

THE PETTINATO FIRM

(406) 314-3247 · JARED@JAREDPETTINATO.COM
JAREDPETTINATO.COM · 3416 13TH ST. NW, #1, WASHINGTON, DC 20010

October 14, 2020

VIA CERTIFIED MAIL

David Bernhardt
Secretary of the Interior
U.S. Department of the Interior
1849 C St. NW
Washington, DC 20240

Lanny E. Erdos
Acting Director
Office of Surface Mining Reclamation
and Enforcement
1849 C St. NW
Washington, DC 20240

Ginny Brannon
Division Director
Colorado Department of Reclamation, Mining, and Safety
1313 Sherman St., Room 215
Denver CO 80203

Cristopher Munoz
Registered Agent
GCC Energy, LLC
600 S. Cherry St., Ste. 1000
Glendale, CO 80246

Dear Secretary Bernhart, Acting Director Erdos, Director Brannon, and Mr. Munoz,

My name is Jared Pettinato, and I represent Citizens for Constitutional Integrity and Southwest Advocates, Inc. Under 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, we hereby notify you that, if you do not stop the King II Mine Modification operations (the Mine) within sixty days, we intend to sue the Office of Surface Mining Reclamation and Enforcement (OSMRE). Our members include residents who live near the Mine. Some members draw their well-water near the Mine; some live next to the La Plata River; some do both.

We intend to ask the United States District Court for the District of Colorado to hold unlawful and to set aside the March 27, 2018, mining plan approval to modify Federal Coal Lease COC-62920 and Federal Indian Lands Permit No. CO-0106A at the King II Mine (the Modification Approval).

In March 2017, GCC Energy, LLC, submitted to OSMRE a permit application package to revise Federal Permit CO-0106A to mine 950.55 additional acres at the King II Mine. OSMRE did not analyze the Modification Approval to determine whether it complied with the fundamentally different regulatory regime that the Stream Protection Rule created. 81 Fed. Reg. 93,066 (Dec. 20, 2016). OSMRE had issued the Stream Protection Rule under its authority in 30 U.S.C. § 1202. *Id.* at 93,072.

The analyses in the Modification Approval violate the Stream Protection Rule in four ways.

- First, OSMRE failed to apply the fundamentally overhauled Stream Protection Rule to the Mine, and that completely undermines every conclusion it reached.
- Second, OSMRE failed to protect the La Plata River from drying up more than necessary, by failing to apply the new definition of material damage to the hydrologic balance.

- Third, OSMRE failed to consider the lost groundwater from diverting Hay Gulch Ditch water from the Huntington farm to the Mine.
- Fourth, OSMRE failed to implement the robust monitoring procedures that the Stream Protection Rule requires to ensure mines do not pollute the nearby wells and groundwater.

For each of these reasons, two laws require you to stop the Mine until you comply with the Stream Protection Rule: (1) the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328), and (2) the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

SMCRA assigned OSMRE several duties. Congress intended to “assure that surface coal mining operations are so conducted as to protect the environment,” and it “exercise[d] the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.” 30 U.S.C. § 1202(d), (m). Congress assigned OSMRE the duty to “publish and promulgate such rules and regulations . . . to carry out the purposes and provisions of this chapter,” and to “administer the programs for controlling surface coal mining operations” *Id.* § 1211(c)(1) and (2). Congress directed OSMRE to ensure compliance with the SMCRA, and therefore the Stream Protection Rule, on Indian lands. *Id.* § 1300(d). OSMRE violated these duties.

Citizens for Constitutional Integrity and Southwest Advocates hereby demand you to rescind the Modification Approval because it violates the Stream Protection Rule.

I. The Stream Protection Rule remains in effect.

You will likely react to this demand by referring to Congress’s enactment that ostensibly rescinded the statutory authority for the Stream Protection Rule. Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10. And you will likely refer to the notice you filed in the Federal Register. Congressional Nullification of the [Rule] Under the Congressional Review Act, 82 Fed. Reg. 54,924 (Nov. 17, 2017). The Constitution, however, voids the February 16, 2017, Act. Consequently, the repeal notice has no legal basis under the APA, and the Stream Protection Rule remains in effect.

Congress used the Congressional Review Act (the Review Act) to rescind OSMRE’s statutory authority to issue the Stream Protection. That act facially violates the Constitution in three ways.

First, the Review Act violates equal protection. Fifty-one votes does not equal sixty. The Act allows the Senate to pass legislation under the Review Act with only fifty-one votes, but the Senate’s Cloture Rule, XXII, requires sixty votes to pass most other legislation.¹ Thus, the Review Act protects unequally

¹ *Compare* Contract with America Advancement Act of 1996 § 251, Pub. L. No. 104-121, Stat. 110 Stat. 847, (Mar. 29, 1996) (commonly known as the Congressional Review Act) (codified at 5 U.S.C. §§ 801-808), *with* U.S. Senate, Standing Rules, Orders, Laws, and Resolutions Affecting the Business XXII.2 (2014) (the Cloture Rule, or commonly known as the “filibuster”), *available at* gpo.gov/senatemanual. The vote numbers here assume no vacancies in the Senate.

(1) citizens protected by statutes that delegate authorities to agencies and (2) Citizens protected by statutes directly. This arrangement fails intermediate scrutiny and the rational basis test.

Second, the Review Act violates substantive due process under the Fifth Amendment because the Review Act does not rationally relate to accomplishing any legitimate governmental objective. An easier Sword of Damocles for rescinding regulatory authority does not encourage agencies to act in good faith, and not even Congress can rationally assume that agencies act in bad faith. *See Nat'l Archives & Rs. Admin. v. Favish*, 541 U.S. 157, 174 (2004). Moreover, it does not accomplish any particular policy objective. Changing the structure for passing laws does not qualify. "Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution." *Clinton v. City of New York*, 524 U.S. 417, 446 (1998).

Third, the Review Act and the Senate Cloture Rule, XXII, together, violate the separation of powers by creating a situation in which Congress can more easily rescind statutory authorities than expand them. The Review Act allows Congress to repeal delegations to agencies with fifty-one votes, but the Cloture Rule prohibits delegating new authorities to agencies without sixty votes. Over time, that one-way ratchet erodes the Executive Branch's authorities. That mechanism violates the separation of powers. *See Stern v. Marshall*, 564 U.S. 462, 503 (2011); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

For these three reasons, the Review Act violates the Constitution. Acts contrary to the Constitution are void. Because the Constitution voids the February 16, 2017, act that rescinded the Stream Protection Rule, the Stream Protection Rule remains in effect and applied to the Modification Approval.

II. The Stream Protection Rule applies to the Modification Approval.

Because the Stream Protection Rule remained in place, OSMRE breached its duties by failing to comply. By its terms, the Stream Protection Rule applies to "[a]ny application for the addition of acreage to an existing permit submitted to the regulatory authority after the effective date of the [Rule, January 19, 2017,] under the applicable regulatory program." 81 Fed. Reg. at 93,323 (30 C.F.R. § 701.16(a)(3)), 93,066. GCC submitted its permit package for the Modification Approval in March 2017. Modification EA 12.² Thus, the Stream Protection Rule applied when OSMRE issued the Modification Approval.

Assistant Secretary for Land and Minerals Management Joseph R. Balash violated SMCRA by approving the Modification without applying the Stream Protection Rule. *See* 30 U.S.C. §§ 1265(a); 1266(a). Mr. Balash has since resigned from that position. Now, Casey Hammond is serving as Acting Assistant Secretary.³ His address is 1849 C St NW, Washington, DC 20240, and his phone number is 202-208-4070 or 202-208-6734. *See* 30 C.F.R. § 700.13(e)(3).

² U.S. Dep't of the Interior, Bureau of Land Mgmt. (BLM) and OSMRE Env'tl. Assessment of Federal Coal Lease (COC-62920) Modification and Fed. Mine Permit (CO-0106A) Revision and Renewal 12, DOI-BLM-CO-S010-2011-0074-EA (Oct. 12, 2017).

³ *Interior Leadership*, Interior, doi.gov/interior-leadership.

III. The Analysis of the Modification Approval's effects did not comply with the Stream Protection Rule.

Locals call this area the “dry side” of La Plata County. The Ute Mountain Ute Tribe owns most of the surface rights over the Modification Approval, and that land qualifies as Indian Lands under SMCRA. Modification EA 16. The United States owns most of the subsurface rights. *Id.* The La Plata River qualifies as a perennial stream under the Stream Protection Rule. 30 C.F.R. § 701.5, 81 Fed. Reg. 93,322.

Hay Gulch Ditch, Inc., owns the water-right shares, and the La Plata Water Conservancy District diverts water from the La Plata River to the Mine. *In re Water Rights of GCC Energy, LLC*, No. 07CW200, ¶¶ 2.6.2 (Colo. Dist. Ct. Water Div. 7, Apr. 20, 2011) (*GCC Energy I*). Eventually, after the adjoining landowners take their water rights from the Hay Gulch Ditch, any remaining water may return to the La Plata River downstream.⁴

When the water court adjudicated two transfers of water rights to the Mine, it concluded that the Mine would “fully consum[e]” the water it received.⁵ In other words, the Mine will not return any water to Hay Gulch Ditch, so the water leaves the hydrologic system. The water balance study, which has its own methodological problems, concluded that about fifty-eight percent would soak into the coal, about forty percent would evaporate into the air, and the remaining would stay in the Mine. *Water Balance Study*, Executive Summary 2.

The EA found that GCC initially acquired 34.07 acre-feet of water rights from three sources:

1. Huntington Ranches irrigation dry-up of 12 acres,
2. Diversion from the La Plata River, and
3. Well water.

Modification EA 43; *GCC Energy I*, ¶ 6.8.7.

Later, when GCC needed more water, Huntington dried-up an additional 44 acres of land it had previously irrigated (for a total of 56 acres). It sold those water rights to GCC, which gave GCC 68.8 additional acre-feet to consume at the Mine. *GCC Energy II*, ¶ 8.6.3. The Water Court accounted for the “subsurface return flows” that would return to Hay Gulch Ditch under the new arrangement, but that analysis did not account for the amounts of water that would have filtered down into the groundwater when irrigating. *See id.* ¶ 6.1.8(e).

The Modification EA did not apply the Stream Protection Rule, and that legal flaw led to lower flows into the La Plata River, and it also increased the risks of undetected groundwater contamination.

⁴ Resource Hydrogeologic Servs., Inc., *King I & II Coal Mine Area Hydrologic Study*, Fig. 3-1, Regional Geology Map (Jan. 31, 2016).

⁵ *GCC Energy I* ¶ 6.8.8; *In re Water Rights of GCC Energy, LLC*, No. 2015CW3029, ¶ 6.1.8(h) (Colo. Dist. Ct. Water Div. 7, Jan. 6, 2017) (*GCC Energy II*); *see also* CDS Env'tl. Servs. LLC, *Water Balance Study for the King II Mine* (May 8, 2014, updated July 20, 2015). Possibly, some of the “domestic uses” for mine employees may return to the ditch.

A. OSMRE applied the wrong Rule.

OSMRE's failure to apply the Stream Protection Rule undermined its entire SMCRA analysis because the Stream Protection Rule changed the fundamental definitions for determining impacts. Under the Stream Protection Rule and for the first time since 1983, OSMRE "update[d] [its] regulations to reflect new scientific understanding of impacts associated with coal mining." 81 Fed. Reg. at 93,070. In other words, the Stream Protection Rule updated OSMRE's whole regulatory regime. Applying the correct regulations would have changed the entire analysis.

SMCRA requires mine operators to prevent "material damage to the hydrologic balance outside the permit area." 30 U.S.C. § 1260(b)(3). The Stream Protection Rule redefines the standard "hydrologic balance" to account for "interactions that result in changes in the chemical composition or physical characteristics of groundwater and surface water."⁶ It changed the definition of "[m]aterial damage to the hydrologic balance outside the permit area" to require "each permit [to] establish the point at which adverse mining-related impacts on groundwater and surface water reach an unacceptable level"⁷ OSMRE never applied this new definition.

Because OSMRE applied the wrong law to the Modification Approval, the APA will require a court to hold the Modification Approval unlawful. *See NLRB v. Brown*, 380 U.S. 278, 292 (1965) ("Courts must, of course, set aside [agency] decisions which rest on an erroneous legal foundation.") (quotations omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("if the action is based upon a determination of law . . . , an order may not stand if the agency has misconceived the law.").

B. OSMRE failed to protect the La Plata River.

Applying the wrong law led to lower flows in the La Plata River. The Stream Protection Rule requires OSMRE to decide whether the "proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area." *Id.* It requires permittees to identify the premining baseline to ensure that "perennial streams located outside the permit area will retain perennial flows . . . during and after mining and reclamation." 30 C.F.R. § 780.21(b)(9)(iii), 81 Fed. Reg. at 93,341.

If OSMRE had completed the analysis the Stream Protection Rule required, it would have realized that the Mine was taking so much water from the La Plata River that it risked the river running dry more often. OSMRE issued the Stream Protection Rule to protect rivers like the La Plata. It failed to protect the La Plata.

OSMRE did not analyze the effects of climate change on the hydrologic balance in Hay Gulch Ditch. Climate change is already causing the La Plata River and Hay Gulch Ditch and all other water resources to evaporate more quickly. When considering the Mine's impacts, the Modification EA failed to acknowledge that impact and failed to calculate that impact.

⁶ Compare 30 C.F.R. § 701.5 with Rule, 30 C.F.R. § 701.5, 81 Fed. Reg. 93,321.

⁷ Compare 30 C.F.R. § 701.5 with Rule, 30 C.F.R. § 701.5, 81 Fed. Reg. at 93,068, 93,322.

Moreover, OSMRE did not see the subtle shift by which the water court gave the Mine more water than Huntington used. The water court based its decisions not on “historic monthly” use, but on the water rights “available” to Huntington. *GCC Energy I*, ¶ 6.8.4; *GCC Energy II*, ¶ 6.1.8(e). The Modification EA failed to account for any difference in water flows to the La Plata River by that subtle shift in metric.

These two losses to the La Plata River, together, demonstrate greater impacts than the Modification EA analyzed, and those losses demonstrate material damage to the hydrologic balance outside the permit area in violation of the Stream Protection Rule.

C. OSMRE failed to consider groundwater losses from diverting water from 56 acres of dried-up land.

In the Modification EA, OSMRE failed to analyze losses to the ground water from diverting Hay Gulch Ditch water from the Huntington farm to the Mine. It never accounted for irrigation water that historically infiltrated through Huntington’s irrigated land to recharge the groundwater. *See Harris Water Engineering, Inc., GCC Energy Mine, Substitute Water Supply Plan 7* (Oct. 8, 2015).

The Stream Protection Rule requires OSMRE to analyze a mine approval’s impacts on “[t]he availability of groundwater and surface water, including the impact of any diversion of surface or subsurface flows to underground mine workings” Rule, 30 C.F.R. § 784.20(a)(5)(v), 81 Fed. Reg. at 93,340. When Huntington used its water to irrigate crops, some water would have infiltrated into groundwater and would never have returned to Hay Gulch Ditch, but the Water Court and the Modification EA never accounted for those groundwater losses. *See GCC Energy II* ¶ 6.1.8(e); *GCC Energy I* ¶ 6.8.6; *Substitute Water Supply Plan 4*.

Failing to account for that lost groundwater violated the Stream Protection Rule, 30 C.F.R. § 784.20(a)(5)(v). Also, OSMRE failed to assess the “probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area,” and that violated the Stream Protection Rule, 30 C.F.R. § 773.15(e).

D. OSMRE failed to monitor the groundwater for all contaminants the Stream Protection Rule required.

OSMRE failed to require GCC to monitor for enough contaminants. The Stream Protection Rule required it to monitor for more contaminants than GCC has completed or is completing, to account for drought conditions, and to consider point-source discharges from other mines. The Stream Protection Rule lists the contaminants it requires mines to monitor, but the Mine did not monitor for all of them. *Compare* Rule 30 C.F.R. § 780.19(a)(2), 780.19(b)(6)(ii)(D), 85 Fed. Reg. at 93,336-37, *with* Modification EA C-1, Table 2.

Pollutant	Stream Protection Rule Required	King II Completed
Bicarbonate	Yes	Yes
Calcium	Yes	Yes
Conductivity	Yes	Yes
Iron	Yes	Yes
Magnesium	Yes	Yes
Manganese	Yes	Yes
pH	Yes	Yes
Sodium	Yes	Yes
Sulfate	Yes	Yes
Temperature	Yes	Yes
Total dissolved solids	Yes	Yes
Any cation or anion that constitutes a significant percentage of the total ionic charge balance, but that was not included in the analyses of major anions and major cations	Yes	No
Cation-anion balance of dissolved major cations and dissolved major anions	Yes	No
Chloride	Yes	No
Hot acidity	Yes	No
Potassium	Yes	No
Selenium (dissolved)	Yes	No
Total alkalinity	Yes	No

(The Stream Protection Rule required monitoring for the red-highlighted contaminants, but GCC did not analyze for those contaminants.)

Separately, the Stream Protection Rule required GCC to provide “the Palmer Drought Severity Index for the proposed permit and adjacent areas for the initial baseline data collection period” Rule, 30 C.F.R. § 780.19(b)(6)(iii), 81 Fed. Reg. at 93,362. This information could have impacted the decision-maker even more heavily than in many regions because of this area’s dry, high-desert climate. Because this area has such little water, every drop of pollution contaminates an even greater proportion of the ecosystem’s water.

OSMRE failed to require GCC to monitor for all of the pollutants that the Stream Protection Rule required. It consequently has no baseline against which to compare the monitoring now. SMCRA, the Stream Protection Rule, and the APA require OSMRE to stop the mining immediately, to monitor for all of the pollutants to develop the baseline, to consider the Palmer Drought Severity Index, and to reevaluate whether to approve the Modification.

IV. Conclusion

These violations will compel a Court to set aside the Modification Approval immediately.

Please stop the Mine and restore the Stream Protection Rule within sixty days. Otherwise, Citizens for Constitutional Integrity and Southwest Advocates will sue OSMRE to ask a Court to stop it.

Sincerely,



Jared Pettinato

cc (via First Class Mail): David Berry

Western Region Director
Office of Surface Mining, Reclamation, and Enforcement
1999 Broadway, Suite 3320
Denver, CO 80202-3050