



Interstate Mining Compact Commission

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GREGORY E. CONRAD

May 26, 2010

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

Dear Mr. Pizarchik:

This letter represents the comments of the Interstate Mining Compact Commission (IMCC) regarding a notice of intent to prepare an environmental impact statement (EIS) on a potential proposed rule regarding the protection of streams from the adverse impacts of surface coal mining operations published on April 30, 2010 at 75 FR 22723. IMCC is a multi-state governmental organization representing the natural resource and environmental protection interests of its 24 member states, many of whom implement primacy programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) for the regulation of surface coal mining operations within their borders. We appreciate the opportunity to submit these comments.

OSM is requesting comments regarding the scope of the proposed EIS that will accompany the anticipated proposed rule. We previously submitted comments dated December 30, 2009 concerning an advance notice of proposed rulemaking published by OSM on November 30, 2009 concerning stream buffer zone protections under SMCRA. A copy of those comments is attached and is incorporated by reference. In those comments, we raised several significant concerns for the states, few of which have been resolved or even addressed to date, and all of which are central to the development of any new proposed rule on stream protection. Many of those concerns are also applicable to the development of an EIS and must be taken into consideration, and ultimately resolved, during that process.

An overarching concern that should first be addressed is why OSM feels compelled to move forward with this rulemaking. We are still uncertain, even after all the debate over the past several months concerning the June 11 Memorandum of Understanding between the Interior Department, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers, about the basis for the proposed rulemaking or the problem the agency is attempting to fix. We certainly understand the high levels of angst associated with mountaintop mining operations in Central Appalachia, but what OSM is attempting to do with this national rulemaking cannot

be justified by that public debate. As we noted in our comments of last December, the appropriate forum for that debate is before Congress, not OSM. Nor can the pending litigation associated with OSM's 2008 stream buffer zone rule serve as an adequate basis for such a rule. There are other options available to the agency for the resolution of this litigation short of a new rulemaking on the matter. And even though we have requested this information in the recent past, we are still not aware of any data that supports the need for this rulemaking. Quite to the contrary, the data and information we are familiar with (including OSM oversight reports) indicates that the states have been implementing stream protection requirements in a fair, balanced and appropriate manner that comports with the requirements of SMCRA and our approved regulatory programs. It would therefore be helpful if OSM would clarify its goals and the problems it hopes to address early on in the rulemaking process.

As we peruse the various "principal elements" of the proposed action spelled out in OSM's notice of intent, one of our primary concerns relates to resource implications for the states. While much remains to be seen in terms of details about the rule, what little we do know from the briefing we received on May 3 signals a major impact on the states in terms of permit reviews, monitoring requirements, various new technical analyses, and intergovernmental coordination. In this regard, we believe that it is critical, as part of the EIS, for OSM to undertake an assessment of the rule's impact on both state resources and federalism implications. We assert that this is required by both the National Environmental Policy Act (NEPA) and Executive Orders that specifically address federalism impacts.

We also recommend that, before moving forward with the EIS and proposed rule, OSM seriously consider the other alternatives available to the agency for addressing stream protection. For instance, OSM developed a set of "Immediate Stream Protection Measures" in November of last year in response to a mandate in the June 11 MOU regarding "guidance for the application of the stream buffer zone rule". We are uncertain of the status of those measures but assert that they, and similar types of actions, can result in a more expeditious approach for addressing stream protection than an expansive proposed rule and EIS. We also believe that there are opportunities for the states and the affected federal agencies (OSM, EPA, the Corps and the U.S. Fish and Wildlife Service) to work cooperatively together to address stream protection concerns. However, to date our requests for arranging such meetings have been ignored. We believe that there are a variety of tools, protocols, policies and other measures available to us as state and federal agencies that, with some coordination, could lead to a comprehensive and effective approach to protecting streams.

As OSM develops the various alternatives that it will consider during the EIS process, we suggest that the agency include an alternative that recognizes the inherent regional differences, especially between the East and the West, related to stream protection. We believe that OSM likely gained an appreciation for these differences during its recent stakeholder meetings. SMCRA itself recognizes the importance of regional differences, both in its findings (Section 101(f)) and in its designation of special treatment for mining practices associated with alluvial valley floors west of the 100th meridian, prime

farmland in the Mid-continent and steep slopes in the East. Failure to recognize these regional differences could result in the expenditure of considerable resources to address issues that are of marginal significance in a particular region of the country.

Before delving into some of the very practical implications and impacts associated with implementation of the elements listed in OSM's notice, we want to note our concern about whether the science supports some of OSM's proposed concepts. In particular, it seems to us that there are several technical issues associated with the concepts that require further thought and research, such as sequencing of stream disturbance, bottom up fill construction, diverting water around fills to avoid retention and percolation, and compliance points off the permit area. We also believe that more can be done in the way of developing tools or methods for prevention and prediction. By advancing a rule that embodies some of these concepts without more in the way of scientific support will complicate the ability of the states to issue and enforce permits that are sound and defensible.

The balance of these comments will focus on some of the practical implications associated with implementation of the various "principal elements" of OSM's proposed action.

- New Permit Application Requirements – the states have several questions with regard to these new requirements, as follows: what is a "new permit" for purposes of prospective application of the new rule? Will states be required to reassess discharge monitoring reports at permit mid-term review? Will this serve as a potential re-opener? When will we see definitions of "preferred watersheds" and "hydrologic equilibrium"? These are new terms and could have significant implications for program implementation. How will some of the new permit application requirements impact us as regulatory authorities, e.g. 12 months of baseline monitoring data (instead of six) and requiring alternative analyses to include depositions within one mile of the mining operation?
- Definition of "material damage" – OSM's new definition appears to be based on a stream classification and use concept pursuant to which OSM seems to be moving toward establishing a narrative water quality standard based on aquatic life. This could result in much duplication with EPA and Corps requirements. OSM's concept of "enhancement" sounds very much like mitigation under Section 404 of the Clean Water Act, again raising concerns about potential conflicts. With respect to mining operations in the western states, a broad, national definition of material damage could prove problematic due to the unique issues associated with water rights and interstate compacts.
- Mining through streams – the states have concerns about whether sequencing of streams is feasible. If an assessment of the success of stream restoration must include the hydrologic regime and benthics, this could take well over six months to accomplish. How many hydrologic cycles will be needed to prove restoration? If we have to require full cost bonding for these stream restoration projects, how will this be effectuated? How will we track these bonds in conjunction with other reclamation bonds? How do we avoid duplication with bonds required by the

Corps under Section 404? How will sequencing impact the permit revision process? For instance, even if mine throughs are focused on form and function, if there are multiple cuts that impact the same stream over and over as in multiple contour cuts in the Appalachian coalfields and multiple draglaine pits in the Midwest and West, how will this impact the mining operation and permitting? Does OSM envision the states using CHIA monitoring/networking stations to measure off-site damage? How can we predict the probability that the stream will be fully restored – are there interim benchmarks anticipated?

- Monitoring requirements – there are potential right of entry/access concerns for gathering some of this data off the permit area that will need to be addressed. For biological monitoring – what system/standard of scoring do we use? Is there an expectation of consistency among the states? For instance, it has been suggested that biological monitoring would not be required for ephemeral streams in the West. However, there is some uncertainty associated with this issue given the fact that the monitoring of biota in ephemeral streams is an emerging area of science. The U.S. Geological Survey, under the sponsorship of EPA, has been examining biological information on ephemeral drainages and recent research at Pennsylvania State University is focused on the biological component of “dry streams”, which may be analogous to ephemeral streams in the West. How do we accurately attribute changes in stream quality to mining, as opposed to some other activity – especially as the applicable watershed is expanded under the rule? How far up and down the stream must we monitor – where is the compliance point? It should be kept in mind that limiting the percentage of a watershed has the potential for significant implications, depending on how the watershed is defined. Watersheds can vary in size from less than one square mile to over a hundred square miles, especially in the West. Small watersheds are sometimes completely disturbed by a single mine and are reclaimed at a later time depending on pit advancement and configuration. A constraint on the percentage of disturbance would greatly limit operations that are dependent upon large pits and large equipment. Finally, if the intent is to address all impacts in a watershed, such a change would likely overlap into land use planning, which would be outside the authority of OSM and the states under SMCRA. It would also require extensive program resources to undertake such planning.

Backfilling and grading and approximate original contour requirements – is OSM attempting to limit postmining land uses, regardless of what a landowner may desire – especially where reforestation is concerned? What about situations, as in West Virginia, where there is a mandate to comply with county land development and master plans? We have serious concerns about the impacts of bottom up fills and the use of aquitards which can result in failure planes being created in the fills, the overall stability of fills and flooding potential.

- Coordination of permitting processes – if we attempt to coordinate SMCRA and Clean Water Act permits, can we expect to see mandated time frames for final action by EPA and the Corps? We also have a concern that the more permitting activity that is undertaken by the state mining agencies under the SMCRA umbrella, the more these agencies will be expected to assume duties that are

currently those of state water quality divisions. It will important to avoid duplication of effort and have clear lines of authority.

We trust that if OSM moves forward with the scoping process for the proposed EIS, the agency will take these concerns under consideration, address them in the EIS and meet with the states prior to developing the proposed rule. The implications for the states, especially in terms of resources, are significant and the effectiveness of our regulatory programs is greatly dependent on the resolution of these issues. In this regard, we believe it would be worthwhile for us to explore with you the potential for some states to participate as “cooperating agencies” in the preparation of the EIS.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory E. Conrad", with a long horizontal flourish extending to the right.

Gregory E. Conrad
Executive Director