



Investigative Report of OSM Environmental Review

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This is a version of the report prepared for public release.

SYNOPSIS

On December 6, 2011, we initiated this investigation after news outlets reported in November that the Office of Surface Mining Reclamation and Enforcement (OSM) pressured contractors working on an environmental impact statement (EIS) to lower their estimate of the number of potential job losses associated with a proposed rule to protect streams located near coal mines. OSM then allegedly ended their contract when they refused.

If adopted, the proposed Stream Protection Rule would place more requirements on coal mining companies to protect streams near mine sites from the environmental effects of mining. OSM hired engineering and environmental firms as contractors to work on the EIS, which examined the environmental benefits of the proposed rule as well as potential socioeconomic effects, including costs to the coal mining industry and job losses.

We initially focused our investigation on two allegations: that OSM pressured the contractors to change their calculation methods to lower the number of job losses, and that OSM ended the contract because the contractors refused to do so. We also examined the accuracy of a figure, leaked to the media before these allegations surfaced, showing that some 7,000 jobs would be lost if the new rule was implemented.

We found that OSM initially directed contractors to use one set of criteria to estimate coal production losses and job losses associated with the Stream Protection Rule. After the contractors determined that there would be high costs to the industry and significant job losses, newer OSM employees involved in the project asked the contractors to change a variable in the calculations. These OSM employees said they knew that this would lower the potential job-loss numbers but felt strongly that the change was correct. Many of the individuals we interviewed, however, including the contractors and career OSM employees, believed this change would produce a less-accurate number. The Office of Management and Budget, which oversees these economic reviews, originally approved the contractors' first method, but subsequently reported to us that both methods were acceptable.

While we found that OSM only began to seriously consider terminating the EIS contract after the job losses were leaked, interviews and internal communications indicate that OSM's dissatisfaction with the contractors' work product and overall performance occurred well before then. Rather than terminate the contract, OSM decided simply not to renew it.

We were unable to determine the accuracy of the 7,000 job losses estimated in the EIS. While the OSM Director testified before Congress that calculations used by the contractors were mere "placeholders," the numbers that went into that figure were not fabricated; they were based on the contractors' knowledge. Career OSM employees have questioned certain aspects of the contractors' methods of analysis, however, and the contractors themselves acknowledged that because of the project's rushed schedule, they were unable to do the full analysis they would have preferred.

We provided this report to the Principal Deputy Assistant Secretary for Land and Minerals Management for any action deemed appropriate.

BACKGROUND

Mining Oversight

Surface coal mining often involves removing the top of a mountain in order to recover the coal underneath. The process creates an immense amount of excess dirt and rock, known as “spoil,” which is typically dumped in nearby valleys and can damage or bury the streams that flow through them. These mining activities are primarily regulated by the U.S. Department of the Interior’s (DOI) Office of Surface Mining Reclamation and Enforcement (OSM) under the Surface Mining Control and Reclamation Act of 1977, and by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers under the Clean Water Act.

As part of the regulations implementing the Surface Mining Control and Reclamation Act, OSM adopted requirements for a 100-foot “buffer zone” around streams as a means to protect the stream channels from erosion from nearby mining activities. OSM modified the Stream Buffer Zone (SBZ) rule in 1979, 1983, and most recently 2008 (30 C.F.R. § 816.57). The 2008 rule replaced the 1983 rule, but there is ongoing dispute as to which rule better protects the environment. Some OSM personnel have said the 2008 rule is stronger. Environmental groups criticized the 2008 rule, however, saying it weakened environmental protections, and several organizations filed suits challenging its validity.

In April 2009, the Secretary of the Interior asked the courts to vacate the 2008 rule (and thus restore the 1983 rule), stating that OSM neglected to consult with the U.S. Fish and Wildlife Service pursuant to the Endangered Species Act. Instead, the courts denied the U.S. Government’s motion, in part because it would have allowed OSM to, in effect, repeal its own regulation while bypassing the Administrative Procedures Act.

The Secretary entered into a settlement agreement on March 19, 2010, with the environmental groups involved in the civil actions, stating that OSM would “make best efforts” to develop a new rule that would be broader in scope than the 2008 SBZ rule. OSM later titled this new rule the “Stream Protection Rule.”

The Environmental Impact Statement (EIS) for the Stream Protection Rule

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 - 4370h, requires Federal agencies to prepare detailed EISs to assess the environmental impact of any major Federal actions significantly affecting the environment and present alternatives to them. On May 27, 2010, OSM hired Polu Kai Services (PKS) to conduct the work for the Stream Protection Rule EIS. According to the statement of work, PKS was to prepare a draft and final EIS for the proposed rulemaking and alternatives or options for the rule. PKS was also to prepare a regulatory impact analysis (RIA), which is required by the Office of Management and Budget (OMB) per Executive Order 12866 and OMB Circular A-4 for economically significant rules. The RIA would examine the associated costs and benefits of the Stream Protection Rule, including potential job losses. PKS hired three subcontractors to assist with the EIS/RIA project: Engineering Consulting Services, Inc. (ECSI), and Morgan Worldwide, both based in Lexington, KY, and MACTEC, based in Atlanta, GA.

Media Coverage and Congressional Testimony

On January 26, 2011, the Associated Press reported that the proposed Stream Protection Rule would eliminate thousands of jobs and cut coal production across the country. The news agency appears to have obtained an unauthorized release of a draft copy of the EIS, which predicted 7,000 job losses associated with the new rule.

On March 8, 2011, DOI Deputy Secretary David Hayes testified before the U.S. House of Representatives Committee on Appropriations. He told the committee that DOI disagreed with the contractors' economic analysis and was looking at "completely revamping it." Hayes also stated that if the contractors' new drafts were not adequate, DOI planned to terminate the contract.

OSM Director Joseph Pizarchik testified before the House Committee on Natural Resources on April 7, 2011, stating that OSM and the contractors had ended their relationship a few weeks earlier, on March 24, 2011. He said OSM did not end the contract because the job-loss numbers were high. On November 4, 2011, Pizarchik testified again before the committee, stating that the contractors' numbers were "fabricated," were based on "placeholder" numbers, and had "no basis in fact."

The president of subcontractor ECSI testified on November 15, 2011, before the Committee on Natural Resources. He stated that at a meeting in February 2011, OSM employees had "suggested" that ECSI and the other contractors revisit coal production impacts and job losses associated with the Stream Protection Rule. He said OSM specifically asked the contractors to change the assumptions that went into the calculations; doing so, he said, would create a "fabricated" scenario that would show less impact and "soften" production losses. He told the committee that shortly after the contractors refused to change their assumptions, they received a notice from OSM that the contract with PKS would not be renewed.

Fox News posted an article on its Web site on November 18, 2011, titled "Contractors Claim Administration Pressed to 'Soften' Job-Loss Estimates From Mining Rule." The article repeated the ECSI president's testimony that after contractors refused to soften the job-loss numbers, they learned that OSM was not renewing their contract.

DETAILS OF INVESTIGATION

We initiated this investigation on December 6, 2011, after news outlets reported that contractors working on the EIS for the Stream Protection Rule were pressured to lower their estimate of job losses that could result from adoption of the rule, and that OSM ended their contract when they refused to do this. We investigated these two allegations and examined the accuracy of the EIS' estimated 7,000 job losses, previously leaked to the press.

Lowering the Job-Loss Number

As we conducted our investigation, we found that the job-loss number leaked to the media appeared in a draft of the EIS, but the numbers used to generate it came from the economic analysis in the

RIA. In preparing an RIA, agencies must establish a “baseline,” or the agency’s “best assessment of what the world would be like absent the action,” and then compare that to the proposed rule and to a range of alternatives so the impact of the rule can be assessed.

To establish a baseline for the Stream Protection Rule, OSM and the contractors needed to look at recent coal production numbers, as well as determine the rules and regulations that were in place and being enforced at the time. This establishment of the baseline for comparing the Stream Protection Rule is at the heart of the allegations.

During his November 15, 2011 testimony (and a subsequent interview with our office), ECSI’s president stated that OSM employees told the contractors in February 2011 that to analyze the economic effects of the Stream Protection Rule—comparing the baseline to the proposed rule—contractors needed to assume that the 2008 SBZ rule was in effect and being enforced across the United States. This was not the case, however, because although OSM had adopted the 2008 rule, it was in litigation; therefore, the 1983 rule was still being enforced. In our initial interview of an OSM regulatory analyst, he also noted that because the 2008 rule was immediately challenged in court, OSM did not notify the States, which had primary responsibility for regulating mining, to amend their programs and enforce the rule.

The contractors with ECSI later told us that if they assumed that the 2008 rule was in effect as part of the baseline, rather than the 1983 rule, it would show the Stream Protection Rule having less of an impact on jobs. In essence, they said, the more-stringent 2008 rule, which had a steeper cost to industry, more closely resembled the proposed Stream Protection Rule than the 1983 rule did; therefore, using the 2008 rule as the baseline would lead to less-dramatic results. In his interview, the OSM regulatory analyst confirmed that the 2008 rule appeared to be stricter than the 1983 rule.

Contractors’ Allegations of Pressure by OSM

ECSI’s president told us that since the beginning of the EIS/RIA project in summer of 2010, the project’s original team lead, the former chief of OSM’s Regulatory Support Division, told the contractors to use the “current regulatory regime” as the baseline for comparing the new rule and projecting coal production and job losses. In most States, this would have been the 1983 SBZ rule. After the job-loss number was leaked in January 2011, however, the contractors were told to apply the 2008 rule “as it might have been enforced” to the baseline. ECSI’s president said it was clear that OSM was “unhappy” about the leaked job-loss numbers, which he believed “came right on the heels” of one of President Obama’s job-creation speeches.

ECSI’s president said that although the chief of the OSM Knoxville Technical Division had previously discussed using the 2008 SBZ rule as part of the baseline, this was the first time that OSM suggested this change to the contractors. He also said the impact of making the change would have been significant in lowering the job-loss number.

We interviewed the executive vice president of ECSI about the baseline used for the RIA. He said the former Regulatory Support Division chief initially told contractors to use 2008 coal production numbers, which were produced under the 1983 rule, as the baseline for comparing the Stream

Protection Rule. Once OSM realized the impact that the new rule would have on jobs, he said, OSM wanted to change that assumption. He also told us that OSM stated “late in the program” that the contractors should have been using the 2008 SBZ rule as the baseline (and thus assuming that the coal production numbers were produced under the 2008 rule). To do so, he said, was “an absolute lie.” He explained that the 2008 rule was stricter than the 1983 rule, and OSM wanted to “pretend” that companies had mined under tougher regulatory conditions than they actually had. Comparing the 2008 rule to the Stream Protection Rule, as opposed to the 1983 rule, he told us, would show the Stream Protection Rule having less of an impact on the coal mining industry and fewer job losses.

He said he got the “clear message” from the Knoxville Technical Division chief and from Director Joseph Pizarchik’s counsel that they wanted the baseline change to lower the proposed rule’s impact on coal production and job losses. When asked for any documentation that this was their intent, however, he could provide none, saying this was simply the impression he got from their conversations. “It was clear that they wanted to soften the impact,” he said. “No question.”

We spoke to ECSI’s senior vice president, who said that OSM’s asking the contractors to change the baseline created an ethical dilemma for them. He explained that the contractors had to compare the Stream Protection Rule to the “status quo,” or what was happening at that point in time. Based on their “moral principles as citizens” and their “duties as professional engineers,” he said, they could not lie to the community. He told us that after the job-loss numbers were leaked to the press, he informed the chiefs of the Knoxville Technical Division and the Ecological Services and Technology Transfer Branch that the contractors would need to add a disclaimer to their work stating that the analysis was hypothetical. The Ecological Services Branch chief told him he could not do so; he said that she told him that he would need to “use weasel words” instead.

We also interviewed a former part owner of prime contractor PKS, the project manager of the EIS/RIA contract. He reiterated many of the statements made by the ECSI executives, stating that if the contractors changed the baseline to the 2008 rule, it would be “skewing” the numbers.

Evolution of the Baseline Used in the Analysis

Through email reviews, we were able to determine that in November 2010, OSM told the contractors to use the 1983 SBZ rule as the baseline for calculating production and job losses associated with the Stream Protection Rule:

- On November 3, 2010, the OSM regulatory analyst emailed OMB Policy Analyst Jim Laity, whose role, according to OMB, was to review draft rules and RIAs, about the baseline for the RIA. Laity responded that for any RIA the baseline would be the existing requirements absent a new rule, but told the regulatory analyst that since the 2008 rule was not in effect, “it is somewhat ambiguous what would be the status quo.” The regulatory analyst later responded to Laity that OSM would “instruct the EIS contractor to develop a baseline, which would consist of the costs and benefits of the [Surface Mining Control and Reclamation Act of 1977] regulatory program as it existed before adoption of the 2008 rule” (i.e., using the 1983 rule).
- On November 5, 2010, the regulatory analyst emailed a MACTEC employee, copying the former Regulatory Support Division chief and other OSM team members, stating that the

“status quo,” in which the States “have not yet adopted or implemented the 2008 rule,” was the baseline to which the RIA alternatives and options must be compared.

- On December 9, 2010, the former Regulatory Support Division chief emailed ECSI’s president, reinforcing that the baseline would not include the 2008 rule.

After receiving information on the costs of the rule to the coal mining industry, however, OSM employees requested that the contractor use the 2008 rule as the baseline.

OSM team members appeared to know about the contractors’ predictions of the high cost of the new rule to the coal mining industry on December 9, 2010. An OSM environmental protection specialist forwarded an email to the chiefs of the Knoxville Technical Division and the Ecological Services and Technology Transfer Branch, stating that the “bottom line” was that the Stream Protection Rule would cost the coal mining industry about \$1.3 billion to implement, with \$900 million in Appalachia alone. He said that approximately one third of the production in Appalachia was projected to move elsewhere.

The following month, Pizarchik’s counsel began to ask questions about the baseline. On January 4, 2011, she emailed the former Regulatory Support Division chief, asking: “Question – does our economic analysis assume implementation of the 2008 rule . . . as the ‘status quo’ . . . ? I realize that the 1983 rule is currently in place . . . and that the 2008 rule is only applied in TN and on Indian Lands.” Four minutes later, she asked him if OSM knew the “cost of compliance” for the 2008 rule and the 1983 rule.

We reviewed a recording of a February 1, 2011 meeting to discuss the baseline. The meeting began with Pizarchik’s counsel discussing OSM’s concerns about the contractors’ work. She stated that most of the contractors’ analysis was focused on the coal industry and the benefits of the proposed Stream Protection Rule had not been assessed.

ECSI’s executive vice president later asked Pizarchik’s counsel whether the contractors should be using the 2008 rule as the baseline for the economic analysis. She responded that OSM was “looking at going from one rule to the next rule” and was “not looking at conditions on the ground.” She later stated that OSM’s status quo was that the 2008 rule was “on the books.” When ECSI’s executive vice president disagreed with this, she responded: “It’s not the real world. This is rulemaking.”

ECSI’s executive vice president told Pizarchik’s counsel that he wished he had heard her viewpoint much earlier in the process and that her direction was a “marked change to this whole program.” He said he was “in shock” and that her direction was “a sea change” from what the contractors had been doing. He also said that predicting what the job-loss numbers would be as if the 2008 rule had been implemented was a “hypothetical exercise.”

During the meeting, the former Regulatory Support Division chief appeared to defend OSM’s new position and said the contractors needed to consider “a world” where the 2008 rule was being implemented, which was a more programmatic approach. ECSI’s executive vice president said the contractors would basically have to “make up” how much coal could have been produced in certain States, because most States were not enforcing the rule. He said the EIS was “a lie” and that he

would not sign off on it. He also wondered if changing the baseline would cause the job losses to completely disappear.

After the meeting, the contractors began to email each other, speculating on OSM's intentions about changing the baseline. On February 5, 2011, ECSI's president emailed the team about concerns that OSM was trying to "steer" the contractors to a "desired outcome" that could not be supported. ECSI's senior vice president emailed ECSI's president and executive vice president on February 6, 2011, saying it was clear that OSM wanted an EIS showing minimal impact "for political reasons."

On February 8, 2011, PKS forwarded to the subcontractors OSM's list of "high priority" items, which included the direction to use the 2008 rule as the baseline condition "to make all baseline comparisons." The same day, OSM issued a cure notice (used to inform the contractor that a failure is endangering contract performance) to the EIS/RIA contractors, with one of the issues being the contractors' failure to use "30 C.F.R. Chapter VII in its entirety," including the 2008 rule, as the baseline. The document later referred to the RIA baseline as the 2008 rule. PKS responded to the cure notice on February 23, 2011, stating that the first time OSM had voiced any concern about using the 1983 rule as the baseline was after the job-loss numbers were leaked in January 2011.

We obtained emails showing disagreements within OSM about the baseline issues. On February 16, 2011, OSM employees discussed whether the RIA baseline should be the 2008 rule or the 1983 rule. Pizarchik's counsel emailed the OSM team that the RIA needed to consider the incremental cost from the 2008 rule to the Stream Protection Rule, "not going back to '83." Andy DeVito, the current chief of the Division of Regulatory Support, responded that when he and the OSM regulatory analyst talked to OMB, they agreed that the baseline would be the status quo, meaning the 1983 rule.

On March 3, 2011, Pizarchik's counsel and DeVito again debated the baseline. Pizarchik's counsel wrote in an email: "Andy – The EIS is wrong. The RIA is wrong." She told him the EIS/RIA was an analysis of what OSM had "on the books" and the changes being proposed and the States' implementation of the 1983 rule did not need to be considered. The following day, she emailed the chief of the Knoxville Technical Division and the OSM environmental protection specialist, stating that she had spoken with OMB's Jim Laity and he preferred that the 2008 rule be the baseline.

Response to Allegations

We interviewed the former Regulatory Support Division chief about the baseline issues. He said his initial direction to the contractors regarding the baseline for comparing the Stream Protection Rule was to use 2008 coal production numbers (the latest year of data available at the time), produced under the 1983 rule, and the States' current mining requirements.

The former Regulatory Support Division chief explained that the job-loss number was leaked the day after the President gave his State of the Union address in January 2011. He said Pizarchik called him to his office and told him he was concerned that the President had just given a speech indicating that jobs would grow in this administration, and the next day it came out that something the OSM Director was doing was going to have the opposite effect, which Pizarchik said was "very

uncomfortable politically.” He said that Pizarchik told him that “obviously something needs to change.”

Pizarchik questioned the former Regulatory Support Division chief on how the number was developed, and he told Pizarchik the number was based on “good engineering practice and best professional judgment.” That day, he said, he attended a number of “damage control” meetings with Pizarchik, OSM Deputy Director Glenda Owens, Pizarchik’s counsel, and OSM Senior Advisor Mary Katherine Ishee to look at how the numbers were calculated. He said these individuals told him during these meetings to “figure out a way that the assumptions could be changed so that the numbers didn’t look so bad.”

According to the former Regulatory Support Division chief, during one of the meetings, Pizarchik’s counsel suggested that applying the 2008 SBZ rule to the baseline, rather than 1983, throughout all of the States would show the Stream Protection Rule having less of an impact on the industry. Pizarchik supported her suggestion, he said. The former Regulatory Support Division chief disagreed, however, because OSM and DOI did not want to actually implement the 2008 rule (based on the fact that DOI had asked the courts to vacate the 2008 rule), and because using it as the baseline created a “hypothetical future.”

The former Regulatory Support Division chief said Pizarchik’s counsel also sent him an email the last week of January 2011 stating that he needed to ensure the contractors did a better analysis of the positive contributions of the Stream Protection Rule to the environment and ensure that the assumptions about the impacts to coal production “are changed so that the numbers don’t look so bad.” He said he believed that Pizarchik and his counsel “were trying to cook the books.” He was unable, however, to provide a copy of this email. We subsequently reviewed his and the counsel’s Government email accounts and were unable to locate the email in question.

We informed the former Regulatory Support Division chief that his comments at the February 1 meeting appeared to endorse the baseline change. He replied that just before the meeting, he had been heavily criticized for his management of the project, so at the meeting, he was “probably very resigned to try to get the job done.”

We interviewed a former OSM procurement chief who served as the contracting officer on the EIS/RIA contract. She confirmed the baseline was a “huge issue” that caused many problems between OSM and the contractors. She remembered attending meetings where ECSI’s executive vice president asked whether the 2008 rule should be used as a baseline to project job losses, given that the rule was still being litigated. She said the former Regulatory Support Division chief finally told the contractors at one point to ignore using the 2008 rule as part of the baseline because no one had embraced it.

The former procurement chief also attended the February 1 meeting with the contractors to attempt to resolve issues with the contract. She said Pizarchik’s counsel told the contractors they needed to use the 2008 rule as the baseline, contradicting the former Regulatory Support Division chief’s previous guidance. The former procurement chief said the contractors “were dumbfounded” because this was the first time they had been told to do so.

An OSM senior program analyst who served as the contracting officer's representative on the EIS/RIA contract believed that the Knoxville Technical Division chief and Pizarchik's counsel wanted the contractors to use the 2008 rule as the baseline. Her impression was that this direction ultimately came from Pizarchik. When asked if using the 2008 rule as the baseline was an effort to lower the job-loss finding, she said she had never heard this but did hear that the job-loss number "was going to be hard to overcome."

Andy DeVito confirmed that earlier in the RIA process, he and the OSM regulatory analyst had asked OMB for guidance on how to determine the baseline. DeVito explained that for OSM, the status quo was the 2008 rule for Tennessee and Washington and the 1983 rule for the other States. He informed Pizarchik's counsel of this in March 2011. We showed DeVito the emails between him and the counsel in February and March 2011, in which she appeared to advocate using the 2008 rule as the baseline, and he said that a credible argument could be made for using the 2008 rule because that was the rule on record. When told that other people we interviewed said that using the 2008 rule as the baseline would not show as many job losses as the 1983 rule because of stricter requirements in the later rule, DeVito agreed with that conclusion.

DeVito stood by his initial opinion that the baseline for the RIA should be the 1983 rule, stating that it was "a more honest approach." He then said "honest" might not be the right word—that using the 1983 rule would be more "accurate." He stated that he did not know Pizarchik's counsel's intent or motivation in wanting the baseline changed to the 2008 rule.

We interviewed the Knoxville Technical Division chief, who took the former Regulatory Support Division chief's place as the EIS/RIA team lead in late 2010. He said that when OSM told the contractors to use the 2008 rule as a baseline, the contractors believed OSM had made the job losses "disappear." He said this was not true, however, because the 2008 rule mimicked what companies already had to do to comply with the Clean Water Act. He defended using the 2008 rule as the baseline, stating that even though the rule was being litigated, it was "on the books" in 30 C.F.R. Chapter VII, which was why he wanted it to be used. He later stated that he believed the baseline issues were settled in December 2010 and provided a draft of the RIA, which noted that the RIA baseline used "2008 data for analysis purposes to reflect the current regulatory environment, including the 2008 Stream Buffer Zone Rule and other existing regulations applied to the coal mining industry."

Agent's Note: During our interview of DeVito, we asked him about this reference to the 2008 SBZ rule in the RIA, and he said this may have been referring to the State of Tennessee's implementation of the 2008 SBZ rule.

We also interviewed the chief of OSM's Ecological Services and Technology Transfer Branch, who said the 2008 rule needed to be used as the baseline for the RIA. She explained that the 2008 rule had already been analyzed through a previous EIS, and OSM needed to move forward from that point. She said the cost for implementing the 2008 rule was already being incurred by industry, or was going to be. She agreed that using the 2008 rule as the baseline, as opposed to the 1983 rule, would show less of an impact on coal production and job losses, but she stated that OSM employees were not trying to lower the job-loss numbers and were only worried about ensuring the contractors' product complied with regulations.

In a second interview, the Ecological Services Branch chief discussed her alleged telephone conversation with ECSI's senior vice president, in which she reportedly told him to use "weasel words" when he wanted to add a disclaimer about using the 2008 rule. She said she did not recall the conversation but acknowledged she may have used the phrase "weasel words" during a conversation with him. She said she had worked as a consultant, and consultants would not use the word "hypothetical" in their reports to describe an analysis. She stated, however, that she did not mean that ECSI's senior vice president should not tell the truth in the report.

We also interviewed Glenda Owens and Mary Katherine Ishee about the former Regulatory Support Division chief's allegation that meetings occurred where they discussed lowering the job-loss number. Both said that during these meetings, senior OSM officials were trying to determine what the figure was based on. Ishee stated that OSM "obviously" wanted to get the job-loss number lower at some point, but her conversations involved determining the accuracy of the numbers and then looking at whether certain provisions of the rule were "worth it." She said she never heard anyone suggest "doctoring" the baseline.

We interviewed Pizarchik about the decision to have the contractors change the baseline to the 2008 rule. He said he did not know who made the decision, but he believed the 2008 rule needed to be the baseline because it reflected the current regulatory status. Pizarchik said he had no expectations regarding the job-loss number calculated by the contractors, so the number was a shock. He realized, however, that the contractors had not looked at the benefits of the Stream Protection Rule, including job increases for positions like aquatic biologists.

Regarding the allegations that he met with OSM officials after the job-loss number was leaked and told them that the number needed to be lowered, Pizarchik recalled meetings where he and other officials discussed needing to understand the basis of the number. Once they understood that, he said, they could find ways to lower the job-loss number based on changing provisions in the rule. He denied that OSM pressured the contractors to change how the job-loss number was calculated in an effort to lower the figure.

We asked OSM and DOI officials, including Sylvia Baca, Deputy Assistant Secretary for Land and Minerals, if senior DOI officials or the Executive Office of the President had any influence on the baseline. We found that Pizarchik's counsel had been detailed to the Council on Environmental Quality, under the Executive Office of the President, from August 2009 to May 2010, and that members of the Council attended meetings with OSM on the Stream Protection Rule. We did not find evidence, however, that the Council or senior DOI officials improperly influenced the baseline or the job-loss numbers.

When we spoke to Pizarchik's counsel, we asked her when she first learned of the production losses and industry costs assessed by the contractors. She said that prior to December 22, 2010, OSM realized that if what the contractors put forth could be substantiated, the economic effect of the Stream Protection Rule would be bigger than OSM expected. We showed her the email from her to the former Regulatory Support Division chief on January 4, 2011, asking whether the baseline for the RIA was the 2008 rule or the 1983 rule. She acknowledged that at that point, she did not have an opinion on the issue.

Pizarchik's counsel said her intention in later recommending that the baseline for the RIA be the 2008 rule was to have an EIS that complied with NEPA regulations. She provided a detailed summary and legal analysis of her reasons for wanting the baseline to be the 2008 rule, as well as her notes from various meetings on the EIS/RIA. Although the 2008 rule was not in effect, the summary document outlined that OMB required that the baseline "reflect the future effect of current programs and policies." The document stated that OSM had a regulatory obligation to evaluate the contractors' analysis, and OSM's questions regarding the baselines and alternatives to the Stream Protection Rule were "driven by" NEPA and DOI responsibilities, and Federal statutory and regulatory requirements. She also confirmed that she had discussed the matter with OMB's Jim Laity, and said that he told her that he preferred that the 2008 rule be the baseline.

We informed Pizarchik's counsel of the former Regulatory Support Division chief's allegation that after the job-loss number was leaked, OSM officials discussed lowering the number and she suggested using the 2008 rule as a means to do that. She did not agree with this statement. She stated that OSM realized OMB would never accept the published job-loss number, so OSM needed to understand where the numbers came from.

We asked her if her desire to use the 2008 rule as the RIA baseline was an effort to lower the job-loss number. She replied that it was simply an effort to obtain accurate information. We later asked her this question again, and she responded: "I don't think it was. . . . It was not my job to deal with the job-loss numbers," but she later acknowledged that she knew that changing the baseline to the 2008 rule would lower the job-loss number.

We interviewed the OSM regulatory analyst about the baseline issues, including his initial communication with Laity. He said he originally believed OSM needed to use the 1983 rule as the baseline for the RIA and that Laity approved this. He explained that the 1983 rule was the easier baseline because the contractors could use actual data and "wouldn't have to manipulate them in any way." He said that if he were under time constraints, as PKS was, he would want to use the 1983 rule and "the actual numbers that were out there."

We showed a copy of Pizarchik's counsel's summary supporting her decision to use the 2008 rule as the baseline to the regulatory analyst, and he said her arguments appeared accurate and valid. We also showed him OMB guidance on baselines, provided by Pizarchik's counsel, which stated that agencies "should incorporate the agency's best forecast of how the world will change in the future." The regulatory analyst said he had never seen this guidance document. He said that because Laity approved the original method, he still believed that it was valid, but based on the OMB document, Pizarchik's counsel's position to use the 2008 rule was the better option.

OMB declined to make Laity available for an interview, but it agreed to answer a list of questions we submitted for him. OMB's response explained that the baseline for the RIA was the "state of the world absent the regulatory action being considered." It also stated that some interpretation by agencies might be applied to baseline conditions, and when rules and regulations were in litigation, the baseline or status quo could be "a legitimate source of uncertainty." The response stated that in those cases, multiple baselines could be used.

OMB stated that Laity advised the OSM analyst that using the 1983 rule as the baseline appeared “reasonable and consistent with OMB’s guidance.” Using the 2008 rule as the baseline would also be reasonable, according to OMB, since the 2008 rule could be implemented if the Stream Protection Rule was not promulgated. However, it said there was “value in showing the public what costs and benefits” would result from the Stream Protection Rule, starting from the present, and this could “get lost” using the 2008 rule because true costs had not been incurred (since it was never implemented). From OMB’s response, it does not appear that Laity expressed a preference in using the 2008 SBZ rule as the baseline, as Pizarchik’s counsel indicated; he felt there were reasonable arguments for using both rules.

OMB also stated that Laity did not recall having baseline discussions with anyone besides OSM staff. It further stated that OMB was not trying to influence the job-loss number. Laity believed OSM genuinely tried to determine the best way to conduct the analysis in an ambiguous situation and was not selecting analytical assumptions to achieve any particular result.

We interviewed the president of subcontractor Morgan Worldwide, who calculated the costs associated with the Stream Protection Rule and actually configured the baseline. He said he used 2008 coal production data as the baseline for his analysis, which included the 1983 rule, and then looked at current industry practices, including what was required for filling streams under the Clean Water Act. When asked about OSM’s directive that the 2008 rule should be applied as the baseline, he said the contractors were “very clear” that the 2008 rule could not be applied.

Morgan Worldwide’s staff attorney, who was also present for the interview, stated that using the 2008 rule as the baseline would be difficult since the rule had never gone into effect due to litigation and there was no way to know how long the legal case would continue. Morgan Worldwide’s president and staff attorney stated that because of newer Clean Water Act requirements, mining operators were already expected to comply with the major aspects of the 2008 rule, so the baseline issue was a moot point. Regarding the arguments between OSM employees and the contractors at the February 1, 2011 meeting, the staff attorney said OSM might not have known about the Clean Water Act requirements and how they mirrored 2008 rule requirements.

Both Morgan Worldwide’s president and staff attorney said OSM employees were not purposely trying to lower the job losses by using the 2008 rule as the baseline. Both believed OSM was trying to get an accurate depiction of the effects of the proposed rule.

Although the PKS contract with OSM ended in March 2011, Morgan Worldwide’s president and staff attorney subcontracted with Industrial Economics, the new prime contractor on the EIS/RIA project, in June 2011 and have continued their work on the project.

PKS Contract Initiation, Performance, and Conclusion

We also investigated the allegation that OSM terminated the contract with PKS when the contractors refused to change the job-loss numbers. We examined contract documents, reviewed emails, and questioned OSM and contract employees about the contract process, PKS’ work product, and any problems that occurred during the contract.

Contract Initiation

The former OSM procurement chief we interviewed said OSM decided to award a firm, fixed-price contract to PKS on May 27, 2010, because it rated similarly to its competitors and PKS' price was \$1 million lower. At OSM's recommendation, PKS subcontracted with Morgan Worldwide, MACTEC, and ECSI. She said ECSI was well known for working with the coal industry and Morgan Worldwide was known for its environmental work. She said that using ECSI and Morgan Worldwide as subcontractors provided OSM with a balance that represented both environmental and coal advocates.

OSM later added additional tasks to the contract, bringing its total value to \$4,981,670. The initial deadline for completing the draft EIS was November 19, 2010, with three 1-year options that could later be exercised.

OSM made several additional modifications to the contract for public scoping meetings. According to the former procurement chief, this extra work was added because a dispute occurred between OSM and the contractors as to whether OSM had done official scoping meetings on the EIS, as required by NEPA. Pizarchik later approved the addition of more meetings, which the former procurement chief said changed the contract substantially.

OSM continued to issue modifications to the contract for developing alternatives for the proposed Stream Protection Rule. Another modification involved the development of a "conceptual" RIA and draft EIS. During her interview, an OSM physical scientist who had acted as the original contracting officer's representative provided insight into these last two modifications. She explained that OSM did not initially provide defined alternatives for the proposed rule, which the contractors needed to begin their work. She told us the former Regulatory Support Division chief directed the contractor to prepare the conceptual RIA to save time even though she said there was "no such thing" as a conceptual RIA. The OSM senior program analyst who replaced the physical scientist on the project stated that the change to a conceptual document later caused problems when OSM realized that it was not going to receive a product.

The "conceptual RIA" issue appeared to contribute to performance issues with the contract. The former Regulatory Support Division chief stated during his interview that tight deadlines set by Pizarchik for the EIS/RIA, and the fact that the team did not have the specificity of what was being proposed in the new rule, prompted him to direct the contractors to prepare a conceptual RIA, meaning they would use the rulemaking concepts to develop the document. He said the conceptual RIA was explained to Pizarchik and possibly the Acting Assistant Secretary for Land and Minerals Management's office, but he did not know if they really understood what it meant. Pizarchik also stated during his interview that he may have approved a conceptual RIA, but he later found out that such a document did not exist.

Contract Performance

Numerous individuals involved in the EIS/RIA contract, including OSM employees, attorneys with the DOI Office of the Solicitor (SOL), and State government employees, expressed concerns with the contractors' work as a whole:

- On September 10, 2010, the OSM senior program analyst emailed the former OSM procurement chief that she was concerned because the contractors were requesting more extensions. She stated that she had nothing good to say about the contractors, and that they lacked project management skills and were disregarding OSM's requirements.
- An OSM hydrologist emailed colleagues on October 28, 2010, regarding certain sections of the EIS, stating that the contractors "did not do their homework."
- On November 9, 2010, a second OSM hydrologist emailed other OSM employees about her review of the surface water section of the EIS. She wrote that the section was the "most poorly written 'professional' document" she had ever seen, and that it lacked clarity, content, organization, and grammar, adding that the section "contained info that was totally irrelevant" and lacked data that should have been included. The second hydrologist commented: "If this had come from one of my entry-level students (when I taught college hydro), I would have failed them."
- An assistant solicitor from SOL's Branch of Surface Mining emailed OSM employees on January 19, 2011, expressing significant concerns with the contractors' work, particularly their focus on the Stream Protection Rule's impact on coal production, rather than the physical environment.
- The West Virginia Department of Environmental Protection sent the former Regulatory Support Division chief a letter dated January 26, 2011, stating that Chapter 4 of the EIS, as with previous chapters, "leaves a lot to be desired." The letter stated that for a document that was supposed to support a rule "anticipated to make sweeping changes" in every technical aspect of coal mining, the document displayed "very little depth of understanding" of technical issues. It further stated: "The characterization of this document as 'junk' is not just one person's observation."

Interviews with OSM, EPA, and some contract employees revealed the same concerns with the contractors' products:

- The OSM senior program analyst said that OSM was concerned about the quality of the work after it received drafts of the EIS. For example, she said, sections of the EIS did not appear to be coordinated.
- The Knoxville Technical Division chief said that OSM was getting "smoke and mirrors" after it received drafts from the contractors and had conversations with them. He later stated that there were holes in the RIA and he was not sure the contractors knew what they were doing. PKS had experience doing project-specific EISs but not programmatic ones such as the proposed Stream Protection Rule, he said, which was much broader in scope.
- The Ecological Services Branch chief said she and other OSM employees began getting more involved in the EIS process toward the end of 2010 because they believed it was "a train wreck about to happen." She stated that when OSM employees first received the contractors' product, they thought it was a "piece of garbage" and that OSM had wasted time and money.
- Mary Katherine Ishee said PKS did not have the depth of experience to manage the contract well, which contributed to problems with the work. She said the company had never done a project as ambitious as the EIS/RIA for the Stream Protection Rule. She explained that working on a tight time frame for something so highly visible offered plenty of opportunities to "fall down."

- We also interviewed an EPA environmental protection specialist and a special assistant with the EPA Office of Water who were involved in the EIS/RIA review process. EPA's environmental protection specialist said the EIS chapters provided by PKS lacked focus and did not appear to be coherent. The special assistant said that it appeared that someone had "dumped" a lot of information in the chapters he reviewed. He said a lot of the tables and maps seemed out of context and lacked a coherent structure, and described the chapters as disjointed.

According to Pizarchik, he received information at some point through the process for the EIS/RIA that the former Regulatory Support Division chief was not accurately portraying how work was progressing with the contractors. He said he realized the former Regulatory Support Division chief was not delegating tasks and had difficulty meeting deadlines. Pizarchik said he removed him from the EIS team in late 2010.

Contract Conclusion

We reviewed emails related to OSM ending the contract with PKS and its subcontractors. We found that emails began to circulate within OSM about terminating the EIS/RIA contract after the Associated Press reported that 7,000 coal mining jobs would be lost as a result of the Stream Protection Rule.

On January 26, 2011, an OSM employee emailed Pizarchik's counsel a link to the Associated Press article. The following day, the counsel emailed Pizarchik, stating: "We should fire the EIS contractor. And put that on the front page!!!!" Several hours later, she emailed a SOL assistant solicitor that OSM was considering its options for terminating OSM's contract with PKS. She attached an "EIS options" document to the email, listing the pros and cons of continuing the contract, terminating the contract for convenience, or terminating the contract for cause. She noted that terminating the contract for convenience might look like retaliation. On February 5, 2011, she emailed the Knoxville Technical Division chief that OSM could "salvage the EIS" with Morgan Worldwide's president, "reject the RIA, and cut loose PKS." She said OSM could then attempt to sole-source the RIA contract to Morgan Worldwide.

The cure notice OSM sent PKS on February 8, 2011, stated that PKS' failure to deliver draft chapters of the EIS/RIA that met the contract's requirements had placed the entire project in jeopardy. The cure notice stated that unless PKS submitted a draft EIS/RIA that cured the deficiencies, the Government might elect to terminate the contract for default.

PKS' response to the cure notice stated that OSM could not terminate the contract since the deficiencies were not PKS' responsibility or fault. PKS added that it had been frustrated with OSM's direction and approval process, highlighting OSM's failure to properly conduct public scoping meetings at the outset and provide the contractors with a list of alternatives for the new rule, all of which delayed PKS' work. The response also stated that high turnover rates of OSM project leaders and contracting officials compounded delays and caused internal disputes at OSM. It further stated that many of the alleged deficiencies in the cure notice were inconsistent with previous direction and approvals provided by OSM employees.

On February 25, 2011, the former OSM procurement chief issued a stop-work order to PKS, thus ceasing all contract tasks.

We obtained a document, dated March 7, 2011, and labeled “Attorney Work Product Prepared in Anticipation of Litigation,” in which Pizarchik’s counsel recommended that OSM attempt to partially terminate the contract with PKS. She wrote that while OSM could make a case for terminating the entire contract, there were benefits to retaining PKS to do some remaining work. She recommended that OSM contract with a nationally recognized firm to prepare a new RIA.

On March 16, 2011, an attorney-advisor from SOL’s Acquisitions and Intellectual Property Branch, General Law Division, sent SOL and OSM employees a recommendation summary on ending the contract with PKS. The document stated that PKS’ response to the cure notice failed to provide assurance that it could fully perform under the contract; however, based on new information provided by the contractors, it appeared that OSM employees were also involved in the contract performance issues. SOL recommended that OSM make a last attempt to work with PKS “in a limited fashion” but de-scope the contract and remove all substantive work related to the EIS/RIA. It stated that OSM could finish the EIS in house and re-compete the RIA. The document stated that this approach would mitigate public relations issues related to “terminating the contract because OSM did not like the leaked numbers.”

We interviewed this attorney-advisor, who said that SOL and OSM discussed letting the contract expire and not exercising the options because this was “the least obtrusive way.” She said OSM did not want to contend with the litigation of terminating for cause and the potential of losing in court. She also said she found that OSM employees contributed to problems with the contract, which was one reason the contract could not be terminated. According to the attorney-advisor, OSM also did not want to terminate the contract for convenience because of problems with the contractors’ performance.

When asked about her statement in the SOL summary about OSM not liking the leaked numbers, the attorney-advisor clarified that terminating the contract would be “a public relations disaster” because the contractors would allege that OSM terminated them due to the leaked numbers. Although she said that this was OSM’s biggest fear, she noted that a primary reason for terminating the contract was that OSM did not have any faith that the product would be usable, even if the contractor was given more time to work on it.

During her interview, the OSM senior program analyst said she suggested to the former procurement chief that rather than terminate the contract for convenience, OSM should simply end the contract and not renew the option year. She said she told the chief that OSM did not have “absolutely clean hands on this.” In the end, she said, both OSM and the contractors agreed to end the contract.

The contract ended on March 24, 2011. OSM paid PKS \$3,700,269 for its work on the contract—\$1,281,401 lower than the original price—including all tasks. The Knoxville Technical Division chief sent a “Lessons Learned” document to OSM employees for review on March 31, 2011. The document stated that the accelerated timeframe of the EIS/RIA caused a number of problems and drove poor decisions, resulting in “unacceptable work product quality.”

Why the Contract Ended

DOI employees we interviewed who were involved in the EIS/RIA project stated that the PKS contract did not end because of the disagreement over changing the baseline for the economic analysis. Most of these individuals outlined problems with the contractors' performance and their lack of experience doing programmatic EISs, as documented previously. The contractors also acknowledged that they did not have experience doing programmatic EISs such as the one developed for the Stream Protection Rule.

OSM employees admitted contributing to problems in getting the work done, including the tight deadlines imposed, the new work added at the beginning of the project, and the conflicts in direction provided by different OSM employees throughout the project. Pizarchik acknowledged the probability that both OSM staff and the contractor made some bad judgments.

OSM employees acknowledged that the leak of the job-loss numbers to the Associated Press brought visibility to problems with the contractors, which spurred discussions of ending the contract. Ishee, for example, stated that had there been more time, more money, and less publicity surrounding the project, the issues probably would have been worked out. Pizarchik's counsel also said that had the numbers not been leaked, and had DOI officials not become focused on the contractors' work, "it would have been something that OSM dealt with in the back-and-forth of review of this [EIS/RIA] document."

We questioned Pizarchik's counsel about her email that OSM should "fire" the EIS contractor. She stated that she had simply been venting. When asked about the email between her and the Knoxville Technical Division chief, in which she said OSM could "cut loose" PKS and pursue a contract with Morgan Worldwide's president, she said cutting PKS loose meant ending the contract, not firing the company. She said OSM was considering sole-sourcing the RIA contract to Morgan Worldwide's president, but eventually contracted with Industrial Economics, with Morgan Worldwide's president as a subcontractor.

Some DOI employees also acknowledged the political implications of getting the rule out before a presidential election year. When asked if OSM ever considered extending the deadlines for the contractor to finish the work, the attorney-advisor said she originally proposed going back to the courts about the 2008 SBZ rule and getting a continuance, but there was "some feeling that this needed to be done this election year." Ishee also recalled the election being mentioned, but did not feel that it was "unduly a concern here." We asked Pizarchik's counsel about this issue, and she said there was a general concern that the Stream Protection Rule was a priority of the Administration, and OSM "wanted to get it done." Pizarchik acknowledged that the longer the EIS/RIA was delayed, the more uncertainty it created, and he wanted the Stream Protection Rule to be finished during the President's first term. He said, however, that he still wanted a good product.

The Accuracy of the Job-Loss Number

We examined the accuracy of the job-loss number reported by the Associated Press. In his April 7, 2011, testimony before the Committee on Natural Resources, Pizarchik stated that the

contractors' job-loss numbers did not "have a sound basis." On November 4, 2011, he testified that the contractors' numbers were "fabricated," were based on "placeholder" numbers, and had "no basis in fact."

The Contractors' Methods

According to ECSI's president, the EIS/RIA team had numerous discussions trying to determine how it would analyze the impacts of the various Stream Protection Rule alternatives. One thought was to develop a "model mine" and then analyze the effects the rule would have on a typical mining operation, but the team did not have enough time to do this. ECSI's president said that he, the former Regulatory Support Division chief, and Morgan Worldwide's president proposed doing an "expert elicitation process," where the contractors would analyze the production shifts themselves and then validate their findings by soliciting information from mining companies.

ECSI's president said they planned to provide the rule alternatives to the mining companies to solicit the information. He did not believe this would be an issue since OSM had stated from the beginning that the contractors would be seeking input from industry. ECSI was ready to send information packages to the companies on December 15, 2010, when ECSI's president decided to check with the former Regulatory Support Division chief again to ensure that he approved soliciting input from the coal industry. ECSI's president said that he told him not to provide the documents to industry because they revealed too much of the proposed rule. Because of this, he said, the team was "left with" just the expert elicitation numbers.

ECSI's president said the production impacts that the expert elicitation team calculated in association with the new rule were provided to MACTEC to input into a software model called IMPLAN, which then computed that 7,000 jobs would be lost. He said that in the time frame given for the project, this was the best analysis that could be done. He added that the number was lower than he had expected.

The former Regulatory Support Division chief also stated that the initial plan for the EIS/RIA was to obtain input from the coal mining industry on the general provisions of the rule alternatives and their effect on a typical mine. He said that an industry survey would be the basis for getting realistic numbers on what the rule would do. He said that Pizarchik knew he planned to take this approach, but Pizarchik changed his mind when they discovered that leaks of information had occurred at different points during the EIS process.

The former Regulatory Support Division chief stated that they then had to figure out a different way to conduct the EIS. He said he decided to have the contractors conduct a professional elicitation with a panel of experts as a methodology to develop the best estimate of coal production shifts associated with the different alternatives. He said the contractors gave their best professional judgment of how each provision of the rule would affect coal production, and then calculated a percentage change.

Morgan Worldwide's president said he developed the figures for the RIA that were eventually used to calculate the job losses in the EIS. He described them as an initial approximation, but acknowledged he may have used the word "placeholder" to describe them to OSM staff. The

numbers were based on his review of historic mining data and his knowledge of mining regions and what the proposed rule components and effects would have, he said. Morgan Worldwide's staff attorney explained that the president planned to go back and get supporting documentation to back up the costs and make them as accurate as possible.

Agent's Note: The job-loss number was leaked to the media before Morgan Worldwide's president could do this.

Morgan Worldwide's president estimated that his error range for the cost to industry was 20 to 25 percent and 10 percent for the coal production shift calculation. He said he would "stand behind" his numbers. He said Pizarchik's comments about the inaccuracy of the numbers was a "knee-jerk reaction to a very good sound bite" in the press about job losses, "which played into the politics at the time."

He also told us he disagreed with the use of the IMPLAN software used to compute the job-loss numbers and said he expressed disagreement with using it from the beginning. He explained that his concern was that the IMPLAN model was too simplistic.

OSM Employees' Views of the Contractor's Approach

We also interviewed OSM employees on their views of the contractors' methods and the accuracy of the job-loss numbers. OSM's Ecological Services Branch chief disagreed with the expert elicitation approach. She said the contractors were not able to explain how they came up with their findings from this method. She later said that the former Regulatory Support Division chief seemed to be unilaterally approving decisions on the EIS/RIA without soliciting input from others.

The Knoxville Technical Division chief said that OSM and the contractors agreed to use the expert elicitation process because the timeline for finishing the EIS was tight. Later in the EIS/RIA process, however, the contractors were unable to describe how they arrived at their final numbers, he said. He said OSM also questioned the contractors' use of the IMPLAN software model.

When asked about the contractors' original plan to solicit the coal mining industry for input, the Knoxville Technical Division chief said that OSM did not like that idea because it feared operators might inflate their costs. OSM consequently told the contractor not to solicit information from the industry, and that operators would have a chance to voice their concerns once the rule was published.

He did not believe the numbers used by Morgan for the RIA were fabricated. He thought they were a "first-pass estimation." Nonetheless, he said, the job-loss number was inaccurate because the data used to produce it were flawed and the contractors did not consider any environmental benefits that might result from the Stream Protection Rule.

Similar to the chiefs of the Knoxville Technical Division and the Ecological Services and Technology Transfer Branch, Pizarchik told us that the contractors could not explain how they came to their conclusions. Without having that type of information, he said, he could not explain

to anybody in DOI or in the Administration how the numbers were derived, “let alone” defend the conclusions in any future litigation.

We asked Pizarchik where the term “placeholder,” which he used to describe the numbers used by Morgan Worldwide to calculate coal production losses and costs to industry, came from. Pizarchik said his staff informed him that the contractor had used a “placeholder” number. He said he understood the word meant that the number had “no basis to the formula” and “no basis in reality.”

SUBJECTS

1. Joseph Pizarchik, Director, OSM.
2. Former Counsel to the OSM Director (currently the Senior Adviser for Enforcement Programs, Bureau of Safety and Environmental Enforcement).

DISPOSITION

We provided this report to the Principal Deputy Assistant Secretary for Land and Minerals Management for any action deemed appropriate.