

July 8, 2010

Allen Klein
Regional Director
Western Regional Office
Office of Surface Mining

Erv Barchenger
Regional Director
Mid-Continent Regional Office
Office of Surface Mining

This letter reflects the comments of the Interstate Mining Compact Commission and the Energy Minerals Reclamation Committee of the Western Interstate Energy Board concerning three reports recently released by the Office of Surface Mining (OSM) as part of its oversight improvement actions initiative. Our comments focus on potential problems that may arise from change in current oversight procedures. From a general perspective, we want to reiterate the importance of OSM providing the states with an additional opportunity to comment on these three reports once they are incorporated into OSM's oversight directive (Reg-8), which we understand will occur sometime later this summer. In some cases, the reports refer to charts, protocols or other materials that are not included with the reports but will appear as revisions to Reg-8 in the future. Furthermore, once all of the reports are consolidated together in Reg-8, it will be important for us to review the more comprehensive, final product to ascertain its impacts on the states and analyze how the various components work together. In this regard, it is likely that we will need a longer period of time than has been previously given to us for the review of the final version of Reg-8 and for the development of additional comments.

Throughout the three documents, there is reference to the continuing need for flexibility and discretion in designing oversight performance agreements, determining the number and nature of federal oversight inspections and evaluating and reporting on offsite impacts. As states, we believe this discretion and flexibility is critical, especially with regard to the regional differences that attend the regulation of surface coal mining operations and the significant variation among state programs in terms of size, complexity, available resources and number of inspectable units. We therefore encourage OSM to be mindful of and incorporate this flexibility and discretion throughout the oversight process.

Oversight Inspections

Oversight, by its very nature, is a state-specific effort. Furthermore, there are dramatic differences in coal mining operations from state to state. For example, Utah has only underground mines; several states have only surface mines; some have both; some have preparation plants with associated refuse areas; many do not; some states have only one mine; some less than five; and a few have several hundred mines; etc. There are also dramatic differences in the size and structure of the state regulatory agencies, the key

environmental issues faced by mining operations, and the issues of concern to the public in each state. It is essential that OSM recognize and reflect these realities in the development and implementation of its oversight inspection methodology.

OSM appears to imply (indirectly at least) that increasing the number of OSM oversight inspectors and inspections will essentially establish the fact that the allegations being leveled against the states regarding the ineffectiveness of program implementation are not true. Stated differently: the more independent and complete inspections that OSM undertakes, the greater the likelihood that the states' effective implementation of their regulatory programs will be confirmed due to the absence of uncited violations and the completeness and accuracy of state-issued permits. However, this premise is hugely dependent on the quality of OSM's inspector force, especially with respect to its understanding of site conditions, state programs, and state permits.

Our experience has been that OSM inspectors do not always understand the intricacies and nuances of state regulatory programs; are not fully familiar with state-issued surface coal mining and reclamation permits; and are far less familiar with individual mine sites than the state inspector. Add to this the fact that OSM will likely need to supplement its current inspection force with new hires or transferred personnel who may have little or no familiarity with SMCRA, much less state programs, and OSM's premise completely falls apart. Thus, while we would like to buy into OSM's suggestion that these oversight improvement actions are "good for us" and will validate the effectiveness of our programs, we anticipate the very opposite could occur. We are concerned that second-guessing of state-issued permits and issuance of inaccurate or frivolous federal violations will develop and may return us to the antagonistic and counterproductive days of the early oversight years, which did little but alienate and divide the states and OSM from one another.

Furthermore, before OSM considers reallocating its resources to an expanded federal inspection work force (and potentially away from other OSM programs that directly support and assist the states), we request that OSM consider investing additional resources in program improvements that would enhance state primacy. These would include equipment purchases, IT support and perhaps the use of intergovernmental personnel transfers or interns. Given the financial constraints under which states are currently operating, and the struggle that some are facing in meeting their state match for Title V grants, these types of non-match investments would greatly assist the states in meeting their program responsibilities, especially as they are able to allocate additional state and federal moneys toward program implementation.

It should be kept in mind that "oversight" does not necessarily equal "inspections". Inspections, independent or otherwise, are only a part of an effective oversight program. There are many aspects of a state program that can be reviewed through some form of auditing or performance review, including bonding activity (calculations, documents, releases), permitting actions, public participation requirements, etc. Placing significant resources into inspections would seem to foreclose or curtail

other appropriate actions by OSM that could make a difference in evaluating state program performance.

Number of oversight inspections

Before moving forward with this initiative, the following questions must be answered: How will environmental protection under SMCRA be improved by these additions? To the extent that this initiative will require a realignment of existing OSM resources, what will the impact be on other SMCRA programs (such as training and technical assistance), which also undergird the goal of environmental protection by supporting state regulatory programs? What metrics will OSM establish to determine how many inspections are enough?¹

The level of detailed information and conclusions in the current annual reports for each state indicates that OSM is well aware of what is going on in each state. The 90% reduction in citizen complaints over the last 20 years (many states had none in 2008) also supports the conclusion that states are doing a much better job and does not support the view that OSM needs to do more inspections in order to know what is going on.²

The number of active coal mines in the United States has decreased substantially over the past 20 years, while the size and complexity of individual mining operations have generally increased (as has total production). Thus, the number of inspections needed is reduced, but their complexity may have increased. This is further complicated by how mining operations may be/have been broken up (or lumped) by regulatory authorities into inspectable units.

If OSM wants to seriously reevaluate its allocation and use of inspection resources, it should first look at its current distribution of those resources as shown in table 3 (Page 65) of the FY 2011 budget justification. How do the number of inspections in the various states relate to the goals and objectives of oversight; to actual on-the-ground problems; and to the complexity of each state's program?

The statutory mandate is that OSM should conduct those inspections "necessary to evaluate the administration of approved state programs." 30 U.S.C. § 1267(a). That is *the* purpose of oversight inspections. How many inspections does that amount to? Why is 1,400 a year insufficient? Absent some conclusion by OSM that it is unable to determine how one or more states are implementing their programs (and any justification here should be state-specific), and that OSM lacks the resources to find out, it has not demonstrated a need for more inspectors or inspections.

¹ For example, in evaluation year 2010, OSM increased its inspections in the West by over 50% from evaluation year 2009, resulting in inspections of approximately 40% of the inspectable units in each state. The increased inspections did not show any increase in TDNs and actually showed decreases in NOV's in a number of states. Was this increase in inspections a waste of resources? Upon what basis will OSM make an informed judgment on an optimal level on inspections?

² As a further indication of progress, we note that twenty years ago, Congress would hold two to four oversight and/or budget hearings each year focused solely on OSM. Now, when called at all, OSM is a minor player in multi-bureau hearings on Interior's budget.

As referenced above, it should be noted that the number of oversight inspections will be dependent on OSM's available, experienced staff. Oversight inspections would need to be conducted by OSM personnel with significant knowledge and experience with the surface coal mining and reclamation operations in the particular state. In order to conduct more oversight inspections, OSM would, by necessity, have to pull staff from other program areas within OSM. These staff will not be trained to do inspections and it will take considerable time to adequately train these individuals on how to properly conduct inspections. This training will, by necessity, require existing OSM inspection staff to accompany the inexperienced staff for a considerable time prior to being able to conduct oversight inspections alone. This shifting of staff within OSM can have a serious impact on the technical assistance states routinely request from OSM's technical staff. Utilizing technical staff for inspections will impact not only the states, but OSM as well. Using a highly trained technical staff person to do inspections will result in that person not being available to perform his/her normal technical duties, including technical assistance to the states, OSM, and technical class training events. We encourage OSM not to reduce the technical assistance available by pulling from its technical staff to conduct oversight inspections.

In short, OSM has not made the case in this paper that it has insufficient inspectors or conducts insufficient inspections to evaluate the implementation of each and every approved state program. In order to make such a case, it would need to do it on a state by state basis showing the deficiencies in its evaluation for each state.

Joint vs. independent inspections

The arguments presented for more independent inspections look much the same as the arguments rejected by OSM when it finalized 30 CFR § 842.11(a)(1) over 27 years ago when oversight inspections were just beginning. The rule mandates, where practical, joint inspections if the state so requests. The principal argument in favor of the current rule was to foster improved communication between states and OSM. 47 FR 35627. While OSM says it wants to revisit the issue, it has laid out no basis (through experience or otherwise) to refute the wisdom of the current rule. We believe the record shows that OSM's initial reliance on the importance of communication in promulgating the current rule was exactly right and to undo that would be counterproductive.

We also take issue with OSM's view that independent OSM inspections have more credibility than joint inspections. It is our experience that state inspectors are in a better position to give serious consideration to an OSM inspector's views if they are able to stand alongside that OSM inspector and discuss what they are seeing together, rather than just seeing an after-the-fact written report, which will then require them to conduct another inspection in order to respond in writing within the next 10 days. Mandating a process that relies on written exchanges without face-to-face discussion is totally counter to the very concept of good communication and can result in a significant waste of resources.

The rule is clear on its face, and if OSM does not want to adhere to it, then it must change it in accordance with the protocols set forth in the Administrative Procedure Act (APA). This will require OSM to lay out a basis and purpose for doing so and providing an opportunity for comment. Any nationwide OSM mandate by Directive for a certain percentage of independent inspections would be a violation of OSM's current rule. In "taking the measures necessary to articulate OSM's authority" to conduct independent oversight inspections without prior notification to the state, besides articulating those authorities, OSM should also explain why this is necessary in the first place.

Our objections to independent oversight inspections aside, we are encouraged that OSM adopted some of our suggestions with regard to how independent oversight inspections will be handled. Providing the states an opportunity to accompany the federal inspector is critical and reflects a recognition of the primacy role played by the states under SMCRA. However, we believe that in certain regions of the country, particularly the West, OSM may need to provide additional time for this notification in order to allow a reasonable time for the state inspector to meet up with the federal inspector. Since states do not notify coal operators about inspections, this should not prove problematic.

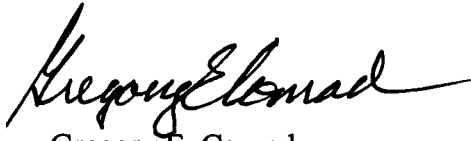
We also support OSM's decision to allow a state to issue any notices of violation identified during an independent oversight inspection prior to the issuance of a Ten-Day notice. Again, this recognizes the appropriate role of the states as primary regulatory authorities within their borders. However, it would be helpful if OSM could clarify how this would play out in a typical federal oversight inspection. For instance, if the OSM inspector notes a settleable solid effluent violation via testing with an Imhoff Cone and the state inspector shows up later the same day and the discharge is in compliance, what is the state to do? Another example relates to a flyrock violation that does not amount to an imminent harm situation. If the flyrock has been removed and is no longer present when the state inspector arrives on the scene, what action should the state inspector take? If the state inspector does not witness the violation, there is no action to take and OSM would be hard pressed not to consider the state's decision not to issue a citation as appropriate action. In our view, these types of examples make the case for joint inspections.

Oversight Outreach

With regard to the oversight outreach report, there are several new opportunities provided for input by the public to the oversight process and the majority of these are the responsibility of OSM. Our primary concern with these outreach opportunities is that they do not unduly impinge on state resources, given the limitations on those resources and recent proposals by OSM to reduce funding for state Title V grants. While we see the value of outreach and are willing to do our part, to the extent the outreach plan places new burdens on the states without the resources to accomplish them, we would have serious concerns. Any realignment of oversight activity to focus heavily on outreach may require an adjustment in other oversight priorities and OSM should therefore exercise caution in new mandates that strain limited resources.

Thank you for the opportunity to submit these comments. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,



Gregory E. Conrad
Executive Director
Interstate Mining Compact Commission



Douglas C. Larson
Executive Director
Western Interstate Energy Board