From: Simpson, Melissa
To: Parrish, Jean; Benedetto, Kathleen
Subject: Fwd:
Date: Thursday, February 09, 2017 3:45:33 PM
Attachments: DOI Issues - Copy.pdf

Please see the attached briefing paper in preparation of the meeting tomorrow with the National Mining Association.

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From: Melissa Simpson <melissasimpsonjd@gmail.com>
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Department of the Interior

Immediate Priorities

1. Department of the Interior Federal Coal Leasing Moratorium

On Jan. 15, 2016, the Secretary of Interior issued Sec. Order 3338 imposing a moratorium on holding new federal coal lease sales pending the preparation of a programmatic EIS and adoption of new policies to make federal coal reserves less accessible and coal mining more expensive. The explanation for the moratorium is comprised of politically contrived reasoning fully embracing the "Keep-it-in-the-Ground" movement's core objective to deny the Nation a reliable and affordable source of energy.

Action: Issue a new Secretarial Order rescinding Order 3338 and terminate the preparation of the programmatic EIS. Resume processing pending coal lease applications and holding lease sales for new lease applications.

2. Department of the Interior 10 Million Acre Withdrawal

In September 2015, the Department of the Interior's (DOI) Bureau of Land Management's (BLM) proposed to withdraw approximately 10 million acres of sage grouse habitat from new mining operations. The withdrawal would be the largest ever in the history of the Federal Land Policy and Management Act (FLPMA) and comes at a time when new mining operations are already either restricted or banned on more than half of all federally owned public lands. DOI's alleges the withdrawal is necessary to conserve the sage grouse and its habitat. It also maintains the withdrawal will have minimal impact on the mining industry as the land involved is of low mineral potential and not prospective for mining. Both these allegations are unfounded and contrary to the evidence.

Action: Given that the withdrawal cannot be finalized by the current administration and that pursing the withdrawal process is essentially at the discretion of the Secretary, a new administration could simply announce it not move forward with that process. A more durable and defensible approach may be to continue the NEPA EIS and use the data and evidence submitted during the comment period as the basis for determining the withdrawal is not necessary to conserve the sage grouse or its habitat.

3. Federal Coal Royalty Valuation Rule

The Department of the Interior's Office of Natural Resources Revenue (ONRR) published a final rule on July 1, 2016 (81 FR 4338), altering the valuation methods for coal produced on federal lands for purposes of calculating the ad valorem royalty. For coal sales to affiliates, the rule moves the point of valuation from the initial sales price to a later point it deems the first "arms-length" transaction and then sets net-back provisions, proxies and default provisions designed to impute a higher value for royalty purposes. The rule changes carry significant implications for coal exports, sales to marketing and logistics affiliates and transactions with affiliated generation and transmission affiliates.

Action: Issue an administrative stay of the rule under the Administrative Procedure Act due to pending litigation. DOI should seek a voluntary remand while it reconsiders and reforms the rules to reflect the longstanding principle that the value of coal is determined by the initial sales price (with appropriate washing and transportation allowances) and use readily available benchmarks (e.g., comparable sales) for "non-arm's length transactions.

Quick Actions for Pending Rules and Existing Policy Documents

1. OSM Proposed Rule for Self-Bonding and revisions to other Bonding Forms

OSM granted a petition from an environmental group (WildEarth Guardians) requesting rule revisions to make self-bonding less accessible to qualified companies with a successful record of reclamation of mined lands. OSM went one step further and plans to make other forms of bonding more expensive and less accessible as well. The rules for self-bonding do not require any revisions—no company that has used self-bonds have defaulted on their reclamation obligations. The financial criteria to qualify remain sound and any concerns about whether a company remains eligible once it qualifies can be addressed under existing rules that provide timely information on a company's financial strength.

Action: Withdraw any pending proposal to revise the bonding regulations. Inform the WildEarth Guardians that OSM has reconsidered its prior decision to grant the petition and after further consideration maintains that concerns about eligibility can be adequately addressed under existing rules with proper monitoring of information submitted under the rules.

2. OSM Temporary Cessation of Operations

OSM has placed on its current regulatory agenda revisions to rules governing coal mines that choose to temporarily cease coal production. Current rules require the mine operator to file a notice with the state regulatory authority setting forth its plans including how the company will maintain the mine site to comply with existing standards including any reclamation that will continue during the period of temporary cessation. The rule revisions would change the process to essentially require operators to submit a "permit" to temporarily idle their operations due to adverse market or other conditions. No evidence exists to support a new requirement to obtain another "permit" to temporarily idle operations. Existing rules provide for notification with information on maintaining the operations in compliance with the law while production is temporarily idled. Those operations remain subject to regular inspections to ensure compliance and a performance bond remains posted to guarantee proper reclamation.

Action: Terminate the further preparation of this unnecessary regulation that will only burden state agencies with additional "permitting" requirements.

3. OSM Blasting Standards

OSM granted a petition from WildEarth Guardians (WEG) to revise current rules for the use of explosives at coal mining operations. However, OSM decided not to proceed with the revisions requested by WEG, but rather propose its own changes to clarify the applicability and duties under OSM rules for emissions from blasting. Most states already address the issue. OSM

maintains that new federal rules are needed for the states that OSM perceives as not adequately addressing this rare situation.

Action: Terminate preparation of a rule. Notify WEG that upon reconsideration the issue raised in its petition is not national in scope necessitating a national rule.

4. OSM Policy Memorandum on SMCRA Enforcement of the Clean Water Act and Clean Air Act

The OSM Director issued a policy memorandum on July 27, 2016 ("A More Complete Enforcement of SMCRA") which unlawfully conflates requirements under the Clean Water Act (CWA) and Clean Air Act (CAA) with SMCRA standards. The memorandum purports to deputize OSM to separately enforce laws that are not within the agency's jurisdiction and will result in duplicative enforcement. SMCRA§ 702 expressly prohibits this result; and case law repudiates OSM's attempt to commandeer those environmental programs that have distinct permitting and enforcement schemes administered by different federal and state agencies. Moreover, the recently passed H.J. Res. 38 voiding the Stream Protection Rule under the Congressional Review Act confirms repudiation of policies calling for the enforcement of the CWA through SMCRA.

Action: Rescind the July 27, 2016 memorandum. A new memorandum should clearly delineate the limits SMCRA places on OSM on adopting policies that duplicate or conflict with the CWA.

5. Clean Water Act Appalachian Coal Mining Review Guidance Document

The Obama Administration issued a memorandum on July 21, 2011 ("Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order") that impermissibly expands EPA's role in CWA permitting, usurps state statutory authority to develop water quality standards and implement the National Pollutant Discharge Elimination System (NPDES) program, and advocates for the application of questionable science regarding the impacts of conductivity on aquatic life. While a Federal district court judge held EPA's actions to be unlawful in *NMA v. Jackson*, that ruling was overturned at the appellate level based solely on the fact that the guidance document was not "final agency action" and was therefore not ripe for judicial review. At the same time however, the appeals court held that policies associated with the guidance document were not enforceable. Nevertheless, it has been cited by federal agencies to support new policies including OSM's Stream Protection Rule and by NGOs in litigation challenging issuance and compliance with coal mining permits.

Action: DOI and EPA should rescind the July 21, 2011, memorandum to avoid its use to compel or inform future policies and regulations. The MOU was the genesis of the ill-fated Stream Protection rule recently voided with the passage of H.J. Res. 38 under the Congressional Review Act.

Intermediate Actions Existing Policy Documents

1. The Department of the Interior Mitigation Requirements

The President issued a memorandum on “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” Pursuant to this memo, the Department of Interior has issued a related order and several DOI agencies has finalized mitigation policies. The memorandum’s and subsequent orders and policies call for a “net benefit” mitigation goal, that is likely to conflict with the agencies’ organic statutes particularly the BLM’s multiple use mandate. BLM does not have the discretion to ignore that mandate to focus solely on avoidance of impacts to environmental resources.

Action: Rescind the Secretarial Order as well as the BLM and Fish and Wildlife mitigation policies.

2. The Department of the Interior Secretarial Oder on Wildlands

In 2010, DOI issued Secretarial Oder 3310 on Wildlands. Pursuant to the order, BLM began managing “wild lands” as “de facto” wilderness in violation of the BLM’s rulemaking procedures, federal laws, and WSAs designation process. As a result, the order is a land management plan revision or amendment that circumvents mandatory statutory and regulatory procedures and disregards the deadline for WSA designations.

Action: Rescind the Secretarial Order.

3. The Department of the Interior National Landscape Conservation System Directorate

The system was created administratively by the Clinton administration and made permanent by Congress in 2009. The system includes roughly 27 million acres of national monuments and conservation areas, wilderness and wilderness study areas, wild and scenic rivers, trails and deserts. The 2010 Secretarial Order that elevated it to a directorate specifies that biodiversity and "ecological connectivity" are supposed to be given a higher priority than other uses. As such, this order violates the Department’s multiple use mandate as established by the Federal Land Policy and Management Act.

Action: Rescind the Secretarial Order that elevates the system to a directorate.

4. OSM Ten-Day Notice (TDN) Policy

The former OSM Director issued a memorandum (Nov. 15, 2010) and a Policy Directive (INE-35, Jan. 31, 2011) unlawfully expanding the agency’s oversight authority in primacy states vested with exclusive permitting and regulatory jurisdiction under the Surface Mining Control and Reclamation Act. These directives are in direct contravention of the statute, implementing regulations and longstanding case law. The directives allow OSM to take enforcement action against mine operators conforming to their state permits when OSM disagrees with the state decision. The directives allow OSM to substitute its subjective judgment for the states on whether conditions constitute an on-the-ground violation of the state permit or program. The directives encourage third-parties to bypass the states and pursue their concerns with the

federal agency. These policies place mine operators unfairly in the middle of federal-state disputes and obliterate the clear boundaries between federal and state authority under the law.

Action: Rescind the Nov. 15, 2010 memorandum ("Application of TDN Process and Federal Enforcement to State Permitting Issues under Approved Regulatory Programs") and Directive INE-35 ("Ten-Day Notices"). Replace INE-25 with a new directive that conforms to the limitations on OSM's authority under SMCRA. Issue a new directive requiring all citizen requests for inspections to be filed with the state regulatory authority under the applicable state regulatory program and pursued under the available state administrative review process.

Right-Sizing Agencies

1. Office of Surface Mining Reclamation and Enforcement (OSM)

Since the enactment of the Surface Mining Control and Reclamation Act (SMCRA) in 1977, two fundamental shifts have occurred: (1) the number of operating coal mines have declined by 85 percent (1976: 6,161; 2015: 853): and (2) States have assumed exclusive jurisdiction to regulate 97 percent of all coal mines. OSM's budget and resources are well above current and foreseeable needs with the substantial reduction in the number of operating coal mines and the secondary role OSM serves under the law. While the number of mines and coal miners has declined by more than 40 percent since 2011, OSM's FY 2017 Budget Request would add 72 more (+ 20%) Title V inspectors and support staff than were on board in 2015. Apart from a handful of mines inspected directly by OSM in federal program states (Tennessee, Navajo Nation) the law requires OSM to make only *occasional* inspections in other states to assess the administration of state programs.

Action: Work with new administration and Congress on an agency restructuring plan to align the resources with the reduced federal role and lower number of coal mines. The plan should include the reduction of state field offices and allocation of resources to core non-duplicative functions OSM performs in the context of mine plan review under the Mineral Leasing Act for operation on federal coal leases. New policies should be developed to minimize federal intrusion on state primacy including those related to permitting decisions and administration of state programs. Such policies would include clarifying that OSM should not issue Ten-Day Notices related to matters that represent disputes over permitting procedures or content. In primacy states, policy should clarify that any request for an inspection of a mine site (i.e., "citizen complaints) must be directed to the state agency and disputes resolved under the state administrative process.