

MEMORANDUM OF UNDERSTANDING

between

The Office of Surface Mining Reclamation and Enforcement

and

State of Alabama Surface Mining Commission

for EIS activities under NEPA for Stream Protection rulemaking

August 25, 2010

A. STATEMENT OF PURPOSE, BACKGROUND

The purpose of this Memorandum of Understanding (MOU) between the Office of Surface Mining Reclamation and Enforcement (OSM) and the State of Alabama Surface Mining Commission (ASMC) (the Cooperator) (collectively referred to as the signatories) establishes responsibilities of each agency concerning preparation of OSM's environmental impact statement (EIS) under the National Environmental Policy Act, 42 U.S.C. § 4371 et seq. (NEPA) for a rulemaking concerning stream protection (the rulemaking) under the Surface Mining Control and Reclamation Act of 1977, 30 USC § 1201 et seq. (SMCRA). This MOU implements NEPA, consistent with the Council on Environmental Quality (CEQ) regulations at 40 CFR 1501.6 and 1501.8, and the January 30, 2002, CEQ Memorandum for the Heads of Federal Agencies (Subject: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act).

Authority for OSM to enter into this MOU includes, but is not limited to:

1. SMCRA
2. NEPA and implementing regulations, cited above
3. Intergovernmental Cooperation Act of 1968 (40 U.S.C. 531)

Authority for the ASMC to enter into this MOU includes, but is not limited to:

1. Code of Alabama 1975 § 9-16-133(2)

B. SIGNATORIES' ROLES AND RESPONSIBILITIES

This MOU describes OSM's and the Cooperator's roles and establishes a framework for cooperation between the signatories, with regard to preparation of the EIS.

OSM'S ROLE: OSM is the lead agency for the federal government's preparation of the draft and final EIS, and has responsibility to ensure compliance with the requirements of NEPA for the rulemaking. In this capacity, OSM has the following responsibilities, among others:

OSM is responsible for requesting participation of other federal, state, and tribal government agencies, as appropriate, and for cooperatively using their expertise in development of the EIS.

OSM has responsibility for determining the purpose and need of the project, the conclusions of the environmental analysis, which alternatives are selected, and what mitigation measures will be included; and making final determinations on the content of the EIS documents.

OSM will provide the signatory with copies of key or relevant documents underlying the EIS that OSM identifies as pertinent to the Cooperator's jurisdictional responsibility or special expertise, including technical reports, data, information, analyses, comments received, and working drafts relative to the environmental reviews, draft and final EISs.

When providing the Cooperator with documents and working drafts, OSM will, to the extent possible, give a reasonable time for review and return of consolidated and comprehensive comments.

OSM will consider for incorporation, to the extent consistent with SMCRA, NEPA, and other applicable law, and the purpose and need for the underlying federal action, the comments, recommendations, and/or data submitted by the Cooperator in the EIS process. Insofar as possible under the EIS schedule, OSM will provide the Cooperator the opportunity to review appropriate sections of administrative drafts of the EIS to determine if data and comments provided by the Cooperator have been accurately represented.

In instances involving questions as to the content or relevance of any material in the EIS, including all data, analysis, and conclusions, OSM will make the final determination.

OSM will provide the Cooperator with relevant information on the EIS schedule, including review timeframes, and with any changes to the schedule as early as practicable.

OSM will provide to the ASMCASMC written or email confirmation of the other cooperating agencies, and their representatives. OSM will timely inform cooperating agencies about the representatives for the EIS.

In meeting these responsibilities, OSM will follow all applicable statutory and regulatory requirements.

THE COOPERATOR'S ROLE: The ASMCASMC is a cooperating agency on the EIS. OSM recognizes that the Cooperator has jurisdiction and special expertise relevant to the preparation of the EIS.

The Cooperator will provide information, data, and comments to OSM regarding those elements of the EIS, and the data and analyses underlying them, in which it has jurisdictional authority or special expertise or for which OSM requests information and comments. The Cooperator will help collect data to the extent possible, participate in discussions about data assessment and technical reports, and provide technical expertise in order to assist in evaluating the effectiveness of all alternatives and the EIS.

The Cooperator will provide timely review and comments on material provided by OSM pertaining to the preparation of the Draft EIS and subsequent NEPA documents regarding information relating to surface coal mining and reclamation regulatory programs and other areas for which the ASMCASMC has special expertise or jurisdiction. Information, comments, and analysis provided by the cooperators may address, but is not limited to, the following: data and analyses regarding existing surface coal mining and reclamation regulatory programs; relevant statutory and regulatory requirements related to surface coal mining and reclamation; impacts of alternatives on surface coal mining and reclamation regulatory programs; and conclusions regarding alternatives with respect to surface coal mining and reclamation regulatory programs or other areas for which ASMC has special expertise or jurisdiction.

All ASMC input to the process of EIS preparation will be through OSM.

The Cooperator agrees that all internal working draft documents for the development of the EIS are pre-decisional and will ensure these documents will not be made available for review by individuals or entities other than the signatories to this MOU. All requests for release of any information to anyone outside of the signatories must be determined by OSM, in compliance with federal law. All data, information, draft documents, and comments provided to and considered by OSM, will be part of OSM's working papers related to preparation of the EIS, and OSM will include them as appropriate in the decision record and administrative record for the EIS. These materials may only be released by OSM. The Cooperator understands that all data, information, drafts, and comments provided will be made available by OSM for public review except as protected under federal law including, but not limited to, the Freedom of Information Act, the Privacy Act, and trade secrets law.

In particular, the Cooperator will provide appropriate information and comments on the following topics:

- a. Data on surface coal mining and reclamation operations, stream protection, environmental compliance data, and cost data related to the implementation of surface coal mining and reclamation programs for which ASMC has special expertise or jurisdiction;
- b. ASMC will provide timely review and comments on material provided by OSM pertaining to the preparation of the Draft EIS and subsequent NEPA documents regarding information relating to surface coal mining and reclamation regulatory programs. ASMC's role as a cooperating agency is to provide guidance to OSM in preparing analyses and to provide technical review of these analyses for the EIS.

At the administrative draft stage of the EIS, ASMC will review technical documents on impacts to surface coal mining and reclamation regulatory programs and will advise the OSM on the technical adequacy and completeness of these documents.

ASMC's participation does not imply endorsement of OSM's action or preferred alternative, and does not affect the legal responsibilities of the ASMC.

Information, comments, and analysis provided by the cooperator may address, but is not limited to, the following: data and analyses regarding existing surface coal mining and reclamation regulatory programs; relevant statutory and regulatory requirements related to surface coal mining and reclamation; impacts of alternatives on surface coal mining and reclamation regulatory programs; and conclusions regarding alternatives with respect to surface coal mining and reclamation regulatory programs or other areas for which ASMC has special expertise or jurisdiction.

- c. Other information based on ASMC's special expertise and/or jurisdiction that may be relevant to the EIS data or analysis.

The Cooperator will return consolidated and comprehensive comments on working drafts and other material provided for review to OSM in a time consistent with the planning schedule. The schedule will be provided to ASMC upon signature of this MOU and may be updated on a periodic basis. OSM will provide ASMC all updated planning schedules as soon as possible to allow for participation in the process.

The Cooperator will not be responsible for the actual preparation of any portion of the EIS or related reports, or for developing any new information; nor will the Cooperator be responsible for the overall adequacy of the EIS.

The Cooperator will designate in writing a representative and backup representative to serve as a contact and ensure coordination during preparation of the EIS. Staff time and budget permitting, the Cooperator will have their representatives attend scheduled meetings pertinent to their responsibilities, and discuss the project and the review process (including agency responsibilities and work schedules). The Cooperator may change a representative at any time by providing a written designation to the other cooperating agencies.

RESPONSIBILITIES OF THE SIGNATORIES: The signatories agree to participate in this NEPA evaluation process in good faith and make every effort to resolve any perceived areas of conflict.

Each signatory will communicate regularly with the other including, at minimum, immediate information of schedule changes that would affect its ability to provide timely input to the document.

For activities related to EIS development, the signatories agree not to employ any third party having a financial interest in the outcome of the EIS. The signatories also agree to take all necessary steps to ensure no conflicts of interest exist with any officers, agents (including consultants), or representatives they may employ in the development of the EIS.

The signatories agree that if comments are not provided in a timely manner that OSM may consider the lack of comments and input to indicate that the ASMC has no comment on the material reviewed.

Nothing in this MOU limits, affects, or binds the authority or legal responsibility of the signatories to perform beyond the respective authority of each, or requires the signatories to assume any obligation or expend any sum in excess of available authorizations and appropriations.

B. TERMS AND CONDITIONS

This MOU will take effect immediately upon being executed.

Both signatories must agree to any changes, modifications, and amendments in writing. Either signatory may renegotiate or terminate this MOU at any time following at least 30 days written notice.

If not terminated sooner, this MOU will end when the Record of Decision is approved by OSM or the designated official in the Department of the Interior.

C. LIMITATIONS

All commitments made in this MOU are subject to the availability of appropriated funds and each agency's budget priorities. This MOU is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the signatories to this MOU will be handled in accordance with applicable laws, regulations, and procedures, including those for government procurement and printing, and will be subject to separate subsidiary agreements that will be effected in writing by representatives of both signatories.

This MOU does not direct or apply to any person outside OSM and the ASMC.

This agreement is intended only to improve the internal management of the Executive Branch and is not intended to, nor does it, create any right to administrative or judicial review; nor does

it confer any right or benefit, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.

This MOU in no way restricts either signatory from participating in similar activities with other public or private agencies, governments, organizations, or individuals. Nothing in this MOU will be construed as affecting the authorities of the signatories to act as provided by statute or regulation or as binding beyond their respective authorities.

Any public information releases that reference this MOU, or the EIS, shall be subject to prior approval of OSM. The signatories agree that all inter- and intra-agency documents designated as privileged, confidential, pre-decisional or deliberative shall not be released to the public, except as those subject to release pursuant to a Freedom of Information Act request. No documents shall be released without prior consultation and approval of OSM, except as otherwise required by law. OSM's Office of Communications shall be designated as the Point of Contact for all information releases to the public, with the with the exception of each cooperator's comments required to be made public according to law.

D. STIPULATIONS

The signatories will: Comply with all necessary provisions of NEPA. OSM will complete an EIS analyzing the impacts associated with the stream protection rulemaking. The ASMC will perform its duties as a cooperating agency.

The signatories will: *Complete tasks mutually agreed to according to the planning schedule which will be provided separately.* Each agency will be responsible for the task assigned and OSM will have overall responsibility for completion of all tasks. Once complete, OSM will confirm, in writing, completion of these tasks. The tasks to be completed and the planning schedule may be updated by mutual agreement of OSM and the ASMC designated representatives. The agencies will identify their designated representatives by letter.

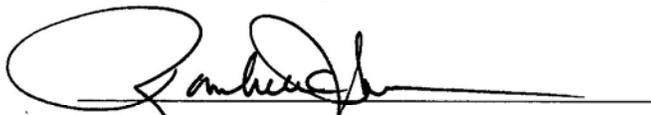
OSM will serve as lead agency for the development of the EIS.

E. DISPUTES

The following procedures shall be utilized to elevate any conflict or disagreement between the agencies. The designated representatives of the signatories will jointly prepare a document that contains a joint statement of facts and succinctly state each agency's position and recommendations for resolution. If the agencies are aware of a dispute, they will defer taking final action, where consistent with applicable legal deadlines, to allow the issue to be resolved through the elevation process. The following procedures shall be utilized to elevate any conflict or disagreement between the signatories regarding their responsibilities under this MOU. If the designated representatives from OSM and the ASMC cannot resolve any contentious issue within 14 days, the issue will be raised with the Director of OSM and the Director of the ASMC, or their representatives, who will attempt to resolve the dispute. The Directors will attempt to negotiate a decision resolving the dispute within 14 days after elevation. A decision will be binding upon the agencies. In every case, the decision rests with the agency exercising the statutory or regulatory authority in question. For matters related to the EIS, the final decision rests with the Director of OSM.

The signatories have executed this MOU on the dates shown below.

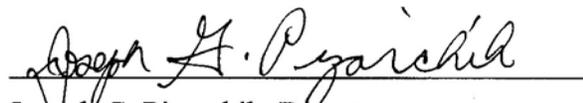
State of Alabama Surface Mining Commission
P.O. Box 2390, Jasper, AL



Randall C. Johnson, Director

Date 8/24/2010

Office of Surface Mining Reclamation and Enforcement
1951 Constitution Avenue, NW, Washington, DC



Joseph G. Pizarchik, Director

Date 8-31-10