

January 7, 2011

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

Dear Director Pizarchik:

This letter represents the comments of the Interstate Mining Compact Commission (IMCC) and the Reclamation Committee of the Western Interstate Energy Board (WIEB) concerning three draft documents recently released by the Office of Surface Mining (OSM) as part of its Oversight Improvement Actions initiative. The documents consist of a new directive on “Ten Day Notices” (INE-35), a revised directive on “Corrective Actions for Regulatory Program Problems and Action Plans” (REG-23) and a revised directive on “Oversight of State and Tribal Regulatory Programs” (REG-8). Together, these three documents represent the heart of OSM’s oversight procedures and policies under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and its implementing regulations. Given the fact these are OSM directives, they are binding on OSM only and cannot, in and of themselves, affect the rights (or impose or alter obligations) of the states beyond the requirements in SMCRA and the Secretary’s regulations. Nonetheless, given the nature and scope of these documents, they are of critical importance to the state regulatory authorities that we represent. Several of our member states implement approved regulatory programs under SMCRA and are therefore subject to the federal oversight process anticipated by the Act and addressed by these three draft documents.

We alerted OSM to our initial concerns with the direction and approach that the agency was taking with respect to federal oversight in comments we submitted to OSM on January 19th of last year. Since that time, we have submitted additional comments on various components of the oversight initiative (see our comments of July 8, 2010) and have also had occasion to meet with OSM both formally and informally to discuss the agency’s actions. The most recent draft documents not only fail to reflect the nature and substance of our comments and discussions to date, but appear fully committed to a preconceived decision regarding the need for a strong command and control approach by the federal government to the implementation of SMCRA in ways not supported by the Act and the Secretary’s own regulations.

We are well aware of the fact that the majority of OSM’s oversight improvement actions have been in response to a June 2009 Memorandum of Agreement between the Interior Department, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers. These three directives, in particular, represent commitments made by the Interior Department under the MOU to “remove [alleged] impediments to OSM’s ability to require correction of permit defects in SMCRA primacy states” and “to reevaluate and determine how OSM will more effectively conduct oversight of state

permitting, state enforcement and regulatory activities under SMCRA.” However, nowhere during the time since the MOU was released and over the course of OSM’s release of its various oversight improvement actions has the Interior Department or OSM articulated exactly what its vision or philosophy is for oversight. And while we have now seen a plethora of proposed approaches for handling the specifics of oversight (such as the use of Ten Day Notices, oversight inspections, and data collection and analysis), we continue to be at a loss for OSM’s overall objective for these various approaches.

In the comments that follow, we present our perspective on what oversight means and how it is to be conducted consonant with the requirements of SMCRA and OSM’s regulations. Much of our philosophy regarding federal oversight is the result of a collaborative process that began in the early 1990’s through federal/state discussions and negotiations about the meaning of oversight and our respective roles in the process. Interestingly, where we ended up with the specifics of the process (via Directive REG-8) is completely consistent with SMCRA and OSM’s regulations, as it obviously should be. However, OSM’s new direction, as evidenced by its various oversight improvement actions and in particular the three directives that are the subject of this letter, suggests that the agency has changed its philosophy about oversight, and along with it, the specific approaches that align with this significant policy shift.

We are extremely concerned that this cultural shift by OSM will completely undermine the progress that we have made in this area over the years. It will also stifle the innovative ideas and approaches that have been the hallmark of our regulatory programs and the oversight process in recent years, particularly as states put forth new ways of dealing with what have often been viewed as intractable issues. A heavy-handed approach to oversight, in which state permitting decisions are second-guessed and differences of approach to environmental challenges are rejected in favor of a one-size-fits-all criterion, discourages new thinking about problems and inevitably makes a mockery of primacy and all that it stands for.

While we set out many of our concerns in the comments that follow, along with both legal and statutory support and suggested changes to the directives, the issues and the procedures addressed by these directives do not lend themselves well to paper arguments. We believe it is therefore essential that we sit down with you, our federal partners, and talk through our concerns and work through the details of a realistic approach to oversight. We have done this in the past with remarkable results. In fact, the current oversight directive (which is still in effect) calls for the Oversight Steering Committee to “analyze the implementation and results of oversight policies, standards and procedures to ensure that the objectives of SMCRA are achieved.” This Committee should be convened to undertake a detailed review of the proposed revisions to both REG-8 and REG-23. A separate working group should be composed to address INE-35 and the implications of reinstating this directive. In the meantime, we urge your serious consideration of the following comments as you contemplate next steps in the federal oversight process.

Introduction and Background

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) is one of several laws passed in the environmental decade of the 1970s that provided for a cooperative and somewhat unique blend of federal and state authority for implementation of its provisions. One of the law's key underpinnings was that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the states with an oversight role accorded to OSM. It has taken a good portion of the past thirty years to sort out the components of these often competing roles, but the result has been a balance of authority that generally works.

The first attempt at designing a meaningful oversight program in the early 1980's (following on the heels of primacy program approvals) was primarily an exercise in data gathering or output measurement. We were concerned then with numbers of inspections, numbers of permit reviews and numbers of enforcement actions. However, the numbers that were collected into oversight reports told us little or nothing about whether the objectives of SMCRA were being met. OSM also tended to look behind state permitting decisions to determine whether OSM would have handled them in the same way. This type of paternal "second-guessing" generated significant conflict and even resentment between the states and OSM. Rather than a statistics-gathering/second-guessing approach, it made more sense to focus on the following: what was happening on the ground?; how effectively were state programs actually protecting the environment?; how well was the public being protected and how effectively were citizens being served?; how well were we working together as state and federal governments in implementing the purposes of SMCRA?

Following an effort by OSM and the states in the late 1980's to fashion a more effective state program evaluation process based on a goal-oriented or results-oriented oversight policy and another review of the process in the mid-1990's, a performance measurement approach was adopted, based in large part on the requirements of the Government Performance and Results Act (GPRA). The new outcome indicators focus on the percentage of coal mining sites free of off-site impacts; the percentage of mined acreage that is reclaimed (i.e. that meets the bond release requirements for the various phases of reclamation); and the number of federal, private and tribal land and surface water acres reclaimed or mitigated from the effects of natural resource degradation from past coal mining, including water quality improvement and correction of conditions threatening public health or safety. These new measurements are intended to provide Congress and others with a better picture of how well SMCRA is working and how well the states are doing in protecting the public and the environment pursuant to their federally-approved programs.

From the time of initial state program approvals (from 1980 through 1982) until Robert Uram was confirmed Director in 1994, far more effort and resources were spent arguing and litigating over the validity of issues raised by OSM during oversight than in

trying to find solutions. Furthermore, the regulated coal industry was constantly caught in the middle of disputes between OSM and states. By 1993, it had reached the point where IMCC submitted a petition for rulemaking in order to return some meaning to primacy as intended by SMCRA. (*See* 58 FR 54594, August 17, 1993, copy attached).

Before Director Uram arrived in March 1994, Secretary of Interior Bruce Babbitt brought in outside leadership on a temporary basis and launched a broad review of OSM in an effort to understand why there was such a high level of controversy surrounding OSM and its programs. Although Director Uram made organizational changes that partially addressed this issue, the primary change he implemented was the approach to oversight embodied in current Directive REG-8. Those changes, and the work of the state/federal Oversight Steering Committee that helped to direct them, were recognized by Vice President Gore with a “Hammer Award” under the National Performance Review for helping “to build a government that works better and costs less”. State performance-based programs have also received national recognition for their effectiveness and efficiency.

In addition to a re-examination of the oversight process, the antagonistic environment between OSM and the states led to the development of the “Ten-Day Notice” rule in 1988 (30 CFR Section 843.12). That rule was not fully and effectively implemented until the Clinton Administration under the leadership of Director Uram following the rule’s validation in federal court in 1994. In response to the continued tensions between OSM and the states, and partially in response to IMCC’s rulemaking petition on appropriate federal oversight and enforcement action in primacy states, Director Uram developed “Principles of Shared Commitment” which served as the basis for the joint development by OSM and the states of the oversight policy (REG-8) that is still in operation today.¹

As a result, during the past fifteen years, the working relationship between the states and OSM has been much more productive and non-contentious. We have moved beyond the second-guessing of state decisions that predominated the early years of state program implementation and instead are engaged in more cooperative initiatives where OSM strives to support the states through technical advice and training and where the states and OSM work together to solve difficult policy and legal questions. OSM’s oversight program is more focused on results, looking at on-the-ground reclamation success and off-site impacts, which better reflect the true measure of whether the purposes of SMCRA are being met.² We articulated many of these perspectives in a

¹ The TDN rule was also in partial response to a rulemaking petition by industry on federal NOV authority. In addition to clarifying the “appropriate action” and “good cause” criteria with respect to state responses to TDNs, it also provided states an appeal process as part of the TDN process within which to raise their concerns.

² In the most recent official statement by OSM regarding federal oversight of state programs, former OSM Director Brent Wahlquist stated the following at an oversight hearing conducted on November 13, 2007 by the Senate Committee on Energy and Natural Resources concerning “The Surface Mining Control and Reclamation Act of 1977: Policy Issues Thirty Years Later”: “The first years after SMCRA’s passage were filled with controversy, contention, litigation, and uncertainty. OSM faced the challenge of striking the proper balance between oversight, direct enforcement, and assistance, in order to promote both quality

letter to the Obama/Biden Transition team dated December 4, 2008, a copy of which is attached. It includes a resolution on state primacy adopted by the IMCC member states, which we hereby incorporate by reference.

Unfortunately, almost everything OSM has laid out in its recent Oversight Improvement Actions documents seems designed to undermine these accomplishments and return us to a time when OSM was at its maximum size and its ineffective worst. What is contemplated by OSM's suggested approach is far more than a reexamination of the process to improve/enhance oversight – it is closer to a complete reinvention, in contravention of the Secretary's rules. It appears to be the dismantling of a good oversight product and the replacement of it with an older and much more expensive model that has already proven to be ineffectual.³

Draft Directive INE-35 re Ten-Day Notices

Overview

The primary premise behind OSM's newly revised directive on TDNs rests on a decision by OSM Director Pizarchik that is contained in his memorandum dated November 15. In that memorandum, Director Pizarchik states that “this guidance clarifies that OSM's TDN and pertinent Federal enforcement regulations at 30 CFR Parts 842 and 843 apply to *all* types of violations, including violations of performance standards or permit conditions and violations of permitting requirements.” Director Pizarchik notes the effect of this decision is to “reject the rationale set forth in the *Metiki* decision and to reaffirm OSM's historic position on this issue.” There are myriad problems with the Director's memorandum and its rationale which we will address below.

Firstly, we do not believe that a Departmental decision rendered by an Assistant Secretary on behalf of the Secretary of the Interior can be summarily reversed by a Bureau Director with the concurrence of a Deputy Assistant Secretary, as was done here. The letter decision of October 21, 2005 rendered by then Assistant Secretary Rebecca Watson was clearly designated as a “final decision of the Department of the Interior” and was based on a substantive review of SMCRA provisions as interpreted by Federal court

state programs and achieve a high level of industry compliance. Through the years, efforts to clarify OSM's oversight role, increase cooperation with states, develop a training program, provide technical tools, and promote technology transfer have largely eliminated the highly contentious relationship with states and other interested parties that existed during the early years of SMCRA. We believe that OSM has succeeded in its efforts to develop and implement a stable regulatory structure that achieves the desired balance between environmental protection and energy production, while respecting the role of states as the primary regulators.”

³ Nowhere in OSM's Oversight Improvement Actions document has OSM suggested, much less substantiated, that it has missed something in its evaluation of state programs, or been precluded from conducting effective federal oversight. In contrast, a review of data submitted as part of the state program evaluation process over the past 20 years (and reported in OSM's annual reports to the public) demonstrates that there has been a dramatic reduction in citizen complaints, TDNs and federal enforcement in primacy states.

decisions. Hence it remains the position of the Secretary and is binding on OSM until such time as either the Secretary chooses to reverse it or a federal court rules otherwise.

Secondly, Director Pizarchik states that his decision “reaffirms OSM’s historic position on this issue.” However, OSM’s position is irrelevant if it is in conflict with the Secretary’s position regarding SMCRA and the Secretary’s own regulations. Further, history shows that OSM has struggled with its position on whether TDNs should apply to “all types of violations”, and specifically whether TDNs should be issued to state regulatory authorities with respect to permit defects. As far back as 1987, OSM has issued a series of directives, reports and recommendations attempting to articulate the appropriate balance of jurisdiction and programmatic responsibility with respect to federal oversight of state permitting decisions. Letters from IMCC to OSM concerning the matter over the period 1995 – 1997 during the Clinton/Gore Administration are attached that evidence the wide range of discussions that occurred during this period and that eventually led to revised versions of INE-35 to accommodate state concerns. However, occasional confusion and concern related to the oversight of state permitting decisions continued and thus the Secretary rendered a final decision on the matter in the *Metiki* case, which ultimately led to the rescission of OSM’s sixth iteration of INE-35 in 2006.

Interestingly, since the rescission of the last version of INE-35 in 2006, there have been few cases that we are aware of where OSM felt the need to rely on the use of a TDN to address state permitting issues. The only exception is the recent TDN issued to the state of Oklahoma involving Georges Colliers, Inc. (Permit 54/86-4105), which we will discuss later in our comments. We believe that over the past five years, to the extent that there have been OSM concerns regarding state permitting matters, these have been appropriately handled under the state program oversight process pursuant to OSM’s Directive REG-8. This is as it should be given OSM’s limited statutory role to oversee the administration of state regulatory programs, which includes the state permitting process, but not individual permits. More on this later in our comments.

Thirdly, there is the matter of legal support for Director Pizarchik’s November 15 memorandum. The memorandum references the legal advice received from the Office of the Solicitor regarding the use of TDNs in primacy states. However, short of the November 16 decision document in the Oklahoma TDN case referenced above (which contains some limited jurisdictional analysis), we have not seen this larger legal analysis. Given the significance of the Director’s reversal of the Secretary’s decision in the *Metiki* case, which included extensive legal analysis of its own from the Solicitor’s office, we believe it is critical that the Director release this analysis for our review.

Importantly, beyond the lack of a rational basis in the Director’s November 15, 2010 memorandum refuting the carefully articulated legal analysis laid out in Secretary Watson’s decision, the changes being contemplated in revised directive INE-35 dramatically affect the rights of both state regulatory authorities and mine operators and thus constitute rulemaking subject to the Administrative Procedures Act (APA). Any significant adjustments to these rights must occur through a formal rulemaking process

that lays out a basis and purpose for the rule demonstrating why it is needed and how it is consistent with SMCRA – hurdles that, as explained in more detail below, cannot be met.

Secretary Watson’s decision in the *Metiki* case laid out broad principles of general application in reaching a case-specific decision. However, despite its broad circulation, no one stepped forward in any forum with jurisdiction to challenge the merits of the decision’s arguments or to claim that it reflected a change in policy. Rather, as elaborated upon below, in 2007, the Secretary referenced this decision and its rationale in support of removing Section 843.21 from the CFR after receiving comments strongly supporting both the proposed removal and the rationale for such a change in the proposed rule. No negative comments were received on either the rule’s removal or the rationale behind doing so.

The Director’s memorandum refers to the “confusion” that has allegedly attended OSM’s oversight and enforcement responsibilities with respect to permitting issues arising under state regulatory programs, purportedly attributable to the departmental decision in the *Metiki* case. Based on our experience, there appears to be little in the way of confusion at the OSM staff level that we are aware of, especially given the clear articulation of the department’s position concerning the use of TDNs to challenge state permitting decisions in the *Metiki* decision document. To the contrary, we believe it is the Director’s memorandum that will lead to new confusion and potential controversy. As we explain below, Section 521 of SMCRA and the agency’s regulations at 30 CFR Parts 842 and 843, when read in context with all relevant provisions in SMCRA, were never intended to apply to state permitting decisions.

But as importantly, OSM’s decision to boldly declare in the November 15 memorandum and the revised version of INE-35 that TDNs apply to “all violations of permitting requirements” in primacy states makes no practical sense and will lead to the very confusion OSM hopes to avoid. There are several related problems here:

- OSM intermixes the use of terms like “permit defect” and “permitting violation”. Clearly SMCRA and OSM’s implementing regulations are structured to assure that all permit requirements and permit conditions are complied with by mine operators and that violations of those requirements or conditions lead to enforcement action by the regulatory authority. However, where OSM determines that a state (as opposed to a mine operator) is failing in some way to comply with the permitting provisions of its approved program, the only appropriate route for OSM to pursue is limited federal intervention that is permissible after following the applicable notice and hearing requirements set forth in sections 504 and 521 of SMCRA and further elaborated upon in Part 733 of OSM’s rules. If by its use of the term “permitting violation”, OSM means violations of a state-issued permit by a mine operator, then the ten day notice requirements of section 521(a)(1) would be applicable. If, however, OSM means differences of opinion between itself and the state regarding appropriate implementation of the state’s permitting function, then the notice and hearing provisions of section 521(b) come into play (following an impasse between the

state and OSM to resolve the matter). It matters little whether this involves one permit decision or a series of permitting decisions – in every case where there is a difference of opinion between state and federal regulatory authorities (whether self-initiated by OSM as part of program oversight or triggered by a citizen complaint), SMCRA sees this as a programmatic issue requiring resolution through the Part 732 and 733 process, failing all else.

- The use of the term “violation” throughout SMCRA and OSM’s own regulations envisions an act of noncompliance by a mining operator for which abatement is possible. (See definition of “violation” at section 701.5). OSM’s regulation at 843.12 reinforces this understanding when it refers to OSM’s authority to issue NOV’s “during federal enforcement of a state program under section 504(b) *or* 521(b) of the Act *and* Part 733 of this chapter”, meaning after the notice and hearing required for federal takeover of all or part of a state program, after which OSM then becomes the regulatory authority responsible for enforcing the provisions of the state-issued permit. Any other interpretation leads to absurd results. For instance, let’s assume that OSM believes a state did not follow its program requirements for a cumulative hydrologic impact analysis (CHIA) and thus asserts that the state “violated” this permitting component of its state program and that the permit is therefore “defective”. If OSM issues a TDN to the state, and the state refuses to take further action (based on its belief that it fully complied with its program requirements), under OSM’s reading of the Act and its rules, it would be authorized to issue a notice of violation to the mine operator. What would OSM require for abatement of the violation? That the operator force the state RA to revise the permit? What if the state refuses? The operator would then be faced with a cessation order for something he had no ability to control or abate. Would OSM further consider the permit “invalid”, thereby subjecting the operator to a charge of “mining without a permit”? If so, an imminent harm cessation order would be the order of the day and a TDN wouldn’t be needed in the first place. Let’s assume that the state agreed from the outset to address the specific defect alleged by OSM. If the state continued to abide by its view of CHIA determinations under its approved program for other permits, OSM would be faced with a continuing round of TDNs, rather than focusing on the programmatic issue through oversight discussions or, if all else fails, a federal takeover of this aspect of the state program.
- The definition of what types of “violations” lead to TDNs is further complicated by the language used in OSM’s draft TDN directive (INE-35), wherein a “permit defect” is defined as a type of “violation” consisting of “any procedural or substantive deficiency in a permit-related action taken by the RA.” Several examples follow, including the broad criterion “an error in the analysis of technical or other information of plans.” It was this very type of second-guessing language that generated so much confusion and controversy in the past. Essentially, any difference of opinion between an OSM field office oversight inspector and a state permit reviewer will result in a violation of SMCRA, thereby leading to a TDN and eventual federal enforcement action. Not only does this fly in the face of primacy under SMCRA, it will also result in a monumental waste of government resources due to intergovernmental squabbling. Furthermore, these

types of permit “defects” are not violations attributable to the operator; they are programmatic issues between OSM and the state that can only be addressed through direct interaction between these two parties and outside a process that is focused on enforcement against an operator. Clearly the situation begs for a different approach to oversight, as eluded to above.

Legal and Statutory Framework

The Surface Mining Control and Reclamation Act establishes a two-phased implementation scheme for the regulation of surface coal mining operations. The first stage, or “interim program”, involves the promulgation of federal standards implementing certain aspects of SMCRA with federal enforcement of those standards accompanied by continuing, or concurrent, state regulation. 30 U.S.C. § 1252. The second phase, or “permanent program”, is to be adopted in each state through a state or federal program “with enforcement responsibility lying with either the State or Federal Government.” *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 269 (1981) (emphasis added). If a state receives approval of its program, it assumes exclusive jurisdiction, or “primacy”, over the regulation of surface coal mining operations within its borders, 30 U.S.C. § 1253(a) and the “statute does not provide for concurrent jurisdiction in the states and federal government.” *Haydo v. Amerikohl Mining Co., Inc.*, 830 F.2d 494, 497 (3d Cir. 1987). *See also id.* at 497 (“We have encountered nothing . . . which leads us to believe that anything other than the ordinary meaning of ‘exclusive’ was intended.”)

In a primacy state, it is the state law, state regulations and a state-issued permit which apply and establish an operator’s obligations. 30 U.S.C. § 1253(a); *Haydo*, 830 F.2d at 498; *In Re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (D.C. Cir.) (*en banc*), *cert. denied sub nom., Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981) (*Surface Mining Regulation Litigation*); *National Wildlife Federation v. Lujan*, 928 F.2d 453, 464 n.1 (D.C. Cir. 1991) (Wald, J., concurring). Neither SMCRA nor the federal permanent program rules apply in a primacy state. *Lujan*, 928 F.2d at 455 n.1. *See also Hodel*, 452 U.S. at 271 (permanent program is not self-implementing, but becomes effective through the approved state or federal program under Sections 503 or 504). At best, SMCRA and federal rules only establish standards for the approval of state programs. *Haydo*, 830 F.2d at 498 n. 2. Pursuant to a state program, the state applies the national standards to the local conditions in that state through the implementation of its program requirements. Once the Secretary approves the state program as capable of meeting the Act’s requirements, he “is not directly involved in local decision making.” *Surface Mining Regulation Litigation*, 653 F.2d at 518. The state becomes “the sole issuer of permits . . . [and] permit decisions are matters of state jurisdiction in which the Secretary plays no role.” *Id.* at 519.

Just as the state program is the law in a primacy state, the state-issued permit applies the law and establishes the permittee’s obligations. The primacy state, as the sole issuer of permits, decides:

Who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. The state . . . inspects the mine to determine compliance; [and] [w]hen permit conditions are violated, the state is charged with imposing appropriate penalties.

Surface Mining Regulation Litigation, 653 F.2d at 519 (citations omitted). Thus, when it assumes exclusive jurisdiction over the regulation of surface coal mining operations, the state, as the "regulatory authority", performs the duties and functions required under SMCRA through state laws and regulations.

The primary means of guaranteeing "effective state programs" is the state program approval process exercised by the Secretary. The principal components required of a state program are:

- A state law for the regulation of surface mining operations in a manner consistent with SMCRA;
- Sanctions for violations of state law, regulations, and permit conditions;
- State law which provides for effective implementation, maintenance, and enforcement of a permit system consistent with SMCRA.

30 U.S.C. § 1253(a).

These requirements include a permitting system that provides procedures, public participation, and appeals; citizen complaints; and appeals of the state authority's decisions on those complaints. 30 CFR § 732.15(b)(10). In other words, state permits are issued under state laws and are subject to state procedures and remedies the state adopts in order to obtain regulatory authority under the Act. *Cf. Laurel Pipeline Co. v. Bethlehem Mines Corp.*, 624 F.Supp. 538, 539-41 (W.D. Pa. 1986); *Lujan*, 928 F.2d at 464 n. 1.

The Secretary of the Interior maintains an oversight role once the state has assumed jurisdiction and how this oversight is performed goes directly to the issue of the allocation of authority under SMCRA between the state and federal governments. Typically, this oversight role is carried out through occasional federal inspections of "surface coal mining and reclamation operations . . . to evaluate the administration of approved state programs." 30 U.S.C. § 1267(a). In one of the first opinions surveying the statute and its allocation of authority, the U.S. Court of Appeals for the District of Columbia characterized the state program approval process as the "Secretary's primary means of guaranteeing effective state programs," *Surface Mining Regulation Litigation*, 653 F. 2d at 520 (emphasis added); and the court described the federal takeover of a state program under Section 521(b) of SMCRA as "the Secretary's ultimate power over lax state enforcement." *Id.* at 519.

As the federal courts have repeatedly held, and as the Interior Department has confirmed, SMCRA's allocation of exclusive jurisdiction was "careful and deliberate". Congress provided for "mutually exclusive regulation by either the Secretary or state, but not both." *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 293-4 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002). *See also Pennsylvania Federation of Sportsmen's Clubs, Inc., v. Hess*, 297 F.3d 310, 318 (3d Cir. 2002).

The June 11, 2009 Memorandum of Understanding among the U.S. Army Corps of Engineers, the Department of Interior, and the Environmental Protection Agency obligates OSM to "remove impediments to its ability to require correction of permit defects in SMCRA primacy states." Frankly, we believe OSM has several options that it can legitimately pursue when it has reason to believe that a state is not appropriately implementing its permitting requirements. OSM simply lacks the authority to take direct enforcement action against operators for perceived defects in state-issued permits as well as the authority to directly require changes in those permits without going through the procedures outlined in 30 CFR Part 733 and Section 521(b) of SMCRA to take over enforcement and permitting. That lack of authority cannot be altered or overcome by issuance of a new Directive INE-35 since Directives are only internal policy guidance to OSM staff and cannot impose or create obligations on outside parties. That can only be done by changing SMCRA and/or the Secretary's regulations.

In any discussion of alleged permit "defects", it is important to reiterate an overriding principle that is often overlooked: namely, any existing permit for a coal mining operation issued under SMCRA, including those issued by state regulatory authorities, is, **by definition**, in full compliance with SMCRA and the regulatory program since, under 30 CFR § 732.15, the duly authorized regulatory authority has, after opportunity for public input, made written findings to that effect before issuing the permit.

For those who disagree with a permitting decision (including a permit recipient who may disagree with restrictions contained in that permit), SMCRA (section 514) and its implementing regulations (30 CFR Part 775) prescribe administrative and judicial procedures and timeframes for challenging that decision. Further, the regulatory authority, subject to administrative and judicial review, may, by order (after preparing written findings to support the order), subsequently require permit revisions "to ensure compliance with the Act and the regulatory program." 30 CFR § 774.10(b). However, the revision provisions serve to strengthen the view that an existing SMCRA permit is, by definition, in full compliance with SMCRA and the regulatory program unless and until a duly authorized body, under the limited procedures identified above, concludes otherwise.

While the States feel this issue has always been clear, we acknowledge that, because of a failure to look critically at SMCRA, its own rules, and Court rulings, OSM has taken various positions on this issue as reflected in, among other things, its six iterations of Directive INE-35 from 1987 through 1995, before it finally rescinded that directive in 2006. Years of frustration with OSM over its abuse of the TDN process as

reflected in INE-35 led IMCC to submit a petition for rulemaking in 1993. The petition laid out our objections to using the TDN process to raise alleged permit defects to a state regulatory authority. (See 58 FR 43603 – 43608) That discussion is hereby incorporated by reference into these comments. Some of the points made in that discussion are also made below for emphasis.

The issue of using the TDN process in permitting oversight was clarified for OSM in the October 25, 2005 letter decision in the *Metiki* case by the Assistant Secretary for Land and Minerals Management in response to a state request to review a decision by an OSM field office to conduct a federal inspection in response to a citizen's complaint alleging defects in a state-issued permit even though no activity had yet been initiated on the ground. That letter decision was a final decision on behalf of the Department of Interior and led OSM to rescind INE-35 in 2006. That decision also caused OSM to reconsider its regulations at 30 CFR § 843.21 providing OSM enforcement authority against improvidently issued state permits (the first two iterations of this rule had been struck down by the Court of Appeals for the District of Columbia Circuit and the third iteration was subject to further revision as required by a settlement with the National Mining Association to resolve pending litigation challenging it). After notice and comment (no opposing comments were received) OSM removed 30 CFR § 843.21 in its entirety on December 3, 2007. In doing so it stated:

Its removal provides greater regulatory stability through clarification of the State/Federal relationship related to permitting in primacy States, which has been a source of great confusion for many years. 72 FR 68024

Under SMCRA and the Federal regulations, permitting is an entirely separate function from inspections and associated enforcement. Regulatory provisions related to permitting are found in Subchapter G of 30 CFR, while inspection and enforcement provisions are in Subchapter L. The statutory and regulatory provisions related to permit review and decisions are found at Section 510 of the Act and 30 CFR Part 773. Review of permitting decisions is covered by Section 514 of the Act and 30 CFR Part 775 respectively. Permit revisions, including the authority to require a permit revision, are covered by Section 511 of the Act and within 30 CFR Part 774 respectively. By statute and regulation, an order to revise a permit must be based upon written findings and is subject to administrative and judicial review requirements established by the State or Federal program. See Section 511(c) of the Act and 30 CFR Parts 773 and 775. In contrast to inspection and enforcement provisions, there is nothing in any of these statutory or regulatory provisions related to permitting that provide for or authorize Federal intervention in state permitting decisions.

In its landmark *en banc* 1981 decision upholding OSM's authority to promulgate permitting requirements not specified in the Act, the Court of Appeals for the D.C. Circuit (the only Circuit with jurisdiction to review the Secretary's national rules implementing the Act) laid the groundwork for its holding with a discussion of the roles of the States and the Secretary in administering the Act, including the States' role under an approved program. In addition to ruling that

“the State is the sole issuer of permit,” the court also noted that “[a]dministrative and judicial appeals of permit decisions are matters of State jurisdiction in which the Secretary plays no role. Act § 514.” *Surface Mining Regulation Litigation*, 653 F.2d at 519.

The following footnote was attached to the last sentence quoted above.

The independence of a State administering an approved State program under the Surface Mining Act may be contrasted with the continuing role of the Environmental Protection Agency after a State has assumed responsibility for pollution discharge permits under the Federal Water Pollution Control Act, 33.U.S.C. 1251 – 1376 (1976 & Supp. II 1978). The EPA Administrator retains veto power over individual permit decisions under that statute. See *id.* 1342(d).

Surface Mining Regulation Litigation, 653 F.2d at 519 n. 7.

This discussion by the Circuit Court is plain and unambiguous and leaves no room for debate. OSM simply does not retain authority to require revision of an existing state issued permit or to issue violations for actions expressly authorized by that permit without going through the procedures of § 521(b) of SMCRA.

The above quote from the Circuit Court was cited in the October 21, 2005 decision by the Assistant Secretary. It was also cited, along with the Assistant Secretary’s 2005 decision, in the December 3, 2007 Federal Register notice (72 Fed. Reg. 68000) removing 30 CFR § 843.21 as follows:

On October 21, 2005, the Department of the Interior's Assistant Secretary for Land and Minerals Management (ASLMM) issued a final decision concerning a citizen's group's request that OSM conduct a Federal inspection in a case where the citizen's group was dissatisfied with a State regulatory authority's decision to issue a coal mining permit. (A copy of the ASLMM's October 21, 2005, final decision is contained in the public record for this rulemaking.) The citizen's group requested an inspection even though mining on the permit had not yet commenced and the citizen's group had failed to prosecute a direct appeal of the State's permitting decision in State tribunals.

In her decision, the ASLMM pointed out that “OSM intervention at any stage of the state permit review and appeal process would in effect terminate the state's exclusive jurisdiction over the matter and [would frustrate SMCRA's] careful and deliberate statutory design.” See also *Bragg v. Robertson*, 248 F. 3d 275, 288-289, 293-295 (4th Cir. 2001) (regulation under SMCRA is “mutually exclusive, either Federal or State law regulates coal mining activity in a State, but not both simultaneously”; primacy States have “exclusive jurisdiction” over surface coal mining operations on nonfederal lands within their borders).

The final decision also explained that in a “primacy state, permit decisions and any appeals are solely matters of the state

jurisdiction in which OSM plays no role.'" In support of this statement, the final decision cited the U.S. Court of Appeals for the District of Columbia Circuit's landmark en banc decision in *In re Permanent Surface Mining Regulation Litig.*, 653 F. 2d 514, 523 (DC Cir.) (en banc), cert. denied sub nom., *Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981) (PSMRL). In that case, the en banc court held that SMCRA grants OSM the rulemaking authority to require States to secure permit application information beyond the Act's specific information requirements. *Id.* at 527. The court laid the groundwork for its holding with a discussion of the relative roles of the Secretary of the Interior and the States in administering the Act.

After then quoting the Court's opinion listed above, OSM went on to state in that same Federal Register notice:

The ASLMM's decision, and the materials cited therein, caused us to look more carefully at the statutory and regulatory scheme governing our oversight role related to State permitting decisions and, in particular, the propriety of retaining section 843.21. Inasmuch as section 843.21 authorized direct Federal enforcement against State permittees based on State permitting decisions, it was inconsistent with the ASLMM's decision and PSMRL's admonition that a primacy State is the "sole issuer of permits" within the State.

Further, under SMCRA, State permitting is entirely separate from Federal inspections and associated Federal enforcement. The statutory provisions related to permit application review and permit decisions are found at section 510 of the Act, 30 U.S.C. 1260, and appeals of permitting decisions are provided for under section 514 of the Act, 30 U.S.C. 1264. There is no mention in these statutory provisions of the need for an inspection--the predicate to Federal enforcement under section 521 of the Act (30 U.S.C. 1271)--in connection with State permitting decisions, and certainly nothing in these provisions mandates Federal intervention in State permitting decisions. Our regulations governing administrative and judicial review of permitting decisions (30 CFR part 775) are likewise silent as to the need for an inspection in the context of permitting appeals. Moreover, nothing in our Federal inspection regulations at 30 CFR parts 842 and 843 suggests that those procedures can be used as an alternative to our permitting appeal provisions.

The Act's provisions for Federal inspections expressly provide that such inspections are of mining "operations.'" See SMCRA Sec. 517(a), 30 U.S.C. 1267(a) (referring to inspections of surface coal mining and reclamation operations) and SMCRA Sec. 521(a) (referring to inspections of surface coal mining operations). The definitions of surface coal mining and reclamation operations and surface coal mining operations at SMCRA Sec. 701(27) and (28), 30 U.S.C. 1291(27) and (28), do not mention anything about permits or permitting decisions. Instead, those definitions refer to activities and the areas upon which those activities occur. In short, the purpose of a Federal inspection is to determine what is happening at the mine, and, thus, SMCRA's inspection and enforcement provisions do not readily apply to State permitting decisions because they are not

activities occurring at the mine. See, e.g., *Coteau*, 53 F. 3d at 1473 ('`Permitting requirements such as revelation of ownership and control links are not likely to be verified through the statutorily-prescribed method of physical federal inspection of the mining operation * * *.'').

In summary, the statutory and regulatory provisions related to inspections and enforcement are separate and distinct, both practically and legally, from permitting actions. The Act and our regulations provide specific administrative and judicial procedures for persons adversely affected and seeking relief from permitting decisions; our Federal inspection regulations do not serve as an alternative to those procedures. Distinct from the review of permitting decisions, Congress provided for inspection and enforcement for activities occurring at the mine and purposely excluded permitting activities from the operation-specific inspection and enforcement process. In short, Congress did not intend for OSM to second guess a State's permitting decisions. Instead, the Secretary of the Interior's ultimate power over a State's lax implementation of its permitting provisions is set out in section 521(b) of the Act, 30 U.S.C. 1271(b). *PSMRL*, 653 F. 2d at 519. The Secretary's power under section 521(b) includes taking over an entire State permit-issuing process. *Id.*

In past discussions regarding “Review of Permits During Oversight”, OSM cited 30 CFR § 701.4(b)(1) as authority to conduct reviews of state issued permits during oversight. However, 30 CFR § 701.4(b)(1) expressly distinguishes conducting inspections of mining and reclamation operations from reviewing state issued permits by placing an “and” between the two. Therefore, that rule is entirely consistent with the discussion above and affirms that the permitting process is entirely separate from the inspection and enforcement process. Thus, 30 CFR § 701.4(b)(1) does not support using the TDN process to address concerns resulting from an OSM review of a state issued permit. To the contrary, it supports the view that it would be inappropriate to apply the TDN process to permitting issues, since that process is, by law (through sections 517 and 521 of SMCRA and 30 CFR Parts 842 and 843), expressly linked to inspections.⁴

Importantly, the 1988 TDN rule (53 FR 26728) does not support using a TDN to address permitting disagreements between OSM and a State regulatory authority. In fact one of the express purposes of the 1988 TDN rule was to avoid situations where operators are caught in the middle because of disputes between OSM and States. The

⁴ Alleged deficiencies about the quantity and quality of either information or technical analysis hardly provides what the Act requires as reason to believe that “any person is in violation of any requirement of this Act or any permit condition required by this Act.” Section 521(a)(1). Instead, these issues involve a difference of opinion as to whether two people would make the same policy judgment based upon a given set of facts and information. Such issues are not amenable to the purpose of the enforcement procedures whereby the inspector must set forth: The nature of the permittee’s violation; remedial action required; the period of time established for abatement; a description of the surface coal mining operation to which the notice applies; and a statement that the failure to meet the abatement date leads to an order for the cessation of the operation. Section 521(a)(2) and (5). These enforcement provisions contemplate that abatement is within the power of the permittee. This simply is not the case where a permittee is subjected to an action by the federal agency (which lacks permitting authority) merely because of a continuing disagreement with the state agency (which is vested with the permitting authority under SMCRA).

preamble contains a discussion (at pages 26729 and 26730) of when OSM is obligated under Section 521(a)(3) of SMCRA to issue a Federal NOV during enforcement of a state program under 521(b). That discussion notes:

Thus, where OSMRE takes over an inadequately enforced state program, Congress clearly envisioned a time lag in the suspension or revocation of permits in situations where an operator was in violation because of a permit not requiring full compliance with the State program. Rather than penalizing the operator when the State is at fault, OSMRE must allow a reasonable time for a permittee to comply with additional permit conditions required by OSMRE when the permittee has been complying with the original permit conditions. Although the proviso expressly addresses suspensions and revocations, it naturally follows that during the reasonable period for compliance, OSMRE would refrain from issuance of NOVs and cessation orders related to the problem being corrected. The same principle is also established in Section 504(d) of SMCRA. (53 FR 26730)

In litigation over the TDN rule, the National Wildlife Federation claimed this discussion substantially eroded OSM's mandatory enforcement obligation and represented an attempt to regulate through preamble in violation of the APA because it stated that "OSMRE would refrain from issuance of NOVs and cessation orders related to the problem being corrected." In dismissing the complaint, the Court stated:

The Court concludes that the statements in the preamble to the TDN rule are not inconsistent with the rulemakings concerning this issue and therefore permissible under SMCRA. As repeatedly mentioned above, it is not unfair not to punish a permittee if it has fully complied with state permit obligations later determined to be inadequate.

National Coal Association v. Uram, 1994 U.S. Dist. LESIX 16404 at *60 (D.D.C. Sept. 16, 1994).

In summary, OSM cannot, through any iteration of INE-35, give itself authority to take direct action against operators for alleged permit defects without going through the requirements of Section 521(b) of SMCRA.

Finally, OSM's insistence on using TDNs to address permit defects is simply unworkable, as we noted earlier. In most instances where OSM disagrees with a state-issued permit, ad-hoc federal intervention in an individual permit through direct enforcement action against the permittee would have the same effect as commandeering the state permitting process. The statute and case law would preclude such a result since the grant of exclusive jurisdiction vests the state as the sole issuer of permits "in which the Secretary plays *no* role." *In re: Permanent Surface Mining Regulation Litigation* (en banc), 653 F.2d 514, 519 (D.C. Cir. 1981) (hereinafter "In Re: (en banc)"). An enforcement action against the permittee based upon OSM's view of non-conformity of a permit to applicable standards would be nothing less than exercising a "veto power" over state permits, authority which Congress expressly withheld from the Secretary. To allow

OSM to accomplish at the back-end what Congress forbade initially would essentially vest OSM with day-to-day “concurrent jurisdiction” which does not exist under the permanent program in a primacy state; *Haydo v. Amerikohl Mining Company, Inc.*, 830 F.2d 494, 497; and improperly allows the Secretary to become “directly involved in local decision making after the program has been approved.” *In Re: (en banc)*, 653 F.2d at 518.

Furthermore, the use of SMCRA’s inspection and enforcement provisions as a means to dislodge state permitting decisions does not fit well with the statutory scheme. Issues involving the non-conformance of a permit to applicable standards are resolved through a request by the state regulatory authority to the permittee for a permit revision, and not enforcement action. *See* Section 511(c); 30 CFR 774.11(b). This process is accompanied by notice, findings supplying the basis for the request, and an opportunity for a hearing before the revision must be submitted.

Even when OSM is the regulatory authority, it must proceed to correct permit problems through the revision process. It appears incongruous for OSM to take direct enforcement action against a permittee in a state where it has no direct jurisdiction, and lacks permitting authority, when it could not conduct itself in such a manner where it *does* have “exclusive jurisdiction” as in a federal program state. Moreover, an enforcement action under Section 521(a) generally requires the prescription of abatement measures to assure compliance and presumes that such measures are within the power of the permittee. However, if the enforcement action requires the submission of a revision to a state-issued permit, the state regulatory authority is the only one empowered under SMCRA to request and approve a revision. If the state disagrees that a revision is warranted under the state program, the permittee cannot fully comply with the federal enforcement action and remains in jeopardy because of a continuing disagreement between the state and OSM. Moreover, the permittee has been denied its rights to prior notice, findings, and a hearing under SMCRA for permit revisions.

It also appears incongruous with the statutory scheme to permit OSM in its general oversight role to take action it could not otherwise pursue even when it takes action to substitute either federal enforcement or a federal program for all or part of the state program. In two provisions which discuss direct federal intervention, the statute requires that the Secretary, *before* issuing any enforcement orders, first afford the permittee an opportunity to revise a permit it finds does not conform to the requirements of the applicable regulatory program. Section 504(d), 521(b). *See also* 53 Fed. Reg. 26730, 26735. A permittee operating in a primacy state in which OSM has not completed, let alone initiated, a proceeding to “take over” a state program has ample ground for relying on the permit issued by the state permitting authority without becoming subject to direct intervention or enforcement by OSM in its oversight role.

However, this is not to say that OSM has absolutely no recourse. The federal action, if OSM decides it is necessary, is captured in the TDN rule’s guiding principles for OSM’s oversight role in these circumstances: “the regulatory focus shifts from individual situations to a broader evaluation of a state’s overall program.” 53 Fed. Reg.

26731. *See also* 53 Fed. Reg. at 26738. In other words, OSM will use the other mechanisms the law provides for “resolving problems with state implementation of the program; and, these mechanisms allow inadequacies to be corrected without placing the mine operator in the middle of conflicting orders from state and federal officials.” *Id.*

One final legal matter: In the November 16, 2010 Decision for Informal Review issued by OSM Regional Director Ervin Barchenger regarding Georges Colliers, Inc., Permit 54/86-4105, there is legal discussion of “Jurisdiction” on pages 3 – 5 of the document. There is significant reliance on two Interior Board of Land Appeals decisions and two U.S. Court of Appeals decisions. All of these are cited for the proposition that “OSM has jurisdiction to address state permitting issues under its TDN authority.” However, OSM misunderstands the reasoning in these decisions and misapplies them to the question of OSM’s TDN authority in primacy states.

First, it is instructive to note that both IBLA decisions in the *Kuhn* and *Mullinax* cases preceded OSM’s regulatory decision regarding the issuance of TDNs in primacy states in December of 2007. 72 Fed. Reg. 68000. This regulation is the most recent and most definitive ruling by the Interior Department concerning the use of TDNs in primacy states and thus is the applicable and operative law. Furthermore, the *Kuhn* case references the 1988 ten-day notice rule but fails to even examine, let alone discuss, its possible application to the case at hand, and instead sets forth erroneous premises citing a string of cases all decided prior to the 1988 ten-day notice rule. For example, the Board stated in *Kuhn* “no definition of the phrase *appropriate action* has been provided by OSM.” 120 IBLA at 16, *citing* a 1982 version of 30 CFR 843.12. This is flatly wrong, and the opinion makes no mention of the other consideration of whether the state showed good cause for not taking action.

Kuhn also misstates some of the precedent that serves as the basis for its decision as follows: “where it is evident that a permit has been issued in violation of state regulatory requirements, this Board has declared such action inappropriate, and has ordered *federal enforcement*. 120 IBLA at 20, *citing W.E. Carter, supra*. Not only was *W.E. Carter* not decided under the ten-day notice standards that are now applicable, the Board in *W.E. Carter* only ordered a federal inspection but never reached the issue of what type of federal action should follow the inspection. In many respects, *Kuhn* is advisory at best since the Board chose to articulate its views despite the fact that the permitting controversy was moot. 120 IBLA at 23, n. 9. *Compare with Hopi Tribe v. OSM*, 109 IBLA 374, 381 (1989) (an appeal is moot if there is no effective relief which the Board can afford to the appellant).

It should also be noted that all of these Board cases were considered in the context of citizen complaints and the Board was either never advised of or chose not to consider the issue (discussed in other sections of our comments) that citizen complaints cannot displace the more specific procedures to contest state permit decisions. To the extent one construes these cases as rejecting this view, the cases then simply remain contrary to applicable case law because they would allow the Secretary to review state permitting

decisions, a matter in which “the Secretary plays no role.” *In Re: (en banc)*, 653 F.2d at 519.

Secondly, OSM completely misreads the two U.S. Courts of Appeals decisions. In *National Mining Ass’n v. Dep’t of the Interior*, 177 F.3d 1 (D.C. Cir. 1999), the U.S. Court of Appeals for the District of Columbia Circuit pointed to the very construction of SMCRA which we articulated above – that OSM may not take remedial action against a state permittee until *after* the agency complies with the provisions of Section 504(b) and 521(b) of SMCRA, which require that OSM first provide notice to the state and hold a public hearing prior to taking over that portion of a state’s program that relates to the permitting function (or any other function, for that matter). This process is embraced by OSM in its regulations at 30 CFR Part 733 and is a prerequisite to any federal enforcement action by OSM. While this process may take more time than OSM and others would prefer, Congress believed that meaningful concepts of state primacy and exclusive regulatory authority require nothing less. Short of changes to the underlying statute, this is the mechanism designed by Congress and for good reason. And short of the Secretary articulating a rational basis for departing from the Department’s current regulatory position on this matter (as set forth in the preamble to the final rule removing 30 CFR 843.21 at 72 Fed. Reg. 68024 – 68026), OSM must continue to abide by its interpretation of SMCRA’s requirements.

Recommended Changes to Draft INE-35

Based on the above discussion and rationale, IMCC and WIEB see no need for INE-35 and urge the agency not to pursue it further. OSM should, instead, simply follow its regulations. However, if OSM feels compelled to guide its field personnel via directive, IMCC and WIEB recommend several changes to draft INE-35 as follows:

Permit Defects – OSM should remove all references to the use of TDNs to address permit defects and should clarify that any concerns with the state permitting process or function should be handled as a programmatic issue, utilizing the various mechanisms available to OSM such as action plans, technical reviews, and the 732 or the 733 process where appropriate. More specifically, OSM should delete sections 3(i) (definition of “Permit Defect”); section 4(g)(3) (regarding when a TDN will not be issued for a permit defect); and sections 6(a)(5) and (b)(5) (regarding the procedures for handling permit defects).

Citizen Complaints – OSM should either remove all references to the use of TDNs to convey citizen complaints to states or, in the alternative, define the term “reason to believe” to include an investigation by OSM of the veracity of the complaint prior to conveying the complaint to the state via TDN. Given the requirement at 30 CFR 732.15(b)(10) that a state program must contain a citizen complaint mechanism in order for the program to be approved by OSM, this mechanism must be given an opportunity to work prior to OSM intervening in the process. This is further confirmed by 30 CFR 842.12, which requires a person requesting a federal inspection to notify the state regulatory authority in writing of the existence of a violation, condition or practice. As a

result, any federal action under Section 521 of SMCRA should be held in abeyance until the state has issued its findings pursuant to its own citizen complaint process. If a citizen is unsatisfied with this result, it may then approach OSM about the need for a federal inspection. Following a “reason to believe” determination (including a review of the state’s findings), OSM may then issue a TDN to the state concerning the alleged violation as a precursor to a possible federal inspection, in accordance with Section 521.

In conjunction with this change, OSM should also define the term “reason to believe”, since the current standard (i.e. “the facts alleged by the citizen, if true, would constitute a violation”) is unduly and inappropriately broad. As long as OSM holds to this standard, the threshold established by the definition is unreasonably and unworkably low and flies in the face of the legislative history concerning the term. In its discussion of Section 521(a)(1) of the Act, Congress stated that “it is anticipated that ‘reasonable belief’ could be established by a *snapshot of an operation in violation* or other simple and *effective documentation of a violation.*” (H. Rep. No. 95-218, 95th Cong., 1st Sess., at 129 (1975) (emphasis added)). Obviously Congress had something more in mind with regard to the “reason to believe” determination than the mere filing of a complaint. OSM is expected to go behind the bald allegations of the complaint and determine, based on a “snapshot” (or, in our view, an investigation, even if limited in scope) of the alleged violation at the surface mining site, or some other effective documentation (such as the state’s analysis contained in its response to the complaint) establishing whether to proceed with any further action (be it a TDN, or in the case of imminent harm, a federal inspection followed by appropriate enforcement action). This process would provide a degree of credence and credibility to the primacy scheme contained in SMCRA by deferring to the procedures in the approved state program. It would also provide for serious and meaningful consideration by the federal government in its oversight capacity whether to proceed with expanded federal involvement in the state’s business via a TDN. If OSM is unwilling to do this via directive, then we would advocate for a rulemaking on the matter, similar to what we advanced in our rulemaking petition of 1993.

OSM’s reluctance to allow the states to first process citizen complaints that are received by OSM reflects a mistrust of either our procedures or our ability. In either case, the answer is not to incorporate federal intervention in the process, but to assess whether there are systemic or programmatic issues that must be addressed and resolved from a larger perspective. If the states are truly to have primacy, OSM must be willing to allow the states to function independently. The mere receipt of a citizen complaint by OSM, rather than by the state, does not change this integral aspect of primacy. Instead, it compels OSM to act in a way that respects the states’ role under SMCRA, which in this instance means forwarding the complaint on to the state for initial review and action. Only after that opportunity should a complaint be ripe for any type of OSM review, and then pursuant to the approach suggested in our comments above.

Transmittal of a citizen complaint through a ten-day notice when the state has not been previously apprised of the complaint by the citizen triggers a federal process which is duplicative of the existing state program procedures. Congress’ intent was to avoid such federal-state overlap. S. Rep. No. 128 at 90; *See also* section 201(c)(12) (cooperate with

state regulatory authorities to minimize duplication of inspection, enforcement, and administration of the Act). Citizen complaint procedures and the ten-day notice process must be reconciled with the deliberate allocation of authority under SMCRA. If OSM immediately invokes the ten-day notice process to intervene in a state program matter when the citizen has never availed himself of the state procedures and remedies, OSM undermines the statutory provisions for primacy and the rationale for the requirement that state programs provide the same opportunities found in SMCRA for citizen participation.

To the extent a state persistently handles citizen complaints inadequately, OSM's general oversight role provides the avenue to evaluate the state's administration of its program. Citizens may also petition the Director to evaluate the state's implementation of the program if they believe the state is not effectively implementing, administering or enforcing, 30 CFR 733.12(a)(2). The general oversight function serves adequately to ensure that states will routinely handle citizen complaints under their programs without OSM intruding upon the state's jurisdiction on a case-by-case basis. The use of ten-day notices upon receipt of a citizen complaint which has not been previously made to and pursued with the state undermines the state program and creates "federal-state overlap" which Congress expressly intended to avoid.

Appropriate Action – OSM's definition of "appropriate action" incorrectly cites the applicable regulation in the Code of Federal Regulations. It should be 30 CFR 842.11(b)(1)(ii)(B)(3).

Arbitrary, Capricious or Abuse of Discretion Standard – OSM's definition of this standard at section 3(b) is confusing and overly broad. What is the difference between the use of the term "irrationally" in (b)(1) and the words "without a rational basis" in (b)(4)? This seems unnecessarily duplicative. Furthermore, the standard in (b)(4) is new and seems to line up more with NEPA than SMCRA, especially the use of the term "hard look". We suggest that (b)(4) be deleted. In addition, we recommend that the following language be added to Section 4(d) regarding field office determinations regarding whether an RA's response is arbitrary, capricious or an abuse of discretion: "The arbitrary, capricious or abuse of discretion standard does not allow OSM as a reviewer to substitute its judgment for that of the RA. Adherence to this standard mandates a finding of *appropriate action* or *good cause* if the RA presents a rational basis for its decision, even if OSM might have decided differently if it were the RA. In reviewing TDN responses, OSM must determine whether the RA's action or response is based on a reasonable consideration of the relevant factors and is an exercise of reasoned discretion that does not deviate from the approved state program. If OSM determines that the RA's response to a TDN does not constitute appropriate action or a showing of good cause for inaction, the written determination must provide a reasonably detailed explanation of the basis for the conclusion that the RA response is arbitrary, capricious or an abuse of discretion."

Authorized Representative – OSM should include the wording "in accordance with the right of entry requirements of 30 CFR 842.13" at the end of subparagraph (c)(1).

Definition of Federal Inspection – this definition at section 3(e) includes an all-embracing catch-all phrase in subparagraph (3) that reads: “Any other inspection conducted by OSM or jointly by OSM and an RA.” Recent experience causes us to inquire what OSM has in mind with this definition. Would a meeting between OSM and the state to discuss an oversight issue constitute “any other inspection” for purposes of this definition? If so, we believe it is overly broad. We recommend that this paragraph be written to read: “An inspection by OSM, either individually or jointly with a state RA, under 30 CFR 842.11(a)(1).” In addition to this change, OSM should also insert the words “an authorized representative of” before the word “OSM” in subparagraphs (1) and (2) when referencing inspections.

Section (4)(g) – When TDNs will not be issued – in conjunction with our position that TDNs should not be issued for alleged permit defects, we recommend the inclusion of the following subsection under this Section so as to clarify OSM’s options for programmatic issues. This is also consistent with section 5(b)(9) of the draft directive:

“(5) Programmatic issues. OSM will not use a TDN once an issue has been determined to be programmatic in nature. The following types of issues have been determined to be programmatic:

- (1) there is or may be a systemic implementation of an aspect of an approved program which OSM believes is inconsistent with the approved program; or
- (2) the state program lacks a counterpart to a requirement of the Act or federal regulations resulting in the RA’s inability to take enforcement action against certain types of violations or to perform certain regulatory functions; or
- (3) the RA and OSM disagree on the adequacy of permit information or the adequacy of reviews required as part of the permitting process.”

In conjunction with this suggested language, OSM should also add the following in Section 6:

“(f) Programmatic issues – When there is a programmatic issue as described in section (4)(g)(5), OSM will void any TDN, if the dispute arises from issuing a TDN, and will

- (1) enter into corrective action plans with the RA as part of oversight work plans or performance agreements;
- (2) initiate actions under 30 CFR Parts 732 or 733, as appropriate;
- (3) initiate joint OSM/RA or other state/federal agency technical reviews; or
- (4) defer to the RA’s technical expertise and judgment with the understanding that, if a performance standard violation develops, either a state enforcement action or a TDN will address it.”

Section 6(b)(4) regarding Field Office evaluation of an RA’s response to a TDN. In an effort to facilitate resolution of TDNs at the state level, we recommend adding the following language at the end of this section: “When the Field Office Director anticipates that it will decide that the RA’s response is arbitrary, capricious or an abuse of discretion, the Field Office Director is encouraged to inform the RA of the basis for the conclusion before issuing a final written determination to give the RA a final chance to take enforcement action or to provide any final views. This process should not delay the time it takes OSM to complete its evaluation of the RA’s response.”

Section 6(c)(2)(d) – we recommend that the Field Office Director should make available to the RA not only items I – V, but also item VI so that the RA is fully aware of, and has an opportunity to respond to, the synopsis of the case and the rationale for the Field Office TDN determination, if the RA has not had the opportunity to do so previously. Similarly, in section (6)(3)(c), the RA should be given an opportunity to review and respond to information the Field Office submits to the Regional Director that was not previously available to the RA.

Draft Directive REG-23 re Corrective Actions for Regulatory Program Problems

As with other elements of OSM’s oversight actions, OSM is again making false assumptions about the current progress of program implementation and performance by the states. Nothing in the record before OSM (i.e. recent annual oversight reports and OSM’s budget justification document and GPRA reporting) supports the assertion that there are significant programmatic issues that have not been adequately addressed by the states as part of the existing oversight protocol. Furthermore, nothing in the record supports the assertion that states need to be “induced” to take corrective action. The cooperative working relationship that we are familiar with between OSM and the states has led to effective problem solving and resolution of outstanding issues. We are not dealing with a program that is broken or bleeding; to the contrary, we have been a model of cooperative federalism that is often commended by other state and federal agencies.

In terms of the options available to OSM to insure correction of programmatic issues, while some may label them as “severe”, we would describe them as congressionally mandated and deliberately conceived to preserve state primacy. And while the options may be limited in scope, we believe this is also intentional. Congress did not intend for state primacy to be easily undermined through a streamlined second-guessing process by the federal government. Instead, Congress anticipated that any adjustments or “corrections” to a state program or implementation thereof be preceded by either an opportunity for public hearing and comment (for programmatic changes) or an opportunity for the state to take appropriate action or show good cause for not doing so (for alleged violations of the state program).⁵

⁵ OSM appeared to understand and capture this important principle of state primacy in the draft discussion paper that was provided to us in August of 2009 where the agency said: “OSM’s primary role in a State with an approved program is to monitor the State to ensure that it maintains the capability to fulfill those SMCRA responsibilities, to assist the State in implementing their responsibilities and to report on its

OSM's suggested resolution of this matter is to reinstate policy and procedures previously contained in Directive REG-23 for the development and implementation of process-oriented action plans to address programmatic issues and/or to place a condition on state regulatory program grants to require correction of issues. We are uncertain what OSM has in mind with regard to its use of "action plans", but this appears to harken back to the days when oversight was focused on the minutia of state program implementation, rather than on-the-ground performance. OSM further tips its hat toward this approach in draft Directive REG-8 where the agency states that it will maintain "to the extent possible" the focus on on-the-ground results. We are very uncomfortable with the direction that this "enhancement" is heading and urge extreme caution.

Whenever OSM references OSM's options for dealing with our failure to complete the terms of an action plan (as in Subparagraph 5(a)), it is critical that the directive reference the procedure set forth in Section 521(b) of SMCRA and 30 CFR 733.12 of its regulations.

With regard to the suggestion in Section 6(a) of the draft directive that states' Title V grants be conditioned to encourage correction of issues, we are totally opposed to this approach. First, we assert that this action is in contravention of SMCRA. Section 705 contains no suggestion that these "support" grants are to be restricted or otherwise conditioned for any reason. Quite the contrary: Section 102 of SMCRA anticipates that OSM will "assist the states in developing *and implementing* a program to achieve the purposes of this Act." 30 U.S.C. § 1202(g). Restricting the federal funding provided in Section 705 flies in the face of Section 102. Additionally, OSM has not received permission from either the authorizing or appropriating Committees of Congress to proceed in this manner. We assert that both of these bodies expect that OSM will use and apply the moneys appropriated for state regulatory grants for the purposes intended and without restriction or condition.

Secondly, it makes little sense to restrict the states' ability to spend federal (and matching state) moneys to implement their regulatory programs when the very reason for "the issue being corrected" may result from limited resources in the first place. And even if this is not the case, after working diligently for the past 10 years to secure increases for Title V funding, it sends the wrong message to now restrict, via conditions, the expenditures of those funds – especially given the fiscal constraints within which states are operating. This incredulous suggested approach by OSM leaves the states wondering what the agency's true intentions are with regard to "enhancing" oversight. Are we back to the "gotcha" approach to oversight? We trust not. Too much progress has been made over the years to recede to this type of state/federal interaction.

We also question the process that OSM has in mind with respect to grant conditioning. OSM notes in the draft directive that it will target additional resources to

evaluation of the State program. OSM maintains its authority under SMCRA to intervene *when there is a clear breakdown in the States' implementation.*" (Emphasis added). This is much closer to congressional and judicial intent, as noted above.

correct identified problems or reduce grants based on poor performance. Does OSM have specific criteria in mind that will be used to target additional resources or reduce grants based on performance? Will something other than the key performance measures set out in REG-8 be utilized? If so, it will be incumbent on OSM to work with the states to develop these criteria so that we are aware of these new criteria for performance.

OSM's draft directive also seems to anticipate that problems will inevitably be found when it uses language on page 3 under "Responsibilities" in subparagraph (5)(c)(1) that Field Office Directors will "identify regulatory program problems." Again, the history of oversight, especially over the past 15 years, does not support this conclusion. In fact, quite to the contrary, there have been relatively few "problems" that have begged for the far-reaching types of solutions and procedures that OSM is proposing in this draft directive. This is one of the reasons that Directive REG-23 was rescinded in the first place. If OSM continues to insist on the need for a new directive, we suggest that the language in Subparagraph 5(c)(1) be changed to read "Determine if Regulatory Program Problems Exist." Similar adjustments should also be made in Subparagraph (5)(c)(2), where the words "if a regulatory program problem is determined to exist" should be added to the end of the sentence and in Subparagraph (5)(c)(3) where the word "identified" should modify "Regulatory Program Problems". We also suggest adding at the end of subparagraph (5)(c)(3) the words: "An opportunity should be provided for the states or tribe to review and comment on the action plan". This will be consistent with paragraph 6(b) on page 4 of the draft directive.

Finally, in subparagraph 5(b)(2), the directive should be amended to provide an opportunity for the state or tribe to request appropriate technical assistance, not just the Field Office Director.

Draft Directive REG-8

This directive has grown exponentially since the last version in 2006 (from 45 pages to 105 pages) and the primary explanation appears to be the June 2009 MOU. Substantial new sections of the directive have been added under oversight inspections, off-site impacts, stream impacts, bond release, special category permits and regulatory program problems – all of which trace their roots to obligations in the MOU directed at OSM. Were it not for the MOU, it is unlikely that this directive would have been revisited at all. It certainly would not have undergone such a drastic facelift. Based on the annual oversight reports received by the states over the past five years, there has been no evidence to support such a major overhaul.

While we understand that OSM has struggled with the presentation of certain data elements contained in REG-8 that are used to support oversight reports, OSM's own annual report, and responses to requests from Congress, the General Accountability Office (GAO) and others, what OSM has undertaken with this revision goes well beyond that concern. We have offered on numerous occasions to work with OSM on these data needs, most recently during the summer of 2009. Rather than engage us on this matter, OSM has chosen to move in a direction that once again reverses much of the progress we

have made over the years and sets up a confrontational environment that will do little to meaningfully evaluate and report on state program implementation. Instead, the directive is structured to provide maximum leverage for OSM to implicate the states for their failure to comply with commitments made on our behalf by OSM in the June 2009 MOU. Some of those commitments require rulemakings to accomplish, not internal directives. The section on “mitigating the impacts to streams” is particularly egregious, as it advances OSM’s objectives under its stream protection rule prior to actual promulgation.

It is difficult to know where to begin in providing comments on this expanded directive. In addition to changes to the text of the directive, there are significant adjustments to the various charts for collecting data and information. We provided detailed comments on the portion of the directive entitled “Oversight Inspections” on July 8 of this year but the draft reflects only a few of our suggested changes. We believe the most effective process for reviewing and sorting out our respective concerns with current and proposed oversight procedures and requirements is through a collaborative effort, as has been utilized in the past. The Oversight Steering Committee has facilitated this process and the result has been an oversight directive and evaluation process that reflects a meeting of the minds. We believe that such an approach is critical and recommend that that Oversight Steering Committee meet in the immediate future to begin an appropriate review process.

In the meantime, below are a sampling of some of our concerns with REG-8, all of which (in addition to others that will likely be identified) require further review and discussion.

Page 3 – **item (h) Performance Agreement/Evaluation Plan** and **(j) Action Plan** – allows OSM to concoct a written plan with or without the primacy State’s concurrence. It basically anticipates the State will sign, but notes that signing is not mandatory for OSM to proceed as it wishes to conduct oversight. This attitude undermines many years of State and OSM cooperation and collaboration in implementing SMCRA.

Page 4 – Subparagraph (5)(a)(2) indicates that the Director/Deputy Director will appoint an Oversight Steering Committee “when appropriate”. We cannot imagine a scenario where this would not be appropriate. Part of the past success of OSM’s oversight policy and procedure has been attributable to the work of this Steering Committee. As suggested above, we believe this is the proper forum for discussing and resolving the many issues associated with the new draft directive and we urge OSM to rejuvenate this Committee as soon as possible.

Page 5 – item (d)(4) – The States have no problem with public participation as allowed under their approved programs, which must be consistent with and as effective as that provided under the federal regulations. OSM seems to be anticipating far more public participation than that currently required by law and regulation.

Page 6 – item 5 – preparing a Performance agreement/Evaluation Plan “to the extent possible” cooperatively with the State regulatory Authority – intent is explicit that OSM will prepare the plan as it deems appropriate, even absent the regulatory authority’s cooperation and concurrence.

Page 8 – OSM does not mention the effect that this new draft directive will have on other REG-8 change notices, including Transmittal Number 932 dated July 1, 2008 and Transmittal Number 943 dated October 6, 2008.

Appendix – Page 1-2, last paragraph – This is a federal guidance document and does not have the weight of regulation or statute. While OSM may feel that the States have “respective roles and responsibilities”, those are set forth by law and regulation. The States should not and are not bound by this federal guidance document.

Appendix – Page 1-3 – OSM notes in paragraph 2 that oversight reviews, “may be associated with evaluation of customer service, actual or potential on-the-ground or permitting problems, and end results.” This sets up the classic second-guessing scenario, especially with respect to permitting issues. OSM’s authority is restricted to review of the state’s permitting process and program, not individual permitting decisions. The suggestion that “potential” problems are fair game also unduly expands the reach of OSM’s oversight review and authority. And while OSM states that its oversight “will not be process-driven”, the draft directive allows OSM to essentially review and second guess the regulatory authority’s decisions and actions at any time. In this regard, paragraph 2 on page 1-3 seems inconsistent with paragraph 4 that follows. OSM sets percentages of the number of inspectable units it will focus on, then provides a caveat that it may review more should it so choose. Not only will this be duplicative of the regulatory authority’s processes, the additional record keeping and reporting will further strain OSM and State resources and foster uncertainty in the regulated community.

Appendix – Page 1-4 – Outreach - OSM needs to be sure that it does not confuse its oversight role with the jurisdictional role of the state regulatory authority. To actively seek other federal agency concerns is the role of the state regulatory authority under its primacy program, either as part of the permitting process or in the initial stages of program approval or later program amendments. This is not and should not be a function of OSM oversight. OSM’s expansion of the role of other federal agencies in the oversight process is a clear indication of the far-reaching impact of the 2009 MOU.

Appendix – Pages 1-5 through 1-8 – Oversight Inspections – This is an entirely new section of REG-8, also driven by the 2009 MOU. In it, OSM has decided upon a shotgun approach without a statistical basis for selecting the types and percentage of inspections it intends to conduct – with or without concurrence of the regulatory authority. Independent inspections contravene and usurp a State

regulatory authority's primacy. If independent inspections are conducted, OSM's inspections should always be conducted with reasonable notice to the regulatory authority. OSM's intent to give less than 24 hours notice is unrealistic and unreasonable. OSM and the States have many years of cooperation and trust in implementing SMCRA. OSM is reverting back to the days of mistrust and confrontation with the States. OSM's inspector should give his/her State counterpart at least 5 working days notice of the inspection date. OSM would not have to disclose the permit or site location until the day of the inspection. OSM's intent to conduct independent inspections without notice to the regulatory authority is unacceptable and contrary to State primacy.

Appendix – Page 1-6 – Oversight Inspections – OSM states in the second paragraph of this section that “inspections that do not specifically address the purpose of an oversight inspection [such as citizen complaints and federal enforcement inspections] will not be counted in meeting the targeted number of inspections in the Performance Agreement/Evaluation Plan”. The fact is, all OSM inspections have the effect of evaluating the effectiveness of a state's program in some form or another. As a result, all OSM inspections in primacy states should be accounted for in determining the actual number of oversight inspections for each respective state or tribe.

Appendix – Page 1-7 – OSM notes with respect to the selection of random and focused inspections that “the final decision on the types of inspections to be used for evaluation of any state or tribal program will be at the discretion of the FOD.” This would seem to undercut any agreements that were reached between the state and the FOD during the negotiation and development of the state's annual performance agreement.

Appendix - Pages 1-9 through 1-13 – Offsite Impacts – The current REG-8 provisions addressing offsite impacts should remain in place. The draft greatly expands the universe of offsite impacts and goes far beyond the jurisdictional control of the regulatory authority. Offsite impacts should be limited to violations cited under SMCRA. OSM's draft would also consider violations cited by other federal and state agencies that are outside the scope of SMCRA. Several of the reporting requirements are new and deserve further discussion before being incorporated in the directive. Again, in many cases, OSM is utilizing the directive to foist new requirements on state regulatory authorities which do not find their support in existing regulations. This is particularly true with respect to the collection of information on unregulated off-site impacts in addition to those regulated or controlled by the state program and the identification of off-site

impacts where no violation was required or cited. In addition to the potential confusion and controversy this could engender, spending limited state and federal resources on these matters seems inappropriate.

Appendix – Pages 1-13 through 1-18 – Reclamation Success – The decision to apply for a phase bond release is a business determination of the permittee. While the regulatory authority can encourage the permittee to submit a bond reduction application, it cannot by regulation or law mandate this result. The timeliness measurements of the approval of the various bond release phases may not provide the most accurate data.

Appendix – Pages 1-20 through 1-21. OSM is moving toward an enhanced database for oversight, especially with the expanded “Regulatory Program Data for States and Tribes” (DST). It is absolutely critical that OSM engage in discussions with the states about the ability to provide the data being sought by OSM before the agency moves forward with this aspect of oversight. The states will likely face challenges associated with both the availability of this data and the resources required to provide the data. If OSM is to be successful in the collection and analysis of this important program data, the agency’s state partners must be brought into the process.

Appendix – Page 1-23 – OSM is proposing to place minutes from meetings between OSM and the states in OSM’s “Evaluation Files”, which in turn would be placed on OSM’s website. These oversight “team meetings” are often frank exchanges about challenging issues, and may involve discussions about potential future enforcements actions against operators. Making these types of notes and discussions available to the public could prove problematic. These materials should enjoy the same protection as attorney-client privilege and work product.

Conclusion

We appreciate the opportunity to submit these comments on the three oversight directives discussed above. We call upon OSM to reconvene the Oversight Steering Committee to engage in further discussions concerning both REG-8 and REG-23 to address the various concerns raised in our comments. We also urge OSM to appoint a separate working group composed of state and federal representatives to work through the issues associated with the proposed reinstatement of INE-35. We stand prepared to meet with you at your earliest convenience.

Sincerely,



Gregory E. Conrad
Executive Director
Interstate Mining Compact Commission



Douglas C. Larson
Executive Director
Western Interstate Energy Board
On behalf of the WIEB Reclamation
Committee