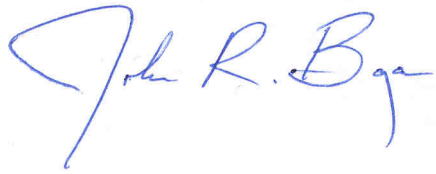
Fernando Martinez
Director
Division of Mining and Minerals
New Mexico Department of Energy, Minerals & Natural Resources



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



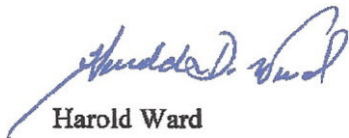
John E. Caudle
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John Baza
Director
Utah Division of Oil, Gas and Mining



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

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.