July 16, 2025

U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
1849 C Street NW, Mail Stop 4557
Washington, DC 20240

Attention: James Tyree, Chief, Division of Regulatory Support, OSMRE
Submitted electronically via *www.regulations.gov*, RIN 1029–AC89
Docket Number OSM-2025-0018

To Whom It May Concern:

These comments are submitted by numerous organizations representing thousands of individuals who live, work, and recreate near surface coal mining operations that are regulated under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"), who will be adversely affected and aggrieved within the meaning of applicable statutes if the proposed rulemaking is finalized as written, and who vigorously object to the *Recission of the "Ten-Day-Notices And Corrective Action for State Regulatory Program Issues" Rule, Issued April 9, 2024,* as published on June 16, 2025 at 90 *Federal Register* 25174 – 25180 (the 2025 TDN Proposed Rule"). These comments are timely filed on July 16, 2025, which is the final date for comments noted in the June 16 proposed rulemaking.

INTRODUCTION

The *Federal Register* notice explains the proposed agency action in this manner:

> The Office of Surface Mining Reclamation and Enforcement (OSMRE) is proposing to rescind the "Ten-Day Notices and Corrective Action for State Regulatory Program Issues" Rule adopted on April 9, 2024. We are undertaking this change to align the regulations with the single, best meaning of the statutory language in the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This proposed rule would streamline the process for OSMRE's coordination with State regulatory authorities to minimize duplication of efforts in the administration of SMCRA and appropriately recognize that State regulatory authorities are the primary regulatory authorities of non-Federal, non-Indian lands within their borders. We solicit comment on all aspects of this proposed rule.

90 *Federal Register* 25174.

In the proposed rulemaking, the Office of Surface Mining Reclamation and Enforcement ("OSMRE" or "the agency") proposes to rescind *Ten-Day Notices and Corrective Action for State Regulatory Program Issues,* published by OSMRE on April 9, 2024, 89 *Federal Register* 24714 et seq. ("the 2024 TDN Rule") in its entirely and to revert to the regulations "that were in effect immediately before the promulgation of [the 2024 rule]." 90 *Federal Register* 25177.

The agency explains the proposed rule in this manner:

> We are undertaking this change to align the regulations with the single, best meaning of the statutory language in the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This proposed rule would streamline the process for OSMRE's coordination with State regulatory authorities to minimize duplication of efforts in the administration of SMCRA and appropriately recognize that State regulatory authorities are the primary regulatory authorities of non-Federal, non-Indian lands within their borders.

90 *Federal Register* 25174.

The agency justifies the proposed rulemaking action in this fashion:

> Consistent with Section 4.b. of Secretary's Order 3418, OSMRE has determined that the foregoing reasons together justify rescission of the 2024 Rule and a return to the regulations that were in effect immediately before the promulgation of that rule. Regardless of any benefits of that rule, OSMRE must not maintain regulations that are inconsistent with the statutory authority. *See Dep't of Homeland Sec.* v. *Regents of the Univ. of California,* 591 U.S. 1, 32 (2020). Moreover, regardless of the inconsistency, OSMRE has no interest in maintaining a rule that subjects a State regulatory authority to more requirements than are mandated by statute. To do otherwise would be against the cooperative federalism structure of SMCRA. To the extent there is any uncertainty about the costs and benefits of the 2024 Rule, it is the policy of OSMRE to err on the side of deregulation. We therefore propose to rescind the 2024 Rule in full, revert to the pre-existing regulations, and seek comment on that proposal. We especially seek comment on whether there are any portions of the 2024 Rule that are consistent with the best reading of the statute and would be beneficial to retain, especially the 2024's language on the Similar Possible Violations mentioned above, or whether any portions of the preexisting regulations could be improved to better meet this Administration's objectives as set out in an Executive Orders (E.O.), such as E.O. 14154 "Unleashing American Energy," E.O. 14219 "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative" (Feb. 19, 2025), and the Presidential Memorandum ''Directing the Repeal of Unlawful Regulations" (Apr. 9, 2025).

90 *Federal Register* 25177.

The effect of the proposed rule will be to reinstate the changes to the ten-day-notice ("TDN") regulations that were adopted by the first Trump Administration in the rulemaking "*Clarification of Provisions Related to the Issuance of Ten-Day Notices to State Regulatory Authorities and Enhancement of Corrective Action for State Regulatory Program Issues*" (RIN 1029-AC77)(85 *Federal Register* 28904)(hereafter "the 2020 TDN Rule").

Commenters Appalachian Voices, Citizens Coal Council, Center for Biological Diversity, Sierra Club, Appalachian Citizens' Law Center, and the Kentucky Resources Council, Inc., respectfully oppose the proposed rule changes as being inconsistent with the letter and legislative history of the Act. The 2020 TDN Rule, which is proposed to be revived by this rulemaking, made significant changes to long-standing agency interpretation and policy; and hewed a path repugnant to both the letter and spirit of the Surface Mining Control and Reclamation Act of 1977. The 2020 TDN Rule was the subject of a challenge filed in the case of *Citizens Coal Council et al. v. Haaland,* Civil Action No. 21-195 (D.D.C. 2021), which was dismissed on April 18, 2024, after promulgation of the curative 2024 TDN Rule by OSMRE. A copy of the *Complaint* in that action is attached to these comments.

OSMRE is also aware that the 2024 TDN Rule, which sought to cure the numerous flaws of the 2020 TDN Rule and to "align more closely than the 2020 TDN Rule with SMCRA's requirements," 88 *Federal Register* 24944 (April 25, 2023), was challenged in the pending case of *State of Indiana, et al. v. Haaland and Citizens Coal Council,* Case No. 1:24-cv-01665 (D.D.C. 2025). The basis and purpose statement ("preamble") accompanying the 2024 TDN Rule noted that the agency's experience with the implementation of the 2020 TDN Rule during the time that it was in effect, was that it delayed proper identification and resolution of SMCRA

violations.[1]

It is beyond dispute that if finalized as proposed, this rulemaking will suffer the same fate as the 2020 TDN Rule, and will be subject to judicial challenge, since it seeks to revive the changes that had been previously adopted, challenged by many of the signatory organizations to these comments, and undone in the 2024 TDN Rule.

Commenters incorporate herein by reference, as if they are fully set forth below, and attach as addenda to these comments, these documents:

1. June 15, 2020, Comments of the Citizens Coal Council, et al., on "Clarification of Provisions Related to the Issuance of Ten-Day Notices to State Regulatory Authorities and Enhancement of Corrective Action for State Regulatory Program Issues" and attachments.

2. June 26, 2023, Comments of the Citizens Coal Council, Inc., Appalachian Voices, Sierra Club, and others on *Ten-Day Notices and Corrective Action For State Regulatory Program Issues* 88 *Federal Register* 24944 (April 25, 2023) and attachments.

3. *Complaint for Declaratory And Injunctive Relief And Petition For Review,* in the case of *Citizens Coal Council et al. v. Haaland,* Civil Action No. 21-195 (D.D.C. 2021).

4. *Respondents' Memorandum in Opposition To Petitioners' Motion For Summary Judgment and in Support of Cross Motion for Summary Judgment, State of Indiana v. Haaland,* Case No. 1:24 -cv-01665 (D.D.C. 2025).

5. *Memorandum of Intervenor-Defendants In Opposition To Motion By Plaintiff States for Summary Judgment, and in Support of Cross-Motion for Summary Judgment, State of Indiana v. Haaland,* Case 1:24-cv-01665 (D.D.C. 2025)

6. *Respondents' Brief in Opposition to Petitioners' Motion for a Stay / Preliminary Injunction, State of Indiana v. Haaland,* Case 1:24-cv-01665 (D.D.C. 2025)

[1] The agency noted in the preamble to the proposed 2023 TDN Rule, that "Although a final rule covering these topics went into effect in 2020 (2020 TDN Rule), the rule has proven to delay our consideration of some possible SMCRA violations. In 2021, the Department of the Interior undertook a reexamination of the 2020 TDN Rule and decided to engage in this rulemaking effort. The primary goals of this rulemaking are to reduce burdens for citizens to engage in the TDN process, establish procedures for OSMRE to properly evaluate and process citizen allegations about possible SMCRA violations, clearly set forth the regulatory requirements for the TDN process, and continue to minimize the duplication of inspections, enforcement, and administration of SMCRA. In addition, we will continue to afford our State regulatory authority partners due deference during the TDN process to an extent that is appropriate under SMCRA. The proposed rule would ensure that possible SMCRA violations are properly identified and addressed in a timely fashion. When OSMRE obtains adequate proof of an imminent harm, OSMRE would immediately conduct a Federal inspection, outside of the TDN process, as SMCRA requires. Overall, we believe that this proposed rule would align more closely than the 2020 TDN Rule with SMCRA's requirements. 88 *Federal Register* 24944.

7. *(Tendered) Response Of Movants for Intervention In Opposition To Motion By Plaintiff States for Preliminary Injunction, State of Indiana v. Haaland,* Case 1:24-cv-01665 (D.D.C. 2025)

8. *Memorandum Opinion, State of Indiana v. Haaland,* Case 1:24-cv-01665 (D.D.C. 2025) December 24, 2024.

9. *Ten-Day Notices and Corrective Action For State Regulatory Program Issues* 88 *Federal Register* 24944 (April 25, 2023)

10. *Ten-Day Notices and Corrective Action for State Regulatory Program Issues,* 89 *Federal Register* 24714 – 24736 (April 9, 2024)

11. Declarations of Willie Dodson, Peter Morgan, and Vernon Haltom, submitted in connection with the *Unopposed Motion To Intervene As Defendants* in the case of *State of Indiana et al. v. Haaland,* Case No. 1:24-cv-01665-RBW (D.D.C. 2024).

For the reasons stated in those comments and summarized herein, and in the pleadings filed by OSMRE and the Intervenors in *State of Indiana v. Haaland*, Case No. 1:24-cv-01665-RBW (D.D.C. 2024), and for the reasons noted by OSMRE in the preamble (i.e. the basis and purpose statement) to the 2023 proposed and final 2024 TDN Rule, which outlined the problems with implementation of the 2020 TDN Rule and the compliance delays occasioned by that rule, Commenters respectfully request that the 2024 TDN Rule be retained and that the other changes outlined in these comments be adopted in order to achieve the ostensible goal of this rulemaking of "align[ing] the regulations with the single, best meaning of the statutory language in the Surface Mining Control and Reclamation Act of 1977 (SMCRA)." 90 *Federal Register* 25174.

IDENTIFICATION OF COMMENTERS AND INTERESTS

Commenter Citizens Coal Council ("CCC") is a nonprofit corporation existing under the laws of Pennsylvania. CCC is a nationwide association of grassroots individuals who reside in or visit America's coalfields. CCC's mission is to protect resources, including the homes, farms, businesses, and water supplies of its individual members, through advocacy of full compliance with

all environmental laws pertaining to coal mining, and in particular, through full and fair implementation of SMCRA. CCC's members include Coal River Mountain Watch and Vernon Haltom, who is the Executive Director of CRMW. CCC has representational standing on behalf of CRMW and Vernon Haltom regarding this challenge to the Ten-Day Notice ("TDN") rulemaking. As reflected in the sworn Declaration of Vernon Haltom annexed as Addendum 11, the CRMW and Vernon Haltom have utilized and intend to continue to utilize the TDN process to secure compliance with the surface mining laws, regulations, and permit conditions.

CCC staff and members have worked with impacted community members to utilize the ten-day notice process to address SMCRA violations at coal mines, when those violations were not adequately addressed by the state regulatory authority. CCC also regularly informs people living near mines about various tools provided by Congress and available to them to address impacts from mining, including the ten-day notice process. The ten-day notice process is critical to the ability of CCC and its members to ensure effective mining oversight by the federal Office of Surface Mining ("OSMRE") as contemplated by Congress.

Commenter Appalachian Voices ("AV") is a regional nonprofit corporation incorporated in North Carolina. AV has around 800 members nationwide. AV has offices in North Carolina and Virginia, and its programmatic work focuses on the Appalachian region, including parts of West Virginia, Virginia, Kentucky, North Carolina, and Tennessee. AV's mission is to protect the air, land, waters, and communities of Central and Southern Appalachia. It is critical to the mission of AV to prevent negative impacts from coal mining to the water, land, and local residents in this region.

AV staff has worked with impacted community members to utilize the ten-day notice process to address SMCRA violations at coal mines, when those violations were not adequately addressed by the state regulatory authority. AV also regularly informs people living near mines about various tools provided by Congress and available to them to address impacts from mining, including the ten-day

notice process. The ten-day notice process is critical to the ability of AV and its members to ensure effective mining oversight by the federal Office of Surface Mining ("OSMRE") as contemplated by Congress. Among those members of AV who are adversely affected and aggrieved, within the meaning of applicable law, by the final agency action complained of herein, is Willie Dodson, who is a member of AV, and also an employee of Appalachian Voices, working as the Central Appalachian Program Coordinator the organization. Willie Dodson is also a member of the Center for Biological Diversity and has been working closely for years with the Center on issues associated with protection of threatened and endangered species affected by coal mining pollution in West Virginia.

Willie Dodson has worked with colleagues to develop and write citizen complaints for submittal to the Office of Surface Mining Reclamation and Enforcement and assisted in the development of such citizen complaints, seeking issuance of ten-day notices to state regulatory authorities to secure inspection and enforcement activity under the surface mining laws. Appalachian Voices and the Center were relieved when OSMRE proposed and finalized the 2024 amendments to the TDN regulations, including the elimination of the unnecessary delays posed by the open-ended process of additional conferrals with state regulators, and the restoration of permit defect-type violations. The declaration of Willie Dodson reflecting the interests of both the Center for Biological Diversity and Appalachian Voices is submitted as Addendum 11 to these comments.

Commenter Appalachian Citizens' Law Center ("ACLC") is a non-profit corporation in good standing incorporated in the Commonwealth of Kentucky with its office at 317 Main Street, Whitesburg, Kentucky. Since its incorporation in 2001, ACLC has focused on addressing the environmental, health, and economic impacts of resource extraction in Eastern Kentucky and Central Appalachia. ACLC's primary work includes both direct representation of individuals and groups, and policy and advocacy work aimed at moving the region toward a more just economic transition away

from coal, and for full and fair implementation of the 1977 Act and approved state regulatory program.

Commenter Sierra Club is a national nonprofit conservation organization incorporated in California, with more than 610,000 members nationwide. The Sierra Club maintains local chapters and members in each of the Appalachian states, including Kentucky, West Virginia, Virginia, Tennessee, and Pennsylvania; as well as in Alaska; the Illinois Basin; Colorado Plateau; Gulf Coast; Northern Rocky Mountains; and Great Plains. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; practicing and promoting the responsible use of the Earth's resources and ecosystems; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has long worked to prevent the harm caused by mining coal across the United States, particularly in Appalachia and the West.

Sierra Club has repeatedly invoked OSMRE's ten-day notice process, and otherwise participated in the ten-day notice process, regarding alleged SMCRA violations at coal mines across the country's coalfields. In recent years Sierra Club has filed citizen complaints on behalf of its members asking OSMRE to act under its ten-day notice authority in Alaska, Ohio, Virginia, West Virginia, and Wyoming. Sierra Club plans to continue to exercise its citizen participation rights under the ten-day notice provisions to protect its members and their communities from the harmful impacts of coal mining.

Among the members of Sierra Club who will be adversely affected if the States are successful in their challenge to the final rulemaking, is Peter Morgan, whose declaration is attached as part of Addendum 11. Peter Morgan is a member of Sierra Club and former attorney for the Club, whose work in the past for over 16 years included efforts to ensure that coal mine operators comply

with SMCRA and other applicable laws. That work included preparing, reviewing, and sending requests for inspections to the OSMRE under SMCRA's ten-day notice provisions.

Sierra Club intends to continue utilizing the ten-day notice process to seek federal oversight of site-specific violations at coal mines as Sierra Club learns of those violations, to protect Sierra Club members and their communities from the harmful impacts of coal mining.

When Sierra Club sends a ten-day notice request and request for citizen inspection, the violations at issue frequently require a rapid response from regulators. For that reason, Sierra Club was very concerned about the unnecessary delays added to the process under the provisions of the 2020 amendments that added additional steps to the process and introduced new opportunities for OSMRE to deny citizen requests.

Commenter Center For Biological Diversity is a non-profit 501(c)(3) corporation with offices in California, Washington, Oregon, Arizona, Nevada, New Mexico, Colorado, Illinois, Minnesota, New York, Virginia, North Carolina, Florida, and Washington, D.C. Through science, policy, and law, the Center works to secure a future for all species, great or small, hovering on the brink of extinction. The Center has 79,143 members, including those who have viewed, photographed, and otherwise appreciated threatened and endangered species, habitats, and ecosystems that may be affected by surface coal mining; who live near these species, habitats, and ecosystems; and who intend to visit and enjoy these species, habitats, and ecosystems in the future. Among the members of the Center who have utilized the ten-day notice process and intend to continue to do so as potential violations of SMCRA and federal and state program regulations are encountered is Willie Dodson, whose Declaration is annexed as Addendum 11.

The ten-day notice requests that Commenters have sent to OSMRE have included assertions of permit defect violations and other violations arising from site-specific actions by state regulators. Commenters believe it is critically important that OSMRE be able to respond to this type of violation

under the ten-day notice process. For that reason, Commenters were very concerned about OSMRE's decision to exclude that category of violation from the types of violations addressable via the ten-day notice process in the 2020 amendment.

Commenters were relieved when OSMRE proposed and finalized the 2024 amendments to the ten-day notice regulations, including the elimination of the unnecessary delays posed by the open-ended process of additional conferrals with state regulators, and the restoration of permit defect-type violations.

Commenters CCC, AV, Sierra Club, Center, and their members suffered injury in fact because of the November 24, 2020, TDN Rule due to the additional delays and exemptions created by the rulemaking to the mandated notice, inspection, and enforcement requirements of SMCRA. For that reason, Commenters CCC, AV, and Sierra Club participated in the rulemaking procedures which preceded the Secretary's promulgation of the November 20, 2020, rules, including submission of written comments on the proposed regulations prior to the close of the comment period provided by the Secretary. CCC, AV, and the Sierra Club challenged a number of the regulatory changes in the November 254, 2020 Ten-Day Notice Rulemaking, in the case of *Citizens Coal Council, et al. v Haaland,* CA No. 1:21-cv-195, which was dismissed by agreement of the parties after finalization of the 2024 TDN Rule, which addressed are resolved the concerns raised in the litigation. To the extent that the 2020 TDN Rule is revived, Commenters will suffer injury in fact for the same reasons as prompted their challenge to the 2020 TDN Rule.

Commenters CCC, AV, Sierra Club, and Center have each utilized the ten-day notice process on behalf of themselves and their members to assure the timely correction of violations of SMCRA, including violations caused by failure of permittees to follow applicable regulations and issued permits, violations caused by site-specific failures by state regulators to follow the statute and applicable regulations, and because of systemic failures of the state regulatory authorities to properly

administer, maintain, and enforce SMCRA and the approved state programs in the permitting process, resulting in on-the-ground violations and damage to the environment.

CCC, AV, Sierra Club, and the Center file these comments on behalf of their members as well as themselves.

If the 2024 TDN Rule is rescinded, and the 2020 TDN Rule is revived, Commenters will have to expend additional resources utilizing the ten-day notice process, because they will have to take additional steps to ensure the process moved quickly and isn't allowed to stall at the initial step of OSMRE conferral with state regulators.

If the 2024 TDN Rule is vacated, and the 2020 TDN Rule is revived, Commenters will also have to expend additional resources pursuing alternative means to address permit-defect type violations by state regulators, including pursuing actions before state regulatory bodies and state courts, where possible. This would cost additional funds in filing fees and retainers for outside counsel and would require additional staff time and other resources.

All parties, including the regulated community and state regulatory authorities, benefit from having a ten-day notice process that is inclusive of **all** potential violations, and which flags for prompt compliance and resolution, all violations of the Act. Constraints on the scope or functioning of the TDN process, whether in the form of delaying TDN issuance in order to allow submittal of "additional information" by state regulators, excluding violations arising from "permit defects" from the TDN process, requiring that persons first seek state response to potential violations before requesting federal inspection, and other barriers and hoops intended to stymie the TDN communication process, invite the resort by Commenters and other citizens to more draconian measures, such as citizen suits. For these reasons, and those provided in the comments that follow and in the documents included in the Addenda to these comments (which are incorporated herein by

reference as if fully set forth below), Commenters respectfully request that the 2024 TDN Rule be retained in its entirety in lieu of the proposed rescission of that rule.

OVERVIEW OF PROPOSED RULE CHANGES

The proposed rule would rescind the 2024 TDN Rule and would default to the previous 2020 TDN Rule, which made a number of changes that were (and will again when resurrected be) repugnant to the federal Act, legislative history, and long-standing agency interpretation and policy. The proposed rulemaking will arbitrarily, capriciously, and unlawfully eliminate important provisions of the 2024 TDN Rule respecting the ten-day notice ("TDN") process and issuance of ten-day notices (TDNs) to state regulatory authorities regarding alleged violations of SMCRA, the Secretary's regulations, provisions of the approved state regulatory programs, or permits issued thereto.

The text of the statute authorizing and mandating such notice is found at 30 U.S.C. 1271(a)(1), and it is simple, straightforward, mandatory, and without exceptions or distinctions as to the *cause(s)* of the violation. The statute provides in pertinent part that:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.

30 U.S.C. 1271.

Congress enacted this provision as part of "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. 1202(a).

In enacting SMCRA, Congress intended, among other things, to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations," and to "assure that surface coal mining operations are so conducted as to protect the environment," 30 U.S.C. § 1202(b) and (d).

Throughout the legislative process that resulted in the enactment of SMCRA, and in the debates on the earlier iterations of a surface mining bill, Congress repeatedly voiced concern over the historic propensity of states to under-regulate and under-enforce environmental constraints on coal mining. In the House Committee Report on H.R. 11500, where the current language of 30 U.S.C. 1271(a)(1) originated, the intent that OSMRE exercise oversight authority to assure that the provisions of SMCRA were fully enforced, is clear. The Senate bill, S. 425, contained **no** provision for federal inspection and enforcement in non-imminent danger situations where the Secretary was acting in an "oversight" role, providing only that the Secretary provide notice to the state regulatory authority, at which point the state was to proceed under the approved program. S. Rept. No. 93-402, 93rd Cong., 1st Sess. 17 (1973). The House provision, which prevailed in Conference Committee and which contained language identical in pertinent part to 30 U.S.C. 1271(a)(1) adopted in l977 and at issue here, reflected that Congressional skepticism of the ability or desire of the coalfield states to effectively regulate the environmental and human consequences of surface coal mining:

> For a number of predictable reasons – including . . . the tendency of State agencies to be protective of local industry - State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment.
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> * * * * *
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> While it is confident that the delegation of primary regulatory authority to the States will result in fully adequate state enforcement, the Committee is also of the belief that a limited *Federal enforcement role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.*

> The mechanism fashioned by the Committee to meet the dual objectives of necessary Federal enforcement oversight and expanded citizen access was made operative in both the interim period and after a State program has been approved. When the Secretary received information from any source that would give rise to a reasonable belief that the standards of the Act are being violated, the Secretary *must* respond by either ordering an inspection by Federal inspectors during the interim period, or, after the interim, notice to the States in the follow-up inspection that the State's response is inadequate.

H. R. Rept. No. 93-1072, at 111. (Italics added).

It is apparent that Congress intended that a federal inspection as a follow-up to the TDN would occur in **all** instances where the state had failed to take "appropriate" action, and that the state had a specific and time-limited period in which to take action to cause the violation to be corrected (i.e. "appropriate" action). This is underscored later in that same Committee report:

> (2) Upon receiving such information [giving rise to a belief in the Secretary that a violation was occurring], the Secretary **must** notify the State o[f] such violations and within ten days the State **must** take action to have the violations corrected. If this does not occur, the Secretary shall order Federal inspection of the operation.

Id. at 143 (Emphasis added).

Here, in a nutshell, is the answer to the agency's search for "the single, best meaning of the statutory language in the Surface Mining Control and Reclamation Act of 1977 (SMCRA)." It need look no further, since Congress made clear that "upon receiving" information giving rise to the belief that a violation was occurring, a ten-day notice **must** be sent and the State **must** take action to have the violations corrected, or a federal inspection "shall" be ordered.

No exceptions. No extensions. No excuses. No "action plans." No substitution of Section 521(b) procedures for federal inspection and enforcement action in the face of a possible violation. No "informal review" process for states to appeal TDN issuance.

"Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes." *Whitman v.*

Am. Trucking Ass'ns, 531 U.S. 457, 468, 121 S. Ct. 903, 909-10 (2001). If Congress had intended to make the TDN process available only for *some* potential violations, and only where *some* reasons existed for the violation (but not state regulatory failures or permit defects), or to allow non-enforcement responses as sufficient to constitute "appropriate" action in *some* cases, it would have so provided. In the absence of such authority, the agency is without the power to do so. "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia v. EPA,* 597 U.S. 697, 735 (2022). OSMRE has no such delegation, and as such, the proposals to cabin and delay the TDN process are *ultra vires* and inconsistent with law.

By resurrecting the 2020 TDN Rules which interposed additional delay in taking federal inspection and enforcement action, and by sidestepping the mandatory TDN process where violations are more widespread due to systemic failures of the state regulatory authority to properly maintain, administer, and enforce SMCRA as it is obligated by law and regulation, the TDN rulemaking is arbitrary, capricious, inconsistent with law, and most egregiously, threatens public health, safety, and the environment by allowing potential violations of SMCRA, federal and state regulations, and permit conditions to continue unabated for lengthy periods of time.

The proposed rule would reinstate the requirement from the 2020 TDN Rule in 30 C.F.R. 842.11 and 842.12 regarding the "reason to believe determination" in order to state that, before issuing a notification to State regulatory authority when a possible violation exists, OSMRE will collect and consider any "information readily available to him or her, from any source, including any information a citizen complainant or the relevant State regulatory authority submits[.]" OSMRE has indicated that the intent is to default back to the 2020 TDN Rule, which allowed "information that a State regulatory authority may choose to provide, before OSMRE issues a notification to a State regulatory authority." 85 *Federal Register* 28905 (May 14,

2020)(Emphasis added). The proposal would restore the delay in OSMRE evaluation and determination on whether the information it possesses gives "reason to believe," instead contemplating communication with and collection of additional information from a state regulatory authority *after* a citizen-initiated request to OSMRE but *before* issuance of a TDN in response to that citizen request – thus reinstating an open-ended pre-notice process that was rejected by the Secretary in 2024. The change violates the plain language and intent behind Section 521(a) of the Act and rested on the specious and unfounded claim that the term "reason to believe" in existing regulation is somehow ambiguous "as to what information OSMRE may consider when determining whether OSMRE has 'reason to believe' that a permittee is in violation of applicable requirements." 85 *Federal Register* 28906. Adding "information readily available to him or her, from any source, including any information a citizen complainant or the relevant State regulatory authority submits" muddies rather than clarifies the information on which OSMRE is required by law to make the determination.

The proposed rule would eliminate the term "citizen complaint" that was adopted in the 2024 TDN Rule and would eliminate the agency clarification that all citizen complaints would be considered as requests for federal inspection. The justification that to maintain these changes would somehow offend "principles of cooperative federalism" is specious, since the intentional creation of the TDN process and expanded role for citizens in the initiation of enforcement responses to potential violations of the Act, as well as the intentionally short (10 day) period for state action in response to a TDN, reflect where Congress sought to balance state and federal interests in order to best assure protection of the coalfield environment and communities.

It is telling indeed that throughout the text of the proposed rule, consideration of protection of the public and environment is notably lost in the weeds of an excessive agency preoccupation with deference to state regulatory authorities whose unwillingness and/or inability

to effectively regulate coal mining were the basis for federal intervention under SMCRA in the first instance. Congress drew the outlines and boundaries of "cooperative federalism," and the agency is without statutory authority to recast those lines to suit political purposes.

The proposed rule would reinstate a requirement that a person seeking a federal inspection "notify both the OSMRE authorized representative and the State regulatory authority, if any, which better aligns the regulations with the statutory structure of SMCRA and the goals of cooperative federalism." 90 *Federal Register* 25175. This description inaccurately suggests that concurrent notice is what is being proposed, when in reality, the language proposed for 30 CFR 842.12(a) would require **prior notice** to the state regulatory authority and additional delay:

> The statement must also set forth the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice, and the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation.

90 *Federal Register* 25180.

The proposal is entirely without statutory support in the federal Act, runs contrary to the legislative history of the law, departs from historic practice of the agency, and contradicts the process established by Congress by adding on new steps and procedures that contradict the plain language of the Act. While the agency appears to have read the *Loper Bright Enterprises* v. *Raimondo,* 603 U.S. 369 (2024) decision, Commenters caution notwithstanding that the crafting of a new procedural step by requiring a pre-notification to the state regulatory authority before being able to access the process outlined in 30 U.S.C. 1271(a)(1), resulting in substantial delay in securing federal inspection, is blatantly inconsistent with an unambiguous statute, and there is no longer *Chevron* deference behind which to shield such a proposal. Had Congress intended to require notification to the state regulatory authority as a prerequisite to 30 U.S.C.

1271(a), it would have done so, and the agency is without statutory authority to create out of whole cloth a new hurdle to timely response to potential violations.

The proposed rule would also eliminate the definition included in the 2024 TDN Rule, of "ten-day notice," explaining (using the language *from* the 2024 TDN Rule preamble to do so!) that [a]ll regulated entities understand that this is the ten-day notice process. A definition is not necessary." 90 *Federal Register* 25176. The bias of the agency is apparent in the focus on what the "regulated entities" understand, rather than on the fact that the TDN process is a communications process between federal and state regulatory authorities, and that the intended beneficiaries of timely notice and appropriate action to cause violations to be corrected, are the coalfield public and the environment, rather than the "regulated entities."

With respect to "persons" subject to a TDN, the proposed rule resurrects that argument that a "person," for purposes of the TDN process, does not include a state regulatory authority. According to the proposed rule,

> Properly understood, a State regulatory authority can only be a "person" that could "be in violation of any requirement of the Act" in order to trigger a TDN if the State is acting as a business organization of some type, such as a permit holder operating a surface coal mining operation. Because the 2024 Rule's direction in the preamble announced its intention to treat a State regulatory authority as a "person" for purposes of the TDN process, which is not in accordance with the best reading of SMCRA, OSMRE is proposing to return to its prior understanding of who can be found in violation of the SMCRA and its implementing regulations for purposes of a TDN. *See Loper Bright,* 603 U.S. 369.

90 *Federal Register* 25176.

Commenters will address the legal questions regarding the definition of "person" in the comments that follow, but note in this overview, that when the agency indicates it intends to revert to "its prior understanding of who can be found in violation of the SMCRA," Commenters are left to wonder *which* "prior understanding," because the 2020 TDN Rule that would be revived by this rulemaking, was a departure from the historic "prior understanding" of the scope

of the term "person" in the context of 30 U.S.C. 1271.

At the bottom line, with respect to this rulemaking, are two tenets that are the only reading of the Act that accords with its plain language and legislative history. The first is that the TDN process is available to be used to address all potential violations of the Act, the Secretary's regulations, the approved state regulatory program, or the issued permit, whether the violation is the result of the actions or inaction of the permittee or operator, or results from an individual or programmatic failure of the state regulatory agency in the issuance of the permit or the interpretation or application of its approved regulatory program. The second is that the process of withdrawing a state regulatory program and substitution of all or part of a federal regulatory program, is not a surrogate for the interim issuance of a TDN and follow-up federal regulatory action with respect to any extant violation. Whether the violation is the result of a SRA failure to maintain, administer, or enforce a program or arises from a permittee's failure to follow the permit and the applicable regulations, the TDN *always* issues. And the TDN *always* issues to the state regulatory authority, whether that SRA is considered a "person" or not, and communicates the existence of a potential violation that must be subject to federal inspection and enforcement action where the state fails to inspect and take action to cause the violation to be corrected. It is *never* "good cause" that a state regulation or state-issued permit does not consider the violation to be one, if that determination is inconsistent with the federal Act or Secretary's regulations, and it is never "appropriate action" where it does not cause the violation to be abated.

The proposed rule seeks to breathe new life into the artificial distinction drawn in the 2020 TDN Rule between violations caused by "permit defects" and those caused by a failure of the operator or permittee to *follow* the permit. With absolutely no statutory basis for creating and restoring the distinction, and in a manner wholly inconsistent with the long-held

interpretation of the agency, the agency purports to base the distinction between violations caused by "permit defects," which will be handled through the 30 U.S.C. 1271(b) process, and those which are caused by permittee or operator failures. As noted above and explained at length in the comments that follow, the "person" argument is a strawman and a distraction from the clear mandate of the Congress – **all** violations, when observed, will be written, and federal inspection and enforcement action is required for **all** violations, whether they result from a state failure in permit issuance, a state misapplication of the approved program regulations, or any other programmatic or "one-off" failure. The 30 U.S.C. 1271(b) process is no surrogate for 30 U.S.C. 1271(a), and the "person" who is violating the Act and is subject to the enforcement action is the permittee or operator, regardless of whether the violation that has been created resulted from a failure to follow a state-issued permit, or resulted from following a flawed state-issued permit. The agency's mantra of "cooperative federalism" cannot trump the plain language of the Act, which demands that "any" violation of the Act be subject to the TDN process and appropriate enforcement action regardless of the reason for the violation. There is no "dichotomy" in the statute concerning the correction of violations under 30 U.S.C. 1271(a), and addressing systematic failures to maintain, administer, and enforce the approved state program under 30 U.S.C. 1271(b); only a dichotomy created out of whole cloth in 2020 and resurrected in this proposed rulemaking, which contravenes the statute and places the coalfield public and environment at risk where a violation manifests as a result of those failures. In so doing, as is explained in the comments that follow, the agency goes **against** the plain language of the Act, vitiates Congressional intent, and eliminates a key component of a framework designed to address a range of state agency failures – from individualized, site- specific failures, to programmatic failures. It also results in the absurd outcome that the State could refuse to take appropriate action until the point where the on-the-ground violation worsens to an imminent-

harm situation, in which case the proposed rule recognizes that federal enforcement action would be necessary.

The proposed rule would also change the definitions of "appropriate action" and "good cause," as used in 30 C.F.R. 842.11, and revise the regulations pertaining to 30 C.F.R. Part 733. OSMRE proposes to remove the time frames that had been self-imposed of 60 days for development and approval of an action following identification of a State regulatory program issue and a 10-business-day deadline following identification of a State regulatory program issue for OSMRE and the State regulatory authority to develop interim remedial measures to abate the existing issue. In lieu of firm target dates, OSMRE instead proposes

> to return to instructing OSMRE to "take action to make sure the identified State regulatory program issue is corrected as soon as possible . . ." and "ensure that the State regulatory authority corrects a State regulatory program issue in a timely and effective manner," and to give a State regulatory authority the discretion to resolve a State regulatory program issue without an action plan, unless the Director determines that resolving the issue is likely to take more than 180 days or result in a violation of the approved State program.

90 *Federal Register* 25176.

While Commenters discuss the issue of time frames more fully below, the critical point is this – Congress was clear and unambiguous in mandating that unless a state took action to cause the violation to be abated within 10 days of notification, OSMRE is to conduct an inspection and take enforcement action. The agency is correct that some problems can be resolved more quickly than others, but the law is clear that in **no** circumstance is an on-the-ground violation of the law to be allowed to continue unabated while the state and federal agencies discuss, debate, and develop plans for resolving systemic problems with the state administration of an approved regulatory program. Immediate action to cause the violation to be abated must occur as an interim response, and federal inspection and enforcement action must be taken within ten days of the notice unless the state regulatory authority has done so. An extant violation, and the

attendant damage to land, air, or water resources, and to the public, is not allowed to continue unabated simply because there are multiple violations of the same nature across multiple mining operations due to a common state permitting or program implementation failure. While correcting the underlying state programmatic failure may take more time, and may result in initiation of the 30 U.S.C. 1271(b) / 30 C.F.R. Part 733 process if it is not resolved, 30 U.S.C. 1271(a) applies to **all** violations, including those resulting from a state failure to enforce or administer an approved program properly, and initiation of 30 U.S.C. 1271(b) processes is not a surrogate for or alternative to issuance of a TDN, followed by state resolution of the violation or federal inspection and enforcement in the absence of state response within ten-days of notification.

Regarding whether development of an "action plan" can constitute "appropriate action," OSMRE observes that:

> If OSMRE issues a TDN, the State regulatory authority must respond within ten days by either taking ''appropriate action'' to cause the possible violation to be corrected or showing ''good cause'' for not taking action. The 2024 TDN rule removed corrective action plans associated with a State regulatory program issue as a possible ''appropriate action'' in response to a TDN, asserting that an action plan to remedy a state regulatory program issue does not remedy violations. However, that is a misstatement. The action plan process in § 733.12 that was in place before the 2024 Rule was not a vehicle to avoid Federal enforcement or avoid the correction of any violation; instead, the action plan process was and is a tool for OSMRE, in collaboration with a State regulatory authority, to address State regulatory program issues promptly, which would include the correction of any violations of SMCRA on any permit identified. Thus, an action plan ''will cause said violation to be corrected'' so the development of an action plan is better characterized as ''appropriate action.'' This is also consistent with the fact that OSMRE has historically allowed programmatic resolution of State regulatory program issues, such as implementation of remedies under 30 CFR part 732, to constitute ''appropriate action'' in a given situation. To avoid confusion or uncertainty for the regulated community, State regulatory authorities, and the public at large, the proposed rule in § 733.12 seeks to remove ambiguity and definitively states that ''appropriate action'' may include corrective action to resolve State regulatory program issues.

90 *Federal Register* 25177.

The issue that is key in this discussion is that while corrective action plans may be appropriate for resolving both programmatic state regulatory program implementation issues (some of which may not manifest in violations causing off-permit or site-specific adverse effects) and "one-off" state permitting failures (such as a failure to impose appropriate permit conditions or to conduct an adequate technical review of a proposed mining plan element), the development of such a corrective action plan cannot *ever* constitute "appropriate action" unless it causes all extant violations to be subject to an enforcement order or orders and abated in accordance with the time frames outlined under the enforcement provisions of the Act. A violation that is caused by an individual failure of a permittee is required to be subject to an enforcement action with an abatement period, followed by increasingly stringent enforcement action in the case of a failure to abate. Nothing in the Act allows a different response where there are numerous violations by a permittee at one mine site, or one violation by a permittee at numerous mine sites, or because that violation is the result of a state permitting error or other program defect. Nothing in the Act suggests or authorizes the allowance of a continued violation without an obligation to abate that violation pursuant to a notice of noncompliance during the period of development of a corrective action plan, just as nothing in 30 U.S.C. 1271(a) exempts violations caused by state programmatic or individual failures to remain unabated due to initiation of 30 U.S.C. 1271(b) proceedings.

Regarding the regulatory treatment of "similar possible violations, OSMRE proposes to remove the language from the 2024 TDN Rule that had "codified the longstanding practice of OSMRE issuing a single TDN for a group of substantively similar possible violations." 90 *Federal Register* 25177. The agency justifies the removal on the basis of "this Administration's deregulatory agenda" and explains that "we do not believe it is necessary to include this

longstanding practice in the regulations because nothing in SMCRA or the pre-2024 regulations prohibits OSMRE from grouping similar violations into a single TDN if it is more effective to do so, even without a regulatory provision." Whether to retain or remove the requirement is ancillary to the underlying mandatory duty of the agency **to** issue a TDN for **each and every** violation that the agency has been given "reason to believe" may exist. Whether there are multiple violations of the same or different performance standards on a single mine site, or multiple instances of single violations arising from the same state program failure or permit defects arising from a common state permitting failure affecting multiple permitted sites, the Act is clear that each violation shall be subject to appropriate inspection and enforcement action, irrespective of the cause(s) of the violation. To the extent that the proposed rule seeks to create off-ramps for violations arising from state permitting or other program implementation defects (for example, a failure to properly train inspectors to identify violations), it is unlawful.

For example, a sediment pond discharges wastewater that fails to meet applicable effluent limitations. The discharge of substandard wastewater runoff from the minesite is a violation, and it is a violation whether it is the result of permittee error (for example, failure to remove sediment from the pond resulting in inadequate detention time) or permit reviewer error (for example, a failure to detect an set of assumptions made in the computer modeling for the sediment structure that resulted in undersizing of the pond.) In either event, the violation must be written up and remediated under an enforcement order, and if the problem is one of the agency routinely accepting inadequate modeling to demonstrate sediment structure compliance during permitting, that issue can be addressed programmatically. But in no case can the violation be ignored or abatement deferred on curing the on-the-ground violation. It is absurd to suggest that Congress intended to exempt from the applicability of 30 U.S.C. 1271(a), those violations resulting from the state failure to maintain, administer, and enforce the approved state

program under 30 U.S.C. 1271(b). There is no textual or historical support for such a reading other than the outlier 2020 TDN Rule.

The proposed rule seeks to reimpose a requirement that a citizen request for inspection to OSMRE include "the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice, and the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation." The agency explains:

> The 2024 Rule removed regulatory language from 30 CFR 842.12(a) that required a person who requests a Federal inspection under § 842.11(b) to include in his or her statement "the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation." The 2024 Rule preamble mischaracterized this pre-existing language, stating that the person seeking a Federal inspection "should not need to state their allegation in statutory or regulatory language." 89 FR at 24718. The regulatory language we are proposing to restore does not require the person who is requesting a Federal inspection to provide citations to statutes or regulations but merely to provide the basis for the assertion that the State regulatory authority has not taken action with respect to a possible violation. This is not a high bar. Any information the citizen can provide to OSMRE about the State regulatory authority's response would be very helpful in OSMRE's efforts to efficiently determine whether there is reason to believe that a violation exists. The preamble to the 2020 TDN Rule affirms that OSMRE "is merely asking the requester of the Federal inspection to provide any information he or she may have about the State regulatory authority's action or inaction." 85 FR 75150, 75160. For these reasons, the Department is proposing in revised § 842.12(a) to require the citizen to include in his or her complaint the basis for the assertion that the State regulatory authority has not taken action with respect to the possible violation.

90 *Federal Register* 25177.

Respectfully, the agency misses the point entirely. It doesn't matter whether the rule requires that a citizen requesting federal inspection cite chapter and verse regarding the state's obligation to and failure to take action to cause a violation to be abated, or to provide a generic written statement that the state has failed to do so. The point is

simple, straightforward, and purely a matter of law – OSMRE has **no** authority to require that a person providing information under 30 U.S.C. 1271(a) first contact the state regulatory authority or first request state action. Any federal rule imposing such a pre-requisite requirement to citizen access to 30 U.S.C. 1271(a) is unlawful, irrespective of whether it does or does not include specific citations. *Had Congress intended* that the citizen be required to first contact and request action from the state regulatory authority *before* requesting a federal inspection, it would have so provided. Rather, Congress provided a ten-day window for state consideration of inspection and enforcement action *after* receipt of such notice from OSMRE. That is the extent of deference allowed under the Act, and any regulation imposing a pre-requisite of notifying and requesting state action prior to invocation of the 30 U.S.C. 1271(a) process will not survive judicial review.

Finally, while proposing changes that weaken the accountability of state regulatory authorities under Section 521(a) of the Act, OSMRE completes the reinvention of the federal-state relationship under SMCRA by proposing to weaken the process for federal resumption in whole or part, of a failure of implementation of a state regulatory program by weakening the so-called "733" process.

The on-line *Merriam-Webster* dictionary contains two definitions of "oversight." The first is "regulatory supervision." The second is an "omission or error." Congress intended OSMRE to serve the first role with respect to state regulatory authorities' management of approved state programs. It is apparent from the proposed changes that OSMRE prefers the second approach of overlooking state omissions and errors rather than properly supervising the implementation by states of their approved regulatory programs.

SPECIFIC COMMENTS ON PROPOSED RULE

I. Executive and Secretary Orders, and Agency "Policy" Do Not Trump Requirements of SMCRA; Order No. 3418 Has Improperly Predetermined The Outcome Of This Rulemaking And Has Tainted Any Further Action On This Rulemaking

OSMRE indicates that justification for the agency's proposed return to the 2020 TDN Rule that was replaced by the 2024 TDN Rule, lies in various Executive Orders issued either by the Trump Administration or the Secretary of the Interior, and in the "policy of OSMRE to err on the side of deregulation." 90 *Federal Register* 25177.

With due respect, as to the last point first, OSMRE is a creature of statute, and lacks any authority under law to adopt a "policy" regarding regulation or lack thereof. OSMRE is charged with full and fair implementation of the requirements of SMCRA – no more, no less - and it is **Congress,** and not OSMRE, that establishes the "policy" concerning the manner of implementation of SMCRA. That Congressional policy is clearly and unambiguously announced, and the agency is without the power, right, or constitutional competence to vary from the objectives, policies, and requirements of the federal Act on the basis of any Executive or Secretarial Order, any "cost-benefit" test, or any philosophical principle concerning the wisdom or desirability of regulations. The purposes of the 1977 Act are as follows:

> PURPOSES SEC. 102. It is the purpose of this Act to—
>
> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
> (b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;
> (c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;
> (d) assure that surface coal mining operations are so conducted as to protect the environment;
> (e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;
> (f) assure that the coal supply essential to the Nation's energy requirements, and to

> its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;
> (g) assist the States in developing and implementing a program to achieve the purposes of this Act;
> (h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;
> (i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act;
> (j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation of surface mining operations for other minerals;
> (k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;
> (l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations, in the exploration, extraction, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, minerals resources, and technology, and the establishment of an appropriate research and training center in various States; and
> (m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

SMCRA Section 102, 30 U.S.C. 1202.

Nowhere in this statement of purposes, is there any mention of "costs and benefits." Notably missing is any expressed goal, policy, or purpose of "deregulation" as a policy. Instead, there is a charge to the Secretary, acting through the Office of Surface Mining Reclamation and Enforcement, to "wherever necessary, exercise the **full reach** of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." SMCRA Section 102(m), 30 U.S.C. 1202(m)(Emphasis added).

As the agency is (or should be) well aware, the executive branch is wholly without the authority to vary or abridge the terms of a congressional enactment by administrative fiat. The Executive Orders referenced by the agency acknowledge as much.

Yet the Secretary of the Interior, in violation of the Administrative Procedure Act, 5 U.S.C. 553, appears to have prejudged the outcome of this rulemaking, making the public notice and comment process a sham. Order No. 3418, issued by the Secretary of the Interior on February 3, 2025, claims that the Order:

> is intended to improve the internal management of the Department and to assure implementation of the above-referenced EO. This Order and any resulting report or recommendations are not intended to, and do not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person. To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.

Order No. 3418 Section 6.

While disclaiming any substantive impact from the Order, and characterizing it as being addressed to "internal management" and creating no "right or benefit, substantive or procedural," the Order mandates that the:

> Assistant Secretaries are hereby directed to promptly review all agency actions and submit an action plan to me in 15 days to consider how to comply with the policy in section 3. The plan should include, but not be limited to, the following:
>
> a. Take all necessary steps to ensure any actions taken to implement the revoked EOs are terminated, including but not limited to, terminating any contract or agreement on behalf of entities or programs abolished in the revoked EOs;
> b. In addition to the review described in subparagraph (a) above, all Assistant Secretaries should include in the plan required by this section, steps that, as appropriate, will be taken to suspend, revise, or rescind documents, including but not limited to, the following regulations, Secretary's Orders (SO), Solicitor's Opinions, Instruction Memoranda (IM), and Departmental Manuals (DM):…
>
> "Ten-Day Notices and Corrective Action for State Regulatory Program Issues," 89 Fed. Reg. 24714 (April 9, 2024);

Order No. 3418 Section 4.

By mandating the rescission of the 2024 TDN Rule through Secretarial Order, rather than directing that a new rulemaking be done to accept public comment on changes to the rule,

(including *whether* the existing rule should be revised), the Secretary has demonstrated clear bias and has prejudged the outcome of the notice and comment rulemaking in a manner repugnant to both the Surface Mining Control and Reclamation Act itself, and the Administrative Procedure Act. The Secretary's bias is evident in the text and tenor of Order No. 3418, and in mandating the outcome of this rulemaking (i.e. rescission of the 2024 Rule) prior to public notice and before accepting the first public comment. No fair consideration of public comment can occur, since the end point, which is the rescission of the 2024 TDN Rule, has been predetermined by the agency head. The rule should be withdrawn and the Secretary should recuse himself from any further proceedings involving potential revisions to the regulations that constitute the "ten-day-notice rule."

Commenters provide substantive comments concerning the proposed rescission *not* because they expect that the agency will provide fair consideration of the comments given the "marching orders," but in order to provide a clear and comprehensive record to support judicial review of the rescission of the 2024 TDN Rule.

II. The Proposed Rescission Of The 2024 TDN Rule Is A Major Federal Action Significantly Affecting The Human Environment And Cannot be Categorically Excluded From NEPA Analysis And Documentation

Commenters respectfully demand that prior to any further action to advance this rulemaking proposing to rescind the 2024 TDN Rule and resuscitate the 2020 TDN Rule, that OSMRE fully with the requirements of the National Environmental Policy Act with respect to such changes. The proposed "categorical exclusion" of this rulemaking from the requirement of environmental analysis and documentation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* is arbitrary and unlawful, since the revival of the 2020 TDN Rule (and the proposed rescission of the 2024 TDN Rule) is not merely "administrative or procedural in nature," but in fact has significant substantive impacts on the natural and human

environment.

The proposed rule provides no explanation for the conclusion that the proposed rule is covered by a "categorical exclusion" other than the conclusory reference to 43 CFR 46.210(i) as a "final rule that is administrative or procedural nature." The 2020 proposed rule similarly claimed that the regulation, which was misidentified as a "clarification" rather than a substantive notice-and-comment rulemaking by the agency at the time, was categorically excluded, and provided this reasoning:

> *National Environmental Policy Act*
>
> OSMRE has made a preliminary determination that the changes to the existing regulations that would be made under this proposed rule are categorically excluded from environmental review under the National Environmental Policy Act (NEPA). 42 U.S.C. 4321 *et seq.* Specifically, OSMRE has determined that the proposed rule is administrative or procedural in nature in accordance with the Department of the Interior's NEPA regulations at 43 CFR 46.210(i). The regulation provides a categorical exclusion for, ''[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis .....'' The proposed rule primarily seeks to clarify how OSMRE formulates reason to believe in the TDN context and the information OSMRE considers in this analysis. As such, the proposed rule would merely clarify OSMRE's process. Therefore, OSMRE deems the proposed changes to the regulations to be administrative and procedural in nature, as these proposed changes ensure regulatory certainty. These clarifications would result in efficiency and enhanced collaboration among State regulatory authorities and OSMRE. OSMRE has also determined that the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA. OSMRE will continue to review these factors as the proposed rule is evaluated.

85 *Federal Register* 28915.

Respectfully, the only "certainty" that the proposed rules created then, and now as they are proposed to be revived, is the certainty that there will be an additional delay between the receipt of a citizen request for inspection providing "reason to believe," and issuance of a TDN (if one is ever issued at all). The attendant environmental damage resulting from unabated violations during that interim is neither speculative in nature nor procedural in aspect. Nor are

the potential environmental consequences too speculative or conjectural to evaluate. There are literally scores of IBLA decisions concerning TDNs and state responses thereto, that highlight the ongoing environmental damage that would occur if the proposed rule becomes finalized and the TDN process is *delayed* by informal communications with state regulatory authorities on "readily available information" prior to TDN issuance, or is foreclosed completely if the violation is one that the state itself is alleged to have allowed to occur. Neither prong of the applicable agency NEPA regulation justifies categorical exclusion of this rulemaking.

The proposed rule also creates an additional gap in oversight where none existed before. Previously, OSMRE had consistently used the TDN process to address site-specific violations by state regulators, such as issuance of a defective permit. Under the 2020 rule, OSMRE excluded such violations from the TDN process. Although OSMRE purports to address such violations under the 733 process, that process is limited to evaluation of alleged programmatic failures, and therefore cannot be properly invoked to address isolated site-specific violations. Furthermore, the 733 process is inherently slow, and so any site-specific violation by a state regulator would remain in place and any attendant adverse impacts to the environment would be allowed to persist unaddressed. This harm is neither speculative nor difficult to analyze – as the many IBLA decisions cited below reflect, violations causing on-the-ground damage on and off- site would continue unabated indefinitely under the proposed rule.

It **is** a certainty, however, that the categorical exclusion in this proposed 2025 rule will be subject to judicial challenge if the agency does not reconsider the posture that a rule with such sweeping substantive changes in enforcement and oversight, is subject to a categorical exclusion from NEPA review. The proposed rule should be withdrawn pending issuance of notice of intent to prepare an Environmental Impact Statement or Environmental Assessment.

The experience of both the agency and of the public with the 2020 TDN Rule that is now

proposed to be revived, further underscores that the rulemaking is not merely administrative or procedural in nature, but instead has a significant substantive impact on the attainment of the purposes of the Act as enunciated by Congress. The agency acknowledged in the 2023 and 2024 proposed and final TDN rules, respectively, that the 2020 TDN Rule resulted in delay in a timely regulatory response to violations of the Act. Additionally, as reflected in the Declarations of Willie Dodson, Peter Morgan, and Vernon Haltom, which were submitted in connection with the *Unopposed Motion To Intervene As Defendants* in the case of *State of Indiana et al. v. Haaland,* Case No. 1:24-cv-01665-RBW (D.D.C. 2024), the 2020 TDN Rule created substantive delays and problems with timely inspections and enforcement of the Act in states with approved regulatory programs. Under any fair definition, the rewriting of a set of regulations that defines the manner in which the federal and state agencies will communicate the existence of potential violations of SMCRA, and which defines the manner in which the OSMRE will respond to citizen requests for inspection where the implementation of the regulatory program has been delegated to a state or tribal nation, constitutes a "major federal action" significantly affecting the human environment in our nation's coalfield communities.

Specific comments follow with respect to the issues identified in the 2025 TDN Proposed Rule, following a discussion of the scope of review of agency rulemaking.

III. Scope of Judicial Review Of Agency Rulemaking

Under the Administrative Procedure Act (APA) and the statutory provisions governing judicial review of agency rulemakings under SMCRA, an agency rule is "arbitrary" or "capricious" when the agency has utilized factors that Congress did not intend to be used for consideration, "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or offered a justification that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle*

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

To satisfy the applicable standards for a rulemaking under the APA, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). While the agency must show that they have established good reasons for the new policy, they are not required to prove that the reasons for the new policy are better than the reasons for the old policy. *See: FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). However, when an agency disregards facts or circumstances that the prior policy relied on, it must have and provide a reasoned explanation for doing so. *Id.* at 516. In the seminal case of *State Farm*, the Court defined revocation not merely as rescinding a prior policy, but as "a reversal of the agency's former views as to the proper course." See *FCC*, 556 U.S. at 549 (Breyer, J., dissenting) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc*., 463 U.S. at 41 The court further explained that "it requires the agency here to focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment." *FCC*, 556 U.S. at 550 (Breyer, J., dissenting).

When evaluating that explanation, the court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc*., 419 U.S. 281, 285 (1974)). Additionally, the agency's action must not be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). In any case, the question:

> is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority.

FCC, 556 U.S. at 536 (Thomas, J., concurring).

Here, it is evident that the proposed resurrection of the 2020 TDN rule not only deviates from and disregards OSMRE's own pre-2020 interpretations of the Act, but also fails to establish a reasonable explanation and correlation between any facts found and the decision made. It is one thing for the agency to suggest a departure from prior policy when there is newly ascertained factual or scientific evidence that supports the conclusion, but quite another when a revision is proposed that would undermine the plain language of the law and upend some 41 years of prior well-established policy without any factual basis or findings showing good reason for the changes. *See Fox*, 556 U.S. at 534. If promulgated, the proposals would effectively rescind OSMRE's long-standing interpretation of Sections 504 and 521 of SMCRA made contemporaneously with the statute's enactment, in a manner that would hobble the very citizen enforcement efforts that Congress determined "a vital factor in the regulatory program as established by the act." H.R. Rept. No. 95-218, 95th Cong. 1st Sess. at 89 (1977). Such an extreme policy shift by OSMRE would survive judicial review only if supported by "a reasoned analysis for the change beyond that which may have required when an agency does not act in the first instance." *State Farm*, 463 U.S. at 42. For a variety of reasons discussed below, the proposed rules are unsupportable by any reasoned analysis. Instead, they are patently "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[5]

[5] *Sierra Club, Inc. v. United States Forest Serv*., 897 F.3d 582, 589 (4th Cir. 2018) (quoting *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 586–87 (4th Cir. 2012)).

IV. The Proposed Changes Are Contrary to the Text and "Best Reading" of 30 U.S.C. 1271(a)

Congress enacted SMCRA to, among other purposes:

a. establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

b. assist the States in developing **and implementing** a program to achieve

the Act's purposes;

c. assure that appropriate procedures are provided for public participation in the development and **enforcement** of regulations and programs established by the Secretary of the Interior or any State under the Act; and

d. wherever necessary, exercise the full reach of Federal constitutional powers to ensure the protection of the public interest through effective control of surface mining operations. *Id*. §1202(a)(g)(i) and (m).

30 U.S.C. 1202 (Emphasis added.) SMCRA's lengthy legislative history culminated in reports issued by the House and Senate Committees charged with drafting the statute. A Conference Committee report explained the final resolution of differences between the House and Senate bills. Ultimately, Congress enacted the House bill, as amended in conference.

In virtually identical language, the House and Senate Committee Reports on Public Law 95-87 explain Congress' intention in crafting SMCRA's overlapping federal and state enforcement procedures. Unlike other major environmental statutes, SMCRA contains significant provisions for citizen participation in every aspect of permitting and enforcement of the Act and approved state or federal program. Additionally, the enforcement process is mandatory, significantly constraining any "prosecutorial discretion" that might be found with respect to, for example, enforcement under the Clean Water Act. Each, and every, violation observed must be cited, and every unabated violation is subject to increasingly severe sanctions. Congress intended to address pervasive historical problems in State nonenforcement of then-existing state surface coal mining laws at the time of SMCRA's enactment. Each report states:

> Efficient enforcement is central to the success for the surface mining control program contemplated by [the bill then under consideration]. For a number of predictable reasons – including insufficient funding and the tendency for State agencies to be protective of local industry – State enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment. The Committee believes, however, that the implementation of

> minimal Federal standards, the availability of Federal funds, and **the assistance of the experts in the Office of Surface Mining Reclamation and Enforcement in the Department of Interior**, will combine to greatly increase the effectiveness of State enforcement programs operating under the Act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, **the Committee is also of the belief that** a limited Federal oversight role as well as **increased opportunity for citizens to participate in the enforcement program are <u>necessary</u> to assure that the old patterns of minimal enforcement are not repeated**.

H.R. Rept. No. 95-218 at 129; S. Rept. No. 95-128 at 90 (emphasis added). The House Report goes on to point out that:

> Once State programs or Federal programs replace the interim regulatory procedure, section 517 requires that Federal inspections must be made for purposes of developing, administering, or enforcing any Federal program, and **assisting** or evaluating the development, administration, or **enforcement of any State program**.
>
> . . . .
>
> In addition to normally programed inspections, section 521(a)(1) of the bill also provides for **special inspections when the Secretary receives, information giving him reason to believe that violations of the act or permit have occurred**. It is anticipated that "reasonable belief" could be established by a snapshot of an operation in violation or other **simple and effective documentation of a violation**.

H.R. Rept. No. 95-218 at 129 (emphasis added). The Senate Report emphasizes the Secretary's mandatory duty to issue an order for a federal inspection as a consequence of SMCRA 521 (a)(1)'s explicit "Ten Day Notice" procedure:

> The Secretary may receive information with respect to violations of provision[s] of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens.
>
> **Upon receiving** such information, the Secretary **must** notify the State on such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary **shall** order Federal inspection of the operation.

S. Rept. No. 95-128 at 89-90 (emphasis added).

In sum, SMCRA requires (1) OSMRE to notify the State in response to **any information received** of a possible SMCRA violation, (2) state action within ten (10) days of receipt of such notice indicating the state has taken action to correct the violation. If the state chooses to take no action in response to the TDN, it must notify the state indicating facts supporting a claim of good cause for failure to do so, and (3) OSMRE **shall** order a federal inspection if the state fails to take action within the ten (10) days to have the violation corrected or finds that good cause supports the State's non-action. Congress outlined each of these procedural steps in precise terms, and OSMRE may not, by regulation, alter Section 521(a)(1)'s statutorily mandated procedure by administrative fiat.

SMCRA's explicit mandatory procedures are best read in the bright light of clear and unmistakable Congressional intent expressed in the Senate Report, which provides:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.

30 U.S.C. § 1271(a)(1). Two features are included in the process leading up to the federal inspection mandated under Section 521(a)(1). First is the availability of information (including receipt of information from any person), giving the Secretary's "reason to believe" that "any person is in violation" of SMCRA or a related permit triggers the process. The second is immediate notification of the state regulatory authority if there is "reason to believe," starting a ten-day period that the state is given to "take appropriate action to cause said violation to be corrected" or to "show good cause for such failure[.]" If the State regulatory authority failed to cause the violation to be corrected to or show good cause for failing to do so, "the Secretary **shall immediately** order a Federal inspection." *Id.* (emphasis added).

SMCRA is clear in delineating how the Section 521(a)(1) process must unfold. The Act does not allow the Secretary to create any new procedural step before the statutory TDN procedure is initiated, such as prior notice to the state regulatory authority. That proposal would inject indefinite additional delay into the investigation of SMCRA violations contrary to the quick and efficient statutory TDN procedure crafted and mandated by Congress.

Nonetheless, OSMRE now proposes to restore an entirely new pre-trigger process nowhere extant prior to 2020 under which the agency would contact the state regulatory authority and "consider the State regulatory authority's action **before** determining if there is reason to believe a violation exists." 85 Fed. Reg. 28904, 28907. OSMRE claims that this extra process is allowable under the Act because "neither SMCRA nor the regulations clearly define the phrase 'reason to believe,' and both are ambiguous as to what information OSMRE may consider when determining whether OSMRE has 'reason to believe' that a permittee is in violation of applicable requirements." *Id*. at 28906.

This purported ambiguity is a fiction, and *Chevron* is no longer available to shield the agency when it plays fast and loose with purported "ambiguities" in the law. Congress was clear in

instructing how the phrase "reason to believe" should be construed and provided examples. Heretofore, the agency has had no problem understanding or implementing the standard. OSMRE has consistently interpreted § 1271(a)(1) for more than four decades without claiming the provision is ambiguous.

The House Report accompanying H.R. 2 explained clearly that:

> In addition to normally programed inspections, section 521(a)(1) of the bill also provides for special inspections when the Secretary receives, information giving him reason to believe that violations of the act or permit have occurred. It is anticipated that "reasonable belief" could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation.

H.R. Rept. No. 95-218 at 129.

The threshold set by Congress is "simple and effective documentation" or a "snapshot" of the operation in violation. As further explained below, for decades the agency has not articulated any problem in understanding and applying the Section 521(a)(1) standard.

OSMRE claimed in the 2020 rulemaking that the "plain language" of the statute does not restrict information upon which the Secretary's reason to believe finding is based to that information provided by the citizen. 85 *Fed. Reg*. 28905, 28907. OSMRE asserts that the inclusion of "readily" allows for an additional step of substantiating the citizen complaint through contacts with the state regulatory authority. This step, OSMRE proposes, would take place **before** initiating the ten-day notice process, thus grafting an additional step prior to activating the explicitly mandated Section 521(a)(1) TDN process. Congress's intent would be honored, according to the proposed rule, because notice given to the state predating the notice mandated by § 1271(a)(1) would provide "simple and effective documentation of a violation" that Congress had in mind. *Id*. OSMRE's proposal is accompanied by bald vague assertions that the state is entitled to a second round of notice because "citizen complaints sometimes present a combination of documentation and bare allegations." *Id.* That citizen complaints "sometimes"

include documentation and bare allegations provides no support for injecting the delay and uncertain timing into Congress' mandated § 1271(a)(1) procedure.

The proposal to add an additional State notice requirement (with the attendant delay in triggering the TDN) is in plain contradiction to the mandate of Section 521(a) and Congressional intent referenced above. It is important to note that information not in the possession of OSMRE at the time of receipt of a citizen complaint or an oversight inspection, and which is requested from the state agency afterwards - is by definition **not** "information available" to the Secretary.

The TDN process was intended by Congress as the vehicle by which information giving the Secretary reason to believe that a violation exists, is to be transmitted to a state regulatory authority for response within ten days. Creating an additional notice process with no time frame for OSMRE's notice and request for information not available to it *before* making a "reason to believe" determination, makes a mockery of Congress' intent that citizen participation with OSMRE in the inspection and enforcement was key to effective implementation of the Act.

The timeline for allowing the state to provide "readily available information" that may be "integral to the assessment of whether a violation exists" is set forth in the Act — it is ten days, no more, no less. 85 *Fed. Reg*. 28905, 28908. The Act is plain and explicit about the time allowed for this process, and it does not allow for OSMRE and the state regulatory authority to be "armed with more time." *Id*. As noted above in Senate Report No. 95-218, what became Section 521(a)(1) set forth "a number of specific characteristics for the Federal enforcement program," those being that the Secretary "may receive information with respect to violations of provisions of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens" and "*upon receiving such information,"* the Secretary "must notify the State of such violations and within ten days the State must take action……" S.

Rept. No 95-218, *supra,* at 88-89. The establishment of a new intervening process between the Secretary's receipt of information giving "reason to believe" and notification through the mechanism of a TDN to the state regulatory authority is wholly inconsistent with the plain language of Section 521 of the Act and the legislative history. OSMRE, as a creature of statute, is without authority to modify, vitiate, add to or subtract from the plain language and mandatory nature of the Act in the manner proposed in the rulemaking.

Nor does the Act allow OSMRE to create or resuscitate the new procedural barrier to initiation of the 30 U.S.C. 1271(a) process in 30 C.F.R. 842.12(a) that requires that the complainant assert and demonstrate that the state regulatory authority has first been notified of the potential violation and has failed to take appropriate action. *Had* Congress intended to require such an action as the first step to initiation of the 30 U.S.C. 1271(a) process, it would have so provided, and in the absence of such a requirement in the law, the agency is without the power to create a new procedural barrier of that or any nature. Nothing in the law, legislative history, or pre-2020 agency interpretations of practice supports such a requirement.

V. The Proposed Rule Is Arbitrary and Capricious Because It Alters the Existing Standard Applicable To The Secretary's "Reason to Believe" Finding and Unlawfully Reverses OSMRE's Longstanding, Consistent Interpretations of SMCRA's Ten Day Notice Requirement While Failing to Acknowledge Earlier Contrary Interpretations, Providing No Reasonable Explanation for Changing Course, and Without Providing or Analyzing Available Relevant Data

The proposed rulemaking is inconsistent with applicable law and prior agency rulemakings in so far as it inserts the word "readily" as a consideration in identifying "information available" referenced in 30 C.F.R. 842.11(b)(1)(i), 30 C.F.R. 842.11(b)(2), and 30 C.F.R. 842.12(a). OSMRE suggests that the "reason to believe" standard must be clarified to ensure that an authorized representative considers "all information" available when determining "reason to believe" a violation exists. OSMRE's proposal baldly asserts that citizen complaints

sometimes involve “a combination of documentation and bare allegations.” OSM asserts but does not explain how the proposed change would ensure that OSMRE timely obtains effective documentation.

The proposed standard imposing an additional notice procedure sharply deviates from the agency’s historic interpretation and application of the “reason to believe" standard. In 1977 OSMRE’s Interim Program regulations rejected several commenters’ suggestions that a reasonable basis to believe should be considered to be established only when the facts, if **proven** to be true, would show a violation.[9] OSMRE interpreted Section 521(a) as antithetical to rigid rules regarding the necessity of documentary proof in every case and concluded that such a requirement was contrary to Congressional intent.[10] Rather, the agency concluded the standard would be met when facts alleged by a complainant, if true, constitute a violation.[11] OSMRE further emphasized that it is the Office’s duty to respond to any information - furnished by any person - which gives rise to a reasonable belief.[12] The agency found a high standard of proof inconsistent with the public participation goal of SMCRA.[13]

Similarly, in the preamble to a 1982 rulemaking, OSMRE discusses commenters’ suggested replacement of the word “alleged” for “possible” in §842.11(b)(1)(ii)(B). OSMRE disagreed. The agency emphasized Section 521(a) imposed a mandatory duty requiring it to conduct an inspection when it has “reason to believe” a violation exists.[14] The basis for such a belief may or may not involve an affirmative allegation.[15] It does not matter if the word “possible” is speculative in nature because OMSRE inspections are in fact speculative --- until it determines whether a violation exists.[16] Another commenter on the 1982 rulemaking suggested something similar to a 1977 comment that OSMRE must have “probable cause” to believe a complainant’s statements are true before acting under §842.11(b).[17] Again, OSMRE disagreed, stressing that section 521(a)(1) of the Act does not require OSMRE to conduct an inquiry into

[9] 42 Fed. Reg. 62665 (December 13, 1977)
[10] *Id.*
[11] 44 Fed. Reg. 15457 (March 13, 1979).
[12] 42 Fed. Reg. 62665 (December 13, 1977).
[13] 44 Fed. Reg. 15299 (March 13, 1979).
[14] 47 Fed. Reg. 35627 (August 16, 1982).
[15] *Id.*
[16] *Id.*
[17] *Id.*

the veracity of the complaint.[18] Also, in the 1982 rulemaking, OSMRE emphasized that the language of the original regulation reflected the intent of the Act, because it required a person need only provide information giving rise to a "reason to believe" rather than requiring a complainant be certain that a violation exists."[19]

One of the proposed rule's justifications for requiring the agency to first seek information from a state regulatory authority before determining if a violation exists reduction of duplicate inspections and conservation of resources in the event that a state has already begun investigating or correcting an alleged violation. However, this concern was previously fully addressed and dismissed by OSMRE. In the preamble to the 1988 rulemaking, OSMRE continued to develop the procedures to take effect during the ten-day notice process, specifically including consideration of what constitutes "good cause" and "appropriate action."

In particular, the standard for State "appropriate action" was more broadly construed. [20] Prior to 1988, "appropriate action" included only state responses showing the potential violation no longer existed or that the state had affirmatively taken enforcement action. [21] In the 1988 rulemaking OSMRE recognized "appropriate action" included "other action."[22] Thus, if the federal agency found the state has already begun correcting a violation or the violation has been corrected, the state will have satisfied the "appropriate action" requirement of 30 C.F.R. 842.11(b)(1)(ii)(B)(3) and the Federal inspection would not be necessary.

[18] *Id.*
[19] 47 Fed. Reg. 35628 (August 16, 1982).
[20] 53 Fed. Reg. 26733 (July 14, 1988).
[21] *Id.*
[22] *Id.*

Additionally, in its Preamble to the 1988 rulemaking, OSMRE listed five situations constituting "good cause for a state failing to take appropriate action."[23] Specifically listing five circumstances under which "good cause" may be met and by emphasizing the ability of the state to request additional time, OSMRE considered and resolved concerns regarding duplicative inspections. Thirty-two years have passed during which the agency never identified "duplicate inspections" as a significant issue.[24] The existing regulatory regime recognizes that if a state regulatory authority has begun investigating a potential violation but has not completed the investigation because it needs more time, that would constitute "good cause" under 30 C.F.R. 842.11(b)(1)(ii)(B)(4)(ii) and a Federal inspection would not be required at that time.

Another change now proposed is the addition of a requirement in 30 C.F.R. 842.12(a) that a citizen identify the basis for asserting that the state regulatory authority has failed to take action with respect to an identified possible violation.[25] This proposal ignores the fact that in the preamble to its 1979 permanent regulatory program rules, OSMRE rejected a commenters' suggestion that a citizen be required to contact the state and to verify that the state had not taken corrective action. OSMRE interpreted Section 521(a)(1) to preclude imposition of such a requirement, finding that "the Office has no authority under the Act to require a citizen to ask for a state inspection before asking for a Federal Inspection."[26]

Further, in the 1982 preamble, OSMRE emphasized that a citizen need not wait for a State regulatory authority to take appropriate action.[27] If a Federal inspection is required in a

[23] 53 Fed. Reg. 26730 (July 14, 1988).
[24] 53 Fed. Reg. 26735 (July 14, 1988).

[25] This proposal is in addition to requiring a citizen complainant to notify the state regulatory authority of the existence of a possible violation.
[26] 44 Fed. Reg. 15299 (March 13, 1979).
[27] 47 Fed. Reg. 35628 (August 16, 1982).

particular instance, requiring a citizen to first notify the state of a possible violation would cause needless delay in the TDN process because such notification can be made at the same time the citizen requests a Federal inspection.[28]

OSMRE's proposed changes also substantially deviate from its prior long-established policy by ignoring Congress' intent that public participation serve as a necessary and important mechanism to achieve effective enforcement of the Act. A stated purpose of Section 521(a)(1) of the Act is to "assure public participation in the enforcement of surface coal mining regulatory programs."[29] In the preamble to its 1979 permanent regulatory program rules, OSMRE rejected a commenter's suggestion that would require that all citizen complaints be in writing because of the importance of convenience for the public and the necessity for prompt action.[30]

A. OSMRE's Longstanding, Consistent Interpretations of SMCRA's "Reason to Believe" Requirement Forecloses the Approach Outlined in the 2020 Proposed Rule and Resurrected Here

OSMRE promulgated the current TDN Rule as part of SMCRA's permanent regulatory program. Over the ensuing four decades, OSMRE has interpreted Section 521(a)(1) to require that information received from any source may establish "reason to believe" a SMCRA violation exists if a complainant's information would, if true, constitute a condition, practice, or violation of SMCRA or its applicable regulatory program. *See* 30 C.F.R. § 721.13 (a)(1) (interim program) and 842.11(b)(2) (permanent program). The latter rule practicably implements Congress's intent that "simple and effective documentation of a violation" suffices to establish

[28] *Id.* It is important to recognize that SMCRA does not give citizens the authority to enter a mine to verify whether a state has acted to correct a violation. However, once a federal inspection is ordered pursuant to section 521(a)(1) , SMCRA affords the complaining citizen the right to accompany federal officials inspecting the mine for asserted violations.
[29] 47 Fed. Reg. 35625 (August 16, 1982).

[30] 44 Fed. Reg. 15299 (March 13, 1979).

"reason to believe" a violation has occurred so as to trigger the State's opportunity to investigate and respond within ten days without further federal intervention. H.R. Rept. No. 95-218 at 129.

Adherence to the "if true" standard is critical to SMCRA's Ten Day Notice procedure in that it effectuates SMCRA's goal of encouraging broad citizen participation in all major aspects of SMCRA enforcement deemed by Congress to be vital to the success of a "nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." *Cf*. H.R. Rept. No. 95-218 at 89; S. Rept. No. 95-128 at 59; 30 U.S.C. § 1202(a).

The "if true" standard does so by preventing regulatory stalling and indefinite administrative delay that would be inevitable were OSMRE to consult State regulators or a host of other potentially informative sources **after** receipt of information and **before** notifying the state of a possible violation triggering a ten-day window for the State to inspect the relevant mine, determine whether the reported violation exists, and immediately begin appropriate corrective action if it does. Adding a second notice and inquiry process as a prerequisite to initiation of the mandatory section 521(a)(1) TDN process is not an option that the plain language of the Act would countenance and is inconsistent with the mandatory compliance processes crafted by Congress.

The procedure Congress prescribed when OSMRE receives information that a coal company is violating SMCRA requires the agency to quickly evaluate whether the information, standing alone, describes a potential violation of SMCRA or a permit. S. Rept. No. 95-128 at 89-90. The immediacy inherent in the short statutorily mandated TDN time frame procedure leaves no room for OSMRE to graft additional state notice and investigation steps between its receipt of a report of a possible violation and the issuance of a TDN to state regulators. The TDN **is** the notice to the state regulatory authority to take appropriate action or give good cause for inaction.

OSMRE affirmed its initial interpretation of SMCRA's plain meaning during the agency's 1982 rulemaking review of its 1979 permanent program regulations. OSMRE made clear that the statutory "reason to believe" standard for TDN issuance "does not require OSM to conduct an inquiry into the veracity of the complainant." 47 *Fed. Reg.* 35627 (August 16, 1982). Emphasizing SMCRA's demand for prompt action in response to information asserting a possible violation, OSMRE explained:

> [i]f a Federal inspection is required in a particular instance, **there need not be any delay** caused by requiring the person to notify the State, because such notification can be made at the same time the person requests the Federal inspection.
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> . . . .
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> Furthermore, the Act does not require that a person be certain that a violation exists, but only that he have "reason to believe" that one exists. The existing language [of 30 C.F.R. § 842.11(b)(2)], thus, reflects **the intent of the Act. *i.e.*, that the Secretary inspect** where the **possibility** of violations exists . . . .

Id. at 35628 (emphasis added).

The proposed additional notice and consultation process is flatly inconsistent with the plain language and Congressional intent behind Section 521(a)(1). Any provision delaying the issuance of or response to a ten-day notice is violative of 30 U.S.C. 1271(a) and cannot stand.

B. The Proposed Rule Is Inconsistent with the Agency's Prior Interpretation and Application of the "Reason to Believe" Standard as Well As Inconsistent with Numerous IBLA Decisions Consistently Interpreting and Applying That Standard

The proposed amendment of its current TDN rule rejects the "if true" standard for determining whether proffered information provides "reason to believe" a SMCRA violation exists. The proposed rule acknowledges, as it must, that its prior promulgation of the long-standing "if true" standard for determining whether proffered information establishes "reason to believe," 85 *Fed. Reg*. 28910. The proposed rule fails to disclose any rationale for doing so and

ignores the full legislative history upon which OSMRE based its "reason to believe" standard. The proposal makes no mention of the broad acceptance and application of the "if true" standard by the Interior Board of Land Appeals (IBLA), which speaks finally for the Secretary in administrative review proceedings. Similarly, OSMRE fails to acknowledge that the decades-long acceptance and settled application of the "if true" standard by approved State regulatory programs and by decisions of State review tribunals.

For the reasons explained above OSMRE's proposal rests upon an unreasonable, arbitrary and capricious interpretation of SMCRA. It is patently unreasonable for the agency to interpret Section 521(a)(1) to permit OSMRE to create an open-ended additional notice and investigation requirement that would necessarily delay the specific time-limited process mandated by Congress. It is important to recognize that the word "whenever" at the beginning of 30 U.S.C. § 1271(a)(1) requires OSMRE to **determine upon "receipt"** of facts indicating a possible SMCRA violation **whether the facts establish "reason to believe"** a violation exists.[31] The next step in the mandated process is for OSMRE to notify the pertinent State regulatory authority, requiring a response within ten days. The intentionally short TDN time frame mandated by Section 521(a)(1) would be eviscerated by OSMRE's open-ended proposal that could be used to indefinitely delay triggering a state's statutory duty to act within ten days of receiving notice of a possible violation of the act or a coal operator's mining permit. In enacting Section 521(a)(1) Congress required a definitive response within ten days - a period Congress deemed sufficient for the state regulatory authority to affirm or refute the existence of an alleged violation.

[31] The proposal that an OSMRE representative could "using his or her best professional judgment" consider a state investigation of an alleged violation "before determining if there is reason to believe a violation exists" flatly ignores the mandate of Section 521(a)(1). The scenario described at 85 *Fed. Reg.* 28907 of "some instances in the past" where "two parallel processes" resulted from issuance of a TDN, should **never** occur when the existing process is being followed, since the state response to a TDN would be that the state "was actively investigating the same

allegation." *Id.* The determination of whether the allegation creates "reason to believe" is distinct from and must precede notification, and OSMRE cannot rewrite mandatory provisions of federal law to provide otherwise.

Congress could have written the Act to allow OSMRE to confer with the State and gather information pertinent to an alleged SMCRA violation for as long as OSMRE deemed necessary, without temporal limit. It did not. Congress could have authorized federal inspections only if OSMRE, in is discretion, deemed an on-the-ground review warranted. It did not. Congress could have limited federal enforcement in oversight to issuance of imminent harm cessation orders. It did not. On the contrary, Congress's used the mandatory exhortation "shall" and imposed a precise ten-day state response deadline triggered by receipt of information giving OSMRE "reason to believe" a violation exists.

The current rulemaking proposal ignores the fact that the IBLA long ago emphatically rejected an earlier attempt by OSMRE to defer issuing TDNs in response to plausible citizen complaints to allow the agency to choose to focus instead on other concerns relating to a State regulatory program. In *West Virginia Highlands Conservancy* (*WVHC 1*), the IBLA held that:

> the pendency of a request for programmatic relief does not excuse OSM from acting independently on inspection requests submitted pursuant to the procedures of 30 C.F.R. §§ 842.11 and 842.12, which require OSM to issue TDN's -- **or at least to decide whether to do so** based on the regulatory factor of whether there was "reason to believe" a possible violation might exist. *See generally Donald St. Clair*, 77 IBLA at 293-95, 90 I.D. at 501-502. Although appellants initially suggested that action on the specific complaints could be delayed if OSM would pursue their complaints in accordance with an agreed schedule, OSM declined this offer. At that point, **OSM had no choice but to follow its regulations with respect to the inspection requests**.
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> . . . .
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> The citizen's complaint response requirements do not call for "policy review" by OSM, and they do not invite action by joint industry/government task forces before OSM decides whether to act. And we agree with appellants that the regulations do not envision "fact-finding" to determine if a violation exists before deciding whether a "possible" violation may exist. Rather, the preamble language to the 1982 rule makes clear that **the possibility of a violation** triggers the regulatory requirements to notify the State.
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> Once a citizen's complaint gives OSM reason to believe that a violation of

> SMCRA has occurred, OSM is required to notify the State regulatory authority. *Plum Creek Mining Co.*, 142 IBLA 323, 328 (1998); *Patricia A. Mehlhorn*, 140 IBLA 156, 159 (1997); *Robert L. Clewell*, 123 IBLA 253, 259, 99 I.D. 100, 104 (1992). **Neither** the **statute** nor an implementing regulation gives OSM discretionary authority to do otherwise; **the issuance of a TDN should be automatic in that case**.
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> . . . .
>
> We agree with appellants' assertion that, pursuant to 30 C.F.R. § 842.12, **the "factual investigation of a citizen's complaint follows, rather than precedes, issuance of the ten-day notice** to state regulators."

WVHC 1, 152 IBLA 158, at 186-87 (2000), (emphasis added) (certain internal quotations, quotation marks, and citations omitted). In five cases decided over the intervening twenty years, the Board has cited *WVHC I* with approval for one or more of the above-quoted principles. *Cf. West Virginia Highlands Conservancy* (*WVHC II*), 165 IBLA 395, 401 (2005), *rev'd and remanded on other grounds*, *West Virginia Highlands Conservancy v. Kempthorne*, 569 F.3d 147 (4th Cir. 2009); *West Virginia Highlands Conservancy* (*WVHC III*), 166 IBLA 39, 47 n.10 (2005); *Mystic Brooke Development, Inc.*, 175 IBLA 209, 211 (2008); *Robert Gadinski*, 177 IBLA 373, 393 (2009)*; Southern Appalachian Mountain Stewards v. Office of Surface Mining Reclamation & Enforcement*, 188 IBLA 310, 316 n.26 (2016), *rev'd on other grounds*, *Southern Appalachian Mountain Stewards v. Zinke*, 279 F.Supp.3d 722 (W.D. Va. 2017); *Jessica Bier*, 193 IBLA 109, 112 n.8 (2018).

OSMRE is without authority to ignore and effectively vacate these decisions through the proposed rulemaking, particularly in the complete absence of an acknowledgement that he is so doing, and without a plausible rationale for doing so.

C. The Proposed Rule Purports To Find Ambiguity Concerning "Reason To Believe" Where Clarity Has Existed, While Abjectly Failing to Provide a Plausible Rationale for Reversing Course Or Support Its Proposal With Available Data

After decades of consistent interpretation and application of the clear mandate of section 521(a)(1) regarding what constitutes "reason to believe," OSMRE in 2020 for the first time asserted

that the long-accepted and consistently applied "reason to believe" standard is ambiguous. The proposed rule claims the standard is unclear – ignoring the numerous Interior Board of Land Appeals' decisions that consistently agreed with the agency's interpretation and upheld its applications of the standard. Indeed, the proposed rule fails to identify even one instance in which its inspectors, IBLA, or their state regulatory or administrative review counterparts have identified any difficulty in understanding and applying the simple "if true" test in evaluating a complaint of a possible SMCRA violation. Similarly, the proposed rule cannot identify even one instance of "disparate application," "regulatory uncertainty," "redundancy," or "duplicative investigation and enforcement" that it alleges provides a basis for its proposal. Moreover, a search of all IBLA decisions fails to disclose even one instance where the Board found the long-established OSMRE Ten Day Notice procedure to be problematic.

The absence of such documentation or "real world" examples of data to support the claim of "disparate application" and "regulatory uncertainty" must be viewed in contrast to the simple, straightforward procedure that Congress mandated to empower citizen participation in enforcement of SMCRA and attendant state regulatory programs.

Commenters understand that in certain circumstances OSMRE may exercise its rulemaking authority to revisit and change even a longstanding policy or interpretation, setting a new course that reverses an earlier determination. However, an agency may not use its rulemaking authority, as it proposes to do in this instance, to subvert, alter, or vitiate the plain language of a statute in which Congress has spoken directly to the precise question at issue. *Chevron* is no longer available to shield agency interpretations at variance with the plain language and "better reading" of the statute. Applying the "traditional tools of statutory construction" requires careful consideration of the text, structure, history, and purpose of a statute or regulation. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). "[A]n agency's reading

must fall "within the bounds of reasonable interpretation." *Id*. at 2416 (citation omitted). As established above, the foregoing factors point unwaveringly to the conclusion that Congress intended OSMRE to issue a Ten Day Notice whenever the facts set forth in a citizen complaint or other information, if true, would constitute a violation of SMCRA or its implementing program. As the above-cited IBLA decisions substantiate, the plain meaning of 30 U.S.C. § 1271(a)(1) requires OSMRE to employ the "if true" standard. The existing 30 C.F.R. § 842.11(b)(2) prior to the 2020 TDN Rule merely codifies what SMCRA itself demands.

Moreover, OSMRE has failed to justify its abandonment of the "if true" standard for a procedure that encourages unlimited delay in rather than the TDN process that Congress has mandated. To support the dramatic reversal of long-standing policy that OSMRE proposes, the governing case law requires the agency to articulate sound and sufficient reasons for the action. When viewed in light of the available data and the agency's experience and expertise, the agency must demonstrate that the proposed amendment to long-extant existing policy rests on rational, neutral principles that are in accord with the agency's proper understanding of its authority. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Justice Kennedy concurring).[32]

[32] The concurring opinion of Justice Kennedy and the dissenting opinion of Justice Breyer constitute the decision of the Court on the issues for which we cite *FCC v. Fox Television Stations, Inc.*

The proposed rule fails to provide a reasoned explanation for rescinding the "if true" standard. Instead, OSMRE has offered a litany of conclusory assertions unaccompanied by any probative data[33] from agency enforcement records. OSMRE has neither provided nor referenced any empirical data explaining or supporting its claim that the "if true" standard has led to "disparate application," "regulatory uncertainty," "redundancy," or "duplicative investigation and enforcement" --- or other administrative problems not inherent in the exercise of dual sovereignty where Congress specifically crafted an ongoing oversight role for OSMRE in order to assure past patterns of state non-enforcement of mining laws not be repeated.

OSMRE's proposal fails to acknowledge the rationale it has relied on for decades to administer the SMCRA TDN process, nor its reasons for adopting the "if true" standard. Neither did it provide neutral explanations for its abrupt change of course from policy it had long embraced. OSMRE also failed to acknowledge or explain its departure from IBLA's nearly uniform approval and application of the "if true" standard. Moreover, the agency did not acknowledge the Board's emphatic rejection of previous OSMRE's attempts to avoid issuing of Ten Day Notices in favor of pre-enforcement investigation. In sum, OSMRE's proposal made no effort to explain why it now proposes to effectively abrogate its long-standing interpretation of Section 521(a)(1) that has been consistently been upheld by Board's rulings on the issue.

Alone and collectively, each of these shortcomings would make promulgation of the proposed regulation arbitrary and capricious and otherwise inconsistent with law.

VI. The Draft Rule's Exclusion from the Ten-Day Notice Process of Violations by State Regulators is Contrary to the Plain Language of SMCRA and Decades of Prior OSMRE Interpretations and Policy

The draft rule purports to "clarify" that the ten-day notice ("TDN") provisions do not apply when the alleged violation is committed by the state regulator itself, as opposed to a permittee. *See* 85 *Fed. Reg*. 28904 at 28906. The *Federal Register* notice provides that "within

the context of section 521(a) of SMCRA and the TDN regulations, the proposed rule would clarify that OSMRE will not send TDNs to State regulatory authorities based on allegations or other information that indicates that a State regulatory authority may have taken an improper action under the State's regulatory program." *Id*. at 28907. OSMRE claims that this approach "is consistent with the plain language of section 521(a)." *Id*.

OSMRE's interpretation of section 521(a) of the SMCRA statute runs counter to the plain language of the statute, congressional intent, and consistent past OSMRE practice. In addition, OSMRE's proposal to only address state regulator violations through the 733 process is not an adequate solution, because it would fail to provide effective and timely oversight for mine-specific violations. The only relevant distinction recognized in SMCRA is between site-specific violations (which are intended to be addressed through the ten-day notice process) and general programmatic violations (addressed through the 733 process). The draft rule violates this scheme by further eliminating any federal oversight for site-specific violations by the state regulator.

The types of mine-specific violation by a state regulator for which TDN oversight by OSMRE is still required include, but are not limited to: issuance of a defective permit; approval of a defective reclamation plan; extension or renewal of an automatically terminated permit; failure to ensure adequate reclamation bonding; or inappropriate denial of a "lands unsuitable for mining" petition. Each of these categories of state regulatory action has the potential to enable site- specific, on-the-ground violations of SMCRA standards. However, because the permittee would be acting in accordance with a valid state-issued permit or authorization, it may not be appropriate to hold the permittee accountable through enforcement action. In such a case, OSMRE must retain the ability to exercise its ten-day notice oversight authority directly against the state regulator. Furthermore, in some cases, the nature of the violation may not be apparent

until mining begins, long after the close of any opportunity for the public to challenge the underlying permitting action.

A. OSMRE's proposed exclusion of state regulator violations from the ten-day notice process is counter to the intent of SMCRA and OSMRE's existing regulations.

The draft rule would rewrite the SMCRA regulations to provide that "'any person' does not include State regulatory authorities, OSMRE, or employees or agents thereof, unless they are acting as permit holders. .....[and that] [t]herefore, within the context of section 521(a) of SMCRA and the TDN regulations, the proposed rule would clarify that OSMRE will not send TDNs to state regulatory authorities" for violating SMCRA. 85 *Fed. Reg*. 28904 at 28906–07. But this "clarification" is contrary to the intent of SMCRA and OSMRE's regulations. As such, the draft rule is an impermissible and unenforceable interpretation of SMCRA and should not be finalized. At a minimum, OSMRE has not justified—and cannot justify—such a significant change to its past interpretations and policy.

Section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1994), states that if "the Secretary has reason to believe that <u>any person</u> is in violation of any requirement of this chapter," then enforcement will be taken according to its further provisions. (Emphasis added.) While courts ordinarily apply "the longstanding interpretive presumption that 'person' does not include the sovereign"—which may include state regulatory authorities—that presumption is to be disregarded "upon some affirmative showing of statutory intent to the contrary." *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780–81 (2000) (discussing applicability of the Dictionary Act, 1 U.S.C. § 1, to the False Claims Act, 31 U.S.C. §§ 3721–3733 and determining whether "any person" included a state agency); *see also Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1863 (2019). As discussed below, the legislative history shows that Congress intended for § 521(a) of SMCRA to apply to state regulators.

Congress' choice to use the phrase "any person" must be interpreted in context. The meaning of words "may only become evident when placed in context." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into the harmonious whole.' " *Id.* at 133 (first quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); then quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995); then quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

First, the context of § 521(a)(1) shows a clear intent that the term "person" be construed in the ordinary and plain meaning of the word to mean any "**entity**" violating SMCRA. The use of the term "any" as a modifier to both "person" and "requirement" shows statutory intent to broaden the scope of those that may violate SMCRA and elicit a TDN. Section 521(a) contemplates "all" or "every" entity and "all" or "every" possible violation of SMCRA. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018) ("In this context, as in so many others, 'any' means 'every.'"); *United States v. Caniff*, 955 F.3d 1183, 1190 (11th Cir. 2020) ("As we have often had occasion to say, when interpreting a statute, 'any' means 'all.' " (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997))); *see also* David S. Elder, *"Any and All": To Use or Not to Use?*, 70 Mich. Bar J. 1070, 1070 (1991), available at https://www.michbar.org/file/generalinfo/plainenglish/pdfs/91_oct.pdf (discussing interchangeability of terms "any" and "all"). Such broad language was therefore meant to encompass any possible violation of SMCRA, including those of state regulators.

Additionally, the preceding provision of the Act at § 520, which discusses citizen suits under SMCRA, 30 U.S.C. § 1270, sheds light on the context of § 521(a). The citizen suits

provision provides that "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter . . . against the United States or **any other governmental instrumentality or agency** to the extent permitted by the Eleventh Amendment to the Constitution....." *Id.* § 1270(a)(1). Section 520(a) clearly contemplates that state regulators could be violators liable to a citizen suit for violations of the Act. When looking at the TDN provision with this concept in mind, it is apparent that Congress intended to include state regulators as those capable of violating SMCRA under § 521(a). Accordingly, based on the plain and ordinary meaning of "person" and the context within which it lies, the term "any person" as used in § 521(a) includes state regulators.

Even if the term "person" as defined by SMCRA did not include state regulators, the plain language of OSMRE's current implementing regulations expressly provides that "any person" must include state regulators. 30 C.F.R. § 700.5. OSMRE's regulations at 30 C.F.R. § 700.5 define "person" as including "any agency, unit or instrumentality of Federal, State or local government," thereby expressly including state regulators in the definition of "person." This is a straightforward interpretation by the agency. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019) (explaining that "the 'traditional tools' of construction" apply to regulatory interpretation); *Safe Air for Everyone v. United States E.P.A.*, 488 F.3d 1088, 1097 (9th Cir. 2007) (noting that "the plain meaning of a regulation governs," and "[o]ther interpretive materials, such as the agency's own interpretation of the regulation, should not be considered when the regulation has a plain meaning" (quoting *Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002))). Because this regulation was promulgated within the statutory authority given to the Secretary and is consistent with the statute, it necessarily brings state regulators into the scope of § 521(a). *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears

that Congress delegated authority to the agency generally to make rules carrying out the force of law, and that the agency interpretation claiming deference was promulgated in exercise of that authority.").

OSMRE was delegated authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [SMCRA]." 30 U.S.C. § 1211(c)(2). Such delegation allowed OSMRE the discretion to determine what was necessary to implement SMCRA and, using such discretion, OSMRE promulgated a definition of "person" that includes state regulators. 33 C.F.R. § 700.5. This definition is neither "procedurally defective, arbitrary or capricious, [n]or manifestly contrary to the statute." *Mead Corp.*, 533 U.S. at 227. As such, it is binding and therefore brings state regulators within the scope of § 521(a). OSMRE's new position in the draft rule that "any person" does **not** include state regulators is contrary to the agency's prior interpretation as expressed in 33 C.F.R. § 700.5. OSMRE has made no effort in the draft rule to explain the basis for its new interpretation, or to reconcile that interpretation with the definition at 33 C.F.R. § 700.5. In the absence of any such explanation or justification, OSMRE's prior and existing interpretation must control, and OSMRE may not artificially narrow the meaning of "any person."

For these reasons, OSMRE's proposed exclusion of state regulator violations from the TDN provisions of SMCRA is counter to the statute and OSMRE's own implementing regulations. Accordingly, the draft rule should not be finalized.

B. Congress intended for OSMRE to use ten-day notice oversight to address site-specific violations by state regulators

When passing SMCRA in 1977, Congress made clear its intent that OSMRE work to secure compliance with SMCRA once primary responsibility for implementation and enforcement had been assumed by individual states. This mandate to OSMRE did not distinguish

between OSMRE's oversight of violations conducted by permittees and violations by state regulators. Congress made very clear that broad ongoing federal oversight of all aspects of SMCRA implementation was critical to ensuring that federal standards would be met at all times:

> The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rept. No. 95-128, 95th Cong., 1st Sess. 88 (1977)(Emphasis added).

This legislative history makes clear that OSMRE's proposed elimination of oversight of state regulator violations under the ten-day notice provisions is counter to the intent of Congress in two ways. First, the statement of Congressional intent makes clear that the only limitation on use of the ten-day notice provisions was that the alleged violation must be specific to a particular mine, stating that "Federal standards are to be enforced by the Secretary on a mine-by-mine basis" and **without** resorting to the Part 733 process of revoking approval in whole or part of an approved state program. There is no indication that Congress intended the additional limitation now proposed by OSMRE: that in addition to there being a mine-specific violation, the violation must also be perpetrated by the permittee. Congress clearly intended to include mine-specific violations by a state regulator, such as issuance of a defective permit. Second, Congress made clear that invocation of the 733 process for revoking primacy and substituting a federal program was **not** intended to address mine-specific issues, stating that OSMRE should enforce federal standards on a mine-by-mine basis "as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program." OSMRE's current proposal to address **all** state regulator violations **only** through the 733 process is therefore directly contradictory to Congressional intent. Although **programmatic** violations by state

regulators are properly addressed through the 733 process, Congress intended that **mine specific** violations by state regulators—including, but not limited to, issuance of defective permits—be addressed through the ten-day notice process.

C. OSMRE's proposed exclusion of state regulator violations from the ten-day notice process runs directly counter to decades of OSMRE's consistent past practice

The proposed exclusion of violations by state regulators from the TDN process is also contrary to decades of consistent agency practice with respect to such violations.

1. For decades, OSMRE has used the ten-day notice process to address site-specific violations by the state regulator

A review of decisions by the Interior Board of Land Appeals (IBLA) reveals that OSMRE has regularly used ten-day notice oversight of violations by state regulators over the decades since SMCRA was enacted in 1977. Although in some of those cases OSMRE ultimately declined to find a violation, and in some cases the IBLA reversed a ten-day notice determination by OSMRE, in none of the cases did OSMRE or the IBLA question the validity of OSMRE's use of the ten-day notice provisions to investigate and address alleged mine-specific violations by the state regulator. This consistent past agency practice refutes OSMRE's current contention that its interpretation is dictated by a plain language reading of the statute, and that its proposed rulemaking is nothing more than a "clarification." Furthermore, the fact that the draft rule fails to acknowledge or address these consistent prior actions by the agency demonstrates that OSMRE has failed to do the work necessary to justify such an extreme departure from prior agency action.

In 1987, in the *Mullinax* decision, IBLA considered a citizen's appeal of OSMRE's ten-day notice decision regarding the citizen's complaint that Alabama's mine regulator had issued defective permits. *Mullinax*, 96 IBLA 52 (Feb. 27, 1987). The citizen complaint alleged that the complainant had alerted the Alabama Surface Mining Commission ("ASMC") that he claimed

ownership of property covered by a permit, and that he had not granted permission for mining of that property. *Id*. at 53. OSMRE responded by issuing a ten-day notice to ASMC that described the violation as "issuance of permit where company did not have legal right to mine/ failure to notify surface/ mineral ownership of issuance of permit." *Id*. at 54. Thus, the ten-day notice was premised **entirely** on the allegation that the state regulator had violated SMCRA in issuing the permit. Ultimately, OSMRE upheld ASMC's permitting decision. In reviewing OSMRE's determination, the IBLA noted that the ten-day notice provisions are "primarily designed to address violations of performance standards or permit conditions that would be ascertainable by inspection of the surface coal mining operation" (*Id*. at 58), but nevertheless held that "OSM acted properly in referring the complaint to the state" (*Id.* at 59). IBLA thus expressly considered the appropriateness of OSMRE's use of Section 521's ten-day notice provisions to review a state's permitting action and held that such action was appropriate.

In IBLA's *W.E. Carter* decision from 1990, the Board considered OSMRE's actions in issuing a ten-day notice to the Kentucky mine regulator in response to a citizen complaint alleging that a mining road "had been permitted in violation of [SMCRA]." 116 IBLA 262, 263 (October 18, 1990). The citizen complaint specifically alleged that the road had been permitted in violation of SMCRA's prohibition against mining operations within 300 feet of occupied dwellings. *Id*. After initially sending the ten-day notice, OSMRE had declined to take further action after it learned that the permit issue had been appealed to an administrative hearing officer, and that the head of the Kentucky regulator had declined to reverse approval of the permit. *Id*. at 265. The IBLA reversed OSMRE's decision, finding that "[a]ctive litigation, in and of itself, does not sustain a finding that the State regulatory agency acted appropriately," that "OSMRE was bound to oversee enforcement of the State permanent program regulation," and that "an inspection was required to be made in furtherance of Federal oversight required by

SMCRA." *Id*. at 268. Accordingly, IBLA affirmatively held that OSMRE has **a duty** under SMCRA to investigate alleged violations by state regulators based on permit defects.

IBLA again held, in 1991's *Kuhn* decision, that OSMRE has an affirmative duty under section 1271's ten-day notice provisions to conduct a federal inspection where the state regulator has allegedly issued a defective permit. 120 IBLA 1 (July 3, 1991). In that case, a citizen had filed a complaint with OSMRE alleging that Ohio had issued a permit to a permittee where the permittee had not secured a legal right to enter and mine. *Id*. at 6. In response to the citizen complaint, OSMRE issued a ten-day notice to the Ohio regulator. *Id*. IBLA interpreted the citizen appeal as seeking federal oversight over **two affirmative duties** on the part of the state regulator: "(1) the duty to ensure accurate permit boundaries prior to permit issuance and to prevent trespass; and (2) the duty to suspend permission to mine where permit boundaries are called into question." *Id*. at 18. IBLA recognized that the case presented somewhat unique facts, noting that "few cases have addressed allegations that the regulatory authority has issued a permit which erroneously expands upon the legal right to mine; that is, that the boundaries described in the permit encompass more land than the operator has legal authority to mine." *Id*. at 19. In that instance, "the regulatory agency has bestowed authority to mine upon the operator, but it allegedly lacks the legal right to do so." *Id*. IBLA then reviewed its prior decisions, including the *Mullinax* and *W.E. Carter* decisions discussed above, noting that "this Board noted that the legislative history of SMCRA indicates an intent by Congress to place primary control of permit issuance within state jurisdiction, even during interim Federal enforcement. **Even so, where it is evident that a permit has been issued in violation of state regulatory requirements, this Board has declared such action inappropriate, and has ordered Federal enforcement**." *See W. E. Carter*, *supra*, *Id*. at 20 (Emphasis added). Ultimately, IBLA held that OSMRE had failed to take appropriate action to correct the state's violation, finding that "[s]o

long as the operator retained full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act stated in section 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" was jeopardized." *Id*. at 27. Where actions by a state regulator are contrary to the intent of SMCRA, OSMRE has a duty to act, including under the authority of Section 521's ten-day notice provisions.

Finally, in 1995's *Molinary* decision, the IBLA reviewed OSMRE's ten-day notice response to a citizen complaint alleging, among other things, that the Virginia surface mining regulator erred in issuing a permit that approved using spoil to construct a roadway at the expense of highwall reclamation. 134 IBLA 244, 261 (Nov. 30, 1995). After issuing a ten-day notice request and reviewing the state's response, OSMRE determined that Virginia's permitting decision was not arbitrary, capricious, or an abuse of discretion. *Id*. at 263. IBLA disagreed, holding that to the extent the Virginia regulatory agency ("DMLR") permitted a road to be constructed to standards beyond those necessary to accomplish the purpose for which the road was intended, the State's approval of the road conflicted with VCSMRR § 480-03-19.819.19(b) and the terms of the permit, which require that "[a]ll available material * * * [be used] to backfill the existing wall to the extent possible." As such, DMLR's approval of the improved roadway was an arbitrary and capricious action, and, before its approval of site reclamation, DMLR should have required Powell to regrade the road, and to use the excess spoil placed on the roadway to backfill the highwall. *Id*. at 264. IBLA therefore once again found that SMCRA requires OSMRE ten-day notice oversight of a state regulator's defective permitting decisions.

IBLA has repeatedly held that SMCRA not only allows, but affirmatively requires, OSMRE to conduct ten-day notice inspections in response to citizen complaints alleging mine-specific violations by the state regulator.

2. OSMRE and the IBLA have successfully distinguished between mine-specific violations by state regulators where ten-day notice oversight is required, and programmatic issues and violations better addressed under the 733 process.

In at least two decisions, the IBLA has clarified the factors that determine whether OSMRE should address a violation alleged in a citizen complaint via the ten-day notice process or via the 733 process. Contrary to OSMRE's assertions in the draft rule, this distinction is not based on whether the alleged violator is a permittee or a state regulator, but whether the alleged violation is permit-specific or general. Where the alleged violation by a state regulator is permit specific, OSMRE must issue a ten-day notice. But where the violation is more general or programmatic, OSMRE should initiate 733 proceedings.

In the *West Virginia Highlands Conservancy, et al.,* decision from 2000, the IBLA addressed an appeal of OSMRE's failure to issue ten-day notices in response to a citizen complaint that the West Virginia regulator had repeatedly failed at multiple mines to conduct inspections of all discharge outfalls as part of the complete inspection required by SMCRA. 152 IBLA 158, 200 (April 25, 2000). In affirming OSMRE's decision, the IBLA drew a clear distinction between permit-specific violations where a ten-day notice is required, and more programmatic violations where the 733 process should be followed. IBLA held that if appellants allege that the effluent from a particular outfall is a violation, then the proper remedy is for OSMRE to issue a TDN, and conduct a Federal inspection if the State fails to inspect that outfall and take appropriate action or provide good cause for failing to do so. On the other hand, if the gravamen of appellant's complaint is that the State as a general matter is programmatically failing to carry out the "complete inspection" requirements of its program by failing to inspect every outfall, that particular grievance would be cognizable under the Federal takeover provisions of 30 C.F.R. § 733.12(a)(2) and would thus be beyond IBLA's jurisdiction.

Id. at 200-201. Because the citizen complaint alleged a "general" failure by the state regulator, as opposed to a "particular" violation, OSMRE was justified in declining to issue the ten-day notice.

IBLA reaffirmed this holding in a second *West Virginia Highlands Conservancy,* decision, from 2005. 166 IBLA 39 (June 9, 2005). IBLA characterized the nature of the violations alleged in the citizen complaint, noting that the citizen complaint "did not present OSM with any site-specific evidence of violations," but instead raised "certain programmatic enforcement issues over which WVHC disagrees with OSM." *Id*. at 46-47. Again, IBLA emphasized the critical distinction between "site-specific" violations, and "programmatic" issues. *Id*. After characterizing the citizen complaint as involving only programmatic issues, IBLA affirmed OSMRE's decision to not issue a ten-day notice.

OSMRE's proposed rule does not reflect this straightforward distinction recognized by the IBLA between "site-specific" violations (to which the ten-day notice provisions apply, regardless of the violator), and "programmatic" issues (which are excluded from ten-day notice review). Instead, OSMRE seeks to exclude a much larger class of violations from ten-day notice review by shunting all violations by state-regulators into the 733 process, regardless of whether the violation is site-specific. OSMRE's interpretation in the draft rule finds no support in the law and is directly contradicted by long-standing IBLA precedent.

That approach is in direct contravention of Congressional intent, expressed in the Senate Report, that "federal standards are to be enforced by the Secretary **on a mine-by-mine basis"** to "reinforce and strengthen State regulation" as necessary, **without** resort to the 733 process by which a federal permit and enforcement program would be installed. S. Rept. No. 95-128, *supra*, at 88. (Emphasis added).

Additionally, the proposed rule change would allow OSMRE, in its unfettered discretion, to treat an alleged site-specific violation *as* a programmatic problem. This aspect of the proposed rule would effectively abrogate the 2000 IBLA decision in WVHC 1 without acknowledging that fact or providing a reasoned basis for why OSMRE decided to make that policy change.

Finally, the failure of the Secretary to address violations occurring under an approved state program that arise due to state failure to properly maintain, implement, and administer the state program manifested at a particular mining operation, through the TDN process and federal enforcement action, is in direct violation of the language and intent of SMCRA. The issuance of NOVs in oversight as needed due to a failure of the state regulator to properly administer the law is in furtherance of the intent of the Senate Committee that the Act and approved state program be enforced "on a mine-by-mine basis," and is consistent with the broad remedial goal of the law:

> [T]he purpose of Congress in passing this Act is to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations as well as the surface impacts of underground coal mining operations.
>
> * * *
>
> If and when a State manifests a **lack of desire or an inability to participate in or implement that program** and to meet the requirements of the Act, the Federal Government is to exercise the full reach of Federal constitutional powers to insure the effectiveness of that program.

S. Rept. No. 95-128, at 63.

3. OSMRE has previously and repeatedly adopted official interpretations of the ten-day notice provisions that require enforcement oversight directly against state regulators

For the majority of years that SMCRA has been in effect, it has been the official, documented policy of OSMRE that the ten-day notice provisions should be used to address

violations by state regulators, including the issuance of defective permits. That policy has been clearly articulated in a series of agency INE-35 directives. The draft rule fails entirely to address this past statutory interpretation and articulation of policy which directly conflicts with the agency's proposed interpretation and policy.

At least by 1989, OSMRE's official policy—as expressed in INE-35 Directive 534 issued by OSMRE's Director—was that a ten-day notice "should be issued" where permit "omissions or defects" are identified as a result of individual field inspections. A permit omission or defect can only be the product of a state regulator's action, so this Directive required OSMRE to use the ten-day notice provision to correct a violation by a state regulator.

OSMRE expanded on this policy in Directive 640 issued in 1990. The directive includes an entire section on "Addressing Permit Defects." That section imposes a mandatory duty on OSMRE to address violations by state regulators, requiring that "[w]here alleged defects are identified in permits issued by the regulatory authority during oversight inspections or during the course of administering permit reviews, the Field Office **shall** notify the regulatory authority of the alleged defect by ten-day letter." (emphasis added). OSMRE subsequently issued two clarifying directives in 1991, 681 and 700, that amended portions of Directive 640—including the use of "ten-day letters" as an alternative to "ten-day notices"—but left intact the mandate that OSMRE address violations by state regulators.

OSMRE maintained this interpretation and policy until October 2006, when the Acting Director rescinded Directive 640 in directive 922, which consisted of just two short paragraphs.

In January 2011, OSMRE Director Pizarchik issued a new INE-35 directive—Directive 968—once again making clear that the ten-day notice provision may properly be used to address state regulator violations, including issuance of defective permits. Directive 968 defined "permit

defect" as "a type of violation consisting of any procedural or substantive deficiency in a permit-related action taken by the RA (including permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights)." The Directive clarified that OSMRE should wait for the state regulator to finalize its permitting action before issuing a ten-day notice, so as to not interfere with a pending permitting decision. The Directive made clear that in conducting its ten-day notice oversight, "permit defects are handled like any other type of violation." Directive 968 also again emphasized that the issuance of a ten-day notice to address a violation by a state regulator is **mandatory,** stating that "an authorized representative must issue a TDN when: (a) the authorized representative has reason to believe a permit defect exists (whether based on an oversight inspection, an administrative permit review, a citizen's complaint, or any other information available to the authorized representative); or (b) on the basis of a Federal inspection, the authorized representative determines that a permit defect exists and OSM has not issued a previous TDN for the same violation." Furthermore, emphasizing that OSMRE must treat violations by state regulators in the same way as violations by permittees, the Directive plainly stated that state responses to ten-day notices "based upon permit defects" are not evaluated differently from responses based on other types of violations, because [a]ll RA responses to TDNs are evaluated under the same "appropriate action" and "good cause" standards set forth at 30 CFR 842.11(b)(1)(ii)(B)."

Director Pizarchik's Directive 968 was purportedly rescinded by Acting Director Glenda Owens on May 3, 2019, via a new directive, also styled as Directive 968 "the Owens document"). The Owens document makes no reference to permit defects or other alleged violations by the state regulator itself—it neither expressly provides that such violations may **not** be addressed via the ten-day notice process, nor does it require OSMRE to issue a ten-day notice

when a citizen alleges a violation by a state regulator. In sharp contrast, the Owens document **does** expressly provide that "OSMRE will not issue a TDN where a citizen has not alleged any site-specific violations and OSMRE determines that the issue raised by the citizen is programmatic in nature." Owens document at 7. Thus, the Owens document conforms with prior OSMRE practice and multiple IBLA decisions by specifying that the ten-day notice provisions may only be invoked for site-specific violations, but **not** excluding violations by a state regulator itself.

4. To the extent OSMRE has previously adopted an interpretation that precludes application of the ten-day notice process for violations by state regulators, that interpretation was flawed.

The only articulation of the interpretation that Congress intended to exclude state regulator violations from the ten-day notice process—prior to this draft rule—was a 2005 letter by Rebecca Watson, Acting Secretary, Land and Minerals Management, responding to a citizen complaint of a site-specific violation at the Mettiki mine in West Virginia ("the Mettiki letter"). In the Mettiki letter, Acting Secretary Watson asserted that the issuance of a defective permit by a state regulator is not a violation that may be addressed via the ten-day notice process. The Mettiki letter was expressly cited in directive 922 as the basis for the rescinding of earlier INE-35 directives that expressly provided for permit defects and other state regulator violations. The Mettiki letter contains flawed analysis and ignores the decades of preceding interpretations and policy by OSMRE applying the ten-day notice process to state regulator violations, as well as the many IBLA decisions upholding the same.

The Mettiki decision does not engage with the plain language of section 521 of SMCRA which requires federal oversight of violation by "any person" of "any requirement of this chapter or any permit condition required by this chapter." 30 U.S.C. § 1271(a). Instead, the Mettiki letter

is premised entirely on an inappropriately narrow view of OSMRE's ongoing authority. The central conclusion of the Mettiki letter is that "[i]n a primacy state, permit decisions and any appeals are solely matters of the state jurisdiction in which OSM plays no role."

There are several fundamental flaws with the interpretation that the SMCRA statute precludes OSMRE oversight of state permitting actions and other decisions of state regulators. First, neither the Mettiki letter nor the draft rule explains how it can be consistent with SMCRA to allow a mine to be constructed or operated in a manner that will inevitably result in a permit-specific on-the-ground violation. This is particularly problematic where the permit defect may not have been apparent until after mining started, such as may be the case where a permit improperly authorizes mining on land where the permittee lacks authorization to mine. Second, where a permittee is operating under a defective permit, there may not be another remedy available other than requiring the state regulator to correct the defect. In any action against the permittee itself, the permittee may have the defense that it is complying with the terms of a valid permit.

Allowing defective permits and other state regulator violations to stand, particularly where they lead to on-the-ground violations, is directly contrary to the primary purpose of SMCRA. SMCRA's statutory statement of purpose provides that Congress intended for SMCRA to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;" "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;" "assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;" and "assure that surface coal mining operations are so conducted as to protect the environment." 30 U.S.C. § 1202. Although SMCRA recognizes a role

for state regulators, it remains the primary responsibility of OSMRE to make sure that these congressional purposes are satisfied. That includes exercising ten-day notice oversight of state regulator violations where necessary.

As reflected in the congressional history, Congress intended for OSMRE to act whenever there is a permit-specific violation, regardless of the source of that violation, stating that "Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program." S. Rept. No. 128, 95th Cong., 1st Sess. 88 (1977). By eliminating federal ten-day notice oversight of state regulator violations, OSMRE's draft rule is contrary to the plain language of the SMCRA statute and to Congress' intent in passing SMCRA.

As noted by former Director Pizarchik in the comments below, it was his understanding of the fundamental inconsistencies between the mandates of the SMCRA statute and the conclusions of the Mettiki letter —together with his awareness of the persistence of and permit defects intentionally made by a state regulatory authority to shield a permittee that had violated its permits - that led him to issue INE-35 Directive 968 in January 2011. Specifically, Director Pizarchik was aware of the Farrell-Cooper Mining Co. matter, in which the permittee and the Oklahoma state regulator challenged OSMRE's use of the ten-day notice provisions to address the Oklahoma state regulator's issuance of defective permits. The Oklahoma state regulator had attempted to shield itself and the permittee from enforcement action by citing the Mettiki letter. Director Pizarchik's INE-35 Directive 968 reversed course from the Mettiki letter and Directive 922, and once again provided guidance to OSMRE clarifying the agency's obligation to issue ten-day notices to state regulators who took actions in violation of SMCRA. The approach proposed in the draft rule is flawed for the same reasons as the Mettiki letter and should not be finalized.

D. OSMRE's attempt to move all state regulator violations into the 733 process creates an enormous loophole that will lead to on-the-ground SMCRA violations that will harm local communities.

The 30 C.F.R. Part 733 process is an inadequate substitute for the ten-day notice process when dealing with mine-specific instances of state regulatory violations for two primary reasons. First, the lengthy and ultimately indeterminate timelines built into the Part 733 procedural process render that process unable to respond to issues requiring prompt action, such as the situations described above where a permittee intends to imminently begin mining on a piece of property its rights to which are contested. Second, because invocation of the Part 733 procedures requires that a state fail to effectively implement, administer, maintain, or enforce an entire "part" of the state program, it may be held inapplicable to cases where the state regulatory authority fails to properly administer its program with regard to one particular mine or permittee, but where it may not be possible to establish a complete breakdown in the state's administration of all or part of its program.

Part 733 procedures do not allow for prompt response to regulatory authority violations. Those procedures provide that, upon submission of a request for evaluation of all or a part of the state program by the public, OSMRE has 60 days to determine whether such an evaluation shall be made and notify the requester. 30 CFR § 733.12(a)(2). If OSMRE has reason to believe that part of the state program is not being adequately maintained or enforced, it must notify the state regulatory authority "promptly," though the regulations provide no specific time limit on this action. Id. § 733.12(b). That notice must "[s]pecify the time period for the State regulatory authority to accomplish any necessary remedial actions." Id. § 733.12(b)(3). Upon

receipt of that notice from OSMRE, a state may then request an informal conference within fifteen days. Id. § 733.12(c). If, following an informal conference, OSMRE still believes that the state is not adequately maintaining or enforcing its program, OSMRE shall notify the state and the public and hold a hearing within 30 days following the deadline for corrective action established in the notice to the state (or in the informal conference, if the deadline was extended as part of that conference). Id. § 733.12(d). Only after OSMRE (1) conducts that hearing and a "review of all available information, including the hearing transcript, written presentations and written comments," (2) concludes that the state program is not being adequately administered, and (3) gives public notice of its intent to take over enforcement of all or part of a state program, may OSMRE wield its federal authority. 30 C.F.R. § 733.12(e), (f). **See also** 30 U.S.C. §§ 1254(b), 1271(b); *Bragg v. W. Virginia Coal Ass'n,* 248 F.3d 275, 294 (4th Cir. 2001) ("SMCRA vindicates its national-standards policy through a limited and ordered federal oversight, grounded in a process that can lead ultimately to the withdrawal of the State's exclusive control. .....Until that withdrawal occurs, ...the minimum national standards are attained by State enforcement of its own law.").

Because of the lack of specific deadlines for some of the steps in the Part 733 process, that process does contain "strict timetables" that are enforceable under the Act. *W. Virginia Highlands Conservancy v. Norton*, 190 F. Supp. 2d 859, 866 n.6 (S.D.W. Va. 2002). Indeed, in the preamble to an amendment to its Part 733 regulations, OSMRE specifically rejected a call for "effective time limits" in this process to avoid "the possibilities for delay or failure to remedy defects," stating that OSMRE "disagrees that specific time limits are necessary and believes that the regulation should provide sufficient flexibility to enable resolution of problems before resorting to the public hearing procedures." Amendment of Procedures for Submission, Review,

Approval or Disapproval and Maintenance of State Programs and for Substituting Federal Enforcement and Establishing a Federal Program in a State, 47 Fed. Reg. 26356-01, 26362 (June 17, 1982); *see also id.* (noting that federal enforcement "would not be instituted until after completion of the thorough procedures for public notice and hearing and a final determination by the Director pursuant to § 733.12(b)-(e)").

Likewise, in the preamble to its initial Part 733 regulations, OSMRE rejected a call for procedures that would allow for a "rapid substitution of Federal enforcement" in situations with the "potential for substantial harm to the environment and the public." *Surface Coal Mining and Reclamation Operations, Permanent Regulatory Program*, 44 *Fed. Reg*. 14902, 14969 (March 13, 1979); *see also* Petition to Initiate Rulemaking on Surface Coal Mining and Reclamation Operations—Permanent Regulatory Program; Procedures for Evaluating State Programs, Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs, 52 *Fed. Reg*. 10898-02, 10902 (April 6, 1987) (rejecting citizen request to limit a state to 90 days to cure deficiencies in its administration of its program once informed by OSMRE). Clearly, the Part 733 process does not allow for the swift action necessary to address the types of permit-specific violations by state regulatory authorities that have traditionally been handled through the ten-day notice process.

Moreover, the Part 733 process, as historically implemented by OSMRE, is not well-suited to address more isolated violations by state regulatory authorities that have traditionally been handled through ten-day notices. OSMRE stated in 2005 that, since the agency's creation, it had instituted only *ten* Part 733 proceedings across the entire country, in part due to the agency's perception that such proceedings cause "substantial disruption to the State, the Federal government, and the coal industry." Revisions to the State Program Amendment Process, 70

Fed. Reg. 61194-01, 61195 (October 20, 2005). OSMRE has been similarly hesitant to employ the 733 process since that time and generally institutes such proceedings only after *years* of less formal prodding of recalcitrant state agencies and imposition of intermediate remedial measures. *See, e.g.,* Letter from Joseph Pizarchik, Director, OSMRE, to Leonard Peters, Secretary, Kentucky Energy and Environment Cabinet (May 1, 2012), available at http://archives.wfpl.org/wp-content/uploads/2012/05/OSMRE-letter.pdf (describing the years-long process preceding OSMRE's initiation of Part 733 procedures to address failures of Kentucky's bonding program, including multiple studies, the establishment of a stakeholder "workgroup" and, later, creation of an intermediate "Action Plan for Improving the Adequacy of Kentucky Performance Bond Amounts"); 70 *Fed. Reg*. at 61200 ("Our reluctance to begin Part 733 proceedings should not be construed as an indication that we took no action to remedy State program deficiencies, because we dedicate considerable resources to oversight ..... If the issues involved in the amendment are complex and/or numerous, the 'back and forth' between the parties can be extensive."). *See also Norton*, 190 Supp. 2d at 873 (explaining that OSMRE had been, for over a decade, "derelict and dilatory in the extreme" in its duty to institute Part 733 proceedings and had only done so in response to citizen litigation). OSMRE has stated explicitly that the standard for invocation of Part 733 "indicat[es] that something less than perfect performance by the State is acceptable. In other words, not all defects in maintenance rise to the level where the Director has 'reason to believe' that the State is failing to effectively maintain its program." 70 *Fed. Reg*. at 61200.

Consistent with this position, in 1987, OSMRE rejected a petition calling for more swift, easily-invoked procedures, which would have required a Part 733 proceeding any time OSMRE or a citizen identified a "failure of the State to achieve a performance level in administering any

part of its program"—a standard that closely resembles 30 U.S.C. 1271(a)(1)'s standard for triggering a ten-day notice. 52 *Fed. Reg*. 10898-02, 10902. In its petition denial, the agency stated that "[u]nder the petitioners' proposal, even trivial matters could become the subject of '733' notices," which it believed should be reserved for "more serious breakdowns in administration." Id.; *see also Id.* at 10904 (stating that OSMRE must exercise its Part 733 authority "judicious[ly]"). OSMRE explained that, before instituting a Part 733 proceeding, it must "carefully weigh all circumstances" and "must have discretion to decide what course of action is appropriate in each unique situation and to consider the State's capability and intent to enforce its program." *Id.* In OSMRE's view, such discretion allows OSMRE to consider "a range of options to deal with deficiencies in a State's administration of its program" that fall short of a full Part 733 proceeding. *Id.* Only after those intermediate mechanisms— such as "work[ing] with the States to develop action plans and timetables"—fail should OSMRE invoke the Part 733 process. *Id.* at 10904.

Nothing in the Draft Rule would change the Part 733 regulations in a manner that would allow for a timely response to a site-specific violation by a state regulator. The Part 733 process, as it has been implemented by OSMRE, is thus not an adequate substitute for the ten-day notice process in promptly remedying permit-specific failures of state regulatory agencies that may not rise to the level of "serious breakdowns in administration" of all or part of a regulatory program.

E. The Proposal To Respond To Violations Which Are Caused By State Failure To Properly Maintain, Administer, and Enforce The Approved State Program, Through Programmatic Procedures Rather Than Through Federal Enforcement Action, Is Inconsistent With The Act And Congressional Intent, And Will Lead To Absurd Results And Environmental Damage

In crafting the continued Federal oversight role and enhanced public participation opportunities in inspection and enforcement under SMCRA, Congress was keenly aware of the historic patterns of State nonenforcement and misadministration of mining laws:

> For a number of predictable reasons - including insufficient funding and the tendency of State agencies to be protective of local industry - State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment. The committee believes, however, that the implementation of minimal Federal standards, the availability of Federal funds, and the assistance of the expertise of the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

H. Rept. 95-218, *supra,* at 129.

> For a number of predictable reasons -- including insufficient funding and the tendency of State agencies to be protective of local industry -- State enforcement has in the past often fallen short of the vigor necessary to assure adequate protection of the environment.

S. Rept. No. 95-128, at 90 (l977).

The proposed rule would have OSMRE use more disruptive mechanisms, such as partial or complete program withdrawal, to identify and seek redress of mine-specific failures of state program implementation. In the meantime, land and water resources, and people, suffer the risks and burdens associated with the continuing and unabated violations. Perversely, it would be only after site conditions deteriorated to become "significant, imminent, environmental harm to land,, air, or water resources" or an "imminent danger to the health of safety of the public," 85 *Fed. Reg.* 28907, that OSMRE would take enforcement action.

The effect is to "monkeywrench" the enforcement process to prevent timely issuance or NOVs by forcing OSM to serve notice and hold a hearing under Section 521(b) for any single violation found in an oversight inspection or based on a citizen complaint, where the violation is caused or worsened by a failure of the state RA to properly apply the law.

The reality is that, given the thousands of oversight inspections conducted in states with

approved programs, the number of federal NOVs issued has been sparing, but the selective use of the enforcement tool serves as a deterrent, and also provides a mechanism for assuring that the public will not be injured during the pendency of resolution of state and federal conflicts concerning appropriate implementation of the protections of the 1977 Act.

The case of retired educator Muriel Smith of Perry County, Kentucky is a classic example of why the continued use of the TDN process to address violations caused in whole or part by failures of the state RA is needed. After the Commonwealth of Kentucky issued a permit to a coal company allowing construction of a high-hazard embankment sediment pond 100 feet above the home of Muriel Smith, she objected to the state regulatory authority that she had not signed a waiver as is required for any mining activities within 300 feet of an occupied dwelling. As the joint owner of the home and the individual with the sole legal right of occupancy after a divorce was finalized, she believed that she, and not her ex-husband who no longer lived in the premises at the time that he signed the waiver, should be the one who determines whether to waiver the 300 buffer zone protection of Section 522 of SMCRA. The state agency dismissed her claims as a "property rights dispute," and refused to accord her an administrative hearing. Rebuffed by the state regulatory authority, she pleaded with OSM to review the matter, resulting in issuance of a TDN, followed by a federal NOV and removal of the pond.

Four years later, the Kentucky Court of Appeals ruled on behalf of Ms. Smith in a challenge filed under the state program, finding that the state agency's handling of the matter was "seriously flawed. Its 'hand off' policy of noninvolvement is in direct conflict with the spirit of Chapter 350[.] . . . We agree with the appellant that to hold otherwise would 'gut the protection of KRS 350.085(3).'" *Smith v. Natural Resources and Environmental Protection Cabinet,* Ky. App. 712 S.W.2d 951 (1986). Without OSMRE taking enforcement action after issuance of a TDN necessitated by an improper interpretation and application of the 300-foot

occupied dwelling buffer waiver, Ms. Smith would have been forced to endure for four years the burden and risks associated with living directly below an improperly sited embankment sediment structure illegally located immediately uphill from her home, with the attendant risk of wash out or catastrophic failure of the structure, and the impairment of value and use of her land.

Individual Federal actions under Section 521(a)(1) are also needed to address those instances where states decline to act based on limited investigation, or simply err as a matter of fact or technical inexpertise, to detect and act upon a violation of the approved state program. Finally, in situations where the state has been prevented by a court of law from properly enforcing the Act through the state program, federal inspection and enforcement action is needed to assure that Congress' purpose is not thwarted. *FitzGerald v. OSM,* IBLA 84-692 (1985).

The proposal to allow OSMRE personnel to ignore a violation that is not being abated due to a failure of the state regulatory authority to properly interpret and apply the approved state program, is also in direct conflict with the obligations of those inspectors under SMCRA. 30 U.S.C. 1267(e) requires that "[e]ach inspector, upon detection of each violation of any requirement of any State or Federal program or this Chapter, **shall forthwith** inform the operator in writing, and shall report in writing any such violation to the regulatory authority." (Emphasis added). This provision, mandatory on its face, applies by its terms to inspectors under approved state programs. 30 U.S.C. 1267(b), 30 U.S.C. 1291(22).[34]

[34] The replacement of "shall" with "will" cannot be used to dilute the mandatory nature of SMCRA's inspection and enforcement requirements. With all due respect to the recommendations of the U.S. Government Publishing Office, Congress used "shall" to indicate a mandatory obligation, and no amount of sophistry can dilute that fact. In the context of the inspection and enforcement obligations imposed under SMCRA, there can be no doubt that the use of

VII. 25-Year Veteran of State and Federal Mining Regulation Questions Stated Purposes Behind The TDN Rulemaking

This section presents the observations and conclusions presented on the 2020 TDN Rule by Joseph G. Pizarchik, who served both as Director of a state regulatory program in Pennsylvania, and as Director of the Office of Surface Mining Reclamation and Enforcement, with a 25-year history in implementation of SMCRA from both a state and federal perspective.

"The proposed rule states that the changes are intended to promote "efficiency" and to "eliminate duplication." Yet the lack of any factual justification for these claims, leads me to conclude that the changes are instead proposed to reduce the workload of federal and state regulatory authorities due to lack of adequate funding to implement the Act as Congress intended it be done.

The House and Senate Committee Reports on Public Law 95-87 cited above explain that Congress crafted SMCRA's overlapping federal and state enforcement procedures to address pervasive problems in State nonenforcement of surface coal mining laws prior to SMCRA's enactment. Each report states:

> Efficient enforcement is central to the success for the surface mining control program contemplated by [the bill then under consideration]. For a number of predictable reasons – **including insufficient funding** and the tendency for State agencies to be protective of

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the word "shall" by Congress is plainly indicative of a mandatory intent. C. Sands, *Sutherland's Statutory Construction*, Section 25.04 (4th ed. l973), *South Carolina Wildlife Federation v. Alexander,* 457 F. Supp. ll8, 130 (D.S.C. 1978) and cases cited therein. *See also, Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C.Cir. l97l). The Supreme Court has recognized that the use of the word "shall" in the enforcement provisions of SMCRA imposes mandatory obligations on the Secretary, and by extension, upon the state regulatory authorities. *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 298 n. 41 (l98l).

Nothing in the Act or legislative history authorizes less than unqualified issuance of a NOV by OSMRE immediately upon detection of a violation, for **each** violation, in **all** cases, if the state fails to do so. OSMRE cannot, by regulation, abridge the mandatory nature of the enforcement provisions of 30 U.S.C. 1267 and 1271*, Dixon v. U.S.* 381 U.S. 68 (l965); nor create out of whole cloth exemptions to mandatory enforcement against each observed violation which are not authorized in law and which are repugnant to the expressed intent of Congress. *Northeast Marine Terminal Co. v Caputo*, 432 U.S. 249, 278-9 (l98l). There can be no doubt that Congress intended to make mandatory the immediate issuance of enforcement orders upon detection of a violation, H.R. Rept. No. 95-218, 95th Cong. 1st. Sess. at 128-130 (l977), S. Rep. No. 95-128, 95th Cong. 1st Sess. 57-8 (l977); and that the mandatory obligation applies with equal force to federal and state inspections under approved state regulatory programs. H.R. Rept. No. 95-218, supra at 128-129.

> local industry – State enforcement has in the past often fa1len short of the vigor necessary to assure adequate protection of the environment. The Committee believes, however, **that the implementation of minimal Federal standards, the availability of Federal funds**, and the assistance of the experts in the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the Act. While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the Committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

H.R. Rept. No. 95-218 at 129; S. Rept. No. 95-128 at 90 (emphasis added). The House Report goes on to point out that:

> Once State programs or Federal programs replace the interim regulatory procedure, section 517 requires that Federal inspections must be made for purposes of developing, administering, or enforcing any Federal program, and **assisting** or evaluating the development, **administration, or enforcement of any State program.**
> . . . .
>
> **In addition to normally programed inspections, section 521(a)(1) of the bill also provides for special inspections when the Secretary receives, information giving him reason to believe that violations of the act or permit have occurred.** It is anticipated that "reasonable belief" could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation.

H.R. Rept. No. 95-218 at 129 (emphasis added). The Senate Report emphasizes the mandatory nature of the Secretary's duty to issue what have come to be known as "Ten Day Notices:"

> The Secretary may receive information with respect to violations of provision[s] of this Act from any source, such as State inspection reports filed with the Secretary, or information from interested citizens.
>
> **Upon receiving such information, the Secretary must notify the State on such violations and within ten days the State must take action to have the violations corrected. If this does not occur, the Secretary shall order Federal inspection of the operation**.

S. Rept. No. 95-128 at 89-90 (emphasis added).

Congress acknowledged that insufficient funding led to inadequate enforcement and protection of the environment. Unfortunately, notwithstanding adequate state funding from

Congress, insufficient matching funds from states, and inadequate funding of OSMRE by Congress, seems to have led OSMRE and the States to propose gutting the Ten Day Notice rules that are intended to address violations at coal mines, whether by the permittee or the State, in order to reduce workload.

The States convinced Congress that the 50% federal share for regulatory programs was $67 million. However, for the past several years many states have not been able to match the Congressional appropriation demanded by the State Regulatory Authorities. OSMRE records document the amount of Title V regulatory funds appropriated each year by Congress and the amount the States were able to match.

As OSMRE Director I had numerous discussions with State officials about their federal match needs to implement their approved programs. I also witnessed the inability of various States to secure the statutorily required state match to federal funds. In addition, I know firsthand that some States have struggled to fulfill their approved program requirements. For example, for a few years while I was the OSMRE Director, Pennsylvania had a budget driven hiring freeze mandated by the state administration. Because of that hiring freeze the mining program was unable to hire replacement staff needed to meet the minimum federal inspection frequency of permitted coal mines as specified in the state's approved program. This deficiency went on for three years before a state employee brought it to my attention. As OSMRE Director I had to threaten Pennsylvania with a 733 federal takeover action to convince the State to lift the hiring freeze so the state mining regulatory program could hire needed staff.

OSMRE had and has a similar staffing problem. However, it was not due to a hiring freeze but rather to inadequate funding from Congress. OSMRE's fiscal condition has further deteriorated under the Trump Administration. OSMRE currently has **less** staff than it had in

2016, and even then OSMRE did not have sufficient staff to fulfill all of its statutory obligations. Based on my personal experience OSMRE clearly does not have adequate staff to fulfill its obligations.

For example, late on June 12, 2020 Mr. Hammond issued a letter whereby Chairman Grijalva's request for additional time for the public to comment on these proposed changes was denied. A few form letters were also sent out on June 12th to some of the others who had also requested the public comment period be extended. However, even using a form letter where all OSMRE had to do was include a copy of that form letter in an email to others who requested the public comment period be extended, OSMRE did not have sufficient staff to notify everyone who requested the public comment period on these proposed rules be extended. I know because my joint extension request with former OSMRE Director Karpan has not received a response as of the morning of June 15, 2020.

This lack of adequate State and Federal staff appears to be the likely basis for State Regulatory Authorities and OSMRE to look for ways to be more "efficient" and to "reduce duplication." The only other explanations for these proposed rule changes is to allow the States to protect their local coal industry, as Congress found to be the case in 1977, or Mr. Hammond is eviscerating the statutorily mandated Ten Day Notice process at the direction of the Trump Administration political appointees in order to satisfy the States' efforts to protect themselves and their local industry from citizen complaints and from adequate federal oversight. As a former State mining program official and as OSMRE Director I witnessed firsthand State Regulatory Officials who complained about the Ten-Day Notice process. They objected to TDNs because it "infringed on State's rights" or because responding to TDNs disrupted their work plans they had for their limited staff.

As a former State program official and former Director of OSMRE it is my conclusion that the only decent thing for OSMRE and DOI to do is to withdraw the proposed changes to the Ten-Day Notice Rules."

VIII. The 2024 TDN Rule Should Be Retained in its Entirety as the Best Reading Of the 1977 Act and as Being "Beneficial To Retain" Since It Most Closely Satisfies the Policies and Goals Set Forth By Congress

The proposed rule has invited public comment on:

> whether there are any portions of the 2024 Rule that are consistent with the best reading of the statute and would be beneficial to retain, especially the 2024's language on the Similar Possible Violations mentioned above, or whether any portions of the preexisting regulations could be improved to better meet this Administration's objectives as set out in an Executive Orders (E.O.), such as E.O. 14154 ''Unleashing American Energy,'' E.O. 14219 ''Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative'' (Feb. 19, 2025), and the Presidential Memorandum ''Directing the Repeal of Unlawful Regulations'' (Apr. 9, 2025).

90 *Federal Register* 25177.

Respectfully, Commenters recommend that the *entirety* of the 2024 Rule be retained since it both is consistent with the best reading of the statute *and* because it is beneficial to retain. Commenters incorporate herein by reference, the June 26, 2023 comments that they provided on the proposed TDN Rule that was adopted in 2024. The agency is specifically requested to consider each argument provided in those comments as to *why* the 2024 TDN Rule is consistent with the "best reading" of the 1977 Act, and why it is beneficial to retain the 2024 Rule.

Commenters also incorporate by reference the *Memoranda* filed both by OSMRE and the Commenters, in their capacity as Intervening Defendants in the case of *State of Indiana v. Haaland,* in which both OSMRE and Intervenors provided compelling arguments as to the consistency of the 2024 TDN Rules with the federal Act, and the beneficial nature of the clarifying definitions added in the 2024 TDN Rule. Commenters also incorporate the final log

created by OSMRE in response to the litigation challenging the 2020 TDN Rule, which reflects the breadth, nature, and disposition of the requests for federal inspection received by OSMRE during the period that the 2020 TDN Rule was in effect before it was superceded by the 2024 TDN Rule.

Finally, since OSMRE has invited comment on "whether any portions of the preexisting regulations could be improved to better meet this Administration's objectives as set out in an Executive Orders (E.O.), such as E.O. 14154 ''Unleashing American Energy,'' E.O. 14219 ''Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative'' (Feb. 19, 2025), and the Presidential Memorandum ''Directing the Repeal of Unlawful Regulations'' (Apr. 9, 2025)." Commenters respectfully request that the agency consider repeal of 30 CFR 842.12(b)(1)(iii)(A), (B) and (C). There is nothing in 30 U.S.C. 1271 that provides for creation of a new right of "informal review" for state regulatory authorities who disagree with an OSMRE determination that it has failed to take appropriate action or to show good cause. The delaying of a federal inspection pending resolution of an "informal review" after the state regulatory authority has already had a full opportunity to take action or to justify inaction, is contrary to the "best reading" of the Act, and is an "unlawful regulation" that must be removed.

Thank you in advance for your consideration of these comments.

Cordially,

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