



WESTERN GOVERNORS' ASSOCIATION

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February 27, 2011

The Honorable Ken Salazar
Secretary of the Interior
Department of the Interior
1849 C. Street, N.W.
Mail Stop 7060
Washington, D.C. 20240

Dear Secretary Salazar:

On behalf of the Western Governors' Association (WGA), we are writing to express concerns over recent actions by the Office of Surface Mining, Reclamation and Enforcement (OSMRE) to comprehensively revise regulations regarding stream protection under the Surface Mining Control and Reclamation Act (SMCRA). These proposed changes, called the "stream protection rule," will apply nationwide and in the agency's own words are "much broader in scope than the 2008 stream buffer zone rule." WGA is an independent, nonpartisan organization of Governors representing 19 Western states and three U.S.-flag Pacific islands. The states in our territory produce 599 million tons of coal annually, representing 56% of the total U.S. coal production.

Several of our member states who are "cooperating agencies" have delivered a letter (see attached letter dated November 23, 2010) to your Director of OSMRE expressing serious concerns about the need and justification for both the proposed rule and accompanying environmental impact statement (EIS), as well as the quality, completeness and accuracy of the chapters of the EIS that they had the opportunity to review. WGA is also concerned by the procedures used by your agency in developing the EIS to support this rule. Members who are "cooperating agencies" on the EIS feel that they have not had a meaningful opportunity to comment on its contents, given the constrained time periods for reviewing and submitting comments.

WGA feels that the OSMRE has not provided a sufficient basis to support the need for sweeping regulatory changes. In fact, one of the primary justifications put forward by the agency in its Federal Register notice is a June 11, 2009 memorandum of understanding (MOU) between the Administrator of the U.S. Environmental Protection Agency, the Acting Assistant Secretary of the Army, and you. However, the MOU was specifically targeted at "Appalachian Surface Coal Mining," which expressly refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia." (See MOU at p. 1

and fn 1). Despite this limitation in the MOU, the OSMRE rules will be applied to coal mines throughout the United States, including coal-producing Western states that we represent.

Likewise, the agency has not provided objective data to support such comprehensive regulatory changes. OSMRE's most recent annual evaluation reports for Western states for 2010 strongly suggest otherwise. For example, the report for Wyoming, which produces more coal than any other state in the U.S. (almost 40% of the nation's total), says that: "...the Wyoming program is being carried out in an effective manner." The report also demonstrates significant and steady progress in reclamation, showing that the ratio of reclaimed to disturbed acres has steadily increased from 10% in 1988 to 45% in 2010. The report also stated that the state ensured that backfilled and graded areas will be returned to approximate original contour, that there have not been any public complaints about bonding, and that Wyoming has not had any bond forfeitures in recent years. Finally, despite OSMRE's insistence on a 78% increase in inspections, no enforcement actions were taken by OSMRE during 2009 or 2010. In OSMRE's own words, "this lack of additional enforcement actions, despite increased inspection frequency, helps to illustrate the effectiveness of the Wyoming's regulatory program."

Similar statements can be found in OSMRE evaluation reports on other WGA-member states. Here is a sampling of what OSMRE said about some of the other major coal producing states in the West:

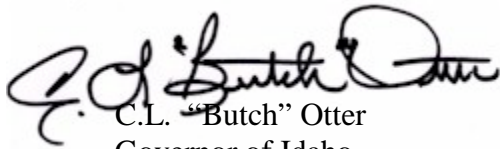
- North Dakota: "Overall, North Dakota has an excellent coal regulatory program."
- Montana: "...an off-site impact is defined as anything resulting from a surface coal mining and reclamation activity or operation that causes a negative effect on people, land, water, or structures outside the permit area...Off-site impacts were not identified during the reporting period."
- Utah: "...site conditions indicated that the state is effectively implementing and enforcing its program."
- Texas: "...the Office of Surface Mining finds that Texas is properly administering its regulatory and abandoned mine lands programs."
- Alaska: the "DMLW [Division of Mining, Land, and Water] is effectively maintaining and administering the coal regulatory program in accordance with the Alaska Surface Coal Mining and Reclamation Act."

WGA urges you to consider these reports on Western state coal programs, evaluate the proposed regulatory changes, and consider suspending further work on their implementation so that OSMRE can re-examine the purpose and need for these rules, and provide appropriate scientific and factual information to support rule changes of this magnitude. If after such evaluation and consideration the agency determines that rule changes are necessary, we request

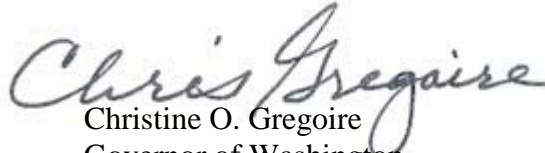
The Honorable Ken Salazar
February 27, 2011
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that OSMRE engage our member states and members of the public in a meaningful and substantial way.

Sincerely,

A handwritten signature in black ink, appearing to read "C.L. Butch Otter". The signature is stylized with a large, looped "O" at the end.

C.L. "Butch" Otter
Governor of Idaho
Chairman

A handwritten signature in black ink, appearing to read "Christine O. Gregoire". The signature is written in a cursive, flowing style.

Christine O. Gregoire
Governor of Washington
Vice Chair

Enclosure

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.

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,



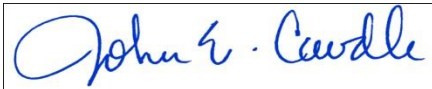
Randall C. Johnson
Director
Alabama Surface Mining Commission



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



John Corra
Director
Wyoming Department of Environmental Quality