# COMMONWEALTH of VIRGINIA

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April 28, 2011

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

Dear Director Pizarchik:

The Commonwealth of Virginia has been a member state of the Interstate Mining Compact Commission (IMCC) since 1977.[1] Over the years, that organization has been very active in cooperatively developing comments from coal mining stakeholders in response to proposed actions by the federal Office of Surface Mining (OSM).

It is with a growing sense of alarm that we have watched the recent efforts by OSM to unilaterally change the role of OSM under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or Act) from one of oversight in relation to state primacy programs to that of a Super Regulator with the purported authority to overrule the state regulators' decisions. This is in direct contradiction to the primacy states' regulatory jurisdiction under SMCRA.[2] We are writing today to ask that you re-consider these actions.

One of the more striking examples of actions taken by your office without legal basis is your November 15, 2010 Memorandum, addressed to OSM Regional Directors, with the subject line "Application of the Ten-Day Notice Process and Federal Enforcement to Permitting Issues Under Approved Regulatory Programs." That Memorandum unilaterally proposes to overturn the October 21, 2005 Department of the Interior (DOI) *Mettiki E Mine* decision. The *Mettiki* decision was issued as a final decision of the DOI by then-Assistant Secretary of Land and Minerals Management, Rebecca Watson, and was laden with citations of controlling authority fully supporting the conclusion, citations which continue as precedential authority to this day. No legal authority justifying your reversal of Asst. Secretary Watson's position has yet been offered. If such authority exists, we ask that you provide it to us at the earliest opportunity.

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[1] Va. Code § 45.1-271.

[2] "States permit and regulate 97 percent of the Nation's coal production. States and Tribes also abate well over 90 percent of the abandoned mine land (AML) problems." Statement of J. Pizarchik before the House Subcommittee on Energy and Mineral Resources, April 7, 2011.

This Memorandum was quickly followed by three Directives, all signed by you in final form on January 31, 2011: INE-35 "Ten-Day Notices" (a new directive), REG-23 "Corrective Actions for Regulatory Program Problems and Action Plans" (a revised directive) and REG-8 "Oversight of State and Tribal Regulatory Programs" (a revised directive). These three Directives, which were written as "effective upon issuance," propose potentially devastating changes to the states' primacy jurisdiction. In conjunction with your November Memorandum, of greatest concern perhaps in this trilogy of directives is INE-35. This Directive eviscerates the concept of state primacy in relation to SMCRA regulation and, simply put, cannot continue to go unchallenged.

After a state has been awarded primacy to regulate coal mining pursuant to the state's version of SMCRA, federal authority to act is significantly limited. Conducting oversight inspections from time to time to confirm the approved program is being correctly implemented and responding to complaints made to OSM that the state is not following the requirements of their approved program are the primary ways OSM may act after an award of primacy. Section 517(a) of SMCRA[3] provides that:

> Inspections of surface coal mining and reclamation operations. The Secretary shall cause to be made such inspections of any surface coal mining and reclamation operations *as are necessary to evaluate the administration of approved State programs*, or to develop or enforce any Federal program, and for such purposes authorized representatives of the Secretary shall have a right of entry to, upon, or through any surface coal mining and reclamation operations.

Additionally, the statutory provision supporting issuance of ten-day notices (TDN) from OSM to the state regulatory authority (RA) under very limited circumstances is set out at 30 U.S.C. § 1271:

> Enforcement.
> (a) Notice of violation; *Federal inspection*; waiver of notification period; cessation order; affirmative obligation on operator; suspension or revocation of permits; contents of notices and orders.
> (1) *Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act [30 U.S.C.S. §§ 1201 et seq.] or any permit condition required by this Act [30 U.S.C.S. §§ 1201 et seq.], the Secretary shall notify the State regulatory authority*, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails *within ten days* after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation…

[3] 30 U.S.C. § 1267.

...

(b) Inadequate State enforcement; notice and hearing. Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall *after public notice and notice to the State, hold a hearing* thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act [], the Secretary shall enforce, in the manner provided by this Act [], any permit condition required under this Act [], shall issue new or revised permits in accordance with requirements of this Act [], and may issue such notices and orders as are necessary for compliance therewith: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this Act [] before suspending or revoking the State permit.

The *Mettiki* decision correctly applied statutory and case law. In *Mettiki,* Asst. Secretary Watson denied the Complainant relief on the basis that the challenge to the state's permitting decisions under West Virginia's approved state program would lie under the state laws and regulations adopted "to assume *exclusive regulatory jurisdiction* pursuant to section 503 of the Act [30 U.S.C. §1253]." The right to request an inspection under section 517(h)(1) [30 U.S.C. §1267(h)(1)] was not available to recast the objection to a permit decision as a violation at the site in an attempt to collaterally attack the RA decision or to circumvent the statutory appeal process and its limitations periods.

As you know, in *Mettiki* the Complainant had filed a request for inspection and review with OSM's Charleston Field Office ("Field Office"), which had then issued a TDN to WVDEP. WVDEP objected to the TDN saying that OSM could not issue a TDN in such circumstances because it would be tantamount to allowing a federal appeal of a state permit decision. WVDEP also explained why it felt the permit decision was appropriate under applicable state law. In issuing the TDN, the Field Office had indicated that the federal inspection process would be somewhat "different from that normally occurring after an inappropriate response determination." Rather than conducting an on-the-ground inspection of the mine site, the Field Office stated that it would evaluate further available information concerning the permit including *consulting anyone else having relevant information.*[4]

In concluding that OSM Field Office had overstepped its statutory authority, the decision noted, "The Regional Director of OSM's [Appalachian] Region is informing WVDEP that the Field Office erred in issuing the TDN for reasons consistent with this final response."[5] All

[4] Watson Letter Decision, *Mettiki* at p. 3.
[5] *Id.*

authorities on which *Mettiki* was based are still controlling precedent. The *Mettiki* decision cited *In re: Permanent Surface Mining Regulation Lit.* [*Regulation Litig.*] in affirming the precept that exclusive jurisdiction over the regulation of surface coal mining operations within its borders, as well as permit decisions and any appeals in a primacy state, are solely matters of that state's jurisdiction in which OSM plays no role:

> Administrative and judicial appeals of permit decisions are matters of state jurisdiction *on which the Secretary plays no role.*[6]

In addition,

> As federal courts have repeatedly held, the Act's allocation of exclusive jurisdiction was "careful and deliberate" by providing for "*mutually exclusive* regulation by either the Secretary or the 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 (3d Cir. 2002); *Haydo v. Amerikohl Mining Inc.*, 830 F. 2d 494, 497 (3d Cir. 1987).

Additionally, on page 2 of *Mettiki*:

> In short, OSM does not possess concurrent or parallel jurisdiction over this matter. *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 frustrates the careful and deliberate statutory design. See Bragg*, 248 F. 3d at 295.

The *Mettiki* complaint also had included allegations that the mine *would* violate the Clean Water Act (CWA), even though mining had not then commenced. The decision noted that any such *future* violations would be evaluated subject to the applicable effluent limitations and surface water quality standards in accordance "with the *State* counterpart to 30 CFR 817.42", with the applicable standard for groundwater flow being the "*State* counterpart to 30 CFR 817.41(a)."[7]

The result of your current unilateral actions would be to allow for independent federal inspections beyond those enumerated in the Act in primacy states. This would occur for the first time since the passage of SMCRA in 1977. Under the proposed changes in the January 31, 2011 Directives, OSM would, for the first time since coal-producing states assumed responsibility for their regulatory programs, conduct independent inspections of operators with state-issued surface coal mining permits.[8] Directive INE-35 concerning TDNs is new. Further review reveals, though, that since the promulgation of 30 CFR 842.11, OSM has issued two versions of this directive and three change notices, all of which have thereafter been rescinded.[9]

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[6] 653 F.2d 514, 519 (D.C. Cir. 1981) *(en banc).*
[7] Watson Letter Decision, *Mettiki* at p.4.
[8] DOI Press Release of 11/18/2009.
[9] DOI, OSM Reclamation and Enforcement Directive INE-35.

This latest Directive defines "federal inspection" as basically anything OSM wants to do:

> (1) An inspection conducted by an authorized representative of OSM under 30 CFR 842.11(b)(1) when an RA fails to take appropriate action, or to show good cause for such failure, in response to a TDN;
> (2) An inspection conducted by an authorized representative of OSM under 30 CFR 842.11(b)(1) when a person provides adequate proof that an imminent danger or harm exists, and the RA has failed to take appropriate action; or
> (3) *Any other inspection conducted by OSM* or jointly by OSM and an RA.

Additionally, INE-35 notes circumstances when a TDN will not be issued:

> (3) Permit defects. *OSM will not review pending RA permitting decisions* and will not issue a TDN for an alleged violation involving a permit *defect until the RA has approved the relevant permitting* (e.g., permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights), and the permittee has the RA's approval to mine under the permit.

Even though OSM does not have veto power over state permitting decisions, and in fact has absolutely no role in primacy states' permitting decisions, this new language purports to set up OSM as a Super Regulatory Authority to review and potentially overrule the state RA's permitting decisions.

"Permit defect" is defined in such general terms that it is not at all clear from that section to what extent OSM feels it could conceivably participate in the issuance of state surface coal mining permits. It is clear, however, that this proposal also would allow OSM to overrule or veto the state permit decisions for an alleged failure to follow the state's own program. OSM has never had that power.

> Permit defect means a type of violation consisting of any procedural or substantive deficiency in a permit-related action taken by the RA (including permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights). *Examples include, but are not limited to:*
> (1) *A failure to follow the procedural requirements of the approved regulatory program.*
> (2) A failure by the RA to make written findings required in order for the RA to approve the permit.
> (3) A lack of technical information, tests, plans, or other information that is required by the approved regulatory program to support a specific finding that was made or action that was taken as part of the permit approval process.
> (4) Approval of designs or mining and reclamation practices that are inconsistent with the approved regulatory program.
> (5) An error in the analysis of technical or other information or plans.

OSM's role under federal law is not to paternally look over the states' work. As testified to on April 7, 2011 before the House Subcommittee on Energy and Mineral Resources, this Administration's proposal to reduce the funds available to the states for correcting their

significant AML problems in FY-2012 belies the argument that these changes are motivated by environmental responsibility.

On the contrary, these directives comport with the apparent objective of the Environmental Protection Agency to overwhelm the states' authority under SMCRA by use of collateral attacks under CWA. This supports my conclusion that EPA's recent actions, such as the issuance of their draft April 1, 2010 Guidance Document, are primarily directed less toward environmental protection than toward gutting SMCRA where the primacy-approved states, not the federal government, have primary exclusive jurisdiction.

Your November 15, 2010 Memorandum, in conjunction with the January 31, 2011 *Directives*, runs counter to established law without the formality of regulatory enactment.[10] Additionally, OSM has made no genuine effort to work in cooperation with the states in developing these fundamental changes.

In April 2010, OSM published in the Federal Register a Notice of Intent to conduct an Environmental Impact Statement for the Stream Protection Rule to replace the 2008 Stream Buffer Zone Rule. On April 7, 2011, before the House Subcommittee on Energy and Mineral Resources during the Oversight Hearing on the *"Effect of the President's FY-2011 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction,"* Chairman Doug Lamborn stated in his opening remarks,

> "Chairman Hastings and I have initiated an investigation into the Office of Surface Mining's attempt to rewrite the 2008 stream buffer zone rule and the ongoing fiasco resulting from the Administration's rushed effort to fast track major changes to an existing and significant rule."
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> ...
>
> "[E]ven more egregious than this budget proposal, is the agency's ongoing effort to re-write the 2008 Stream Buffer Zone Rule. A rule that an independent contractor, hired by this Administration, found will result in the loss of over 7,000 direct jobs nationwide and eliminate over 20,000 direct and indirect jobs in Appalachia. Over 29,000 people will be driven into poverty. After the job loss estimates became public, this Administration ended the contract with the contractor."

During the past year, states have been invited to sign a MOU to be "cooperating agencies" in reviewing and commenting on the chapters of the draft EIS as they become available. Virginia has signed the MOU. However, these states are finding that their comments are not given much consideration and that the drafts provide insufficient support for the proposed rule. Furthermore, the cooperating agencies are only given five working days for analysis and response, an unreasonably brief time for meaningful analysis of such complex issues.

On November 23, 2010, several states joined in a letter to you documenting many of these concerns. The letter was signed by representatives from Alabama, Indiana, Kentucky,

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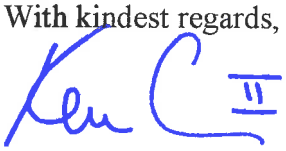
[10] A consistent discussion is set out in the December 3, 2007 Federal Register notice removing 30 CFR § 843.21, 72 FR 68000, December 3, 2007. *See* excerpt as Attachment A.

Texas, Utah, Virginia, West Virginia and Wyoming. I am not aware of any response to that letter. If such a response has been forthcoming, I am requesting a copy of that document.

The IMCC has sent numerous documents offering comments and proposing revisions that would preserve Congress's intent to afford the states primacy. Those efforts, too, have generally gone unacknowledged.

These actions seem to have been taken without any legal basis or justification. They exceed the delegation of authority Congress has given to OSM and jeopardize the vested states' authority under SMCRA. I continue to hope that a legal challenge will not be necessary. If there are unresolved problems, we should–as we have throughout the history of this program–reach an amicable resolution within the framework that Congress has created. Failing that, we will have no choice but to seek legal redress. I look forward to your prompt reply in addressing these concerns.

With kindest regards,



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cc: The Honorable Douglas Domenech
Secretary of Natural Resources

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