

Testimony of Dr. Randall C. Johnson, Director, Alabama Surface Mining Commission
Before the House Committee on Natural Resources Subcommittee on Oversight and Investigations
May 20, 2015
“State Perspectives on the Status of Cooperating Agencies for the Office of Surface Mining's
Stream Protection Rule”

Good afternoon. My name is Dr. Randall Johnson and I am Director of the Alabama Surface Mining Commission. My agency is responsible for the regulation of coal mining operations within the state pursuant to our approved regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). I have been employed with the Surface Mining Commission for more than 34 years and have served as its Director for more than 29 years. I was directly involved in securing primacy in 1982 for the State of Alabama under Title V of SMCRA. I co-authored or authored all of Alabama's regulations promulgated, and some of the legislation enacted by the state, during the last 34 years, including those submitted for initial program approval. During my tenure at the agency, there have been 20 Directors or Acting Directors of the U.S. Department of Interior, Office of Surface Mining Reclamation and Enforcement (OSMRE). I have dealt directly with all of them except one. Our involvement in the state and federal regulatory process has always been proactive. Over the years, we have developed a regulatory program in our state that is among the best in the country and we take immense pride in that.

I and my colleagues appreciate the opportunity to appear before you today to discuss a disturbing chapter in federal-state relations under SMCRA. Alabama is one of nine states that signed Memoranda of Understanding (MOUs) with OSMRE to serve as a cooperating agency related to the preparation of an environmental impact statement (EIS) by OSMRE to accompany a rulemaking under SMCRA concerning stream protection. The MOUs were developed pursuant to the National Environmental Policy Act (NEPA) and the Council on Environmental Quality's (CEQ) implementing regulations at 40 CFR 1501.6 and 1501.8, as well as CEQ's January 30, 2002 Memorandum for the Heads of Federal Agencies regarding cooperating agencies. Although we anticipated a robust opportunity to work with OSMRE as cooperators in the development of this critical EIS, following a brief period of engagement in late 2010 and early 2011, the cooperating states have essentially been shut out of the process and been relegated to the sidelines as OSMRE moved forward with the EIS.

Some historical perspective may be instructive. During the summer of 2010, OSMRE Director Joseph G. Pizarchik offered the opportunity to states to participate 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. OSMRE committed to replacing this rule as part of an interagency effort to address stream protection as it relates to mountaintop mining operations in Appalachia. (See the July 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). OSMRE 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. The Court vacated the 2008 rule and OSMRE published a notice vacating the 2008 rule and reinstating the previous version of the rule on December 22, 2014.

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 nine 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, the remaining chapters of the draft EIS were given to the states with only eight days to review and comment. Despite requests for more time, we were told that the deadlines were firm and that the schedule for publication of the EIS in 2011 would be met. As of today, the draft rule and draft EIS have still not been published. Since that time, we understand that OSMRE has significantly revised the entire draft EIS and that several new rule alternatives have been considered. We have not seen these revisions.

The cooperating agency states have sent three letters to OSMRE Director Joseph Pizarchik expressing their concerns with the EIS process and their 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

Over two years after the last engagement by OSMRE with the cooperating states, the states sent a second letter to OSMRE Director Pizarchik on July 3, 2013, requesting an opportunity to re-engage with the EIS development process. We requested an opportunity to review revised chapters of the draft EIS, and 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. OSMRE never responded to this letter, and no further opportunities have been provided by OSMRE for participation by the cooperating agency states. In fact, OSMRE has, on several occasions, verbally 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 originally submitted by the states were addressed in the final draft EIS.

The role of cooperating agencies in the NEPA process is well documented in the Federal Regulations at *40 C.F.R. Sections 1501.6 and 1508.5* as well as in the Council on Environmental Quality Memorandum for the Heads of Federal Agencies entitled “*Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act*” dated January 30, 2002. The Federal Courts, too, have recognized the importance of providing state agencies the opportunity for “meaningful participation” in the NEPA process. As an example, I refer you to 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). In that ruling, the court states “*the purpose of having cooperating agencies is to emphasize agency cooperation early in the NEPA process. 40 C.F.R. § 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. § 1501.7 (2004).*” Further, the Court cites an earlier ruling in *Wyoming v. USDA*, 277 F. Supp. 2d 1197, 1219 (D. Wyo. 2003) that states, “*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.*”

Given this, the cooperating agency states concluded in yet a third letter submitted to Director Pizarchik on February 23, 2015, that OSMRE has not provided for meaningful participation by the cooperating agency states in the preparation of the EIS and is unlikely to do so prior to release of the draft EIS and proposed rule this spring. The cooperating agency states were therefore left with a decision about whether and when to withdraw from the process in order to protect their interests and to craft an appropriate statement for inclusion in the draft EIS regarding their participation and

decision to withdraw. CEQ's regulations provide ample reasons for a cooperating agency to end its status as a cooperator, which include: 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 lead agency's decision making authority regarding the scope of the analysis, including the authority to define the purpose and need for the proposed action or to develop information/analyses 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, OSMRE's unwillingness to share revised and new draft chapters of the EIS with the states, as well as background and supporting documents, has precluded the states from accomplishing these tasks and hence has undermined their status as cooperating agencies and the meaningfulness of their participation. Consequently, since that time, four states, including Alabama (*See* letter from Johnson to Pizarchik dated February 10, 2015), have formally withdrawn as cooperating agency states and requested termination of their MOUs with OSMRE. I must also add that OSMRE has yet to respond or acknowledge our letter of withdrawal.

It is clear the National Environmental Policy Act recognizes that federal agencies are not the sole repository of all wisdom and knowledge concerning their areas of regulatory responsibility. As such, NEPA mandates that the agencies reach out to states and other federal agencies to solicit input in the EIS process. It also anticipates that the process will provide for meaningful participation. It is unfortunate from my perspective that circumstances have deteriorated to the point where my state and others felt obligated to withdraw from this process given the importance of the EIS and the related rule for our programs. I for one do not want my state's name used to validate the EIS process since our input was limited to the extent that it was. In the end, we will be the ones who must implement any new rule and it was for this reason that our input and expertise were sought initially, and willingly offered, I might add. Our inability to participate fully and meaningfully from February 2011 to the present date casts considerable doubt as to whether OSMRE has complied fully with the NEPA process in developing the EIS.

Thank you for the opportunity to present this testimony. Copies of my written statement and exhibits have been provided to you. I will be happy to answer any questions you may have.

Exhibits:

1. Letter from Cooperating States to Pizarchik, November 23, 2010
2. Letter from Cooperating States to Pizarchik, July 3, 2013
3. Letter from Cooperating States to Pizarchik, February 23, 2015
4. Letter from Johnson to Pizarchik, February 10, 2015