

Subcommittee on Oversight and Investigations

Louie Gohmert, Chairman

Hearing Memo

May 18, 2015

To: All Natural Resources Committee Members

From: Subcommittee on Oversight and Investigations, Majority Staff
Jessica Conrad (6-5727)

Hearing: Oversight Hearing entitled, *“State Perspectives on the Status of Cooperating Agencies for the Office of Surface Mining’s Stream Protection Rule”*

The Subcommittee on Oversight and Investigations will hold an oversight hearing on **Wednesday, May 20, 2015, at 2:00 P.M. in room 1334 Longworth**. The hearing will focus on the perspectives of cooperating state agencies on the environmental review process for the Office of Surface Mining’s new Stream Protection Rule.

Policy Overview

- The National Environmental Policy Act (“NEPA”) and its implementing regulations strongly emphasize interagency cooperation in order to incorporate valuable expertise and streamline the environmental review process.
- In 2010, the Office of Surface Mining Reclamation and Enforcement (“OSM”), as the lead agency for the NEPA review of the Stream Buffer Zone Rule (“SBZR”) rewrite, entered into memoranda of understanding (“MOU”) with a number of states. These MOUs set forth the expectations and responsibilities for the lead and cooperating agencies for environmental impact statement (“EIS”) activities under NEPA for the Stream Protection rulemaking and afforded cooperating agency status to the signatory states. However, OSM has excluded the states from the NEPA process in contradiction of both NEPA regulations and their MOUs.
- OSM has denied states the opportunity to participate in the NEPA review, even though NEPA regulations require lead agencies to “[r]equest the participation of each cooperating agency . . . at the earliest possible time”¹ and “collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise.”² This duty begins “at the earliest possible time”³ and extends “throughout the development of an environmental document.”⁴

¹ 40 C.F.R. § 1501.6(a).

² 43 C.F.R. § 46.230.

- The cooperating agencies for the SBZR rewrite have repeatedly expressed their frustration with OSM’s exclusionary tactics, failure to “provide[] for meaningful participation,” and continual limiting of the states’ involvement over the past several years.⁵ Due to these concerns, as well as general apprehension about being associated with the rule itself, some states have withdrawn from their MOUs and are no longer part of the environmental review process for the Stream Protection Rule.

Witnesses Invited

Dr. Randall C. Johnson
Director
Alabama Surface Mining Commission
Jasper, AL

Mr. Greg Baker
Reclamation Program Manager
Virginia Department of Mines, Minerals, and Energy
Big Stone Gap, VA

Mr. Dustin White
Community Organizer
Ohio Valley Environmental Coalition
Charleston, WV

Mr. Russell M. Hunter
Counsel
Division of Mining and Reclamation
West Virginia Department of Environmental Protection
Charleston, WV

³ 40 C.F.R. § 1501.6(a)(1).

⁴ 43 C.F.R. § 46.230.

⁵ Letter from Cooperating State Agencies, to Joseph Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement (Feb. 23, 2015).

Background

Since 2009, the Office of Surface Mining (“OSM”) has been in the process of rewriting the Stream Buffer Zone Rule (“SBZR”) to regulate surface coal mining.⁶ OSM’s ongoing mismanagement of the rulemaking, wasteful spending, and recurring issues with the environmental contractors have been well-documented, and subject to extensive oversight of this Committee.⁷ Just recently, however, OSM’s wrongful exclusion of cooperating state agencies has come to the fore.

In 2010, OSM entered into memoranda of understanding (“MOU”) with a number of states. These agreements, which are provided for under the National Environmental Policy Act (“NEPA”), afforded cooperating agency status to the state agencies. Since then, the cooperative relationship between OSM and the states has steadily deteriorated, leading several states to withdraw from the process.⁸

States as Cooperating Agencies

When OSM began to rewrite the SBZR, a number of states signed MOUs with OSM to act as cooperating agencies for the environmental review process.⁹ The MOUs sought to implement NEPA and provided that OSM would furnish “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 draft reports, data, information, analyses, comments received, and working drafts relative to the environmental reviews, draft and final EISs.”¹⁰ Additionally, OSM agreed to “give [the cooperating agencies] a

⁶ Office of Surface Mining Reclamation and Enforcement, Building a Stream Protection Rule, <http://www.osmre.gov/programs/rcm/StreamProtectionOverview.shtm>.

⁷ STAFF OF C. ON NATURAL RESOURCES, 112TH CONG., REP. ON PRESIDENT OBAMA’S COVERT AND UNORTHODOX EFFORTS TO IMPOSE NEW REGULATION ON COAL MINING AND DESTROY AMERICAN JOBS (2012). See also Office of Inspector General, U.S. Department of the Interior, Report of Investigation: OSM Environmental Review (2013) (finding that OSM began contemplating terminating its agreement with the contractors only after the 7,000 job loss figure became public, that the figure was based on expert opinion and was not “fabricated” as OSM Director Pizarchik had testified before Congress, and that Department officials had changed their instructions for measuring job losses under the contractors in a way that would have artificially shown fewer jobs losses from the new rule. The OIG report also has an entire section entitled “Issues With the New Contract” that appears to show the new contractors are facing similar pressure to obscure the job loss numbers and that the contractors have objected to some of these directions from the Department. However, the Department redacted most of that section.)

⁸ To date, Alabama, New Mexico, Texas, and Utah have withdrawn from their MOUs.

⁹ The ten cooperating agency states are: (1) Alabama, (2) Indiana, (3) Kentucky, (4) Montana, (5) New Mexico, (6) Texas, (7) Utah, (8) Virginia, (9) West Virginia, and (10) Wyoming. Ohio did not sign an MOU, but acted as an informal cooperating agency.

¹⁰ 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 (Aug. 25, 2010).

reasonable time for review and return of consolidated and comprehensive comments” on draft documents, “to the extent possible.”¹¹

Cooperating Agencies under NEPA Regulations

Congress intended that NEPA be carried out “in cooperation with State and local governments.”¹² The Chair of the Council on Environmental Quality (“CEQ”) reiterated that intent in a memorandum directed to the heads of federal agencies:

The CEQ regulations addressing cooperating agency status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so ‘in cooperation with State and local governments’ and other agencies with jurisdiction by law or special expertise.¹³

The memorandum went on to note that the involvement of cooperating agencies is “important in ensuring decisionmakers have the environmental information necessary to make informed and timely decisions efficiently.”¹⁴ Incorporating the practical knowledge and pertinent expertise of cooperating agencies only improves the agency’s decisionmaking.

As noted in the CEQ memorandum, NEPA’s implementing regulations strongly emphasize cooperation between agencies in order to incorporate special expertise and streamline the environmental review process. When conducting a NEPA review with a cooperating agency, lead agencies are directed to:

- (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.¹⁵
- (2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.¹⁶
- (3) Meet with a cooperating agency at the latter’s request.¹⁷

These requirements are imposed because cooperating agencies have pertinent knowledge and practical expertise that will benefit the environmental review process and, by extension, the rulemaking as a whole.

¹¹ *Id.*

¹² 42 U.S.C. § 4331(a).

¹³ Memorandum from James Connaughton, Chair, Council on Environmental Quality (Jan. 30, 2002).

¹⁴ *Id.*

¹⁵ 40 C.F.R. § 1501.6(a)(1).

¹⁶ 40 C.F.R. § 1501.6(a)(2).

¹⁷ 40 C.F.R. § 1501.6(a)(3).

The states are also qualified to act as cooperating agencies because they serve as the primary regulators of coal mining in their respective jurisdictions. Director Pizarchik acknowledged this fact in testimony before the Subcommittee on Energy and Mineral Resources last month, saying “states permit and regulate ninety-seven percent of the nation’s coal production.”¹⁸ When such a vast majority of the industry is already regulated by the states, it would be foolish to exclude them from related rulemaking processes.

Another rationale for the participation of cooperating agencies is to streamline the environmental review process. The regulations emphasize cooperation with other agencies “before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document.”¹⁹ Including the states throughout the process obviates the need for significant revisions after the fact and ensures that any conflicts or issues are addressed organically.

Cooperating Agencies under DOI Regulations

The Department of the Interior has adopted its own regulations governing NEPA implementation for the Department and its bureaus. These regulations largely mirror CEQ’s and reiterate that the lead bureau is to “collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise.”²⁰ The lead bureau is to work with cooperating agencies “throughout the development of an environmental document.”²¹

OSM’s Failure to Include the States Leads to Withdrawal

Instead of including the cooperating agencies throughout the process, per CEQ’s NEPA regulations and the MOUs, OSM has excluded the states at every turn. In a recent letter to OSM Director Joe Pizarchik, the states restated their long-standing concerns that OSM has “not provided for meaningful participation” and has repeatedly limited their involvement in the environmental review process. Even when OSM has provided portions of the EIS to the states, the constrained timeframes OSM imposed made substantive comments by the states impossible.

Just last month, the states met with OSM officials at the Interstate Mining Compact Commission’s (“IMCC”) annual meeting in Baltimore, Maryland. The meeting lacked “details,” according to a Wyoming official, and OSM merely offered “an assurance that the state

¹⁸ *Oversight Hearing on “Effect of the President’s FY 2016 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction” Before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources*, 114th Cong. (2015) (statement of Joseph Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement).

¹⁹ 40 C.F.R. § 1501.1(b).

²⁰ 43 C.F.R. § 46.230.

²¹ *Id.*

comments were included in the final copy.”²² Afterward, one West Virginia official bluntly said, “We are strongly considering withdrawing from the process.”²³

On February 25, 2015, Secretary Jewell testified before Congress that the states will have an opportunity to comment “when [the] rule is released and we’re in the public comment period.”²⁴ Director Pizarchik echoed her sentiments the following month at a Subcommittee on Energy and Mineral Resources hearing.²⁵ Secretary Jewell and Director Pizarchik’s statements directly contradict NEPA’s implementing regulations and exemplify the Department’s blatant intent to exclude the states.

Given their mounting frustrations with OSM’s behavior, and the Department’s recent affirmation that the cooperating agencies are no longer welcome to be involved in the process, the states have begun to reevaluate their participation in, and association with, OSM’s environmental review for the Stream Buffer Zone Rule rewrite.

²² Manuel Quiñones, *States remain concerned over stream rule after closed-door meeting*, Greenwire, Apr. 29, 2015, <http://www.eenews.net/greenwire/2015/04/29/stories/1060017658>.

²³ *Id.*

²⁴ *Department of the Interior Budget Hearing Before the Subcomm. on Interior, Environment, and Related Agencies of the H. Comm. on Appropriations*, 114th Cong. (2015) (statement of Sally Jewell, Secretary, Department of the Interior).

²⁵ *Oversight Hearing on “Effect of the President’s FY 2016 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction” Before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources*, 114th Cong. (2015) (statement of Joseph Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement).