November 23, 2010

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

Dear Director Pizarchik:

We are writing to you as cooperating agencies that are participating in the Office of Surface Mining's development of a draft Environmental Impact Statement (EIS) to accompany a soon-to-be-proposed rule on stream protection. Our role as cooperating agencies, as defined by the memoranda of understanding that each of us entered into with your agency, is to review and comment on those Chapters of the draft EIS that are made available to us (at present, Chapters 2 and 3). Based on our participation to date, we have several serious concerns that we feel compelled to bring to your attention for resolution.

Without rehashing our previously articulated concerns about the need and justification for both the proposed rule and the accompanying EIS, we must object to the quality, completeness and accuracy of those portions of the draft EIS that we have had the opportunity to review and comment on so far. As indicated in the detailed comments we have submitted to date, there are sections of the draft EIS that are often nonsensical and difficult to follow. Given that the draft EIS and proposed rule are intended to be national in scope, we are also mystified by the paucity of information and analysis for those areas of the country beyond central Appalachia and the related tendency to simply expand the latter regional experience to the rest of the country in an effort to appear complete and comprehensive. In many respects, the draft EIS appears very much like a cut-and-paste exercise utilizing sometimes unrelated pieces from existing documents in an attempt to create a novel approach to the subject matter. The result so far has been a disjointed, unhelpful exercise that will do little to support OSM's rulemaking or survive legal challenges to the rule or the EIS.

We also have serious concerns regarding the constrained timeframes under which we have been operating to provide comments on these flawed documents. As we have stated from the outset, and as members of Congress have also recently noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with only five working days to review the material, some of which is fairly technical in nature. In order to comply with these deadlines, we have had to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business such as permit reviews. While we were prepared to reallocate resources to review and comment on the draft EIS Chapters, additional time would have allowed for a more efficient use of those resources and for the development of more in depth comments.

There is also the matter of completeness of the draft Chapters that we have reviewed. In the case of both Chapters 2 and 3, there are several attachments, exhibits and studies that were not provided to us as part of that review. Some of these are critical to a full and complete analysis of OSM's discussion in the chapters. OSM has developed a SharePoint site that will supposedly include many of the draft materials, but to date the site is either inoperable or incomplete.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. The first of those reconciliations (which was focused on Chapter 2) occurred via conference call on October 14. The call involved little in the way of actual reconciliation but amounted to more of an update on progress concerning the draft EIS. There was talk about another reconciliation session, but to date this has not occurred. There were also several agreements by OSM during the call to provide additional documents to the states for their review, including a document indicating which comments on Chapter 2 from cooperating agencies were accepted and passed on to the contractor, as well as comments provided by OSM. OSM also agreed to consider providing us a copy of a document indicating those comments that were not accepted. To date, neither of these documents has been provided to us. And even though a draft of Chapter 3 has now been distributed and comments have been provided to OSM, we are still awaiting a reconciliation session on this chapter.[1]

Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately. We are therefore requesting that these revised Chapters be provided to us as soon as practicable.

We understand that OSM is considering further adjustments to the time table for review of additional Chapters of the draft EIS. We are hopeful that in doing so, the agency will incorporate additional time for review by the cooperating agencies, especially given the size and complexity of Chapter 4 and the full draft EIS. Pushing back the time for the completion of these drafts by OSM without additional time being provided for review by the cooperating agencies would be wholly inappropriate. We request that you please provide us with these new time tables as soon as possible so that we can begin our own internal planning.

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[1] We also understand that OSM had planned to contact the states to provide estimates of the additional time and resources that would be required to review/process a permit under the proposed rule. This information would be used by OSM to prepare at least one of the burden analyses that are required by various executive orders as part of federal rulemakings. We now understand that OSM plans to generate these estimates on its own. We are somewhat mystified about how OSM intends to accomplish this without direct state input and urge the agency to reconsider the methodology under which they are currently operating.

You should know that, as we continue our work with OSM on the development of the draft EIS, some of us may find it necessary to reconsider our continued participation as cooperating agencies pursuant to the 30-day renegotiation/termination provision in our MOUs. Under the NEPA guidance concerning the status of cooperating agencies, some of the identified reasons for terminating that status include the inability to participate throughout the preparation of the analysis and documentation as necessary to meet process milestones; the inability to assist in preparing portions of the review and analysis and help resolve significant environmental issues in a timely manner; or the inability to provide resources to support scheduling and critical milestones. As is evident from much of the discussion above, these are some of the very issues with which many of the cooperating agencies are struggling given OSM's time schedule for the EIS and the content of the documents distributed to date. We continue to do our best to meet our commitments under the MOUs but based on our experience to date, this has become exceedingly difficult.

Finally, as you have likely noted throughout the submission of comments by many of the cooperating agencies, there is great concern about how our comments (limited as some of them are due to time constraints for review) will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", given what we have seen so far of the draft EIS we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are wrestling with the consequences of their names appearing on the EIS, as it would assume tacit approval independent of the comments that have/have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore request an opportunity to jointly draft a statement with you that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

Sincerely,

Randall C. Johnson
Director
Alabama Surface Mining Commission

Bruce Stevens
Director
Division of Reclamation
Indiana Department of Natural Resources

Carl E. Campbell
Commissioner
Kentucky Department for Natural Resources

John Caudle
Director
Surface Mining and Reclamation Division
Railroad Commission of Texas

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines Minerals and Energy

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

John Corra
Director
Wyoming Department of Environmental Quality

July 3, 2013

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

Dear Director Pizarchik:

We are writing to you as cooperating agencies that are participating in the Office of Surface Mining's development of a draft Environmental Impact Statement (EIS) to accompany a proposed rule on stream protection. Our role as cooperating agencies, as defined by the memoranda of understanding that each of us entered into with your agency, is to review and comment on those chapters of the draft EIS that are made available to us. Since the initiation of the EIS process in 2010, the states have had the opportunity to comment on three initial draft chapters (numbers 2, 3 and 4).

Over the course of the past two years, OSM's draft EIS development process has seen several fits and starts, largely due to issues related to the work of various contractors OSM engaged to assist the agency with the draft EIS. Our understanding is that OSM has now addressed these issues and is once again moving forward with the development of the draft EIS. As a result, we would like to re-engage with the process and request an opportunity to review draft chapters and other related documents as they become available, pursuant to the MOU's we have in place with the agency. In doing so, we have a few requests.

In the past, we had serious concerns regarding the constrained timeframes under which we were operating to provide comments on draft documents. As we have stated from the outset, and as members of Congress have also noted, the ability to provide meaningful comments on OSM's draft documents is extremely difficult with limited working days to review the material, some of which can be fairly technical in nature. In order to comply with the deadlines, we have to devote considerable staff time to the preparation of our comments, generally to the exclusion of other pressing business. While we are prepared to reallocate resources to review and comment on the draft EIS Chapters, adequate time will allow for a more efficient use of those resources and for the development of more in depth comments.

There is also the matter of completeness of the draft chapters that we will review. In the case of Chapters 2, 3 and 4, several attachments, exhibits and studies were not provided to us as part of that review. Some of these were critical to a full and complete analysis of OSM's discussion in the chapters. It is important for us to receive all applicable documents that are referenced in draft chapters in order to conduct a meaningful review.

As part of the EIS process with cooperating agencies, OSM committed itself to engage in a reconciliation process whereby the agency would discuss the comments received from the cooperating agencies, especially for purpose of the disposition of those comments prior to submitting them to the contractor for inclusion in the final draft. Our experience with the reconciliation process to date has not been particularly positive or meaningful. We are hopeful that as we reinitiate the EIS review and comment process, OSM will engage in a robust reconciliation process. Among other things, we believe it should include an explanation of which comments were accepted, which were not, and why. Frankly, in an effort to provide complete transparency and openness about the disposition of our comments, we believe the best route is for OSM to share with us revised versions of the Chapters as they are completed so that we can ascertain for ourselves the degree to which our comments have been incorporated into the Chapters and whether this was done accurately. We are therefore requesting that the revised Chapters be provided to us as soon as practicable after their completion.

As OSM considers re-initiation of the review process for cooperating state agencies, it would be helpful if the agency would provide us with new time tables as soon as possible so that we can begin our own internal planning.

Finally, as we noted during the submission of comments by many of the cooperating agencies in the early rounds of the EIS development process, there is great concern about how our comments will be used or referred to by OSM in the final draft EIS that is published for review. While the MOUs we signed indicate that our participation "does not imply endorsement of OSM's action or preferred alternative", we want to be certain that our comments and our participation are appropriately characterized in the final draft. Furthermore, since CEQ regulations require that our names appear on the cover of the EIS, it is critical that the public understand the purpose and extent of our participation as cooperating agencies.

As it is now, the states are uncertain whether their names will appear on the draft EIS, which was originally anticipated. This of course would imply tacit approval independent of the state comments that have/have not been incorporated into the document. And while the cooperating agency has the authority to terminate cooperating status if it disagrees with the lead agency (pursuant to NEPA procedures and our MOUs), the states realize the importance of EIS review and the opportunity to contribute to, or clarify, the issues presented. We therefore request an opportunity to jointly draft a statement with you that will accompany the draft EIS setting out very specifically the role that we have played as cooperating agencies and the significance and meaning of the comments that we have submitted during the EIS development process.

In order to move forward expeditiously, we would appreciate a response to our request to re-engage with the EIS process no later than July 10. If we have not heard from you by then, we will contact via phone to further discuss the matter.

Sincerely,

Randall C. Johnson
Director
Alabama Surface Mining Commission

Bruce Stevens
Director
Division of Reclamation
Indiana Department of Natural Resources

Steve Hohmann
Commissioner
Kentucky Department for Natural Resources

John Caudle
Director
Surface Mining and Reclamation Division
Railroad Commission of Texas

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines Minerals and Energy

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

Todd Parfitt
Director
Wyoming Department of Environmental Quality

February 23, 2015

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

Dear Director Pizarchik:

We are writing to you as cooperating agency states pursuant to the Memoranda of Understanding that we negotiated with your agency concerning the development of an environmental impact statement (EIS) to accompany a proposed rule on stream protection expected to be published by the Office of Surface Mining (OSM) sometime this spring. As you know, during the summer of 2010, OSM offered the opportunity to states who were interested in participating as cooperating agencies as part of the development of an EIS to accompany a new rule on stream protection that would replace the 2008 stream buffer zone rule. OSM committed to replace this rule as part of an interagency effort to address stream protection as it relates to mountaintop mining operations in Appalachia. (See the June 11, 2009 Memorandum of Understanding between the U.S. Environmental Protection Agency, the Office of Surface Mining and the U.S. Army Corps of Engineers.) OSM also agreed to propose a new rule on stream protection pursuant to a settlement agreement with several environmental groups that had challenged the 2008 rule. The settlement agreement was approved by a U.S. District Court in Washington, DC on April 2, 2010. More recently, the Court vacated the 2008 rule and OSM last month published a notice vacating the 2008 rule.

Ten states (UT, NM, KY, TX, MT, WY, WV, AL, IN and VA) originally agreed to serve as cooperating agencies, with the state of Ohio agreeing to participate as a state commenter in the process. MOUs were negotiated with most of these states and the first chapter of the draft EIS (Chapter 2) was shared with the states for comment in September of 2010. Chapter 3 was shared with the states in October of 2010 and Chapter 4 was shared with the states in January of 2011. In each case, comment periods were exceedingly short and, while "reconciliation meetings" were supposed to be held on each of the chapters, only one such meeting was held. Following the receipt of state comments on Chapter 4 in January of 2011, no additional outreach to the cooperating agency states has occurred. Since that time, OSM has significantly revised the draft EIS and we understand that several new alternatives are being considered and that each of the chapters has been significantly revised.

The cooperating agency states have sent two letters to you expressing our concerns with the EIS process and our role as cooperators. The first, on November 23, 2010, expressed concerns about the quality, completeness and accuracy of the draft EIS; the constrained timeframes for the submission of comments on draft EIS chapters; the reconciliation process; and the need for additional comment on revised chapters. The letter also alerted OSM to the potential of some states reconsidering their continued participation as cooperating agency states pursuant to NEPA guidance concerning the status of cooperators. The letter also expressed concern about how the comments of the cooperating agency states will be used or referred to by OSM in the final draft EIS and requested the opportunity to draft an appropriate statement to accompany the draft EIS setting out the role that the states have played as cooperating agencies. OSM responded to this letter on January 24, 2011 and made a number of commitments regarding continued, robust participation by the cooperating agency states in the EIS development process. However, shortly thereafter, the agency terminated that involvement without explanation.

The cooperating agency states sent a second letter to you on July 3, 2013 requesting an opportunity to re-engage with the EIS development process following several fits and starts by OSM, largely due to issues related to the work of the various contractors OSM engaged to assist the agency with the draft EIS. In requesting an opportunity to review revised draft chapters of the draft EIS, the states requested expanded timeframes for commenting on the chapters; an opportunity to review any attachments and exhibits that are appended to the chapters; a meaningful, robust reconciliation process; and a timetable for review of draft chapters. The letter reiterated the concern of the states regarding how their comments will be used or referenced by OSM in the final draft EIS, including an appropriate characterization of their comments and participation. OSM never responded to this letter and to date no further opportunities have been provided by OSM for participation by the cooperating agency states. In fact, OSM has, on several occasions (at meetings of the Interstate Mining Compact Commission and other OSM/state meetings), indicated that it does not envision re-engaging with the states on the draft EIS and at most would provide a briefing, coincident with release of the draft EIS and proposed rule, regarding how the comments that were originally submitted by the states were addressed in the final draft EIS. Even this latter opportunity for engagement now appears to have evaporated.

As noted in a Memorandum for the Heads of Federal Agencies dated January 30, 2002 entitled "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act", the Council on Environmental Quality(CEQ) regulations addressing cooperating agency status (40 C.F.R. Sections 1501.6 and 1508.5) specifically implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. The Memorandum goes on to note that the benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal or local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and inter-governmental trust and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents.

In litigation interpreting how the federal government must meet its obligation to cooperating agencies, the U.S. District Court for the District of Wyoming in *International Snowmobile Manufacturers Association et al v. Norton*, 340 F. Supp. 2d 1249 (D.Wyo.2004) ruled as follows:

the purpose of having cooperating agencies is to emphasize agency cooperation early in the NEPA process. 40 C.F.R. Section 1501.6 (2004). Federal agencies are required to invite the participation of impacted states and provide them with an opportunity for participation in preparing the EIS. 40 C.F.R. Section 1501.7 (2004). "When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful." Wyoming v. USDA, 277 F. Supp. 2d 1197, 1219 (D.Wyo.2003).

Based on our experience to date with OSM's development of the draft EIS for the stream protection rule, we assert that OSM has not provided for meaningful participation by the cooperating agency states in the preparation of the EIS and it seems unlikely that the agency will do so prior to release of the draft EIS and proposed rule this spring. The cooperating agency states are therefore left with a decision about whether and when to withdraw from the process in order to protect our interests and to craft an appropriate statement for inclusion in the draft EIS regarding the nature and level of our participation and our decision to withdraw. CEQ's regulations provide sample reasons for why a cooperating agency might end its status as a cooperator, including that the cooperating agency is unable to

identify significant issues, eliminate minor issues, identify issues previously studied, or identify conflicts with the objectives of regional , State and local land use plans, policies and controls in a timely manner; is unable to assist in preparing portions of the review and analysis and resolving significant environmental issues in a timely manner; is unable to consistently participate in meetings or respond in a timely fashion after adequate time for review of documents, issues and analyses; is unable to accept the leads agency's decision making authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action or to develop information/analysis of alternatives they favor or disfavor; or is unable to provide data and rationale underlying the analyses or assessment of alternatives.

While the cooperating agency states were, for the most part, actually able and willing to do all of these things, OSM's unwillingness to share revised and new draft chapters of the EIS with the states has precluded the states from doing so and hence has undermined their status as cooperating agencies and the meaningfulness of their participation. Consequently, the states appear to have more than adequate reasons for withdrawing from the process and terminating their status as cooperators based on CEQ's regulations. We are therefore alerting you that, by separate actions pursuant to the provisions of our respective MOU's with your agency, several of us are seriously contemplating withdrawing from the EIS development process. Regardless of individual state determinations regarding withdrawal, we hereby request that the attached statement be included in a conspicuous place at the front of the draft EIS explaining the role of the cooperating agency states and any individual state decisions to withdraw. It is also likely that those states who choose to continue on as cooperating agency states will request that their state seal not appear on the cover of the draft EIS. We welcome the opportunity to discuss and potentially adjust this statement, but it is critical that we receive assurances from you that the statement will appear in the draft EIS at an appropriate place.

Should you have any questions or wish to discuss the matter further, please communicate with Greg Conrad, Executive Director of the Interstate Mining Compact Commission, who is assisting us with the matter.

Sincerely,

Randall C. Johnson
Director
Alabama Surface Mining Commission

Steve Weinzapfel
Director
Division of Reclamation
Indiana Department of Natural Resources

Steve Hohmann
Commissioner
Kentucky Department for Natural Resources

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

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

Lanny Erdos
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Ohio Department of Natural Resources

John E. Caudle
Director
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Railroad Commission of Texas

John Baza
Director
Utah Division of Oil, Gas and Mining

Bradley C. Lambert
Deputy Director
Virginia Department of Mines, Minerals & Energy

Harold Ward
Acting Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Todd Parfitt
Director
Wyoming Department of Environmental Quality

Attachment

Statement from Cooperating Agency States

Pursuant to Memoranda of Understanding with the Office of Surface Mining, several states that implement regulatory programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) have participated as cooperating agencies in the development of this draft environmental impact statement for the proposed stream protection rule. These states include: Alabama, Indiana, Kentucky, New Mexico, Texas, Utah, Virginia, West Virginia and Wyoming. The state of Montana and Ohio have also participated in an unofficial review role during the process. Early in the development of the draft EIS in late 2010 and early 2011, the cooperating agency states were provided an opportunity to review three initial draft chapters of the EIS (then chapters 2, 3 and 4). The states, under very constrained timeframes, provided comments on these draft chapters and engaged in one reconciliation meeting with OSM. The states also alerted the agency to several serious concerns that they were encountering with the process via letter of November 23, 2010. Since January of 2011, the cooperating agencies states have not been involved in the EIS development process, despite requests to re-engage with the agency. (See letter dated July 3, 2013). Some of this was due to difficulties encountered by OSM with its contractors, which resulted in a full scale revamping of the draft EIS. But in large measure, OSM simply chose not to pursue further involvement of the cooperating states in the process, in direct contravention of the states' MOUs with the agency, as well as the Council of Environmental Quality (CEQ) regulations and guidelines concerning the role of cooperating agencies. As a result, some cooperating agency states, via letters dated [list dates of individual state letters], formally withdrew from the EIS process as cooperators. Others [list the states] remained as cooperators, but only to preserve their rights as cooperating agencies. As a result of these decisions, any reference to the role of the cooperating agency states should be understood to embrace only the early, limited opportunities provided to them to comment on draft chapters 2, 3 and 4 in late 2010 and early 2011. It should also be noted that the states did not have an opportunity for full reconciliation regarding their comments and have not been informed of how and to what extent their comments were taken into account and incorporated in the draft EIS. This limited, constrained role of the cooperating agency states must be understood as such and should not be read as an endorsement of any portion of the draft EIS.

STATE OF ALABAMA

SURFACE MINING COMMISSION

P.O. BOX 2390 - JASPER, ALABAMA 35502-2390
(205) 221-4130 • FAX: (205) 221-5077

February 10, 2015

Joseph Pizarchik
Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Director Pizarchik:

On August 24, 2010, the Alabama Surface Mining Commission signed a Memorandum of Understanding (MOU) to participate as a Cooperating Agency in the development of an Environmental Impact Statement (EIS) to support a proposed stream protection rule. Since that time we have participated diligently in that process, but with increasing concern and reservation.

We and other state cooperating agencies have expressed concerns regarding the piece-meal approach, the lack of adequate time for review and comment, the overall quality of the product, major deficiencies, inconsistencies, and missing reference material evidenced in the draft documents. Federal cooperating agencies have verbally echoed similar concerns during reconciliation conference calls. Almost four years have now passed since our last interaction on the EIS.

I have concluded that it is no longer in the best interest of the Alabama Surface Mining Commission to continue as a cooperating agency. I hereby give notice to you of my decision to terminate the MOU. I request that any references to our participation as a cooperating agency be removed from the proposed EIS and its notice prior to publication in the Federal Register.

Sincerely

Randall C. Johnson
Director