PEER *White Paper*

A Publication of Public Employees for Environmental Responsibility

Undermining the Public Trust

An Appraisal of the Office of Surface Mining by its Staff

— Part One —

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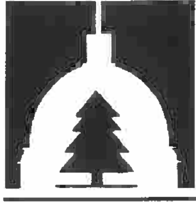

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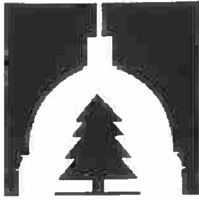


Introduction

"Undermining the Public Trust" is the first in a series of reports prepared by current Office of Surface Mining (OSM) employees. These employees have written and reviewed this paper in order to communicate their concerns about current OSM practices which allow environmental degradation, the disruption of the living environment of coalfield citizens, and massive environmental remediation and clean-up costs. The employees authoring this paper hope that it will serve as a foundation for reform efforts at OSM.

The authors of this report have chosen to remain anonymous in order to avoid retaliation from OSM managers who will not countenance employees raising concerns about agency policies. The authors welcome Director Uram's pledges to "not tolerate reprisals against employees" and view the reception of this report by OSM managers as the litmus test to measure how far change in OSM management culture has progressed. The employees who worked on this report have chosen to release it through Public Employees for Environmental Responsibility (PEER) a non-profit organization with a proven track record of protecting and enhancing the free speech rights of public employees.

The Office of Surface Mining was created to protect the environment and local communities from the adverse effects of surface mining operations. Although significant progress has been made towards this end, there is much room for improvement. "Undermining the Public Trust" is a critique of OSM policies.

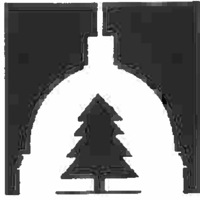
The Office of Surface Mining Reclamation and Enforcement was established in the Department of Interior by the Surface Mining Control and Reclamation Act in 1977 [30 USC 1201 *et seq.*]. OSM's primary goal is to operate a nationwide program to protect the environment from the adverse effects of coal mining; it regulates the environmental aspects of coal mining by itself in some areas and in partnership with state governments in others. By enforcing minimum standards, OSM establishes an equal competitive environment for mining companies in various states.

Unfortunately, virtually every independent review[1] of OSM and its operations has found OSM to be ineffective to some degree in carrying out this mission. Surface Mining Control and Reclamation Act regulations are not adequately enforced. This insufficient enforcement stems from a number of causes—inadequate anticipation of the environmental impacts of mining operations, bypassing of compliance with mining plans and an adjudication system that is overly cumbersome. As a result, toxins are allowed to escape into the environment from mine sites, and the land is not properly restored to its pre-mining condition.

These problems have not occurred without comment. OSM's inspectors, technical experts, and other front-line staff have attempted time and again to raise their concerns internally about the agency's rules, policies and practices. All such efforts have been squelched by middle and top agency managers. Many OSM employees hope that Vice-President Al Gore's National Performance Review will provide added incentive to review agency operations and increase the effectiveness of government programs.

Notes

[1] Including investigations by Congressional committees, the General Accounting Office, the Office of the Inspector General, and internal Department of Interior task forces.



Executive Summary

Recommendations for Reform

The Department of Interior's Office of Surface Mining (OSM) oversees surface mining operations in partnership with state governments. This shared oversight, an overburdened adjudicatory system and inadequate regulations have contributed to significant gaps in the enforcement of mining laws and regulations. Environmental degradation and costly taxpayer-funded clean-up operations have resulted from these deficiencies. In this report, OSM employees have examined the agency's policies in four areas. After careful consideration, they have formulated recommendations to reform the agency.

Mining Permit Issuance in the East

Problem: In issuing permits to mining operations in the eastern United States, the states routinely fail to perform adequate analyses of environmental impacts. Because the impacts are not evaluated, the proper mitigation requirements are never written into the permit. The lack of proper mitigation requirements causes unnecessary environmental damage and clean-up costs. OSM's failed oversight of state permitting has allowed this problem to become commonplace.

Recommendation: OSM's oversight of state permitting procedures needs a drastic overhaul. Proper environmental impact analyses must be conducted along with devising proper measures to mitigate any environmental harm. These steps must be taken before a permit is issued.

State Program Deficiencies

Problem: Mining regulations allow states to take on primary responsibility for enforcing mining laws if the state programs comply with the Surface Mining Control and Reclamation Act. It is the responsibility of OSM to evaluate the state programs and ensure that when OSM changes its rules or regulations, state programs comply with these changes. OSM is not doing an adequate job ensuring that state programs conform to federal rules. States are routinely allowed to lapse behind in bringing their rules into compliance.

Recommendation: OSM must exert greater pressure on state agencies to conform to federal regulations. OSM needs both stricter oversight policies and budget funds to take over non-compliant state enforcement programs until the states can correct their deficiencies.

Administrative Hearings

Problem: OSM's enforcement program is compromised by an administrative hearings process prone to lengthy delays. The administrative appeal mechanism is used by operators to postpone or kill OSM enforcement actions.

Recommendation: The Department of Interior needs to allocate more funds to the adjudicatory system to solve the problems of costly delays and blockage of enforcement actions. In addition, rulemaking efforts could tighten up the appeals process. Department of Interior leadership must curtail the tendency of Administrative Law Judges to substitute equity considerations for legal requirements.

Revegetation and Bond Release

Problem: OSM fails to implement requirements for mine operators to restore mined lands to previous productivity levels. Mine operators are getting their bonds back despite failure to meet revegetation and land restoration requirements.

Recommendation: OSM should rewrite bond release and revegetation rules to meet the requirements of the Surface Mining Control and Reclamation Act and enforce those regulations. It must set a good example for the states by reforming its own programs.

Conclusion

The recommendations suggested in this white paper are procedural and structural changes. Implementation of these reforms will enable OSM employees to be more effective and serve the public to the best of their abilities. Without addressing the problems detailed in this report, OSM will continue to leave a legacy of environmental degradation and massive clean-up bills to the American public.

Anonymity of the Authors

The authors of "Undermining the Public Trust" have chosen to remain anonymous in order to avoid reprisals from OSM managers who continue to demonstrate their intolerance for internal dissent. All inquiries concerning this report should be directed to PEER.

Great care has been taken to ensure the factual accuracy of this report. "Undermining the Public Trust" has been peer reviewed by other employees in OSM and the Department of Interior, as well as experts in the private sector.

About PEER

PEER is a non-profit association of government resource managers, scientists and others committed to upholding the public trust through responsible management of the nation's environment and natural resources. PEER is proud to have assisted the OSM employees who have painstakingly drafted this report by serving as the intermediary in its distribution.

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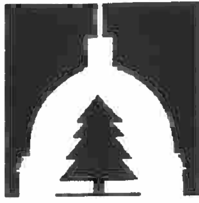


Chapter I

Permitting in the East—Lost Opportunities to Mitigate Environmental Harm

This chapter will examine OSM's negligent permitting practices. OSM is allowing eastern states to issue deficient permits—without adequate analysis of environmental impacts and incorporation of required mitigation measures.

In enacting the Surface Mining Control and Reclamation Act (SMCRA), Congress recognized that sufficient environmental protection is *not* achieved merely by setting performance standards. These standards detail what an operator is required to accomplish, during and after mining, with regards to OSM regulations. However, environmental interactions resulting from mining operations are so complex that they cannot be controlled exclusively by performance standards. Any action with impacts as great as a mining operation must be carefully evaluated *in advance* to identify potential impacts, and the operation must be carefully planned to avoid them. Without proper prior planning of mining operations and mitigation measures, unforeseen damage—often permanent—will result.

Specifically, regulatory authorities under SMCRA are required to exercise *prior restraint*: mining operations with unacceptable or irremediable impacts must be prohibited; it is not sufficient that the operations merely be cited, after the fact, for being in violation of performance standards.

Under SMCRA, the function of permit application and permit issuance is to anticipate potential harmful impacts of mining operations and mandate measures to reduce or avoid those impacts. An approved permit should not be merely a "permission" to mine, but rather should be a precise blueprint showing how the mining operation must be conducted.

The eastern states have a long history of coal mining, far pre-dating this concept of in-depth technical analysis prior to conducting mining operations. Historically, the industry in these eastern states developed from small "mom-and-pop" companies, or small partnerships, that had no technical expertise and no technical staff. There was no technical analysis required by the early state regulatory programs. Over the years, the makeup of the eastern coal industry has evolved to include larger and more sophisticated companies. Nevertheless, both the industry and the state regulatory authorities retain a historically-based tendency to neglect the prior planning and technical analysis required by SMCRA. OSM, in conducting "oversight" in these states, has colluded in these deficiencies.

The following description of permitting problems in eastern states is specifically directed at Ohio—the state with which the authors are most familiar. The reader should understand, however, that similar problems exist in most of the eastern states. Some OSM staff are reporting that similar problems are also beginning to occur in western states such as Colorado, despite an industry composed largely of large corporate operators that do have technical expertise.

Ohio Mining Operations Are Not Planned in Advance

Ohio does not require permit applications to provide a mining plan. There is no pit-by-pit mining sequence plan to address how and where the mining is done. In addition, there is no detailed plan for spoil handling—how to dispose of the waste material from mining. This

causes significant problems once the operation is underway.

Any review of Ohio's permitting files will show many instances where sediment control plans had to be revised because backfilled and graded areas would not drain to the sediment ponds planned and built for those areas. In these instances, Ohio inevitably approves "alternate sediment controls" for those areas, usually silt fences or hay bales, which provide less environmental protection.

Similarly, final land shape (post-mining land contour--which is important to prevent landslides and erosion, and to protect streams) is seldom planned in advance, and never becomes a question until the operator applies for Phase I bond release[1]. By the time the operator is applying for bond release, Ohio views it as too expensive to make the operator go in and completely rework the final contour, so Ohio invariably approves what the operation happens to produce. The landowner never knows in advance what the final shape of his land will be.

One of Ohio's most experienced inspectors, having the temerity to question one operator's spoil handling, was nearly fired and was reassigned to different operations. Because there was no pit-by-pit mining sequence and no detailed spoil-handling plan, the operator did not have to change the spoil handling procedures. But under SMCRA, this is precisely the sort of review the regulatory authority needs to perform in order to ensure that mining operations are within the law. The lack of advance planning and approval prevents inspectors from adequately regulating the mining process and is thus a huge hindrance to law enforcement.

Another problem related to lack of planning is that operators do not calculate their spoil volume or "swell factor." This results in the creation of unplanned and unapproved fills, or planned fills that are never constructed or only partly constructed. If the "spoils" or leftover material are improperly handled, environmental damage can result. One such problem is that considerable land area is being needlessly disrupted because of poor spoil handling. A more alarming problem is acid mine drainage—rocks near the coal being mined have acidic properties, and when exposed to air, these rocks produce sulfuric acid. Forests, cropland and stream channels can be harmed by acid mine drainage and other problems associated with mining.

Several years ago, Ohio's permitting data showed that each year, Ohio was approving eight times as many permit revisions as new permits, indicating that each permit was being revised many times each year, most due to conflicts between the actual operation and what was proposed in the application. This high rate of permit revisions further indicates the lack of advance planning for Ohio mining operations.

Ohio Permits Merely Parrot Performance Standards And Lack Site-Specific Plans

Federal rules require permit applications to contain specific engineering designs (e.g. for sediment ponds). Except for these specific design requirements, Ohio permits are all generic re-statements of the performance standards. This is problematic, because each mining site has unique geology, hydrology, and other characteristics that must be considered in planning an environmentally acceptable mining operation. It is for this reason that the law requires site-specific plans.

Ohio not only allows such generic restatements of the performance standards, but also actually requires them: Ohio sends application revision letters that say "Revise Response No. XX to read: 'XXXXXXXXXXX.'" Most parts of Ohio permits read exactly the same as every other permit; they are generic, not specific to the mine site. In effect, Ohio does not believe in the "prior restraint" concept discussed above. Instead, Ohio permits serve only to ensure that the operator is aware of the performance standards.

In fact, both Ohio and coal companies operating in the state see permits only as "licenses." In their view, once an operator gets a permit, the operator can go out and do anything, as long as the performance standards are followed; if they are not, the operator is issued a violation, but only after the environmental damage has occurred. No prior evaluation is made of the operator's plan to ensure that the operation can be conducted in

accordance with the performance standards, or to make sure the operation is conducted least damaging way. As noted in the introduction, this is not sufficient for the implementation of SMCRA.

OSM's oversight of Ohio's permitting for the last twelve years has endorsed this deficient permitting program. OSM's review has been largely the responsibility of OSM's Pittsburgh Office. In effect, the Pittsburgh Office has only reviewed "administrative completeness" (*i.e.*, whether all components of the application have been addressed), not the content or technical adequacy of the permit applications or Ohio's analysis/review of the applications.

Failure to Study Fish and Wildlife Impacts

The Ohio regulatory authority does not require any study of fish and wildlife habitats or usage before or after mining. This lack of study undermines any regulatory ability to determine whether or not fish and wildlife have been protected.

All permits are required to contain a fish and wildlife protection and enhancement plan. The Ohio regulatory authority routinely ignores the recommendations of the Ohio Division of Wildlife regarding these plans. If any fish and wildlife enhancements are included in the permit (e.g. a reconstructed stream is required to have meanders and riffle-pool sequences), those requirements are invariably deleted from the permit by subsequent revision.

The only fish and wildlife enhancement that ever gets implemented in the field is to leave sediment ponds as permanent impoundments. This spares the operator the expense of reclaiming them.

Approval of "As Built" Engineering in Permit Revisions

As noted above, the only specifics contained in Ohio permits are engineering designs. But, Ohio operators usually ignore even these specifics, and build whatever is easiest, then revise the permit to substitute the "as built" design for the originally required design. This circumvents the law. SMCRA specifically calls for engineering designs to be approved prior to construction.

As noted above, an example of this problem can be found with fish and wildlife enhancement plans. Occasionally, a plan will require a stream that is mined through to be reconstructed with meanders and riffle-pool sequences. Invariably, the operator simply constructs an arrow-straight, flat-bottomed diversion channel, which has no value for wildlife, but is much cheaper and easier to construct. Then, the operator applies for a permit revision to substitute the straight channel design for the original design. Since these permit revisions are considered "minor" or "nonsignificant," they are not subject to public notice or comment or to review by other agencies (e.g., the Ohio Division of Wildlife). Ohio rarely if ever disapproves such revisions.

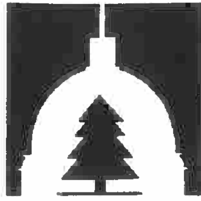
Recommendations for Reform

The new leadership at OSM needs to closely scrutinize and revamp the oversight of state permitting procedures. Compliance with many of the most critical areas of SMCRA can be ensured at the permitting stage by setting up the plans and standards to which the operator must adhere.

In addition, better congressional oversight over the enforcement of SMCRA is needed. After seventeen years of SMCRA regulation, OSM and the state agencies have developed a dismal track record. Congress may opt to use increased independent reviews (by the General Accounting Office) to extract better performance from OSM during the appropriations process.

Notes

[1] When an operator gets a mining permit, it posts a bond as an insurance policy that it will do the required reclamation. After reshaping the land and doing drainage work, the operator applies for Phase I bond release, in which it can get back fifty to sixty percent of the bond they posted—*if* it has done the proper restoration.



Chapter II

State Program Deficiencies

Introduction

This chapter will highlight how OSM has allowed primacy state regulatory programs (under which states take primary responsibility for enforcing mining laws) to remain deficient for extended periods of time. OSM rules and procedures are inadequate to ensure that state rules and other program components remain in compliance with new or revised federal requirements.

The Surface Mining Control and Reclamation Act (SMCRA) allows state governments to assume primary regulatory responsibility for surface mining activities, but only if the particular state's laws and rules are in accordance with SMCRA and pertinent federal rules.

This evaluation was initially made during the approval of the state programs in the early 1980's. However, when OSM revises its rules to add more stringent requirements, the states must correspondingly revise their rules, or those state programs become deficient. The purpose is to modify state programs as quickly as possible, so that the deficient program is in effect for as short a time as possible.

The mechanisms to notify states that their programs are deficient, and for the states to modify their programs, are contained in 30 CFR 732.17. The procedure is as follows: 1) OSM's Director notifies the state about the deficiency; 2) the state then has sixty days to submit a proposed program amendment; then, 3) if state rulemaking procedures require more than sixty days, the state must submit a timetable for when it can propose a program amendment.

State Delays in Responding to Deficient Program Notifications

States seldom respond to a deficiency notification by submitting a proposed program amendment within the mandatory sixty days. This is understandable, given the complexity of state rulemaking procedures. However, states also seldom even submit a timetable within the sixty days for when they will complete the amendment.

Even in cases when a timetable is submitted, states seldom follow it. They ignore the timetable, and/or continually ask OSM for "extensions." The result is that state program deficiencies remain outstanding for years. Some states have programs that have been deficient since as far back as 1985 and 1986.

Another manifestation of this problem exists when OSM approves certain state rules proposed by the state in order to eliminate a deficiency in the state program. The state may follow the requirement to propose the rules, but be reluctant to actually implement them. So the state delays putting the new rules into effect, sometimes for years (e.g., Oklahoma, Louisiana, and Arkansas). Despite OSM's approval, the approved rules are not legally effective in that state until the state promulgates them.

Under OSM procedures, the Field Offices are responsible for keeping pressure on the states under their jurisdiction to submit required program amendments. However, there is great variation among the Field Office Directors regarding their willingness to confront the states and apply pressure for them to bring their programs up to speed. OSM has

been reluctant to take any effective enforcement actions against these recalcitrant states; the states are well aware of this and take full advantage of it.

That the states are intentionally circumventing SMCRA can be concluded from the fact that the states have quickly submitted and promulgated program amendments to incorporate more lax standards in those cases where OSM's rules have been made *less* stringent, while delaying action on more stringent provisions.

Legal Effect of State Rule Promulgation

OSM rules provide that no state rule shall be effective until it is approved by OSM as a program amendment. However, OSM has not required the states to incorporate such a provision into their own programs. As a result, under state laws, once the state has properly promulgated a rule, the state *must* enforce it, regardless of whether OSM has approved it.

For example, in 1986, Wyoming promulgated revised state rules regarding contemporaneous reclamation. OSM never approved those rules. Nevertheless, Wyoming continues to enforce them; in fact, under its own laws Wyoming *must* enforce them.

This lack of control on the legal effectiveness of state rules means that a state could promulgate a clearly deficient rule. Even without OSM approval, that rule would be legally enforceable by the state. That rule is likely to be in effect for an extended period, until OSM either supersedes the rule [under 30 CFR 730.11] or forces the state to revise it. To rectify this situation, OSM needs to require that each state incorporate a provision in its program that state laws and rules cannot be effective until approved by OSM.

This problem recently resulted in the filing of a lawsuit by the coal industry against West Virginia because the state was enforcing rules that had not been approved by OSM, but were legally enforceable by the state.

Problems in Approved State Programs and Subsequent Amendments

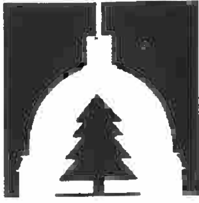
When OSM was originally reviewing and approving proposed state programs in the early 1980's, the agency faced an incredible workload. Not surprisingly, some mistakes were made—at least a few state program provisions were approved which are clearly deficient. Unfortunately, OSM has been unwilling to revisit these original program mistakes and require program revisions, even though they do not comply with SMCRA.

In fact, OSM has been unwilling to ever admit that it approved a state provision improvidently. The agency's attitude has been that once we have approved a state provision, we cannot require the state to change it. Both of these problems continually weaken the regulatory program as additional states propose to duplicate the deficient provision, and OSM, having told one state it is okay, is sometimes unable to disapprove the new proposals.

Recommendations for Reform

OSM does not do a good job supervising state programs and allows the states to be slow in responding to OSM deficiency notices. OSM supervision is more form than substance. Part of the problem is that OSM has little power to force states into compliance. It can take the state regulatory power away from the state, but OSM does not have readily available resources to pick up the slack in enforcement.

Methods to hold state agencies accountable need to be developed. If OSM could have a budget that would allow taking over the worst offenders, OSM would have an ability to secure better performance from state programs. This would provide motivation for state employees to respond to OSM deficiency notices. Another option may be the strict nationwide enforcement of deadlines by which all states must comply, or incur financial penalties (loss of grant funds). Currently, there is significant variance from state to state in OSM's enforcement of deadlines.



Chapter III

Administrative Hearings: Holding the OSM Enforcement Program Captive

This chapter demonstrates how OSM's enforcement program is being compromised by the inadequacies of the required administrative hearing process. All OSM enforcement actions and civil penalties are subject to administrative appeal before the Office of Hearing and Appeals (OHA), where they are initially heard by Administrative Law Judges (ALJ's). Appeals of ALJ decisions are heard by the Interior Board of Land Appeals (IBLA). OSM's enforcement program is being undercut by OHA. Particular problems include: (1) lack of timeliness; (2) erroneous interpretations of law; and, (3) politically-motivated decisions and other decisions based on personal agendas.

Lack of Timeliness

Nearly all of OSM's enforcement actions in the Western states are being appealed to OHA. Currently, it is taking an average of two years to get a final decision on these appeals.

This delay in obtaining decisions creates disruption and uncertainly in the enforcement program. If inspectors know that a given violation is under appeal, they are uncertain about citing it on other mine sites until they know what OHA's decision will be. If "temporary relief" is granted, the operator may not have to take any remedial action stemming from the enforcement citation for up to two years, until the final decision from OHA is issued. With many such appeals outstanding, it quickly becomes difficult to know what acts or omissions are violations.

For these reasons, it is usually to the operator's advantage to file appeals. No civil penalty need be paid until a decision is rendered[1], and no interest accumulates; hence, for purely financial reasons, the operator is likely to file appeals and delay decisions. Operators are very adept at manipulating the system to delay appeals and decisions as much as possible. One indication of this is the fact that, in the few cases where it is to their advantage to get a quick ruling (e.g., when the release of bond money is in question), they are able to get very quick rulings.

OHA is not following its own rules and procedures in the docketing of appeals. Clearly deficient petitions (e.g., petitions for penalty hearings that are not accompanied by the required escrow payment) are nonetheless docketed as appeals. OHA thus forces OSM and the Office of the Solicitor to invest needless time and resources into filing to dismiss these faulty appeals. This further overloads the system and slows down the process.

Temporary Relief

Under SMCRA 525 and OHA's rules at 43 CFR 4.1260 *et. seq.*, the operator can be granted "temporary relief" which means that the permittee need not cease operations (if the company has been given a cessation order by OSM inspectors), or undertake any remedial measures to abate the violation, until a final decision on the appeal is rendered. However, temporary relief is supposed to be granted only when a two-prong test is met: (1) the grant of temporary relief will not adversely affect the public or cause significant environmental harm; and, (2) the appellant must show a likelihood of prevailing in the final decision.

1. Incorrect Interpretation of Law

In the case of Powderhorn Coal Co., N93-020-370-1, Docket Nos. DV 93-7-R and IBLA 93-458, both the ALJ and the IBLA granted temporary relief in violation of the two-prong test.

The ALJ granted temporary relief despite finding, on the record and noted in his decision, that the operator was unlikely to prevail upon the merits of the case in the final decision. In fact, the final decision found the enforcement action to be valid and found virtually no evidence or other factors in the operator's favor.

The IBLA, in its decision on OSM's appeal, totally destroyed the two-prong test. The IBLA stated that neither the statute nor the regulations defined "substantial likelihood" of eventually prevailing on the merits of the appeal; therefore, the IBLA decided that the standard would be a "balance of hardship to the parties from not granting temporary relief." Further, the IBLA decided that if such a balance tips decidedly in favor of the operator, it is only necessary that the appellant raise legitimate legal questions, effectively eliminating the need to show a substantial likelihood of prevailing in the final decision. This directly violates Congressional intent in creating the second of the two prongs in the two-prong test.

This appeal decision by the IBLA has created a very bad legal precedent: the decision has already been used as the basis for upholding temporary relief in yet another appeal (Heatherly Mining, Docket No. IBLA 94-411).

2. ALJ's Rule Prematurely on the Fact of the Violation

In at least one case (Lion Coal Co., C92-010-108-1, Docket No DV 93-1-R), the ALJ issued a final decision on the fact of the violation during the temporary relief hearing, despite the fact that the hearing was held only a few days after the cessation order was issued. The Department of Interior Solicitor did not have time to adequately prepare to defend the validity of the cessation order.

Erroneous Interpretation of Law and Decisions Based on Personal Agendas

1. Refusal to Sustain Cessation Orders (CO's)

In both the Lion Coal (C92-010-108-1, Docket No. DV 93-1-R) and White Oak Mining & Construction (C93-020-244-1, Docket No. DV 94-1-R) cases, the ALJ's ruled that operating under permits that were not properly approved does not constitute an imminent harm to the environment, and hence cannot be addressed by CO's. This erroneous interpretation ignores the regulatory definition of imminent harm. OSM promulgated that regulatory definition precisely because of earlier misinterpretations of SMCRA by OHA.

2. Decisions Based on Personal Ideas of "Fairness" Rather than on the Law

In the above two cases, the ALJ's stated on the record that they were not willing to sustain CO's that shut down mine sites and put miners temporarily out of work. In so doing, they negate one of the most effective enforcement powers Congress established in SMCRA. They apparently do so based on their own ideas of fairness and their own ideas of the correct balance between economic interests and environmental protection, ignoring the will of Congress.

3. Personal Agendas

One ALJ has a personal grievance with the Department of Interior, and blatantly runs his hearing in favor of the operator. The ALJ makes objections for the plaintiff and inequitably applies rules of evidence to the favor of the operator.

Recommendations for Reform

The Department of the Interior desperately needs more funds and resources for its adjudicatory system. The system is simply overburdened. There are not enough administrative law judges, stenographers and clerks to handle the workload; even travel funds are a problem. This lack of resources applies to both OHA and the Department's Solicitors. The judges and solicitors have to

combine hearings to save travel expenses, often causing additional delays. So, if a citation is appealed, it may take years before the operator is finally forced to stop a harmful activity.

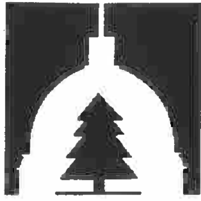
One recent OSM budget proposal suggests that OSM intends to provide OHA with funds for one more ALJ. This is a step in the right direction, but only a small step. Much more is needed, for both OHA and for the Office of the Solicitor.

ALJ's are taking too many liberties in interpreting the law, with many decisions being based on "equity" considerations rather than on the law. Secretary Babbitt needs to ensure that, as Congress intended, SMCRA is narrowly construed.

In addition, OSM and OHA need to undertake a rulemaking effort to tighten up the appeals process. Currently, operators do not have to state their reason for filing an appeal, until it comes before the judge. This means an operator can avoid taking remedial action, for no stated reason, for months or years. Further, it would be helpful for the Interior Board of Land Appeals to be able to decide whether or not an ALJ decision merits a second-level appeal. Currently, there is automatic acceptance of all second-level appeals—further overburdening the system.

Notes

[1] if only the fact of the violation is appealed, not the civil penalty itself.



Chapter IV

Revegetation and Bond Release: The Failure to Restore Land after Mining

This chapter will examine OSM's failure to adequately implement SMCRA requirements to restore mined lands to previous productivity levels. Revegetation success standards and bond release requirements are the primary means required under SMCRA to ensure the restoration of the productivity of mined lands.

Revegetation Success Standards and Measurement Methodologies

Revegetation is crucial to restoring land after mining because it provides protection against erosion and makes the land useful again.

Under 30 CFR 816.116(a)(1), all regulatory programs (federal and state) are required to include revegetation success standards and revegetation sampling techniques. The success standards provide standards for the approval or disapproval of permit applications and provide objective criteria for the release of performance bonds. Sampling techniques are used to measure whether or not success standards have been met.

1. Federal Programs

Virtually no federal regulatory program has been modified to include success standards and sampling techniques. For example, the federal program for California (30 CFR 905.816(c)) and the proposed federal program for Arizona (30 CFR 903.816(b), proposed 8/10/94, 59 FR 41208) incorporate only the general statement that success standards shall include criteria representative of unmined land in the area being reclaimed and that sampling techniques use a 90-percent statistical confidence. Under these federal programs, specific success standards and specific sampling techniques are established for each individual permit application. This system exposes the determination of success standards and measurement techniques to the politically sensitive "negotiation" process of permit approval, rather than having the standards and measurement techniques determined by purely technical considerations.

Further, the federal programs for other states such as Georgia and Washington (30 CFR 910.816, 947.816) do not contain any reference at all to revegetation success standards or measurement methodologies. OSM uses the same permit-approval-negotiation process to establish success standards in those states as well.

The one federal program that does include revegetation success standards is the Tennessee program; however, even it does not include statistically valid sampling techniques. Even though OSM runs the Tennessee program—which means that it should be better than state primacy programs—it was not until recently that the Tennessee federal program included all required success standards. And it is not clear whether those success standards were properly promulgated with public comment.

As a result of this lack of objective success standards in the Tennessee and other federal programs, approval of federal permits is based on subjective "professional opinions" of the applicant's revegetation plan by OSM staff (who may not be biologists); these subjective opinions are then further subjected to a politically sensitive negotiation process. *I.e.*, bond release standards become the based on the results of political negotiation rather than

based on the requirements of law. The failure to incorporate measurement techniques means that federal decisions on bond releases[1] are not fully documented with technically adequate or legally defensible evidence of revegetation success or failure.

The obviously deficient federal program proposed by OSM for Arizona has been eagerly seized upon by the Western Interstate Energy Board (WIEB) in an attempt to justify reductions in the revegetation requirements of the western states. See letter from WIEB Chairman Michael Long to OSM Director Uram, dated 11/8/94.

2. State Programs

OSM has provided no guidance for the approval/disapproval of revegetation success standards and sampling techniques proposed by primacy states. In accordance with OSM's historic pro-state philosophy, OSM staff have therefore been approving technically questionable state proposals since no clear guidance exists to provide a basis to disapprove them. Additionally, there has been no effort to require consistency, or even equivalent levels of regulation, between the states.

There is also a problem with lack of timeliness: t has been at least ten years since OSM first notified primacy states (in accordance with 30 CFR Part 732) that their programs were deficient in this regard. Despite the elapsed years, however, relatively few state programs have been modified to include complete and adequate success standards and sampling techniques.

Statistical Procedures

30 CFR 816.116(a)(2) requires that regulatory programs specify revegetation sampling techniques, including statistical tests with a one-sided alpha of 0.1 (a statistical measure), to be used in determining whether or not the operator's revegetation efforts have successfully revegetated the former mine site.

1. Burden of Proof[2]

OSM policies on statistical procedures place the statistical burden of proof on opponents of bond release; statistical procedures are allowed (even encouraged) which let the operator to assume that revegetation is successful and force opponents to statistically prove otherwise. This stands in contradiction to all other aspects of SMCRA regulation, which require that the applicant or operator clearly demonstrate that they will meet SMCRA's requirements. Under such statistical procedures, operators can get their bond liability reduced if there is as little as a ten percent probability that they have achieved revegetation success.

2. Statistical Testing vs. Sample Adequacy

OSM is approving state proposals which allow the use of "sample adequacy" formulas to fulfill the requirement for statistical tests. Sample adequacy is not a statistical test, as required by 30 CFR 816.116(a)(2). Further, "sample adequacy" formulas include a critical "precision factor" (a decision as to how accurate one wants to be) that is not discussed by any federal rulemaking or OSM policy. Therefore, OSM has no way to disapprove any precision factor a state cares to use.

"Sample adequacy," while not in accordance with OSM's rules, is probably preferable to statistical testing with the burden of proof incorrectly placed on the regulators (as described above), since it increases the probability that the revegetation is successful from ten percent (as discussed above) to perhaps fifty percent. But OSM *should* require statistical testing (hypothesis testing) with correctly-assigned burden of proof, which would allow bond release only when there is at least a ninety percent probability that the revegetation is successful.

"Undeveloped" Post-mining Land Use

Under 30 CFR 816.133(a), all mined lands must be reclaimed to conditions capable of supporting the land use that existed prior to mining. Alternatively, lands can be restored to conditions that will support "higher or better" land uses. Because this requires a comparison of pre-mining land uses to proposed post-mining land uses, OSM has promulgated definitions of various land use categories (see 30 CFR 701.5, "land use").

Because the land prior to mining might not have been affected by management activities, OSM included a definition of

"undeveloped land." This was meant to apply only to land use prior to mining; it was not envisioned that mined land could be "undeveloped" after mining[3]. Instead, it was intended that operators would be required to restore to the post-mining land use of "fish and wildlife habitat" any land which was not intended to be used for any other purpose after mining.

Nevertheless, OSM has approved amendments to at least three state programs (Alabama, Louisiana, and Ohio)[4] that allow the states to approve "undeveloped" as a post-mining land use. This is, first, a ridiculous oxymoron (when one starts reclamation with raw spoil piles, anything one does is in fact developing a land use, not "undeveloping" one). Second, it is also a clear violation of the Congressional finding and intent that it is not acceptable to allow mined land to be naturally restored by leaving it alone and letting nature reclaim it[5]; instead, Congress required that a post-mining land use be consciously and deliberately developed.

Recently, OSM has approved an amendment to the Ohio program (see 59 FR 22507; May 2, 1994) which only requires the operator, in cases of an "undeveloped" post-mining land use, to plant woody species; the operator is not held responsible for meeting any survival/success standards. OSM's reasoning was that a sufficient number of woody plants, and hence the land use itself, will eventually be achieved through the process of natural succession. This policy is clearly in conflict with the Congressional finding that natural succession is inadequate to ensure that lands are restored to pre-mining productivity and ensure that erosion, stability, and other problems are minimized. Further, it reduces a clear performance standard to a "goal" or target which the operator is not required to achieve.

Phase II Bond Release Criteria

Phase II bond release allows the operator to get back about twenty-five percent of the bond it posted before mining. The bond cannot be released until the operator meets certain revegetation requirements.

OSM, by policy, is interpreting 30 CFR 800.40(c)(2) to require only that revegetation be "established" prior to Phase II bond release; i.e., revegetation is *not* required to meet the success standards of 30 CFR 816.116. Further, OSM holds that since it has not defined what constitutes "establishment," states are free to define it however they choose[6].

This policy is clearly in violation of SMCRA, OSM's rulemaking action on 30 CFR 800.40, and the Administrative Procedures Act.

1. Negative Ramifications of the Policy

This policy benefits operators by returning performance bond monies before they have restored the land's productivity, as required by SMCRA; but it has other serious regulatory implications in addition to this breach of the public trust.

First, OSM's policy of allowing each state to define "established" has resulted in widely-varying requirements for operators to obtain a Phase II bond release. In most western-region states (e.g. Kansas), operators are required to meet a ground cover success standard for one year; but in Ohio, operators can obtain Phase II bond release 90 days after planting. This represents a clear failure of OSM to achieve a "level playing field" among the various states and enforce minimum federal standards.

Second, Phase II is used to define when an operation becomes "inactive" (30 CFR 842.11(c)(2)(iii)(B)), allowing regulatory authorities to inspect the site only quarterly (rather than every month). Therefore, this erroneous policy on Phase II allows states to inspect some sites less frequently than they should.

Third, at least two states (Ohio and Colorado) use Phase II release to justify the termination of water monitoring, which under this policy is allowed much earlier than it should be.

2. Explanation of Problems with OSM's Phase II Policy

a. Violation of SMCRA and OSM regulations

OSM is mistaken in asserting that "established" has not been defined. SMCRA 515(b)(19) and 30 CFR 816.111(a) clearly require the operator to "establish" a vegetative cover that must be: diverse, effective, permanent; comprised of native species or introduced species where

necessary; at least equal in extent of cover to the natural vegetation of the area; and that is capable of stabilizing the soil surface from erosion. I.e., the revegetation is not established until it meets these criteria. These criteria are precisely the success standards of 30 CFR 816.111 and 816.116. Further, SMCRA 515(b)(20) equates "established" revegetation with "successful" revegetation.

OSM's policy also ignores a critical phrase in 30 CFR 800.40(c)(2): the second sentence clarifies that Phase II is the bond released after "*successful revegetation* has been established" (emphasis added). Thus, the rule itself clearly requires that revegetation success standards be met.

b. Administrative Procedures Act[7]

The current language of 30 CFR 800.40(c)(2) is precisely the same as the language of SMCRA 519(c)(2). When OSM first promulgated rules interpreting this statutory language, in 1979, it explicitly interpreted that language to require that revegetation success was necessary for Phase II bond release:

(2) Reclamation Phase II shall be deemed to have been completed when-
(i) Revegetation has been established in accordance with the approved plan *and the standards for the success of revegetation are met*; ... (emphasis added; 30 CFR 807.12(e)(2)(i)).

This was so obviously correct that in the preamble to the 1979 rules this requirement was not discussed; there were *no* public or industry comments that disagreed with it. It was also so obviously correct that the industry did not file suit against it (although they did file suit on one very closely related requirement).

OSM in 1983 revised the Phase II language and moved it to 30 CFR 800.40(c)(2). However, as noted previously, the new language is precisely the statutory language, which the 1979 rule interpreted to require revegetation success. OSM did not, in any proposed rule, propose any different interpretation of that language. Hence, the public was given no opportunity to comment on any such change.

Further, one person, through public comment, complained that the explicit requirement for revegetation success was no longer explicit. If OSM had intended to change that requirement, it should have said so in response to the comment. However, OSM did not so declare a change in interpretation. While OSM's response is not perfectly clear, it emphasizes the word "*successful*," and states that "[s]tandards for success are established in the permit" (see 48 FR 32953; July 19, 1983). This last statement can only be a reference to 30 CFR 780.18(b)(5)(vi), which requires each permit application to contain: "[m]easures proposed to be used to determine the success of revegetation as required in 30 CFR 816.116." So, OSM's response to this public comment must read as referring to the revegetation success standards of 30 CFR 816.116 as a prerequisite for Phase II bond release.

OSM needs to address its revegetation and bond release problem. The current regulatory language for Phase II bond release is the same as the statutory language. That language was interpreted in 1979 as requiring revegetation success. When OSM changed the rule in 1983 to repeat the statutory language, it proposed no other interpretation. In replying to a public comment, OSM affirmed that revegetation success is required. Since OSM's current policy has reversed this position without giving the public opportunity to comment, the current policy constitutes a violation of the Administrative Procedures Act.

Recommendations for Reform

OSM's federal programs are deficient in revegetation requirements and must be amended. In addition to representing a failure of OSM to follow its own rules, these federal program deficiencies are setting bad examples for the primacy states (who are, quite appropriately, citing them as justification for reducing the revegetation requirements of their own programs). OSM also make make it clear to primacy states that both a willingness to promulgate revegetation requirements, and the technical staff necessary to do so, are prerequisites of a regulatory program.

In order to achieve SMCRA's goals, OSM must revise its rules and policies on postmining land use, revegetation standards and measurement methodologies (particularly

statistical requirements), and bond release, so that operators are required to affirmatively demonstrate revegetation success prior to Phase II bond release.

Notes

[1] When a mining operation has met certain revegetation requirements, it may get back some of the money posted to the government to guarantee its reclamation performance.

[2] Note: statisticians should consult Appendix I for a more technical discussion.

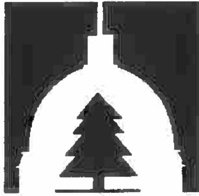
[3] This is the authors' belief. OSM's rules and rule preambles are not clear on this subject. The authors believe this to be the case based not only on SMCRA and its legislative history, but also because no one even suggested the possibility of approving "undeveloped" as a postmining land use until the last few years.

[4] Texas has proposed this in its program, and OSM is on the verge of approving it. Even without it being approved in its program, Texas has approved permits allowing the reclamation of thousands of acres with a postmining land use of "undeveloped."

[5] See House Report 95-218 (April 22, 1977), pages 107 and 91.

[6] This policy was expressed, without opportunity for public comment, at 56 FR 15279 (April 16, 1991). It was, however, being implemented at a much earlier date (at least as early as May 8, 1984; see 49 FR 19472).

[7] For additional detail, see Appendix II



Conclusion

Becoming a More Effective Agency

OSM in its rulemaking, and especially in its policies has failed to ensure that the goals of SMCRA are met. The needs of OSM's primary customers, the coalfield citizens, have been ignored; and the legal requirements of both SMCRA and the Administrative Procedures Act have been violated. OSM has also allowed, without protest, its enforcement program to be undermined by the administrative and policy failures of its sister agency, the Office of Hearings and Appeals.

This paper reports only a few of the many policy and operational failures that have prevented OSM from achieving its legislative mandates. Most of these issues—and many others—have been raised internally by OSM front-line staff to no avail. Management has been unwilling to change the agency in the ways suggested by employees. It is time for real reform at OSM. The price of ignoring the voices of ethical employees within OSM will be very high. Without change, OSM will continue to:

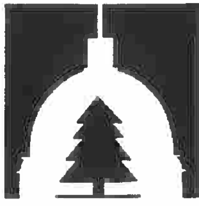
➤ Allow coal mining operations to cause environmental degradation. Much of this damage is irreparable, and no funding sources exist for that which can be fixed. These environmental damages will remain a perpetual legacy of OSM's failures.

➤ Be unable to hold coal companies accountable for their actions.

➤ Fail to achieve its mission and squander scarce tax dollars. This lack of effectiveness is of particular concern in this era of tight budgets, and is relevant to the National Performance Review.

➤ Lose the confidence of the American public. Citizens who live near coalfields do not believe that OSM is paying attention to their concerns. As these citizens become alienated, fulfilling its missions will be an ever-more-distant mirage for OSM.

By implementing the recommendations in this report and subsequent reports in the "Undermining the Public Trust" series, OSM *can* become an effective agency. The majority of OSM employees want the agency to fulfill its mission and are eager to engage in the reform process. Without increasing OSM's budget allocation, OSM could make great strides to implement rules and policies that would result in much greater environmental and citizen protection.



Appendix I

Statistical Burden of Proof

The statistical procedures section of Chapter 4 refers to the statistical "burden of proof" in an attempt to render palatable to laypersons the concept of statistically testing null and alternate hypotheses.

For every statistical test performed, one must state a null hypothesis and an alternate hypothesis, and all possible outcomes must be accounted for by these two hypotheses.

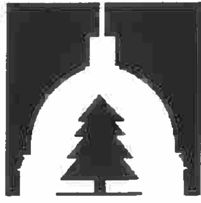
It is always the null hypothesis, not the alternate hypothesis, which may be tested statistically. The statistical procedure is to ask "if the null hypothesis is true, how likely would it be to obtain from the population a random sample with the data that was obtained in this case?" If the probability is small (in this case, less than ten percent), then the tester reasonably concludes that the null hypothesis is false, and therefore assumes that the alternate hypothesis is true. In other words, statistical tests assume the null hypothesis to be true unless the data demonstrates that it is very unlikely to be true.

OSM, in the preamble to its rule at 30 CFR 816.116, has stated that operators may declare, as the null hypothesis, that their revegetation meets success standards. The statistical testing will then assume that the revegetation meets success standards, with the "alternate hypothesis" stating that the revegetation does not meet success standards. The null hypothesis will be rejected only if the data shows that there is a probability of less than ten percent that the revegetation meets success standards. I.e., if there is as little as a ten percent probability that the revegetation is successful, it will be assumed to be so.

For the preamble discussion allowing this declaration of the null hypothesis, see 48 FR 40140, 40150-40152; September 2, 1983:

> "This means that it is assumed that the mine operator has achieved the required degree of revegetation success unless evidence as provided by the sample data indicates that the standard has not been obtained."

To be consistent with other aspects of SMCRA regulation, operators should be required to make an affirmative demonstration that they have met revegetation success. OSM should require that the null hypothesis state that the revegetation does not meet success standards. The statistical test would then ensure that there is less than a ten percent chance that performance bond will be released without success standards being achieved.



Appendix II

Chronology of Bonding Rulemaking and Federal Register Citations for Phase II Bond Release Standards

Interim Program:

1977: No federal bonding; no bond release requirements.

Permanent Program

9-18-78: Proposed permanent program rules.

Success standards explicitly required for Phase II (43 FR 41871). Preamble states that this release schedule implements SMCRA 519(c) (pg. 41733).

3-13-79: Final initial permanent program rule.

Phase II definition required revegetation to meet success standards [30 CFR 807.12(e)(2)(i)] (44 FR 15392).

The preamble (pg. 15122) again states that this implements Section 519(c) of SMCRA.

5-14-79: Rulemaking petition on bonding: Mining And Reclamation Council of America, *et al.* (44 FR 28005).

The suggested language for Phase II resembled the Act's language (pg. 28007); the "justification" (pg. 28008) states no intent to delete the requirement for revegetation success.

1-24-80: Proposed rulemaking resulting from petition (45 FR 6028).

Preamble (pg. 6035) reports no intention to revise Phase II criteria. Proposed rule indicates no proposed change to Phase II definition (807.12(e)(2)) [pg. 6041].

8-6-80: Final rule resulting from petition (45 FR 52306).

Final rule did not change the definition of Phase II (pg. 52324). Preamble discussion of amounts of bond to be released included:

Proposals ... are similar in that they propose variations in the Phase 1 and Phase 2 percentages ... would allow 30 percent release after *successful vegetation* ... These proposals request additional bond release at achievement of *successful vegetation*. (pg. 52316) (emphasis added)

Note also that, in the table on pg. 52315, OSM's brief description of Phase II is "Successful vegetation."

9-9-81: Proposed rule (46 FR 45082).

Rulemaking resulted from Exec. Order 12291, directing efforts for regulatory relief from excessive, burdensome or counterproductive regulations. Also reorganized and renumbered bonding rules (bond release criteria moved from 30 CFR Part 807 to Part 800.40).

There is no declared intent to revise the Phase II criteria, which at this point still included the requirement that revegetation success standards be met.

In the "detailed discussion of proposed revisions," the only relevant discussion is:

"Several commenters thought that 800.40(c) was confusing because all language concerning phases of reclamation was omitted. The commenters requested clarification. Consequently, OSM proposes 800.40(c) to include references to the three phases of bond release." (pg. 45089)

7-19-83: Current rule and preamble (48 FR 32932).

Again, the preamble indicates no intention of altering the Phase II criteria. There is no applicable discussion in either the "Background" or "General Comments" sections.

In the section discussing 800.40(c), it is again stated that this section implements Section 519(c) of the Act. There is no repudiation of the earlier view that Section 519(c) requires success standards to be met at Phase II, or that a change in policy was intended (pp. 32952-4).

The disposition of the comment on the upper right of pg. 32953 is critical. The commenter complained that the earlier *explicit* requirement that success standards be met was not reflected in the new rule. OSM's disposition states that the language comes directly from the Act [which has always, in all the rulemakings reported above, been interpreted to require revegetation success], and emphasizes that *successful* revegetation is required.