July 18, 2016

BY ELECTRONIC MAIL AND
U.S. PRIORITY MAIL

Joe Pizarchik
Director
Office of Surface Mining
Reclamation and Enforcement
1951 Constitution Ave. NW
Washington, D.C. 20240

Re: Citizen Complaint Under Surface Mining Control and Reclamation Act Over Violation Related to Tri-State Generation and Transmission's Colowyo Mine in Moffat and Rio Blanco Counties, CO, Colorado Permit No. C-1981-019

Dear Director Pizarchik:

Pursuant to the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1267(h)(1) and 1271(a)(1), and regulations implementing SMCRA, 30 C.F.R. § 842.12(a), WildEarth Guardians hereby writes to inform you that a violation of SMCRA and SMCRA regulations appears to be occurring in relation to the Office of Surface Mining Reclamation and Enforcement's ("OSMRE's") oversight of the Colowyo coal mine in northwestern Colorado, which is permitted to mine under State Permit No. C-1981-019.

Specifically, OSMRE appears to be illegally preparing a decision document for a mining plan pursuant to SMCRA regulations. In this case, it appears that a mining plan under review by OSMRE for the Colowyo coal mine, called the "Collom Permit Expansion Area," involves federal coal that was illegally leased under a decision that had "no legal effect" pursuant to Interior Board of Land Appeals ("IBLA") precedent. Furthermore, the mining plan under review involves federal coal that was illegally leased below fair market value pursuant to the U.S. Mineral Leasing Act and therefore does not constitute a valid coal lease for purposes of SMCRA.

Under SMCRA regulations, the Secretary of the Department of the Interior must approve a mining plan before the mining of leased federal coal can occur. *See* 30 C.F.R. §§ 740.4(a)(1) and 746.11(a). Before the Secretary can issue approval of a mining plan, OSMRE must prepare a decision document and make recommendations as to the approval of the mining plan. *See* 30 C.F.R. § 746.13. However, before OSMRE can even begin to prepare a decision document and

make recommendations as to the approval of a mining there must, at a bare minimum, be leased federal coal.

Here, in the case of the Colowyo coal mine, OSMRE is currently preparing a decision document and recommendations as to the approval of a mining plan authorizing the mining of purportedly valid federal coal lease COC-68590, or the Collom Permit Expansion Area. The agency has gone so far as to prepare an environmental assessment ("EA") pursuant to the National Environmental Policy Act ("NEPA") and has recommended approval of a mining plan modification without conditions. However, the purported decision to offer lease COC-68590 for sale and issuance was not approved by an authorized official, meaning that, according to the IBLA, the decision had "no legal effect." *WildEarth Guardians*, 187 IBLA 349 (May 6, 2016). Furthermore, as the U.S. Department of the Interior's Inspector General has revealed, federal coal lease COC-68590 was sold below fair market value. Under the Mineral Leasing Act, no bid for a coal lease shall be accepted by the Department of the Interior that is less than "fair market value." 30 U.S.C. § 201(a)(1). Because federal coal lease COC-68590 was not sold at fair market value, it is not a valid, legally issued coal lease.

OSMRE has effectively acknowledged that it believes federal coal lease COC-68590 has been validly approved and issued. This is not correct. By moving forward to prepare a mining plan decision that would authorize mining of COC-68590, OSMRE is violating SMCRA. SMCRA allows OSMRE to prepare mining plan decision documents and recommendations only where leased federal coal is involved. Here, there is no legally leased federal coal. Thus, by moving forward with preparing its mining plan decision document, including analysis under NEPA, OSMRE is in violation of SMCRA rules. Below, we provide more detail on this apparent violation of SMCRA rules and need for the agency to inspect and enforce.

1. LEGAL BACKGROUND

A. Mining Plans

The Secretary of the Department of Interior is responsible for authorizing the surface mining of federal coal leased by the BLM. *See* 30 C.F.R. § 740.4(a)(1).[1, 2] This authorization is provided through the issuance of a "mining plan." The authority to issue a mining plan was initially set forth under the Mineral Leasing Act, which states that before any entity can take action on a federal leasehold that "might cause a significant disturbance of the environment," an operation and reclamation plan must be submitted to the Secretary of Interior for approval. 30 U.S.C. § 207(c).

[1] "Surface coal mining operations" include both activities conducted on the surface of lands in connection with a surface coal mining operation and the surface operations and surface impacts incident to an underground coal mining operation. 30 C.F.R. § 700.5.

[2] "Leased Federal coal means coal leased by the United States pursuant to 43 CFR part 3400[.]" 30 C.F.R. § 740.5(a).

SMCRA ultimately incorporated and reasserted this Mineral Leasing Act requirement. *See* 30 U.S.C. § 1273(c). Pursuant to the SMCRA, OSMRE promulgated regulations governing the process for the "review and approval, disapproval or conditional approval of mining plans on lands containing leased Federal coal." 30 C.F.R. § 746.1. Above all, OSMRE's regulations provide that, "[n]o person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved [a] mining plan" and that "[s]urface coal mining and reclamation operations on lands containing leased Federal coal shall be conducted in accordance with this subchapter, any lease terms and conditions, and the approved mining plan." 30 C.F.R. § 746.11. To this end, the regulations require OSMRE to "prepare and submit to the Secretary a decision document recommending approval, disapproval or conditional approval" and that the Secretary "approve, disapprove or conditionally approve" a mining plan in accordance with 30 C.F.R. § 746. 30 C.F.R. §§ 746.13 and 746.14.

SMCRA rules are abundantly clear that where there is no leased federal coal, there is no duty or authorization for the Secretary of the Interior to approve mining or for OSMRE to undertake any review or make recommendations as to the mining of coal. The very definition of a mining plan is a "plan for mining ***leased Federal coal***." 30 C.F.R. § 740.5(a) (emphasis added).

B. OSMRE's Duty to Inspect and Enforce

Ultimately, while the duty to review and, as appropriate, approve mining plans stems from the Mineral Leasing Act, this duty has also been clearly codified and imposed by rule pursuant to SMCRA.[3] Thus, OSMRE is not only authorized, but also mandated, to inspect and, if appropriate, enforce violations related to mining plan reviews and approvals.

SMCRA regulations provide that "[a] person may request a Federal inspection under [30 C.F.R.] § 842.11(b) by furnishing to an authorized representative of the Secretary a signed, written statement [] giving the authorize representative reason to believe that a violation, condition or practice referred to in [30 C.F.R.] § 842.11(b)(1)(i) exists[.]" 30 C.F.R. § 842.12(a). The violations, conditions, or practices referred to in 30 C.F.R. § 842.11(b)(1)(i) include, among other things, a violation of "this chapter," referring to regulations set forth under Title 30, Chapter VII. Chapter VII includes regulations set forth under 30 C.F.R. § 746, meaning that if OSMRE has reason to believe that a violation of any provision of 30 C.F.R. § 746 is occurring, the agency must conduct an inspection pursuant to 30 C.F.R. § 842.11(b)(1)(i). Further, if the inspection reveals a violation of any provision of 30 C.F.R. § 746, OSMRE must undertake appropriate enforcement action, potentially including, but not limited to, issuance of a "notice of violation." 30 C.F.R. § 843.12(a)

2. THE COLOWYO MINE AND FEDERAL LEASE COC-68590

The Colowyo coal mine is located in Moffat and Rio Blanco Counties in northwestern Colorado between the towns of Meeker and Craig. The surface mine currently encompasses

[3] It is notable that in promulgating 30 C.F.R. § 746, OSMRE expressly cites "30 U.S.C. § 1201, *et seq*.," which is SMCRA, as authority for doing so.

16,824 acres and is permitted to produce six million tons of coal annually, the vast majority of which is extracted from federal coal leases. The mine, which is owned by Western Fuels, a subsidiary of Tri-State Generation and Transmission, provides coal primarily to the nearby Craig Generating Station, the second largest coal-fired power plant in Colorado, which is also largely owned and operated by Tri-State.

Over the last several years, Tri-State has sought to develop new mining operations to the northwest of its current Colowyo mine, an area described as the "Collom Permit Expansion Area." As part of this effort, a new federal coal lease, COC-68590, was applied for from the Bureau of Land Management ("BLM"). Informally described as the Collom Tract, this new lease comprised 1,406.71 acres and contained 92 million tons of recoverable coal. Combined with an adjacent state-issued coal lease, another adjacent federal coal lease, and various privately owned coal deposits in the area, the Collom Tract has been intended to be the linchpin of the Collom Permit Expansion Area, opening the door for the development of two new mining pits, more than 2,090.5 acres of surface mining, and the ultimate extraction of more than 80 million tons of sub-bituminous coal. *See* Exhibit 1, U.S. Department of the Interior OSMRE and BLM, "Colowyo Coal Mine Collom Permit Expansion Area Project Federal Mining Plan and Lease Modification Environmental Assessment" (Jan. 2016) at 2-4—2-5, available online at http://www.wrcc.osmre.gov/initiatives/colowyo/documents/Colowyo_Collom_EA_CH%201-7.pdf.

In 2007, the Collom Tract was purportedly issued by the BLM. However, the issuance of the lease is marred with serious discrepancies, casting enormous doubt on the legal validity of the lease.

To begin with, when the lease was purportedly approved for sale and issuance in 2006, it was done so by the by former BLM Little Snake Field Office Manager, John Husband. *See* Exhibit 2, BLM, "Finding of No Significant Impact and Decision Document" (Aug. 1, 2006). In the decision document, Mr. Husband's signature is obvious, he is clearly identified as the "Authorized Official," and he very clearly attests to offering his full approval of the coal lease, stating, "It is my decision to permit the coal lease by application sale to proceed[.]" According to the IBLA, however, under BLM delegations of authority, Field Managers are not authorized to approve the sale and issuance of coal leases. *WildEarth Guardians*, 187 IBLA 353 (May 6, 2016). Any decision approved by an employee without delegated authority is "not properly considered a decision of the BLM." *Id*.

Although the decision to sell and issue the Collom Tract was not actually a decision by the BLM, the agency nevertheless offered the lease for sale and issuance on December 1, 2006. *See* 71 Fed. Reg. 69581-69582 (Dec. 1, 2006). On December 19, 2006, the BLM held its lease sale and received a single bid. This bid was ultimately rejected for failing to represent "fair market value," as required by 43 C.F.R. § 3422.1(c)(1).[4]

[4] The Mineral Leasing Act also states that, "No bid shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease." 30 U.S.C. § 201(a)(1).

On April 25, 2007, the BLM scheduled a second lease sale, or what the agency described as a "Federal Competitive Coal Lease Sale Reoffer," for May 30, 2007. 72 Fed. Reg. 20560 (April 25, 2007). At this sale, the BLM received a single bid of $13,106,600, or 14¢ per ton. Although the BLM accepted this bid, an Interior Department Inspector General's Office report from 2013 revealed that this bid still did not represent "fair market value." *See* Exhibit 3, Letter from Mary L. Kendall, Deputy Inspector General, to U.S. Senator Ron Wyden in re: the Federal Coal Leasing Program (Nov. 15, 2013). As the Inspector General stated, "BLM's Colorado [] State Offic[e] did not comply with the Mineral Leasing Act by accepting [a bid] below the FMV [Fair Market Value]." In spite of this, the lease was purportedly issued on September 1, 2007.

Thus, BLM not only illegally approved the sale and issuance of federal coal lease COC-68590, but the agency also illegally accepted a bid that was below fair market value and purported to issue the lease.

In the meantime, OSMRE has commenced to review and make recommendations regarding the approval of mining the Collom Permit Expansion Area pursuant to 30 C.F.R. § 746.13. In early 2016, the agency prepared an Environmental Assessment documenting its review and indicating its preference to approve the new mining plan. *See* Exhibit 1. In a legal notice announcing the availability of the Environmental Assessment, the agency stated that "OSMRE must prepare and submit to the Assistant Secretary for Land and Minerals Management (ASLM) a decision document recommending approval, conditional approval or disapproval of the proposed mining plan modification." *See* Exhibit 4, OSMRE, "Availability of an Environmental Assessment for Public Review and Comment, Colowyo Coal Mine, Collom Permit Expansion Area Mining Plan Modification and Federal Coal Lease Modification" (Jan. 15, 2016), available online at http://www.wrcc.osmre.gov/initiatives/colowyo/documents/Colowyo_Collom_EA_Legal_Notice.pdf.

3. APPARENT VIOLATION OF SMCRA

At issue is that OSMRE is readying to submit to the Secretary of the Interior a recommendation as to the approval, disapproval, or conditional approval of the Collom Permit Expansion Area mining plan, yet has no valid authority to do so. Pursuant to 30 C.F.R. § 746.13, OSMRE is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of [a] mining plan[.]" However, pursuant to SMCRA implementing regulations, OSMRE can only prepare and submit a decision document for a mining plan where there is "leased Federal coal." 30 C.F.R. § 700.5. In the case of the Collom Permit Expansion Area, there exists no validly leased federal coal. Thus, by acting pursuant to 30 C.F.R. § 746.13 to "prepare and submit" a decision document for the Collom Permit Expansion Area mining plan, OSMRE is in violation of SMCRA implementing regulations.

As discussed, approval of federal coal lease COC-68590 was issued by an unauthorized employee of the BLM. According to IBLA precedent, the decision is therefore "not properly considered a decision by the BLM" and therefore "has no legal effect." In other words, it cannot

serve to justify the BLM's sale and issuance of the coal lease and the lease's current validity. In effect, as it currently stands, the lease is null and void and there is no "leased Federal coal" from which to authorize the preparation and submittal of decision document for the Collom Permit Expansion Area mining plan pursuant to 30 C.F.R. § 746.13.

Further, and as discussed, federal coal lease COC-68590 was sold below fair market value, in violation of the U.S. Mineral Leasing Act, which states unequivocally that, "[n]o bid shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease." 30 U.S.C. § 201(a)(1). This violation of the Mineral Leasing Act clearly demonstrates that there exists no validly leased federal coal that would provide authorization for OSMRE to prepare and submit a decision document for the Collom Permit Area Expansion mining plan pursuant to 30 C.F.R. § 746.13.

Although both of the fatal flaws plaguing federal coal lease COC-68590—the failure of an authorized employee to approve the lease and the failure of the BLM to sell the lease at fair market value—relate to the propriety of the BLM's coal leasing actions, they have direct and significant bearing on the validity of the coal lease. Therefore, these fatal flaws are not only relevant, but also dispositive as to the legitimacy of OSMRE's authority to act under 30 C.F.R. § 746.

Put another way, if a federal coal lease has not been properly issued and is not valid, OSMRE cannot simply ignore this fact. Regulations at 30 C.F.R. § 746.13 only allow the agency to prepare and submit a decision document for a "mining plan," which itself is defined as "a plan for mining leased Federal coal[.]" 30 C.F.R. § 700.5. Where there is no "leased Federal coal," OSMRE is clearly without authority to act under SMCRA implementing regulations. If there is no "leased Federal coal," yet OSMRE moves to prepare and submit a decision document for a "mining plan," then OSMRE would be violating SMCRA regulations. To this end, if BLM improperly asserts that federal coal has been leased, OSMRE cannot ignore this. OSMRE simply cannot prepare and submit a decision document for a mining plan where the BLM improperly asserts that federal coal has been leased; such an action would be in violation of SMCRA regulations.

By moving to prepare and submit a decision document for the Collom Permit Area Expansion mining plan, even though there exists no validly leased federal coal, OSMRE appears to be violating SMCRA implementing regulations at 30 C.F.R. § 746.13.

4. REQUEST FOR INSPECTION AND ENFORCEMENT

Where there is reason to believe that a violation of SMCRA, regulations implementing SMCRA, or any condition of a permit exists, and where there is no state regulatory authority, OSMRE is required to "immediately" conduct an inspection. 30 C.F.R. § 842.11(b)(1). If a violation is found as a result of an inspection, OSMRE must issue a "notice of violation" pursuant to 30 C.F.R. § 843.12(a) to remedy the violations.

Based on the aforementioned information, there is reason to believe that a violation of SMCRA are occurring with regards to OSMRE actions to prepare and submit a decision document for the Collom Permit Expansion Area mining plan. OSMRE appears to be improperly preparing a decision document for the Collom Permit Expansion Area mining plan, even though there exists no validly leased federal coal, in violation of 30 C.F.R. § 746.13.

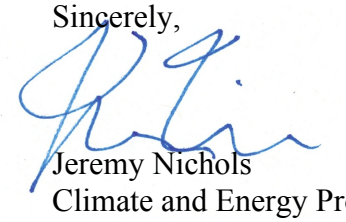
The aforementioned violation does not involve any provision of the State of Colorado regulatory program, including the State and Federal cooperative agreement set forth at 30 C.F.R. § 906.30. Thus, OSMRE is responsible for inspecting and resolving this violation.

Accordingly, pursuant to 30 C.F.R. § 842.11, it appears that OSMRE must, at a minimum, immediately undertake an inspection. It also appears that to address the aforementioned violation, OSMRE must immediately halt its preparation of a decision document for the Collom Permit Expansion Area mining plan.

With this complaint, we do not waive our right to file additional complaints, appeals, lawsuits, or other proceedings to enforce other violations of SMCRA that may be occurring at the Colowyo mine, or to seek additional administrative, judicial, or other relief to resolve any other violations.

We look forward to a prompt response from OSMRE to this complaint. Under SMCRA implementing regulations, OSMRE must respond to this complaint within 15 days. *See* 30 C.F.R. § 842.12(d). If you have any questions or concerns, or would like to discuss this matter further, please contact me at the information below. Thank you.

Sincerely,



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