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Congress of the United States  
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The Honorable Cass Sunstein, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
Washington, DC 20503

Dear Administrator Sunstein:

With appreciation for your meeting with me last month in my Washington office, I write, again, to underscore my concerns about EPA guidance documents related to Sections 402 and 404 Clean Water Act (CWA) permits for surface mining in Appalachia.

The EPA issued interim guidance related to CWA permits for Appalachian surface mining in April 2010. The Guidance Memo set new and binding criteria for the issuance of permits, adversely affecting in a material way the mining sector of the economy in Appalachia. Contrary to OMB's "Final Bulletin for Agency Good Guidance Practices," the EPA did not submit its guidance documents to the Office of Information and Regulatory Affairs (OIRA) for review or for public comment before the guidance took effect. Now, the EPA is scheduled to finalize its guidance on April 1, 2011.

The stated purpose of the OMB Bulletin is "to ensure that guidance documents of Executive Branch departments and agencies are: developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements." Nevertheless, the interim guidance is being used by the EPA Region III Administrator to deny, delay, and force significant changes to Section 402 and 404 CWA permits. The binding nature of this guidance is a clear argument for its review by OIRA, if not a strong case for the guidance being rescinded and issued, instead, under the rulemaking procedures outlined in the Administrative Procedure Act and Executive Order 12866. Previous court cases clearly indicate that agency guidance documents cannot be binding in nature.

I ask that you review the EPA's Guidance Memo and determine whether it should be issued as a rule instead of a guidance document. If the memo is determined to be guidance, the review should ensure that it is carefully considered under the procedures for guidance development and review as identified in the OMB Bulletin. Certainly the far-reaching effects of this guidance document warrant such a review prior to its being finalized.

With kind regards, I am

Sincerely,



NICK J. RAHALL, II  
Member of Congress