



Interstate Mining Compact Commission

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December 8, 2009

The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Nancy Sutley
Chairwoman
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, DC 20503

Dear Secretary Salazar and Chairwoman Sutley:

We are writing to bring to your attention a recent initiative by the federal government that would seriously encroach upon and likely erode the exclusive authority of state governments to regulate surface coal mining and reclamation operations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). On November 18, the Office of Surface Mining (OSM) announced the release of proposed "Oversight Improvement Actions" that are aimed at "improving the agency's effectiveness in overseeing state implementation of their approved surface coal mining regulatory programs."

Among other things, OSM would, for the first time since coal-producing states assumed responsibility for their regulatory programs in the early 1980's, conduct independent inspections of coal operators with state-issued permits. OSM would also conduct more federal oversight inspections, review more state-issued permits and re-evaluate the entire state permitting process. The impetus for this far-reaching initiative by OSM grew out of the Obama Administration's commitments in a June 11, 2009 Memorandum of Understanding among the Interior Department, the Environmental Protection Agency, and the U.S. Army Corps of Engineers focused on Appalachian surface coal mining. Given the scope of the "oversight improvement" initiative, it also appears to be based on a false assumption that states are not adequately regulating the coal mining industry nationwide. Nothing could be further from the truth.

One of the hallmarks of the Surface Mining Act when enacted in 1977 was its incorporation of a state primacy approach to the regulation of surface coal mining operations, pursuant to which the states have exclusive jurisdiction over

the regulation of these operations within their borders. As the federal courts have repeatedly held, and as the Interior Department has confirmed, SMCRA's allocation of exclusive jurisdiction was "careful and deliberate". Congress provided for "mutually exclusive regulation by either the Secretary or state, but not both." *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 293-94 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002). See also *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 318 (3rd Cir. 2002); *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, 497 (3rd Cir. 1987). Also, in a primacy state, permit decisions are solely matters of state jurisdiction in which OSM plays no role. As the U.S. Court of Appeals for the District of Columbia explained:

[T]he state is sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable." * * * Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role." *In re: Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (DC Cir. 1981) (*en banc*) (hereinafter "Regulation Litig.")

As the Interior Department noted in a letter written by Assistant Secretary Rebecca Watson dated October 21, 2005:

In short, OSM does not possess concurrent or parallel jurisdiction over this matter [of permit issuance by states]. See *Pennsylvania Federation*, 297 F.3d at 318. ("Exclusive, in other words, means just that It doesn't mean 'parallel' or 'concurrent'"). OSM does not retain "veto" authority over state permit decisions. *Regulation Litig.*, 653 F.2d at 519 n. 7. Accord *Bragg*, 248 F.3d at 295. OSM intervention at any stage of the state permit review and appeal process would in effect terminate the state's exclusive jurisdiction over the matter and frustrate the careful and deliberate statutory design. See *Bragg*, 248 F.3d at 295. It would encourage persons dissatisfied with state decisions to circumvent the very state laws and procedures that the Act insists states enact and maintain in order to exercise exclusive regulatory jurisdiction.

Many of the "oversight improvement actions" being proposed by OSM go to the heart of state primacy under SMCRA, especially federal review of state permitting actions. The states alerted OSM to the seriousness of these potential new directions during meetings of the OSM/State Oversight Steering Committee in August of this year. It was at that time that we first learned about the nature and scope of OSM's plans for addressing this particular action item in the DOI/EPA/Corps MOU. We asked then, and we continue to ask now, what the basis is for OSM proceeding in this fashion. The current oversight policy and philosophy of OSM, which was completely revamped during the Clinton Administration, has resulted in meaningful and effective evaluations of how the states are implementing their regulatory programs and thereby accomplishing the goals and objectives of SMCRA. Annual oversight reports, which are provided to the public, Congress and others, provide comprehensive

pictures of how the states are doing, identify where improvements are needed and highlight program accomplishments. The reports also allow OSM to address the performance measures contained in the Interior Department's Strategic Plan under the Government Performance and Results Act (GPRA).

While the states are supportive of assessing the effectiveness of the federal oversight program under SMCRA on a regular basis, what OSM is proposing goes far beyond this type of review. Without working in full partnership with the states, as has been our modus operandi over the past 15 years, OSM has undertaken a full scale, unilateral restructuring of the oversight process, to the detriment of the state/federal relationship under SMCRA. We will provide more detailed comments on our specific concerns with the proposed oversight improvement actions in the near future, but several key items fly directly in the face of state primacy and the state/federal partnership under SMCRA, including independent oversight inspections, review of state-issued permits, and conditioning of state regulatory grants.

Before proceeding further with this ill-fated initiative, we believe that the Administration should seriously revisit the need for these actions in light of the effectiveness of the existing oversight process. If you choose to continue moving forward, we request that you provide a detailed basis for doing so. To date, the record is completely devoid of any rationale for undertaking such a dramatic adjustment to the status quo. In particular, we request that you provide specific information related to allegations that the existing oversight policy: 1) is not sufficiently comprehensive; 2) is too deferential to the states; and 3) fails to strike the proper balance between coal production and environmental protection. Nothing in the existing record, to our knowledge, supports these allegations and without more, we believe it is inappropriate for OSM to move forward with this initiative.

We also request an opportunity to meet with you to further discuss this matter and the ramifications for state-federal relations under SMCRA.

Sincerely,



Gregory E. Conrad
Executive Director

cc. The Honorable Lisa Jackson, EPA Administrator
Lieutenant General Robert Van Antwerp, Chief Engineer and Commanding
General, U.S. Army Corps of Engineers