CLIENT ALERT

SMCRA: It's Back in the News and That's Not Good News For Coal

Winter 2014

The Surface Mining Control and Reclamation Act (SMCRA) stands alone among environmental statutes because of its dual, competing goals: Congress enacted SMCRA to promote coal mining to provide the nation with an important source of fuel, while also minimizing mining's environmental impacts. In SMCRA, Congress also established a uniquely federalist regulatory scheme that sets forth certain national minimum standards, but allows states to establish their own regulatory programs which, if federally approved, allow the state to be the *exclusive* regulator of surface mining and reclamation operations on non-federal and non-Indian lands.

The Act's inherent tension between the economy and the environment, and its uneasy division of authority between the federal government and the states, was long a source of conflict, beginning with the Act's passage in 1977 after two prior presidential vetoes, and then followed by decades of rulemaking and enforcement litigation by various groups vying to tip the Act's balance in their favor. But as the 21st century dawned, the controversy surrounding SMCRA had quieted, with the Act and its implementing federal regulations becoming *de facto* settled law.

That changed with the Obama Administration, which has brought SMCRA back into the news by launching several initiatives seemingly aimed at reducing the use of coal. Many have deemed these initiatives to be part of a virtual "war on coal." These actions by the Administration and its environmental allies have substantially upset SMCRA's hard-won balancing act, with potentially devastating consequences for the coal industry.

Mining Law Monitor
Winter 2014

Background

SMCRA's scheme of "cooperative federalism" provides a stark contrast to the more limited authority given to states under statutes like the Clean Water Act and the Clean Air Act. As the 4th Circuit has explained, "in contrast to other 'cooperative federalism' statutes, SMCRA exhibits extraordinary deference to the states" – either the federal government or the state is the regulator, but not both.

Under SMCRA, once OSM approves a state's regulatory program, that state becomes a "primacy" state with exclusive jurisdiction over surface coal mining and reclamation on non-federal and non-Indian lands. As multiple courts have held, when a state's program is approved, SMCRA's provisions and implementing regulations "drop out" and the federal government retains only a limited oversight role to ensure that the state is still complying with the approved state program.

But that system recently has been eroded by (i) efforts to increase federal "oversight" of state regulatory programs in order to ensure more aggressive environmental protections and (ii) active litigation by environmental non-governmental organizations (ENGOs) attempting to "reinterpret" SMCRA to achieve their environmental protection objectives, as discussed below.

Expanded Federal "Oversight"

First, in an Inter-Agency Memorandum of Understanding (MOU), the heads of the EPA, Interior Department, and Army Corps of Engineers (the Corps) announced the new Administration's concerns about surface mining in Appalachia and set forth their plans to do more to protect the environment from surface coal mining, particularly targeting mountaintop mining, without rulemaking or legislation. The federal government has carried out the MOU in three major ways to date.

1) OSM's Expanded Use of Ten Day Notices: *Farrell-Cooper Mining Company v. U.S. Department of the Interior*

As it promised to do in the MOU, OSM has expanded its interpretation and use of ten-day notices to overturn state permitting decisions and impose federal policy on state programs. SMCRA provides that, as part of the federal government's limited oversight authority in primacy states, OSM may issue a notice to the state giving it ten days to take enforcement action or show good cause for its failure to do so, such as by advising OSM that the state has determined that there is not, in fact, a violation. OSM may take action only after a state has failed either to institute its own actions or to demonstrate to OSM "good cause" for not doing so. If, within ten days, the state fails to respond in either of those two ways, then OSM is empowered to conduct an inspection and issue a notice of violation or cessation order to the permittee as necessary. But if the state *does* respond, OSM has no further enforcement role. As the D.C. Circuit held in a 1981 *en banc* decision, "Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary [of the Interior] plays no role." *In re Permanent Surface Mining Litig.*

Despite some occasional flip-flopping, OSM historically interpreted its ten-day notice authority in accordance with the D.C. Circuit's decision and did not use that authority to second guess or otherwise interfere with state permitting decisions or a state program. But in the MOU, the Secretary of the Interior pledged to determine how OSM could "remove impediments" to OSM's ability to "require correction of permit defects in SMCRA primacy states." And in November 2010, OSM Director Joseph Pizarchik did just that when he announced that he was changing OSM's historic interpretation and declared that OSM was in fact authorized to issue ten-day notices to remedy violations of *SMCRA's* permitting requirements regardless of whether those activities complied with a state program or a state SMCRA permit.

OSM has acted to enforce that policy nationwide, but its use in Oklahoma led to the first lawsuit challenging OSM's expanded interpretation. In Oklahoma, OSM issued ten-day notices to Farrell-Cooper Mining Company, claiming that Farrell-Cooper was not restoring lands to approximate original contour in accordance with federal requirements. Oklahoma responded to OSM that Farrell-Cooper's operations fully complied with the Oklahoma federally approved program and its permits and were not, therefore, in violation of applicable law. Yet OSM rejected the state's showing of "good cause" as arbitrary, capricious, or an abuse of discretion and issued NOVs to Farrell-Cooper ordering the company to cease its reclamation activities and submit a new reclamation plan to OSM, despite the fact that Farrell-Cooper had already completed 90 percent of its reclamation work.

Farrell-Cooper sued OSM, contesting the NOVs and arguing *inter alia* that OSM had no authority to issue NOVs in a primacy state where the state had determined that the permittee was in compliance with its state permit, effectively vetoing the state

permitting decision. The State joined the company's suit, arguing that OSM had violated SMCRA's allocation of authority to the state by unilaterally overturning the state's permitting decisions. The court dismissed the case for lack of subject matter jurisdiction as a direct challenge to OSM's regulations that must be brought in the District of Columbia.

Farrell-Cooper's and Oklahoma's appeal to the 10th Circuit also was dismissed, but on different grounds. The appellate court determined that the case was unripe due to the pendency of administrative litigation contesting the NOVs.

2) EPA's Intrusion into SMCRA Permitting: *National Mining Association v. McCarthy*

Like OSM, EPA is seeking to broaden its control over state regulation of surface mining and reclamation. Congress gave EPA only a minor programmatic role under SMCRA, requiring its concurrence on any regulations promulgated by the Secretary that relate to air or water quality standards and on any aspects of a state program that relate to such standards. Otherwise, EPA has no lawful basis under SMCRA for further involvement in the regulation of surface coal mining and reclamation.

However, in the MOU, EPA, the Corps, and the Department of the Interior pledged to coordinate reviews of pending permit applications under the Clean Water Act and SMCRA. EPA thereafter inserted itself into SMCRA's permitting process through ostensibly non-binding "suggestions" set forth in a July 21, 2011 guidance document issued to EPA Regions III and IV. The guidance document is remarkable for EPA's unprecedented intrusion into SMCRA permitting and regulation, disregarding the clear limits Congress placed on EPA's role.

The regulated industry and primacy states, including West Virginia and Kentucky, soon discovered that the "suggestions" in the guidance document were binding mandates. They brought suit against EPA and won summary judgment in *National Mining Association v. Jackson*, invalidating the guidance under SMCRA, as well as the Clean Water Act and the APA. The court explained that SMCRA provides "only a limited role for EPA" and that "[i]t is . . . beyond the EPA's purview" to establish upland operational standards "or to attempt to specify to the Office of Surface Mining or the State SMCRA agency what constitutes an 'appropriate' best management practice." EPA may participate preliminarily on a programmatic level, but after submitting its written concurrence, EPA's role under SMCRA is over.

The ultimate outcome of that case on appeal will have wide-ranging implications for the coal industry, including SMCRA's balance between environmental regulation and the facilitation of coal mining. Accordingly, 11 states have filed an amicus brief in support of the plaintiffs on appeal arguing that EPA's guidance memorandum conflicts with principles of cooperative federalism, undermines state interests, and is part of a recent pattern of EPA improperly circumventing cooperative federalism principles in environmental statutes, including SMCRA, the Clean Water Act, and the Clean Air Act.

3) OSM Review of State Programs

OSM's usurpation of state regulatory authority has continued with changes to reclamation bonding programs in Appalachia, which may signal the beginning of broader changes for state regulatory programs in general. SMCRA requires reclamation bonds to ensure that mine reclamation is achieved in the event that the mine operator itself does not complete it. Only after an operator has met all of the permit and applicable regulatory program's reclamation requirements may the regulatory authority release the reclamation bond. Should the mining operator forfeit the bond, the regulator will use the bond to reclaim the site.

Kentucky and West Virginia have bond programs that provide an alternative to full-cost bonding, but, under pressure from OSM and ENGOs, each of those states has had to make changes to its programs, including:

- In 2010, the Government Accountability Office issued a report critical of reclamation efforts and financial assurances for reclamation in Kentucky, Virginia, and West Virginia (all primacy states) and Tennessee (a federal program state).
- OSM conducted Field Office reviews in Kentucky and West Virginia, the results of which were particularly critical of Kentucky's alternative bond system.
- Based on its Field Office review, OSM instituted Part 733 proceedings in Kentucky in 2012, beginning the process for substituting federal enforcement for Kentucky's program. In response, Kentucky overhauled its bond system to increase the amount of reclamation bonds, increase rates per acre, and establish an emergency state-wide bond pool.
- Successful ENGO litigation caused West Virginia to increase its special reclamation tax from to 14.4 cents per ton of coal mined to 27 and 9/10 cents per ton to treat discharges at bond forfeiture sites in accordance with state water quality standards and pursuant to Section 402 permit limits.

And there may be broader changes on the horizon that reach to the heart of state SMCRA programs. ENGOs filed a substantial Part 733 petition with OSM in June 2013, alleging that West Virginia is not properly implementing, administering, enforcing, and maintaining its program. They asked OSM to substitute federal enforcement for the entire state program. After reviewing the petitioners' nineteen allegations, OSM has identified five that warrant further evaluation. OSM will investigate how the state handles potential flooding risks, whether it issues SMCRA violations where Clean Water Act violations exist, how it evaluates selenium water pollution, how it conducts Cumulative Hydrologic Impact Analyses, and how it handles soil reclamation. OSM already has released a preliminary study in which it concluded that, where there is selenium impairment, the state accepts what OSM might consider to be merely a minimum amount of information to demonstrate that the mine is not contributing to the impairment. West Virginia has pledged to work with OSM in this investigation, which has the potential to lead to major changes in that state's program.

ENGO Litigation Against Regulations and Mine Operators

As the recent bond activity in West Virginia illustrates, environmental groups have also recently deployed SMCRA as a weapon in their own fight against the use of coal in the United States. Those groups have been major drivers behind efforts to enhance federal regulation of surface coal mining. Two examples of such significant cases highlight their efforts.

1) The Stream Buffer Zone Rule: *National Parks Conservation Association v. Jewell* and *Coal River Mountain Watch v. Jewell*

In these two cases, ENGOs challenged OSM's revised Stream Buffer Zone Rule, which could further tip the scales against coal mining. Although SMCRA does not require a buffer zone around streams, OSM has historically provided such a buffer, minimizing, but not prohibiting, mining activities near streams. The revised Stream Buffer Zone Rule (2008 Rule) was intended to clear up confusion over an earlier (1983) rule, set forth regulations to minimize the construction and design of valley fills, and revise the conditions under which mining operations could be conducted within the buffer zone to better conform with

SMCRA's provisions. But ENGOs believe that the rule impermissibly liberalized the conduct of mining operations near streams.

Although the 2008 Rule was the product of more than five years of rulemaking, it was condemned as a midnight rush to judgment because it was issued weeks before the George W. Bush Administration left office. ENGOs have also claimed that the 2008 Rule violates SMCRA, the APA, the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act.

After those lawsuits were filed, President Obama's first Interior Secretary took the unprecedented step of publicly renouncing his own agency's rule. The Administration has since twice asked the court to vacate and remand the 2008 Rule without reaching the merits of plaintiffs' claims and without regard for APA rulemaking requirements. The National Mining Association intervened in that litigation and is now the only party defending the 2008 Rule and resisting the ENGOs' sue-and-settle tactics.

Meanwhile, although OSM published an Advance Notice of Proposed Rulemaking in 2009, announcing its intention to supersede the 2008 Rule, no proposed rule has been published. Although OSM's new rulemaking successfully delayed that litigation for several years, OSM's announcement that it will not issue a new rule until sometime in 2014 inspired the court to lift the stay. The plaintiffs are now vigorously prosecuting their respective challenges to the 2008 Rule. For its part, OSM continues to denounce the current rule, without attempting to rescind it under the APA.

2) Sovereign Immunity and Cooperative Federalism: *Montana Environmental Information Center v. Stone-Manning*

In another important case, ENGOs brought suit in federal court against the Montana state regulator, alleging that DEQ had violated SMCRA by performing inadequate Cumulative Hydrologic Impact Assessments (CHIAs) and failing to properly determine whether proposed mining operations would cause material damage to the hydrologic balance. This case hinges on whether state law applies in a primacy state, the federal provisions having "dropped out" when the state's program was approved. If so, a state regulator is protected by the Eleventh Amendment from being sued in state court for allegedly failing to comply with state law.

A group of defendant-intervenors made up of coal owners, mine operators, and employee representatives joined DEQ in defending that case. The court dismissed the case on sovereign immunity grounds, reasoning that Montana had primacy and its state law governed mining and reclamation in the state, "[a] suit against [the Director of DEQ] would, in essence, be a suit against the State of Montana." The court also held in the alternative that the case was not justiciable because the ENGOs had challenged a non-discretionary duty not subject to a SMCRA citizen suit and because the case suffered from fatal standing and ripeness defects, including the failure to exhaust available administrative and state remedies.

On appeal, the ENGOs have argued that DEQ was not entitled to sovereign immunity from suit because SMCRA's provisions do not "drop out" when a state obtains primacy. Instead, they believe that state law is somehow "codified" as federal law when the state program is approved and published in the Code of Federal Regulations.

Conclusion

Now that the federal government and ENGOs have re-discovered SMCRA as a useful weapon against coal, SMCRA regulatory changes and ENGO litigation are likely to remain a central focus of environmental law for years to come, at least absent an administration whose priorities for coal differ significantly from the current one. That is not good news for coal.

(Editor's note: C&M represented the industry parties in several of the cases discussed in this article.)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas (Tim) C. Means
Retired Partner – Washington, D.C.
Email: tmeans@crowellretiredpartners.com

Sherrie Armstrong Davis
Counsel – Washington, D.C.
Phone: +1 202.624.2846
Email: sarmstrongdavis@crowell.com