



Office of the Governor

December 6, 2010

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

Dear Mr. Pizarchik:

I am writing to you to express my concerns with the process that the Office of Surface Mining (OSM) is undertaking in its preparation of an environmental impact statement (EIS) and its associated "stream protection rule". Our Director of the Department of Environmental Quality recently signed a letter sent to you by a number of cooperating agencies, expressing their concerns with the adverse impacts on the cooperating agencies. I urge you to take them into consideration, as well as the concerns outlined in this letter.

The action OSM is undertaking is a comprehensive rewrite of regulations under the Surface Mining Control and Reclamation Act (SMCRA) not a stream protection rule. The packaging of this major revision to a law that has served the country well for over 40 years as a "stream protection rule" is misleading. Some of the changes being contemplated have broad implications and deserve thoughtful evaluation. We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA.

OSM's rush towards a self-imposed deadline for completing the rulemaking is at the expense of thoughtful discourse as required by National Environmental Policy Act (NEPA). This undue haste is limiting the thoughtful and reasonable "hard look" as required under NEPA. Although OSM had earlier identified an option to apply the regulations only to mountaintop removal operations and operations in steep slopes, that alternative is not discussed in the EIS materials. NEPA requires an EIS to examine all reasonable alternatives to the proposal. If OSM proceeds with this rulemaking, it should consider two additional reasonable alternatives. The first alternative is that the proposed regulations be applied only to mountaintop mining. The second alternative is that the proposed regulations be applied only east of the 100 Meridian. The second alternative would parallel SMCRA's (30 CFR Chapter VII 785.19) current alluvial valley floor regulations which apply only west of the 100 Meridian. Additionally, the Clean Water Act also recognizes the unique differences between the arid west and the eastern part of the U.S. as noted in the NPDES surface discharge regulatory program. OSM should do the same.

OSM actions consistently appear to avoid or limit public and state comment throughout this rulemaking. Initially the agency tried to avoid rulemaking altogether by asking a federal court to allow it to revise the stream buffer zone rule through a guidance document. This request was denied. Next, OSM denied multiple requests for additional time to comment on their advanced notice of proposed rulemaking on this issue in December, 2009, providing the bare bones minimum period of time required by law, for one of the most complicated rulemaking efforts in OSM's history. The agency's initial scoping notice was so deficient that OSM had to issue a second notice providing more information in June 2010. Scoping meetings were a sham, because the public was not even allowed to speak publicly at the agency's public meetings. The public open house meeting in Gillette, Wyoming, which is the center of 40 percent of the coal production in the US, was held the evening of July 29, 2010. The comment period ended July 30, 2010. This hardly represents time for thoughtful discourse.

This rulemaking may also conflict with state authorities under both the state SMCRA programs and under the Clean Water Act (CWA). OSM does not have the authority to attempt to broaden a state's water quality standards by adding new restrictions on such things as "material damage to the hydrologic balance." There are no federal water quality standards in Wyoming and OSM lacks the authority to establish any. OSM must work through the State rulemaking process since the authority to establish water quality standards rests solely with the state.

OSM cannot do an "end run" around the prohibition against setting water quality standards by requiring state regulatory authorities to establish more stringent "corrective action thresholds" at the direction of OSM. In addition, "enhancement" concepts are likely to conflict with mitigation requirements under the Corps' § 404 program. OSM's proposals have serious potential to directly conflict with and/or duplicate CWA requirements of the state and/or the Corps.

The EIS documents provided by OSM are poorly written, unclear and sometimes internally inconsistent. The alternatives are written with cross references to other alternatives instead of just plainly stating what the agency is proposing. The unreasonably complex process of 5 alternatives with 11 items for each alternative results in 55 options to evaluate. It is simply unmanageable.

Wyoming is a "cooperating agency" in preparation of the EIS. Yet, we do not believe we have been given meaningful opportunity to comment and participate. Sections of the EIS with 25, 50, and even 100's of pages are distributed to the States with only a few days to read, review, and provide comment back to the agency. States have been forced to withdraw staff from permitting and other critical areas in order to have any opportunity to provide feedback to OSM within the required timeframe. Even when states take such measures, meaningful comments cannot be provided in an appropriate manner.

OSM appears to be ignoring the resource implications for these proposed rules. I find this particularly offensive in light of the fact that you are also seeking to significantly reduce OSM's share of funding for our regulatory program.

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The agency wants massive increase in information and data collection that may not even be useful or practical in improving environmental performance. I see this as a significant resource burden and urge you to consider these impacts on Wyoming. I call on OSM to comply with its obligations under the NEPA and conduct a genuine EIS process where States are engaged in real discussions of the regulatory options and EIS alternatives. I also suggest that OSM extend its deadline so that it can re-examine the "purpose and need" for these rules, provide appropriate scientific and factual information to support a rule change of this magnitude on a national scale, and engage Wyoming and other states in a more meaningful way.

Best regards,

A handwritten signature in blue ink, appearing to read "Dave Freudenthal", with a stylized, flowing script.

Dave Freudenthal
Governor

DF:pjb