

# OSM Oversight Issues

**C**hristopher B. (Kip) Power, Dinsmore & Shohl, presented **OSM Oversight Issues** to the West Virginia Mining Symposium.

The Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) is a comprehensive environmental statute with the goals of protecting the environment during mining and restoring land to a condition capable of supporting the same or higher uses. The basic premise is that due to the diversity in terrain, biologic, and other physical conditions, primary responsibility for regulating coal mining should rest with the states. "Primary governmental responsibility" for regulating environmental aspects of coal mining "should rest with the states," 30 USC para 1201(f), the purpose of SMCRA is to "assist the states in developing and implementing" a mine regulatory program, 30 USC para 1202(g). It should be either state-regulation or federal regulation, but not both simultaneously. *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess* (Third Circuit 2002); *Sierra Club v. Secretary of Interior, et al.* (DC ND 10/22-13). "In contrast to other "cooperative federalism" statutes, SMCRA exhibits extraordinary deference to the states." *Bragg v. WV Coal Association* (Fourth Circuit 2001).

SMCRA provides the minimum national standards. State laws must be "in accord with" SMCRA and regulations and must be "no less effective than" OSM regulations. Reviewing proposed state programs also involves EPA, Secretary of Agriculture, and other federal agencies. The Interior Department must hold at least one public hearing; obtain the "written concurrence" of EPA as to the Air and Water Quality Standards. Approval or rejection of a proposed state program is subject to review in federal court. With regard to amendments to a state program, OSM approval must be obtained (federal rulemaking).

There are a number of basic elements in federal oversight. The Office of Surface Mining Reclamation and Enforcement (OSM) makes regular and special inspections of mine sites in primacy states and files state regulatory authority (SRA). In response to complaints or focused on periodic issue-based reviews, performance is summarized in an annual oversight report. The Interior Secretary has residual authority to take over implementation of the state program, substitute a federal program, or take enforcement action directly.

Other basic elements of federal oversight include immediate cessation order. This is where there is imminent danger to the health or safety of

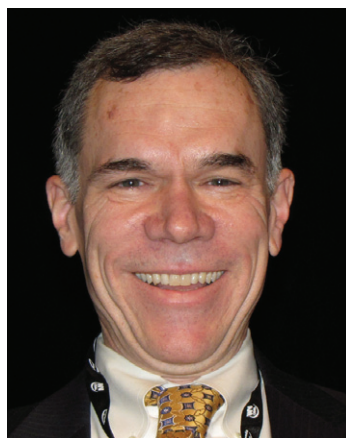
the public or conditions presenting significant, imminent environmental harm. "Ten-Day Notice" is for situations not requiring cessation orders; for complaints, if facts as alleged would constitute a violation, OSM is required to find that it has "reason to believe that a violation, condition, or practice exists" that warrants an inspection. SRA must take appropriate action or show good cause for failure to take such action. If the OSM Field Office finds that SRA has not taken appropriate action or shown good cause, SRA may request a formal review (OSM Deputy Director). Any person who may be adversely affected may seek a review. If the OSM Field Office finds that SRA has taken appropriate action or shown good cause, any person who may be adversely affected may request informal review (OSM Deputy Director). An adverse decision by the Deputy Director may be appealed to the Interior Office of Hearings and Appeals. There is no prejudice to right to bring a citizen's suit under SMCRA Paragraph 520.

On June 11, 2009, EPA, OSM, and the Army Corps of Engineers completed a Memorandum of Understanding implementing the "Interagency Action Plan on Appalachian Surface Coal Mining." This indicated that OSM would plan to "reevaluate" its oversight of state permitting, state enforcement, and regulatory activities under SMCRA. OSM will "remove impediments" to its ability to require correction of permit defects in SMCRA primacy states.

On November 18, 2009, an OSM briefing paper was issued entitled "Oversight Improvement Actions." This described more oversight inspections, more independent inspections (current OSM regulations require joint OSM/state inspections where practicable, and the states so request. The use of the Ten-Day Notice procedure to correct permit defects (note: questionable legal authority) was included.

What was the purpose of the OSM 2009 proposals? There is no record of inadequate state enforcement of approved SMCRA programs. There was a reduction in the total number of mines of 50 percent since 1990. There is a reduction in the number of citizen complaints under SMCRA of 90 percent. So the oversight proposals based on June 2009 MOU are based on what?

The case of *NMA v. Jackson* (DC District of Columbia) was filed July 2010. This challenged the legality of the June 2009 MOU and EPA programs and memoranda affecting unprecedented expansion of the Clean Water Act Paragraph 404



**Christopher B. Power**

Permitting Requirements and Review Procedures. On July 3, 2012, the Memorandum Opinion and Order was issued striking down the final guidance, and confirming the limited role for EPA in SMCRA matters. Appeals were filed by EPA, the Corps of Engineers, Sierra Club et al, and the oral argument is scheduled for February 10, 2014. There were other oversight cases. *Sierra Club et al. v. Secretary of Interior et al.* (DC North Dakota) challenged implementation of North Dakota mining program that were approved more than 30 years ago. On October 22, 2013, an order granted summary judgment to the defendants. It held that long-standing general presumption against judicial review of agency decisions to decline to take enforcement action applies to the Secretary of Interior's enforcement powers under SMCRA. The Secretary or OSM Director will only replace the state program in extremely serious situations, yet the same level of discretion was determined whether to substitute federal enforcement of the state program, whether to provide for implementation of a federal program, and whether OSM has "reason to believe" that a violation of the state program exists.

*Montana Environmental Information Center et al v. Montana DEQ* alleged improper implementation of CHIA provisions of approved Montana program under SMCRA based on challenges to interpretation of "material damage" and failure to use water quality standards as thresholds. SMCRA Citizens Suit Provision allows adversely affected person to file civil action against state regulatory authority "...to the extent permitted by the 11th Amendment to the Constitution" where there is an alleged failure to perform any mandatory act or duty under SMCRA. On January 22, 2013, the Court granted the defendants motion to dismiss. It was held that the 11th Amendment's sovereign immunity bars the suit. Any duties involved in making a "material damage" determination are discretionary, not mandatory. The Plaintiffs' claim is not right (no currently pend-

ing permit application or issuance involving the issues). This is on appeal to the 9th Circuit and is fully briefed as of December 30, 2013.

Power turned to recent OSM oversight matters with regard to WV DEP. With regard to three-year "not started permits, on June 8, 2012 the OSM determination was that WV DEP failed to show good cause for not enforcing, revoking the permit. This was based on alleged failure to make "notice" policy a part of the approved program and based on the absence of authority for retroactive extensions of non-started permits.

On August 20, 2013, the OSM Deputy Director overturned the Charleston Field Office and finds that WV DEP showed good cause for failing to take enforcement action. This affirms the OSM position that permitting issues are subject to citizen complaint and OSM oversight. "The scope of review under the deferential arbitrary and capricious standard is narrow and OSM should not substitute its judgment for that of WV DEP." It relied on the general juris prudence disfavoring "automatic forfeitures" and upheld the practice of giving notice and opportunity to respond.

Federal citizen suits challenging OSM determination include *Coal River Mountain Watch v. Sec. of the Interior* (DC District Court), answer due January 31, 2014, and *Coal River Mountain Watch v Sec. of the Interior* (Southern District West Virginia Court), answer due January 31, 2014. Both of these cases were filed on October 21, 2013. They challenge the Deputy Director's determination as a "de facto Rule" that was required to go through APA rulemaking process. It is unclear if a national or "state specific" rule (though OSM allegedly sent the determination to field offices for reference). The alleged impact on the ability to file unsuitability petitions and allege 143 active permits on which mining has not commenced are illegally still in effect per WV DEP policy and OSM illegal "rule."

With regard to Selenium/water quality standard complaints, a group of five letters from environmental groups are directed towards active mining operations and "active permits." There are alleged in-stream concentrations of Selenium downstream from mining sites that exceed WV DEP water quality standards and therefore violate the state program, but are not being enforced. None of the corresponding NPDES permits include Selenium water-quality-based effluent limits. One additional letter is directed towards bond forfeiting site, "Keenan Trucking." This is the same basic allegations as to Selenium violations in the receiving

stream and the remedy would be WV DEP issuance of the violation to itself. The WV DEP response of April 22, 2013 says there is no reason to believe that a violation exists because "(a) there are no Selenium effluent limits in the NPDES permits, so the mining regulation requiring compliance with effluent limits does not apply; and (b) the WV Code 22-11-6 (2012) NPDES permit shield provision precludes an allegation of violation where Selenium is not identified within the permit. The complainants were advised of their right to appeal WV DEP's refusal to undertake an inspection or issue a violation to the West Virginia Surface Mine Board, but chose not to do so. The Keenan Trucking site is no longer a "surface mining operation" and therefore may not be subject to a citizen request for inspection per WV Code 22-3-15.

OSM has made a number of decisions. On July 2, 2013, Active Permits, OSM found WV DEP had taken "appropriate action" to address the violations, by requiring operators to determine if they are discharging Selenium, and if so requiring that NPDES permits be modified to include effluent limits. The finding is "predicated on WV DEP following through" on its commitment in a timely fashion. OSM specifically rejects WV DEP's position that the state permit shield statute precluding a finding of a possible violation, opting to rely on EPA interpretations of federal permit and shield provision, and noting that two federal citizen's suits are addressing this issue. OSM rejects WV DEP's position that OSM has no authority to interpret and apply the Water Pollution Control Act requirements, because NPDES permit writer's duties overlap with CHIA writers, and OSM has provided federal funding to WV DEP on that basis.

OSM rejects WV DEP position that four-day sampling is required to indicate a possible violation of the five ug/l Selenium chronic aquatic life standard. OSM reminds WV DEP that it agreed to "consider" water quality standards when making material damage determinations, as part of the revised "material damage" definition approved by OSM in 2008. On July 23, 2013, in Keenan Trucking, OSM found WV DEP had not taken appropriate action to cause the violation to be addressed. It rejected WV DEP's position that the site was no longer a "surface mining operation" because no proof was submitted showing that the site was reclaimed to the required standards, e.g. showing any post-mining discharges complied with water quality standards. OSM cited the IBLA decision that "expressly rejected the notion that





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enforcement obligations of OSM or a state agency ends with bond forfeiture." WV DEP has filed at least an initial request for informal review of the July 2, 2013 decision. It is unclear if WV DEP has filed an informal review request or otherwise challenged the July 23, 2013 decision re: Keenan Trucking.

On June 23, 2013, the OSM determination was made on the Part 733

Petition. The petition was filed by many of the same groups that filed citizen complaints leading to the recent Ten-Day Notices. OSM completed the first step in the review process with verification of the allegations. It denied the request by the petitioners to withdraw approval of the parts of the WV DEP program and immediately substituted federal enforcement. It found that 14 of the

19 allegations "do not warrant further evaluation." The five allegations that will be subject to further processing are: failure to address potential flooding risks from mine permitting; failure to issue SMCRA violations for NPDES violations; failure to regulate Selenium pollution; failure to properly define the impacted areas in CHIA studies; and failure to properly implement soil removal and reclamation

measures. The next steps are formal evaluation by OSM of the five allegations determined to merit further consideration. If a determination is made that WV DEP is not effectively administering the state program, written notice must be provided to WV DEP specifying what areas are deemed to be deficient, the basis for those conclusions, and a timeline for remedial actions. WV DEP may request an

informal conference within 15 days if OSM continues to believe there is inadequate implementation of the state program, that provides public notice and conducts a public hearing within 30 days after any informal conference, to receive testimony, written presentations, and comments.

**For further information, e-mail [christopher.power@dinsmore.com](mailto:christopher.power@dinsmore.com).**



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