

June 26, 2023

U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
1849 C Street NW, Mail Stop 4550, Main Interior Building
Washington, DC 20240

Re: Comments of the Interstate Mining Compact Commission Notice of Proposed Rulemaking
– Ten-Day Notices and Corrective Action for State Regulatory Program Issues 88 Federal
Register 24944, April 25, 2023 OSM–2022–0009 RIN 1029–AC81

To Whom It May Concern:

The Pennsylvania Department of Environmental Protection (Pennsylvania or DEP) submits the following comments in response to the Office of Surface Mining Reclamation and Enforcement’s (“OSMRE”) request for comments on the proposed rulemaking identified as OSM-2022-00009, Ten-Day Notices and Corrective Action for State Regulatory Program Issues. We appreciate the opportunity to provide these important comments.

I. Section II A. Proposed Rule Summary

OSMRE states that “if a citizen is filing a complaint with OSMRE, the citizen implicitly believes that there is a violation that the State regulatory authority has not addressed.” We feel that this statement is incorrect. OSMRE assumes that a citizen knows to contact a State regulatory authority, when in fact, the citizen may be unaware that mining is regulated by the State. We believe that most citizen complaints can be resolved by the State regulatory authority and thus save OSMRE time and resources by preventing duplicative efforts. Therefore, a system should be in place that ensures the citizen is first directed to the State regulatory authority.

II. Section III A. Section-by-Section Analysis Overview

OSMRE unequivocally states that “consistent with the notion of State primacy, a Ten-Day Notice (“TDN”) affords the State the first opportunity to address the underlying issue [of a possible violation.]” Yet, in practice, the proposed revisions undermine State primacy. Pursuant to proposed 30 CFR 842.11(b)(2) and 842.12(a), all citizens complaints would be considered a request for a Federal inspection. Additionally, OSMRE proposes to remove important prerequisites—§ 842.12(a)(1) and (2)—to Federal inspection requests that recognize the important role of the State regulatory authority. If the goal is to afford the State the first opportunity to address the citizen complaint, we believe it best to keep § 842.12(a)(1) and (2) as part of the regulations and allow the State to investigate the citizen complaint prior to OSMRE issuing a TDN.

Secretary

III. Proposed 30 CFR § 842.11(b)(1)(ii)(B)(4)(ii)

OSMRE proposes to amend 30 CFR 842.11(b)(1)(ii)(B) to specify the time within which the State regulatory authority must complete its TDN investigation into a possible violation. OSMRE states that “[i]n implementing the 2020 TDN Rule, we found that the data collection process took longer than expected.” OSMRE goes on to state, “[g]iven our experience with that rule and after reexamination, we now conclude that ‘readily available’ does not necessarily impose a time limit and could be interpreted to involve a larger information gathering than we envisioned, potentially including information that takes months to gather and analyze, and can unnecessarily delay a ‘reason to believe’ determination.” The proposed rule would provide that “[t]he State regulatory authority may request up to 30 additional days to complete its investigation of the issue,” and that, “in complex situations, the State regulatory authority may request up to an additional 60 days to complete the investigation.” Where the data gathering process takes longer than expected, DEP does not believe OSMRE should limit the time allowable for extensions to address a TDN.

IV. Proposed 30 CFR § 842.11(b)(1)(ii)(B)(3)

Proposed 30 CFR § 842.11(b)(1)(ii)(B)(3) would eliminate action plans from qualifying as an “appropriate action” in response to a TDN. OSMRE seeks this revision because action plans do not themselves remedy violations. Instead, OSMRE proposes that such a plan could constitute good cause for not taking action within ten days. As a result of this proposed change, would a TDN be considered an open, unresolved enforcement action until the action plan is completed? If so, such a change would create a substantial number of open records with no resolution. Conversely, closing a TDN when an action plan is created provides for a limited duration which promotes consistency and clarity. Should the action plan not be completed to OSMRE’s satisfaction, it could always issue another TDN.

V. Generally

- a. DEP believes that the proposed amendments to the 2020 TDN rule will create further, unnecessary burdens on State regulatory authorities in the name of efficiencies. Under the current rule the State performs a thorough investigation of all citizen complaints, no matter how they are received. When OSMRE issues a TDN to a State, significant administrative time strains are laid on both OSMRE and the State. Under the rule change not only would the State respond to the citizen complaint, but the State would also have to respond to a TDN prompted by a citizen complaint. In cases where the State is already investigating a citizen complaint, responding to a TDN is duplicative and a drain on federal and states resources.
- b. OSMRE is no longer considering “readily available information” as the temporal limitation on data collection related to a citizen complaint. Rather OSMRE proposes to limit the source of the information to that “contained in [OSMRE’s] files at the time [OSMRE is] notified of a possible violation or receive a request for a Federal inspection.” Could OSMRE please provide an example of what information will no longer be used to

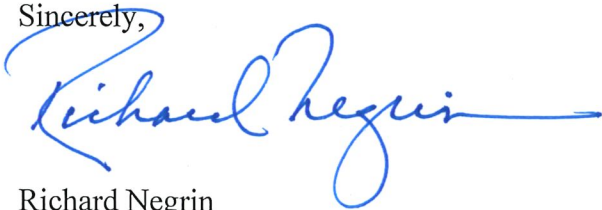
limit the scope and time of the preliminary evaluation? Will OSMRE ask the States to supply the permit information where it is not in a publicly available digital form? Will this new limitation shift the task of supplying claim information to the States?

- c. OSMRE states that a TDN resulting from a citizen complaint is not a direct enforcement action, a finding that any violation exists, or a determination that the State has acted improperly. We suggest that the term used for a TDN resulting from a citizen complaint be changed to a Ten-Day Notification to Respond. This change is appropriate because the proposed rule would create two types of TDNs, one that results from a violation deferred from OSMRE to the State and a second type that results from a citizen complaint. The first type of TDN is a direct enforcement action and the second type is a “communication mechanism” as described in this proposed rulemaking. The word “Notice” strongly suggests an enforcement action. Referring to both of these devices by the same name, TDN, leads to confusion.

Conclusion

DEP appreciates the opportunity to supply this feedback and questions. Thank you for your consideration of our remarks. Should you have questions or need additional information, please contact Nathan Houtz, Director, Bureau of Mining Programs, by email at nhoutz@pa.gov or by phone at 717.783.9580.

Sincerely,



Richard Negrin
Acting Secretary