

Congress of the United States
Washington, DC 20515

July 14, 2011

The Honorable Joseph Pizarchik
Director
The Office of Surface Mining Reclamation and Enforcement
South Interior Building, Room 233
1951 Constitution Avenue, NW
Washington, DC 20240

Dear Director Pizarchik:

It is with a growing sense of concern that we write to you today about the recent direction that the Office of Surface Mining (OSM) has taken. As you know, the Surface Mining Control and Reclamation Act of 1977 (SMCRA) provides for a cooperative arrangement of federal and state authority for implementation of its provisions. SMCRA provides the states with the primary responsibility for developing, authorizing, issuing and enforcing regulations for surface coal mining and reclamation operations while ensuring that OSM maintains a limited oversight role. OSM has taken two actions recently that seem to unfairly single out Oklahoma. These two actions threaten an entire industry, its employees, and the state regulatory authority. We are unable to determine the rationale for OSM's actions.

OSM's first action was on January 31, 2011 when it issued three new directives as part of its "Oversight Improvement Actions" initiative; INE-35 ("Ten Day Notices"(TDNs); REG-23 ("Corrective Actions for Regulatory Program Problems and Action Plans"); and REG-8 ("Oversight of State and Tribal Regulatory Programs"). These three directives are in response to the June 2009 Memorandum of Agreement between the Interior Department, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers that was primarily focused on surface coal mining operations in Appalachia.

OSM has been unable to provide a reason for this new oversight initiative and we are worried OSM is being unnecessarily heavy-handed in carrying it out. We are especially confused by the use of TDNs that would override and replace state primacy programs. OSM has already issued three TDNs in Oklahoma as part of this effort. The end result is that OSM is second guessing its state partner without adequate rationale for its actions, thereby undermining the integrity of the state's program and processes. Further, OSM's seemingly unprompted actions are seen as a direct assault on a valuable and viable industry in our state.

While OSM sets minimum standards for performance and compliance pursuant to SMCRA, once a state's program is approved by OSM, the state is exclusively responsible for implementing that

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program through the issuance of permits and the inspection and enforcement that follows. OSM's only role following program approval is limited to restrained oversight of the state's program through annual performance reviews. It appears to us that OSM is changing the rules in the middle of the game and attempting to override ODM permitting decisions, despite the fact that such action is barred by SMCRA and a bevy of federal court decisions.

SMCRA 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. 197). *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.") Since Oklahoma is a primacy state, we are left to conclude that OSM is infringing on their state rights. Also *In re: Permanent Surface Mining Litigation*, 653 F.2d 514, 519(1981)(D.C. Cir.) (en banc). INE 35 and its implementation through the issuance of TDN's are clearly contrary to the exclusive regulatory jurisdiction states are given in section 503(a) of SMCRA and the state's role as the sole issuer of permits under SMCRA.

To add insult to injury, OSM is also working on a proposed rule that will replace the agency's existing stream buffer zone rule. A recently leaked 278 page draft Environmental Impact Statement (EIS) on this proposed "stream protection" rule brought several serious concerns to light. An example is the following statement from the draft of the proposed Stream Protection rule:

"The reasonable, foreseeable development scenario for coal production in the United States the [the preferred option] is for no new mining activity in [Arkansas, Kansas, Missouri and Oklahoma], an increase in both surface and underground mining in the Northern Rockies and great plains region, an increase in underground mining in the Illinois Basin, and a decrease in surface mining in the Appalachian Basin, Northwest, Gulf Coast, Illinois Basin, and Colorado Plateau."

Our hope is that you will realize that pursuing an option in your proposed Stream Protection rule that outright eliminates an entire industry is unacceptable. Additionally, we would encourage you not to allow OSM to override our respected state agency's rights and responsibilities with your new oversight initiative. Our state cannot afford to lose any more jobs: pursuing policies that will eliminate at least 260 high wage jobs in Oklahoma is unacceptable.

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We request an immediate briefing on your current activities in Oklahoma. Please coordinate with Matthew Hite on the Senate Environment and Public Works Committee to set up the briefing. He can be reached at (202)224-6176.

Sincerely,

Sam Mitchell

Tom Cohn

Paul Leland

Frank D. Lucas

Ken Brown

John S.

Tom Cole