



IN REPLY REFER TO:

# United States Department of the Interior

OFFICE OF SURFACE MINING  
Reclamation and Enforcement  
P.O. Box 46667  
Denver, Colorado 80201-6667

October 12, 2006

Stephen Bloch, Staff Attorney  
Southern Utah Wilderness Alliance  
425 East 100 South  
Salt Lake City, Utah 84111

Dear Mr. Bloch:

The Office of Surface Mining (OSM) has completed its review of the revised petition to designate the Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations. The revised petition alleges that UtahAmerican Energy, Inc.'s permit application package does not meet the requirements of Utah Admin. Code R.645-100-200 because it does not now and never had contained all information addressing each application requirement of the State Program.

Based on our review, pursuant to 30 CFR §769.14(g) and SMCRA, OSM is reaffirming its August 24, 2006 decision and will not process SUWA's revised petition. The enclosed response explains our determination not to process the revised petition.

We thank you for the opportunity to consider the revised petition.

Sincerely,

James F. Fulton, Chief  
Denver Field Division

Enclosure

cc w/enclosure: Al Klein, WR  
John Kunz, SOL

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**MAY 14 2007**

Div. of Oil, Gas & Mining



# **Response to Revised Petition to Designate Lands as Unsuitable for Surface Coal Mining Operations**

**October 12, 2006**

## **Introduction**

On July 25, 2006, the Office of Surface Mining's (OSM) Denver Field Division (DFD) received a petition to designate all lands lying within the zone of subsidence of the proposed Lila Canyon Extension to the Horse Canyon Mine ("subject lands") as unsuitable for surface coal mining operations. The petition was submitted by the Southern Utah Wilderness Alliance (SUWA). SUWA urged the Secretary to designate the subject lands as unsuitable for surface coal mining operations because such lands are either known to contain or likely to contain a significant number of historic and prehistoric sites.

SUWA's petition covers 5,544 acres contained within six Federal leases currently held by UtahAmerican Energy, Inc. (UEI). The permit area is comprised of two permit areas: Permit Area A (the Horse Canyon Mine); and Permit Area B (the proposed Lila Canyon Extension).

By letter dated August 24, 2006, OSM-DFD informed SUWA that it was exercising its discretion not to process the petition in accordance with 30 CFR §769.14(g) because an administratively complete permit application had been filed, and the first newspaper notice has been published more than two years prior to the petition's submittal.

SUWA responded on September 13, 2006, by submitting a revised unsuitability petition. SUWA now claims that UEI's permit application package (PAP) does not meet the requirements of Utah Admin. Code R.645-100-200 because it does not now and never had contained "all information addressing each application requirement of the State Program." (Emphasis added). SUWA further states the Utah Division of Oil, Gas and Mining's (DOGM's) findings to the contrary are arbitrary and capricious. Lastly, SUWA asserts that, based on the information contained in its revised unsuitability petition which purports to demonstrate that the PAP is not administratively complete, it would be unfair, highly prejudicial, and inconsistent with the rules and the preamble language to 30 CFR Part 764 for OSM to deny processing of its petition under 30 CFR §769.14(g).

## **Petitions for Designating Lands Unsuitable for Mining**

Section 522(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) allows any person having an interest which is or may be adversely affected to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations. The specific procedures for processing such petitions are found in 30 CFR Parts 764 (State process) and 769 (Federal process).

The Federal regulations at 30 CFR §769.14(g) read as follows:

OSM may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, OSM may issue a decision on a complete and accurate permit application and shall inform the petitioner why OSM cannot consider the part of the petition pertaining to the proposed permit area.

This rule "...is the result of the reasonable exercise of OSM's discretion in implementing the Act," and "...will strike a fair balance between the petitioner's interest and an operator's commitment to mine." 48 FR 41333 (Sept. 14, 1983).

### **Findings and Analysis**

The preamble language to 30 CFR §§764.15(a)(7) and 769.14(g) is instructive in determining whether to process a lands unsuitable petition once a permit application has been filed and the first newspaper notice has been published. The preamble language to section 769.14(g) does not contain any instructive language per se, but refers the reader to the preamble language to Part 764. Specifically, this language states that 30 CFR §769.14(g) was "...proposed to protect the interests of operators who have invested significant expense and time in preparing and submitting extensive documentation and information required for a permit application." 48 FR 41332 (Sept. 14, 1983). Moreover, in responding to a comment that this provision (30 CFR §769.14(g)) would unjustly preclude petitioners from the petition process because of inadequate knowledge of the permit status, OSM noted that "...the provision recognizes the time after which the filing and consideration of a petition will preclude action on a permit application. The new provision will prevent the administrative processing of petitions from being used to impede surface mining operations on lands for which petitioners could earlier have filed petitions. It does not take away the right for citizen participation, but does set limits on the effects the timing of a petition filing [has] on a permit application. The petition process is more a general land-use planning tool than it is a means to make site-specific decisions \* \* \*. Petitioners should be looking ahead to identifying areas which should not be mined, not reacting on a site-by-site basis. \* \* \* This new rule does not mean, however, that important issues will not be considered or that the public will be excluded in the consideration of permits. The permit review process includes means for citizen input and for consideration of important issues." Id. at 41332-41333.

Our August 24, 2006 letter found that SUWA has been intimately involved with the proposed Lila Canyon Extension permitting process for nearly five years. It has requested several administrative hearings, conferences, and reviews throughout the process and continues to actively monitor and participate in permitting decisions. Accordingly, SUWA's members have been afforded every opportunity to participate, provide substantial input, and consider important issues throughout the permitting process. We also confirmed that DOGM has previously found UEI's Lila Canyon

Extension Permit application to be administratively complete and the first newspaper notice was published on April 6, 2004. 30 CFR §769.14(g) clearly allows OSM the discretion to not process a petition where an administratively complete permit application has been filed and the first newspaper notice has been published. Considering SUWA's close and lengthy involvement with the Lila Canyon Extension permitting process during the past five years, we determined that it has had ample opportunity to file an unsuitability petition. We further concluded that to accept and consider SUWA's petition more than two years after the public notice of completeness was first published would constitute an unwarranted delay of mining operations by precluding action on the permit application.

Your revised petition now expresses dissatisfaction with DOGM's March 26, 2006 Determination of Administrative Completeness for the Lila Canyon Extension. Specifically, you assert that the PAP is not administratively complete and that it does not meet requirements of Utah Admin. Code R.645-100-200. In support of the revised petition, you submitted material that is comprised primarily of correspondence that tracks SUWA's challenges to the permit application, and details the technical deficiencies that have been identified as a result of DOGM's permit review process. In short, you are requesting OSM to review a permit decision of DOGM with which you disagree.

A petition to designate lands unsuitable for mining under section 522(c) is not an alternative avenue for seeking review of the regulatory authority's permit decisions. SMCRA provides specific provisions in section 514 for seeking review of permit decisions. If the permit decision here were one issued by OSM as the regulatory authority under a Federal Program, any objections would have to be raised and resolved through the specific appeal process pursuant to section 514. In this instance however, because Utah has an approved state program, the appeal of the permit decision at issue here would lie under the state laws and regulations that Utah adopted to assume exclusive regulatory jurisdiction pursuant to section 503 of the Act. Moreover, DOGM has been delegated the authority by OSM to administer its program on Federal lands pursuant to the Cooperative Agreement between Utah and the Secretary of the Interior set forth at 30 CFR §944.30. Utah has broad discretion under the Cooperative Agreement and its Coal Program to determine whether a permit is administratively complete. Lastly, the Cooperative Agreement provides "As a matter of practice, OSMRE will not independently initiate contacts with applicants regarding completeness or deficiencies of the PAP with respect to matters covered by the Program." See 30 CFR §944.30, Article VI.C.2. Again, your revised petition consists of your disagreements with findings made by DOGM in reaching its decision that the permit application complies with applicable requirements of the Utah program.

Another aspect of the Act's statutory scheme precludes OSM's acceptance of your revised petition. Utah has been granted primacy under the Act, and therefore has exclusive jurisdiction over the regulation of surface mining operations within its borders (Section 503(a)). As Federal courts have repeatedly held, the Act's allocation of exclusive jurisdiction was "careful and deliberate" by providing for "mutually-exclusive regulation by either the Secretary or the state, but not both." *Bragg v. West Virginia Coal*

*Ass'n*, 248 F. 3d 275, 293-94 (4<sup>th</sup> Cir. 2001), cert. denied, 534 U.S. 1113 (2002); See also *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F. 2d 310, 318 (3d Cir. 2002); *Haydo v. Amerikohl Mining Inc.*, 830 F. 2d 494,497 (3d Cir. 1987).

In a primacy state, permit decisions and any appeals are solely matters of the state's jurisdiction in which OSM plays no role. The roles of the state and Federal governments were explained by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

[T]he state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable.

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Administrative and judicial appeals of permit decisions are matters of state jurisdiction on which the Secretary plays no role.

*In re: Permanent Surface Mining Regulation Lit.*, 653 F. 2d 514, 519 (DC Cir. 1981) (*en banc*) (herein after "*Regulation Litig.*").

Thus, OSM does not possess concurrent or parallel jurisdiction over this matter. See *Pennsylvania Federation*, 297 F. 3d at 318. ("Exclusive, in other words, means just that.... It doesn't mean 'parallel' or 'concurrent'"). OSM also does not retain "veto" authority over state permit decisions. *Regulation Litig.*, 653 F. 2d at 519 n. 7. Accord *Bragg*, 248 F. 3d at 295. OSM's intervention at any stage of the state permit review and appeal process would, in effect, terminate the state's exclusive jurisdiction over the matter and frustrates the careful and deliberate statutory design. See *Bragg*, 248 F. 3d at 295. It would encourage persons dissatisfied with the state decisions to circumvent the very state laws and procedures that the Act insists states enact and maintain in order to exercise exclusive regulatory jurisdiction, and would conflict with the federalism established under the Act by allowing OSM to commandeer the state permit review and appeal process. The statutory design requires citizens in primacy states to pursue their claims under the procedures and in the forums established under the state laws enacted to obtain primacy. In sum, the Act does not provide for alternative avenues or forums for seeking relief from a permit decision.

This matter demonstrates the very concerns just expressed about circumventing the deliberate statutory scheme. Indeed, transcripts provided by SUWA as part of its revised petition for both July 7, 2004 (Exhibit 12) and November 8, 2005 (Exhibit 20) DOGM informal conference proceedings clearly illustrate that the issue of administrative completeness has already been pursued under the procedures and in the forums established under Utah's laws.

For the reasons discussed above, we are reaffirming our August 24, 2006 decision and will not process SUWA's revised petition to designate the Lila Canyon Extension to the Horse Canyon Mine as unsuitable for surface coal mining operations. OSM's determination not to process the revised petition is based on a fair and accurate interpretation of SMCRA, as well as a reasonable exercise of its discretion under 30 CFR §769.14(g), and is consistent with the rules and the preamble language to 30 CFR Part 764. This decision not to process SUWA's revised unsuitability petition constitutes the final decision of the Office of Surface Mining in this matter.