

On November 15, 2010, a Memorandum to Regional Office of Surface Mining Reclamation and Enforcement (OSMRE) Directors from OSMRE Director Pizarchik was issued. The subject of the memorandum was the application of the Ten-Day Notice (TDN) Process – notices to states - and Federal Enforcement to Permitting Issues under Approved Regulatory Programs. This memorandum reversed a previous long standing OSMRE policy (the October 21, 2005, Assistant Interior Secretary Watson letter) of not using TDNs for permitting issues. The new OSMRE policy allowed for TDNs and direct federal enforcement actions, not only on violations of performance standards or permit conditions, but on the vague term "permitting requirements." Permitting is a major pillar of state primacy; Congress intentionally left permitting exclusively to the states.

One result of the reversal of the Watson Letter was the issuance of a Notice of Violation (NOV) to Farrell Cooper (FCMC) by OSMRE on Liberty 5. OSMRE admits that the company is in compliance with that issued permit, but OSMRE believes that the permit doesn't meet SMCRA requirements for AOC.

Throughout the AOC debate, the Oklahoma Department of Mines consistently contended that the approved reclamation plan for the Liberty 5 permit not only met the AOC standard set forth in Oklahoma's approved program, it was also consistent with previously issued permits that had received OSMRE's approval.

The federal NOV was appealed by Farrell-Cooper using OSMRE's administrative appeals process. An Administrative Law Judge found this NOV to be invalid. The Federal Administrative Law Judge found that OSMRE had no authority, in a primacy state, to issue the subject NOV to FCMC. The Federal Administrative Law Judge went on to vacate the subject NOV.

OSMRE subsequently appealed the ruling to the Interior Board of Land Appeals where it currently resides.