

## Chapter 10

# Back in the Spotlight: The Surface Mining Control and Reclamation Act in 2013

Thomas C. Means  
Sherrie A. Armstrong  
*Crowell & Moring LLP*  
Washington, DC<sup>1</sup>

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<sup>1</sup> The authors of this chapter are or have previously been counsel in many of the cases discussed herein. The views expressed in this chapter are their own and do not necessarily reflect the views of their clients.

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The Surface Mining Control and Reclamation Act was enacted almost 36 years ago to balance the nation’s need for coal as a source of fuel with the need for national environmental regulation of coal mining. The Act (known by its acronym, SMCRA) was a lightning rod for controversy from its inception, inspiring two presidential vetoes even before its passage in 1977. And once SMCRA became law, it spawned decades of intensive rulemaking and enforcement litigation as one group or another attempted to tilt the Act’s balance in their direction. But as the 21st century dawned, the regulation of surface mining and reclamation seemed to have largely stabilized and matured.

SMCRA is now back in the spotlight as a center of controversy as the Obama administration declared what critics have called a “war on coal.” Driven by environmental concerns — principally, a belief that the burning of coal must be eliminated as soon as possible to save the planet from the perils of climate change — the administration and environmental activists have re-discovered SMCRA, pressing it into service as a weapon in their arsenal to move “America Beyond Coal.” Recent developments have fulfilled President Obama’s campaign promise to bankrupt the coal industry and have done much to upset Congress’ balancing act between encouraging coal mining and protecting the environment. With SMCRA back in the spotlight, this chapter canvasses recent regulatory and litigation developments and addresses the outlook for prospective developments in surface mining regulation.

**§ 10.01. Introduction.****[1] — Overview of Surface Mining Control and Reclamation Act.**

The 95th Congress enacted the Surface Mining Control and Reclamation Act (SMCRA) on August 3, 1977, to strike a balance between the nation's interests in protecting the environment from the adverse effects of surface coal mining and in assuring the supply of coal that was (and still is) essential to the nation's energy requirements.<sup>2</sup> To meet those goals, the Act established a system of "cooperative federalism," in which responsibility for the regulation of coal mining and its surface effects in the United States is "shared" between the U.S. Secretary of the Interior (acting through the U.S. Office of Surface Mining Reclamation and Enforcement (OSM)) and state regulatory authorities.<sup>3</sup>

Under SMCRA, Congress established "minimum national standards" for regulating surface coal mining and reclamation, but allowed states to enact their own laws incorporating these standards, as well as any "more stringent," but not inconsistent, standards that they might choose.<sup>4</sup> Once a state has done so, and its program has been approved by the Secretary, the federal laws and regulations drop out and the state becomes the *exclusive* regulator of surface coal mining (and is known as a "primacy" state).<sup>5</sup> In

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<sup>2</sup> See SMCRA, Pub. L. 95-87 (1977), codified at 30 U.S.C. §§ 1201-1328; see also 30 U.S.C. § 1202(a), (d), (f). As an illustration of the importance of that balance, the federal agency charged with administering SMCRA, the U.S. Office of Surface Mining Reclamation and Enforcement, even displays a scale on its seal, with a depiction of trees on one side of the scale evenly balanced with a depiction of a pile of coal on the other.

<sup>3</sup> See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001) (citing H.R. Rep. No. 95-218, at 57 (1977), reprinted in 1977 U.S.C.C.A.N. 593, 595).

<sup>4</sup> *Id.* at 288 (citing H.R. Rep. No. 95-218, at 167 (1977), reprinted in 1977 U.S.C.C.A.N. at 698).

<sup>5</sup> *Id.* at 288-89 (explaining that "SMCRA provides for *either* State regulation of surface coal mining *or* federal regulation, but not both. . . . Thus, after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the 'blueprint' against which to evaluate the State's program, 'drop out' as operative provisions."); see also *In re Permanent Surface Mining Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981) (holding that "it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply. *Administrative and judicial appeals of permit decisions*

other words, the state, not OSM, is entitled to regulate the environmental aspects of coal mining and its surface effects. And the state, not OSM, issues mining permits and inspects mines for compliance. For that reason, the cooperative federalism system under SMCRA is far more robust than under other environmental statutes and regulatory authority is not really “shared” between the two sovereigns.<sup>6</sup> As the U.S. Court of Appeals for the Fourth 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 regulatory authority, but not both.<sup>7</sup>

SMCRA has been a focus of controversy since before it became law. Similar legislation proposing federal regulation of surface mining had been introduced, debated, presented, and twice vetoed by President Ford in 1974 and 1975. SMCRA was then passed by the 95th Congress and signed into law by President Carter.<sup>8</sup> The new Act was immediately the subject of a pre-enforcement (and ultimately unsuccessful) constitutional challenge before the U.S. Supreme Court.<sup>9</sup>

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*are matters of state jurisdiction in which the Secretary plays no role*” (citations omitted) (emphasis added).

<sup>6</sup> See Christopher B. Power and Donnie L. Adkins II, “SMCRA Primacy, Mine Permit Transfers, Ownership and Control, and Excess Reclamation Responsibilities: A Primer on Confusing Topics,” 31 *Energy & Min. L. Inst.* ch. 8 (2010) (describing how SMCRA’s system of cooperative federalism is different from the division of authority in other environmental statutes) (hereinafter Power and Adkins).

<sup>7</sup> *Bragg*, 248 F.3d at 289, 293.

<sup>8</sup> For information about state regulation of surface mining prior to the Act’s passage, the many failed attempts to enact a national regulatory scheme, and the early days of the Act’s implementation, see Edward M. Green *et al.*, “The Surface Mining Control and Reclamation Act of 1977: New Era of Federal-State Cooperation or Prologue to Future Controversy?,” 16 *E. Min. L. Inst.* 11 (1997); see also *In re Permanent Surface Mining Litig.*, 653 F.2d 514; *In re Surface Mining Regulation Litig.*, 627 F.2d 1346 (D.C. Cir. 1980).

<sup>9</sup> See *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981). That challenge was brought by the Virginia Surface Mining and Reclamation Association, Inc., 63 of its member companies, and four individual landowners, who were later joined by the Commonwealth of Virginia and the town of Wise, Virginia, and who challenged the Act as violating the Commerce Clause, the Fifth Amendment Due Process Clause, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment. The Supreme Court rejected those arguments and upheld the Act as constitutional.

SMCRA's implementing regulations also have long been controversial. After the Supreme Court deemed the Act constitutional, OSM promulgated interim and then permanent implementing regulations through notice-and-comment rulemaking, many of which were immediately challenged with varying degrees of success.<sup>10</sup>

## [2] — Chapter Roadmap.

Although the era of wholesale challenges to SMCRA and large portions of its regulatory framework largely ended with the 20th century, the regulation of surface mining is still evolving due to (i) the controversy that continues to surround this mining practice (particularly in Appalachia where mountaintop mining results in valley fills and buried stream segments);<sup>11</sup> (ii) the federal government's recent efforts to increase "oversight" over state regulatory programs in order to ensure more aggressive environmental protections; and (iii) active litigation by environmental non-governmental organizations (ENGOs) that have rediscovered SMCRA and either are opposed to coal mining generally or selected aspects of it, and that bring suit against industry as well as federal and state regulators.<sup>12</sup> Rather than trying to amend the statute to rebalance SMCRA more in favor of the environment at the expense of coal mining, the administration and its environmental allies have sought through litigation and inter-agency agreements and policy changes to "reinterpret" SMCRA to achieve their environmental protection objectives.

This chapter explores those recent developments, concentrating on the following topics.

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<sup>10</sup> See 30 C.F.R. Chapter VII; see, e.g., Nat'l Mining Ass'n v. U.S. Dep't of Interior, 177 F.3d 1 (D.C. Cir. 1999) (challenge to Applicant Violator System regulations); Nat'l Mining Ass'n v. U.S. Dep't of Interior, 105 F.3d 691 (D.C. Cir. 1997) (same); Nat'l Wildlife Fed'n v. Lujan, 950 F.2d 765 (D.C. Cir. 1991) (challenge to bond release regulations); Nat'l Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991) (challenge to subsidence regulations); Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988) (challenge to various permanent regulations); *In re Permanent Surface Mining Litig.*, 653 F.2d 541, 519 (challenge to various permanent regulations); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346 (D.C. Cir. 1980) (challenge to interim regulations).

<sup>11</sup> For a discussion of mountaintop mining techniques, see *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

<sup>12</sup> See 30 U.S.C. § 1270(a).

*Expanded Federal “Oversight.”* The federal government has recently attempted to exercise more control over state regulation of coal mining through OSM’s controversial expanded interpretation of its authority to issue 10-day notices, which has spawned litigation challenging the agency’s ability to second-guess state permitting decisions. OSM also has increased its oversight and review of the adequacy of state bonding programs and has successfully required states to strengthen their reclamation bonding programs, particularly in West Virginia and Kentucky (and motivated in part by additional ENGO pressure). Moreover, OSM is not the only federal agency attempting to control state regulation of surface mining; in EPA’s July 21, 2011 Final Guidance, EPA attempted to “work with” the U.S. Army Corps of Engineers (the Corps) and SMCRA permitting authorities to incorporate Best Management Practices in Clean Water Act Section 404 permits and to otherwise influence SMCRA permit terms. That effort was invalidated by the U.S. District Court for the District of Columbia and is now on appeal to the D.C. Circuit.

*Escalating ENGO Challenges.* This chapter also will discuss some of the most significant recent litigation by ENGOs against regulators and industry, seeking to harness SMCRA to further their environmental protection objectives. For example, ENGO challenges to OSM’s 2008 Stream Buffer Zone Rule are pending in the U.S. District Court for the District of Columbia. In an unprecedented move, the former Secretary of the Interior in 2009 publicly announced the new administration’s repudiation of the 2008 Stream Buffer Zone Rule and asked the court to vacate and remand the rule. Invoking administrative law principles, the court declined to do so, and OSM has been forced to engage in notice-and-comment rulemaking to craft a replacement rule, known as the Stream Protection Rule. Apparently frustrated with the amount of time that OSM has taken to craft that rule (which the agency predicts will be proposed sometime in 2014), the ENGOs have reactivated their challenge to the 2008 rule, forcing industry intervenor-defendants and the government to litigate the validity of a rule that OSM is actively working to replace.

And ENGOs have appealed the decision by the U.S. District Court for the District of Montana rejecting their hydrologic balance challenges to

Montana permit decisions, based on the sovereign immunity holdings of the Third and Fourth Circuit Courts of Appeal insulating state regulators from suit in federal court. Those ENGO plaintiffs have asked the U.S. Court of Appeals for the Ninth Circuit to hold that state regulators are not entitled to the protection of the 11th Amendment if they fail to satisfy SMCRA's requirements. If their appeal is successful, the resolution of that case could create a circuit split and introduce a significant amount of uncertainty into SMCRA's cooperative federalism scheme.

*Outlook for Future SMCRA Developments.* Finally, this chapter will explore the outlook for prospective SMCRA developments that present a significant potential for further financial challenges for the coal industry, concentrating on the recently proposed federal Cost Recovery Rule (vigorously opposed by industry) and the potential need for rulemaking, legislation, or litigation to reform the maze of arguably unlawful and overly restrictive state ownership-and-control rules, which were reformed at the national level but have not changed at the state level for states like West Virginia, Kentucky, and Illinois.

### **§ 10.02. Expanded Federal Government “Oversight.”**

In recent years, the federal government has attempted to expand its oversight of and control over surface mining practices past the limited oversight role assigned to it under SMCRA's system of cooperative federalism, arguably infringing upon the authority granted to state regulators in primacy states.

In those states where coal is mined, the state, not OSM, is entitled to regulate the environmental aspects of coal mining and its surface effects so long as they agree to adopt and enforce their own state programs upon OSM's approval and determination that the state program meets the minimum federal standards under SMCRA. If OSM approves the state program, then the state is deemed to have “primacy,” which means that the state becomes the *exclusive* regulatory authority over surface coal mining operators within the state (and enforces state law in exercising that authority). The state, not OSM, issues the permits and inspects mines for compliance.<sup>13</sup>

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<sup>13</sup> See Overview of SMCRA, *supra* § 10.01(1); see also 30 U.S.C. §§ 1252(e), 1253(a).

Federal oversight remains, however, to ensure that the state is properly enforcing the state program, as it promised to do in order to be granted primacy. If OSM finds that a mine is in violation of the state program, SMCRA provides that OSM may issue a notice to the state giving it 10 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).<sup>14</sup> OSM sees those inspections and site visits as “an integral part of OSM’s oversight activities.”<sup>15</sup> OSM also may notify the state when its program is no longer in compliance with SMCRA and may initiate proceedings to withdraw the Secretary’s approval of that program and to reinstate federal regulation of all or part of a state program.<sup>16</sup>

The federal government recently has expanded its oversight role to go beyond those limits, beginning with the June 11, 2009 Memorandum of Understanding between the Environmental Protection Agency (EPA), the Corps, and the Department of the Interior (the “MOU”).<sup>17</sup> The MOU was a drastic change in federal policy; it announced the new administration’s concerns about surface mining in Appalachia and set forth its multi-faceted interagency “action plan” to do more to protect the environment from surface mining, particularly targeting mountaintop mining. Many of the federal intrusions into state SMCRA regulation addressed in this chapter are the results of the promises made in the MOU. For example, the Department of Interior pledged to revise the Stream Buffer Zone Rule and SMCRA’s Approximate Original Contour Requirements; promised that OSM would “reevaluate and determine how it will more effectively conduct oversight” of state permitting, state enforcement, and state regulatory activities under SMCRA; and committed to “remove impediments” to OSM’s ability to

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<sup>14</sup> See 30 C.F.R. §§ 732, 842.11. For an overview of federal oversight in primacy states, see Power and Adkins, *supra*.

<sup>15</sup> See OSM Oversight Inspections Discussion Paper, available at <http://www.osmre.gov/topic/Oversight/SCM/OversightInspections.pdf>.

<sup>16</sup> See 30 U.S.C. §§ 1254(a)(3), (b); *id.* §§ 1271(b), 1276(a)(1); 30 C.F.R. Parts 732 and 733.

<sup>17</sup> See June 11, 2009 MOU, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 3, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009\\_06\\_10\\_wetlands\\_pdf\\_Final\\_MTM\\_MOU\\_6-11-09.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf).

“require correction of permit defects in SMCRA primacy states.”<sup>18</sup> As one coal company that has been the target of OSM’s new policy of overriding state permits has put it, the MOU was the beginning of “a plan to expand the scope of federal oversight over the regulation of surface coal mining without any new legislation or rulemaking.”<sup>19</sup>

The federal government has kept that promise and expanded its oversight of state regulation in three major ways: (1) OSM’s controversial expanded 10-day notice policy, (2) EPA’s debut involvement in upland mining practices and SMCRA permitting through a guidance document, and (3) federal scrutiny and reform of state reclamation bond programs.

**[1] — OSM’s Expanded Use of 10-Day Notices: *Farrell-Cooper Mining Company v. U.S. Department of Interior*.**

To fulfill one of the promises in the MOU, OSM has expanded its interpretation and use of 10-day notices of violations to collaterally challenge state permitting decisions and to impose federal policy on state programs.

SMCRA allows OSM to take direct enforcement action against state programs and state permittees only under limited and carefully prescribed circumstances. When OSM has reason to believe that an operator is in violation of the state regulatory program, OSM may take enforcement action *only after* a state has failed to respond by instituting its own enforcement action or demonstrating to OSM “good cause” for not doing so, such as showing that no violation exists.<sup>20</sup> And, if within 10 days the state fails to take enforcement action or to show good cause, OSM is empowered to conduct an inspection and issue a notice of violation or a cessation order to the permittee as necessary.<sup>21</sup> Moreover, if OSM concludes more broadly that the state has not been enforcing its state program, then it may hold a hearing,

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<sup>18</sup> *Id.*

<sup>19</sup> *Farrell-Cooper v. Dep’t of Interior*, No. 12-7045, *Farrell-Cooper Appellant Br.* at 9 (Nov. 13, 2012) (10th Cir.).

<sup>20</sup> *See* 30 U.S.C. § 1271(a)(1); 30 C.F.R. §§ 842.11(b), 843.11(a), 843.12; *see also* 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) (defining good cause).

<sup>21</sup> 30 C.F.R. § 843.12(a)(2).

giving notice to the state.<sup>22</sup> If, after that hearing, OSM makes a finding that the state has not been enforcing all or part of its state program and lacks the intent or capability to do so, then the Act provides for OSM to take over all or part of its state program.<sup>23</sup>

Not satisfied with that limited authority, the Secretary of the Interior in the MOU pledged to “reevaluate and determine how [OSM] will more effectively conduct oversight of State permitting” and to “remove impediments” to OSM’s ability to “require correction of permit defects in SMCRA primacy states.”<sup>24</sup> The most obvious of those impediments seems to have been OSM’s lack of authority to control or overturn state permitting decision in primacy states, which the D.C. Circuit held in an *en banc* decision are exclusively left to the states: “*Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role.*”<sup>25</sup>

### [a] — What Was the Law?

Despite some occasional flip-flopping, OSM historically interpreted its 10-day notice authority in accordance with the D.C. Circuit’s decision, limited to enforcement actions inspired by violations of performance standards and of a state program. OSM did not use that authority to interfere with or second-guess state permitting decisions or to attempt to change a state program. In fact, when the Appalachian Center for the Economy and the Environment (now known as Appalachian Mountain Advocates) pressured OSM to use its 10-day notice authority to review and effectively “veto” a mining permit issued by the West Virginia Department of Environmental Protection (WVDEP), Assistant Secretary of the Interior Rebecca Watson responded that OSM lacked the authority to do so; OSM’s 10-day notice authority was not an alternative avenue for collaterally attacking the

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<sup>22</sup> *Id.* § 1271(b).

<sup>23</sup> *Id.*; see also 30 C.F.R. pt. 733.

<sup>24</sup> See June 11, 2009 MOU, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 3, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009\\_06\\_10\\_wetlands\\_pdf\\_Final\\_MTM\\_MOU\\_6-11-09.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf).

<sup>25</sup> *In re Permanent Surface Mining Litig.*, 653 F.2d 514, 519 (citations omitted) (emphasis added).

regulatory authority's permitting decision.<sup>26</sup> And in that instance, the ENGO had appealed WVDEP's permitting decision to the West Virginia Surface Mine Board and lost.<sup>27</sup> As Assistant Secretary Watson explained, because West Virginia is a primacy state, OSM does not possess the authority to "veto" a state permitting decision.<sup>28</sup> The state administrative and judicial appeal process was the only avenue open to the ENGO challenger: "In a primacy state, permit decisions and any appeals are solely matters of the state jurisdiction in which OSM plays no role."<sup>29</sup>

### [b] — What Changed?

In November 2010, OSM fulfilled the promise in the MOU to remove that impediment to federal oversight and control over state permitting decisions. In a memorandum addressed to OSM regional directors, OSM Director Joseph Pizarchik announced that he was overturning the past restriction of 10-day notices and declared that, effective immediately, OSM was in fact authorized to issue 10-day notices to remedy violations of SMCRA's permitting requirements (that is, for all kinds of activities deemed violations of the federal law by OSM, regardless of whether those activities comply with a state program or a state SMCRA permit).<sup>30</sup> In other words, even if

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<sup>26</sup> See The *Mettiki* Letter Decision from Rebecca Watson, Assistant Secretary, Land and Minerals Management, Department of the Interior, to Joseph M. Lovett, Executive Director, Appalachian Center for the Economy and the Environment (Oct. 21, 2005) (citing *In re Permanent Surface Mining Litig.*, 653 F.2d 514).

<sup>27</sup> The ENGO also had appealed that decision to the West Virginia Circuit Court, but voluntarily dismissed that appeal in order to seek relief from OSM. *Id.*

<sup>28</sup> See *id.* Notably, OSM did issue a regulation in 1988 that allowed the agency to collaterally attack improvidently issued state permits that violated AVS ownership and control rules. 30 C.F.R. § 843.21. But, in settlement of litigation challenging that regulation as contrary to SMCRA's state primacy scheme, the Secretary repealed that regulation in 2008 on the grounds that Congress had not intended for OSM to second-guess a state's permitting decision. 72 Fed. Reg. 68,000, 68,024-26 (Dec. 3, 2007).

<sup>29</sup> See The *Mettiki* Letter Decision from Rebecca Watson, Assistant Secretary, Land and Minerals Management, Department of the Interior, to Joseph M. Lovett, Executive Director, Appalachian Center for the Economy and the Environment (Oct. 21, 2005).

<sup>30</sup> See Memorandum from Joseph G. Pizarchik, Director, OSM, to Regional Directors (Nov. 15, 2010), available at <http://www.osmre.gov/topic/oversight/scm/10daynoticeMEMO.pdf>. Director Pizarchik explicitly rejected the rationale set forth in the *Mettiki* decision by

no one had objected to a permit during the state administrative process, or appealed to the state court a permit decision (or even if the permit had been upheld through those challenges), OSM believes that it can nevertheless still shut down the state-approved mining operation should OSM decide (days, months, or even years later) that the state should not have approved it. OSM has acted to enforce that policy in Oklahoma and its unprecedented actions are now the subject of ongoing litigation.

### **[c] — Litigation Ensued.**

In January 2011, OSM issued two 10-day notices in Oklahoma, asserting that Farrell-Cooper Mining Company was in violation of SMCRA because it was not restoring lands to original Approximate Original Contour (AOC).<sup>31</sup>

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the former Assistant Secretary for Land and Minerals Management. *See also* Directive No. INE-35 at 3 (Jan. 30, 2011), *available at* <http://www.osmre.gov/guidance/docs/directive968.pdf> (defining permit defects for which OSM can issue a 10-day notice to include, *inter alia*, “a failure by the [state or tribal regulatory authority] to make any written finding that is required in order for the RA to approve the permit,” “a lack of technical information, tests, plans, or other information that is required by the approved regulatory program to support a specific finding that was made or action that was taken as part of the permit approval process,” and “[a]pproval of designs or mining and reclamation practices that are inconsistent with the approved regulatory program”).

<sup>31</sup> OSM and Oklahoma previously had disputed whether Oklahoma, a primacy state, had properly interpreted federal AOC requirements. But that disagreement was resolved in 1997, when a joint OSM and Oklahoma Department of Mines team approved the reclamation techniques used by Farrell-Cooper in its reclamation under the Oklahoma AOC definition. OSM nonetheless reopened the issue in May 2010. In May 2010, OSM began a review of the State of Oklahoma’s AOC enforcement. In an August 18, 2010 draft “Oversight Assistance Report,” OSM concluded that Oklahoma had failed to require mines to be reclaimed to AOC and that the surface mining permits that had been issued by the State to Farrell-Cooper Mining Company violated SMCRA because they did not require a return to AOC. The Oklahoma Department of Mines disagreed and on November 17, 2010, the Oklahoma Department of Mines agreed to meet with OSM to discuss the interpretation of AOC under Oklahoma law, consistent with principles of state primacy under SMCRA. Despite that agreement, in January 2011, OSM issued two 10-day notices to the Oklahoma Department of Mines asserting that Farrell-Cooper was in violation of SMCRA based on the company’s alleged failure to comply with federal AOC requirements in its reclamation activities. Robert G. McLusky, “OSM Sued Over Ten Day Notice Policy, Jackson Kelly PLLC *Energy & Environment Monitor* (Dec. 12, 2011), <http://eem.jacksonkelly.com/2011/12/osm-sued-over-ten-day-notice-policy.html>.

Because Farrell-Cooper was in compliance with the Oklahoma Department of Mines' approved permits and reclamation plans, the Oklahoma Department of Mines responded to OSM that Farrell-Cooper's operations were in full compliance with the Oklahoma federally approved program and was not, therefore, in violation of applicable law. Yet OSM rejected the state's showing of good cause on March 3, 2011, as arbitrary, capricious, or an abuse of discretion. Thereafter, the Department requested an informal agency review of OSM's use of 10-day notices and asserted that OSM had misinterpreted and misapplied Oklahoma state law regarding AOC. OSM refused to change course and issued notices of violation (NOVs) to Farrell-Cooper, ordering the company to cease its reclamation activities, to submit a new reclamation plan to OSM, and to implement a new OSM-approved reclamation plan. At that time, Farrell-Cooper had already completed 90 percent of its reclamation work.

On November 29, 2011, Farrell-Cooper brought suit against OSM in the U.S. District Court for the Eastern District of Oklahoma, contesting the NOVs and arguing that OSM had no authority to issue NOVs in a primacy state where the state had determined that the permittee was not in violation of its state permit.<sup>32</sup> Farrell-Cooper argued that OSM wanted to expand its oversight authority to effectively veto state permits, which it could not do without at least going through notice-and-comment rulemaking. And Farrell-Cooper pointed out that OSM's NOVs were arbitrary and capricious and in violation of Farrell-Cooper's due process rights because the company already had reclaimed 90 percent of its mine site in conformance with the AOC requirements of its state permits. To comply with OSM's NOVs, Farrell-Cooper contended, would effectively put the company out of business.

The State of Oklahoma joined the company in challenging OSM's actions,<sup>33</sup> arguing that OSM had violated SMCRA by exercising jurisdiction in a primacy state without following the express requirements set forth in the

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<sup>32</sup> Case No. 6:11-cv-428 (E.D. Okla.).

<sup>33</sup> Farrell-Cooper amended its complaint to name the Oklahoma Department of Mines as a defendant; the state then cross-claimed against OSM, effectively joining in Farrell-Cooper's complaint.

statute and by improperly issuing 10-day notices. The state also argued that OSM improperly had implemented this change through an internal policy document<sup>34</sup> rather than promulgating regulations by notice-and-comment rulemaking in violation of the Administrative Procedure Act (APA).

OSM moved to dismiss the case against it for lack of subject matter jurisdiction, claiming that Farrell-Cooper and the state were attacking OSM's regulations (rather than their implementation or the agency's actions themselves), and that such a regulatory challenge must be brought in the U.S. District Court for the District of Columbia under 30 U.S.C. § 1276(a)(1).<sup>35</sup> Without reaching the merits of the parties' claims, and with virtually no analysis, the district court agreed and granted OSM's motion to dismiss for lack of subject matter jurisdiction.<sup>36</sup>

The Oklahoma Department of Mines and Farrell-Cooper appealed that decision to the U.S. Court of Appeals for the Tenth Circuit.<sup>37</sup> They have argued that § 1276(a)(1) does not deprive the Oklahoma federal district court of subject matter jurisdiction because they are challenging administrative actions that are not taken in accordance with SMCRA or with federal regulations, attacking OSM's actions *under* the regulations, not the regulations themselves.<sup>38</sup> To persuade the court to reverse the dismissal, Oklahoma also has argued that OSM simply cannot unilaterally overturn state permitting provisions in a primacy state without violating SMCRA.<sup>39</sup> Oklahoma also contended that OSM, not the state, would effectively become the ultimate permitting authority in violation of SMCRA's careful system of cooperative federalism if it were allowed to insist, permit by permit, that

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<sup>34</sup> See Directive No. INE-35 at 3 (Jan. 30, 2011), *available at* <http://www.osmre.gov/guidance/docs/directive968.pdf>.

<sup>35</sup> See 30 U.S.C. § 1276(a)(1) ("Any action by the Secretary promulgating national rules or regulations . . . shall be subject to review in the United States District Court for the District of Columbia Circuit.").

<sup>36</sup> Order, Case No. 6:11-cv-428 (May 8, 2012) [Docket No. 79]. The court later dismissed all related actions, including the cross-claim.

<sup>37</sup> See Case No. 12-7045 (Farrell-Cooper appeal); Case No. 12-7048 (Oklahoma Department of Mines appeal).

<sup>38</sup> Oklahoma Appellant's Brief at 10-11, 13-23; Farrell-Cooper Appellant's Brief at 20-26.

<sup>39</sup> Oklahoma Appellant's Brief at 23-26.

operators in a primacy state revise their state-issued permits in accordance with federal policy when faced with 10-day notices and NOV<sup>s</sup>.<sup>40</sup>

That appeal was argued before Tenth Circuit Judges Lucero, Ebel, and Holmes on May 8, 2013. The court may well decide the case on jurisdictional grounds, either affirming the district court or reversing the district court's jurisdictional ruling and remanding the case to the district court to address the merits of Farrell-Cooper and the state's claims in the first instance. Should the circuit court reach the merits, its decision could substantially affect OSM's continued use of expanded 10-day notices nationwide as a tool to review state permitting decisions, possibly empowering OSM to further interfere with primacy state permitting decisions or putting a halt to the agency's extraordinary intrusion into the state's sovereign interests in its regulatory program and permitting process (accomplished with the stroke of a pen, ignoring any rulemaking requirements or necessary statutory amendments). If OSM ultimately prevails on the merits, the Obama administration will have gone a long way toward achieving the goals of the June 11, 2009 MOU. Although the outcome is impossible to predict, this case is one to watch.

## **[2 ] — OSM Review of State Reclamation Bonding Programs.**

The dramatic expansion of federal reach into state primacy programs (as promised in the MOU) also has resulted in increased federal scrutiny of and interference with Appalachian states' bonding programs, which are required by SMCRA to ensure that reclamation of a mine site is achieved in the event that the mine operator itself does not complete the reclamation.

That scrutiny began with a critical 2010 Government Accountability Office (GAO) report on regulatory authority reclamation efforts (and financial assurances that reclamation will be completed) for surface mines with valley fills in four Appalachian states — Kentucky, Virginia, and West Virginia, all of which are primacy states, and Tennessee, where the federal program is in place.<sup>41</sup> Of those states, West Virginia relies exclusively on an alternative

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<sup>40</sup> *Id.*

<sup>41</sup> Specifically, GAO studied the approaches that OSM, the U.S. Army Corps of Engineers, and the states took to obtain financial assurances for surface coal mines with valley fills,

bonding system, Tennessee on a full-cost bonding program, and Virginia and Kentucky on a combination of the two. The GAO reported poor reforestation efforts, water-flow issues, contaminated streams, and failure to restore AOC in those states.<sup>42</sup> State regulators in the primacy states included in the report pushed back, contending that the report did not account for site-specific problems and gave the misimpression that there are bonding and reclamation issues only in those four states.<sup>43</sup> They also expressed grave concern that GAO was advocating what would amount to never-ending monitoring of sites at which mining had ceased, circumventing SMCRA's basic premise that regulatory jurisdiction should terminate when reclamation is complete.<sup>44</sup>

OSM then sprung into action and conducted its own oversight reviews in West Virginia and Kentucky. In January 2011, OSM's Charleston Field Office

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what monitoring state and federal regulators conducted after reclamation and mitigation are complete, and the federal laws that agencies may use to address latent environmental problems. *See* GAO Report to Congressional Requesters, Surface Coal Mining: Financial Assurances for, and Long-Term Oversight of, Mines with Valley Fills in Four Appalachian States (Jan. 2010), *available at* <http://www.gao.gov/assets/310/300079.pdf>.

This was not the first GAO report on surface coal mining in recent years. *See, e.g.*, GAO, Information on Clean Water Act Section 404 Permit Reviews Under Enhanced Coordination Procedures in Appalachia, focusing on West Virginia (Oct. 19, 2010), *available at* <http://www.gao.gov/assets/100/97147.pdf>; GAO Report to Congressional Requesters, Surface Coal Mining: Characteristics of Mining in Mountainous Areas of Kentucky and West Virginia (Dec. 2009), *available at* <http://www.gao.gov/assets/300/299226.pdf>.

<sup>42</sup> *See* GAO Report to Congressional Requesters, Surface Coal Mining: Financial Assurances for, and Long-Term Oversight of, Mines with Valley Fills in Four Appalachian States (Jan. 2010), *available at* <http://www.gao.gov/assets/310/300079.pdf>.

<sup>43</sup> *See, e.g.*, Letter from Lewis A. Halstead, Deputy Director of the West Virginia Department of Environmental Protection to Robin Nazarro, Director, Natural Resources and Environment, Government Accountability Office (Dec. 22, 2009), *available at* <http://www.gao.gov/htext/d10206.html> (Appendix VIII to GAO Report: Comments from WVDEP); Letter from Stephen Walz, Director of the Virginia Department of Mines, Minerals and Energy to Robin Nazarro, Director, Natural Resources and Environment, Government Accountability Office (Dec. 22, 2009), *available at* <http://www.gao.gov/htext/d10206.html> (Appendix VIII to GAO Report: Comments from Virginia Department of Mines, Minerals and Energy).

<sup>44</sup> Letter from Lewis A. Halstead, deputy director of the West Virginia Department of Environmental Protection, to Robert Nazarro, director, Natural Resources and Environment, Government Accounting Office (Dec. 22, 2009) *available at* <http://www.gao.gov/htext/d10206.html> (Appendix VIII to GAO Report, comments from WVDPT).

released a report on West Virginia's alternative bonding system as part of a national priority review mandated by OSM.<sup>45</sup> Also in January 2011, OSM's Lexington Field Office issued a critical report on Kentucky's bonding system as part of OSM's national priority review.<sup>46</sup> That pressure from OSM, in combination with ENGO litigation, has caused West Virginia and Kentucky to make significant changes to their reclamation bond programs.

**[a] — SMCRA Was Enacted in Part to Ensure that  
Mine Sites Are Reclaimed.**

Reclamation ensures that the land, vegetation, and water affected by mining will be reclaimed and restored.<sup>47</sup> SMCRA's reclamation bonding requirements constituted a major reform in the regulation of surface mining — prior to SMCRA, reclamation bonds often were so inadequate that it cost the operator more money to reclaim the site than to abandon it and forfeit the bond, which many operators did.<sup>48</sup> Permit applicants therefore must submit detailed reclamation plans at the time that they seek a mining permit and to estimate the per-acre cost of reclamation.<sup>49</sup> And SMCRA requires a mining operator to submit a reclamation bond in an amount sufficient to ensure that adequate funds will be available for the regulatory authority to complete reclamation of the site once mining has ceased in the event that the operator does not complete that reclamation.<sup>50</sup> Once mining is completed, operators are required to comply with the permit's reclamation plans and

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<sup>45</sup> OSM, Charleston Field Office, West Virginia's Alternative Bonding System: A National Priority Bonding Review at 1 (Jan. 2011), *available at* [http://www.arcc.osmre.gov/FOS/CHFO/Reports/2011/WV\\_Bonding\\_Review\\_-\\_Final\\_01\\_26\\_2011.pdf](http://www.arcc.osmre.gov/FOS/CHFO/Reports/2011/WV_Bonding_Review_-_Final_01_26_2011.pdf).

<sup>46</sup> See OSM Lexington Field Office, National Priority Oversight Evaluation: Adequacy of Kentucky Performance Bond Amounts (Jan. 4, 2011), *available at* [http://www.arcc.osmre.gov/fos/lfo/ky/ts/ey2011-ky-ts-fi-bond\\_adequacy.pdf](http://www.arcc.osmre.gov/fos/lfo/ky/ts/ey2011-ky-ts-fi-bond_adequacy.pdf).

<sup>47</sup> See *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 774-75 (S.D. W. Va. 1996) (holding that SMCRA is designed to provide assurance of "complete reclamation of mine sites").

<sup>48</sup> See Craig B. Griffin, "West Virginia's Seemingly Eternal Struggle for a Fiscally and Environmental Adequate Coal Mining Reclamation Bonding Program," 107 *W. Va. L. Rev.* 105, 113 (2004) (hereinafter Griffin).

<sup>49</sup> 30 U.S.C. §§ 1257(d), 1258.

<sup>50</sup> *Id.* § 1259(a). Moreover, the bond amount must not be less than \$10,000. *Id.*

with regulatory standards that govern how the site is reclaimed.<sup>51</sup> *Only after* an operator has met all the reclamation requirements for the permit and applicable program may the regulatory authority release the reclamation bond, which typically occurs in phases as reclamation is conducted.<sup>52</sup> Should the mining operator forfeit the bond (if, for example, the operator ceases to do business), the regulatory authority will use the forfeited bond to reclaim the site.

Full-cost bonding is not required by the Act, however. SMCRA allows the Secretary to approve as part of a state regulatory program an alternative system that will achieve the objectives and purposes of the bonding program and enable the regulator to have sufficient money to complete the reclamation plan for any areas in default.<sup>53</sup> An alternative bond system spreads the risk and draws in part on a bond pool to cover the reclamation liabilities of each individual mining site, allowing the state to discount the amount of the site-specific bond imposed on an operator to an amount that is less than the full cost needed for complete reclamation of that site.<sup>54</sup> By contrast, full cost bonding, also known as a conventional bond system, requires an operator to pay the entire cost of the bond needed to complete reclamation in the event of forfeiture and the cost of the bond is not discounted or supplemented by any other source.<sup>55</sup> The states with alternate bonding systems have been the targets of litigation by environmental non-governmental organizations (ENGOs) and OSM scrutiny. That scrutiny is not new, but has been used most recently in West Virginia and Kentucky as a tool for the administration and the ENGOs to advance their agenda, further tipping the balance of SMCRA's scales toward environmental protection.

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<sup>51</sup> *Id.* § 1265.

<sup>52</sup> *See, e.g.*, 38 W. Va. Code R. § 38-2-7.4.b.1.I (phased bond release).

<sup>53</sup> 30 U.S.C. § 1259(c); 30 C.F.R. § 800.11(e). The states that currently have (or in the past have had) alternative bonding systems include Indiana, Missouri, Ohio, Virginia, West Virginia, and Wyoming. *See, e.g.*, OSM COALEX State Inquiry Report-37 (Apr. 2, 1985), available at [http://www.osmre.gov/topic/Coalex/docs/coalex\\_037.pdf](http://www.osmre.gov/topic/Coalex/docs/coalex_037.pdf).

<sup>54</sup> *See* Pa. Fed'n of Sportsmen Clubs, Inc. v. Kempthorne, 497 F.3d 337, 341 (3d Cir. 2007).

<sup>55</sup> *See* 30 U.S.C. § 1259(a); *Pa. Fed'n of Sportsmen Clubs*, 497 F.3d 337, 341.

**[b] — OSM Pressure and ENGO Litigation Have Increased the Reclamation Tax in West Virginia, with a Potential Part 733 Action on the Horizon.**

West Virginia has a long history of litigation and negotiations with OSM over its alternative bond program,<sup>56</sup> under which a variety of factors determine the reclamation bond for each proposed mine operation, but which caps the overall bond amount at \$5,000 an acre, with a minimum total bond required of \$10,000.<sup>57</sup> To supplement the funds available for reclamation in the event of bond forfeiture, West Virginia also imposes a special reclamation tax on each ton of coal mined that supplies a pool of funds called the Special Reclamation Fund (or SRF) that the state may access to complete reclamation in the event of a forfeiture.<sup>58</sup>

Before the most recent dispute arose, West Virginia's special reclamation tax stood at 14.4 cents per ton of clean coal mined (up from the original one cent per ton). An actuarial report had predicted that the bond fund would remain solvent until around 2038, when it would then become insolvent largely due to water treatment issues at forfeited bond sites.<sup>59</sup> It is obvious from that report that the adequacy of the Fund to support future water treatment at additional abandoned sites (*the* major stressor on the West Virginia reclamation fund) was in serious doubt. Previous litigation required WVDEP to treat acid mine drainage at bond forfeiture sites and, in 2007, the West Virginia Highlands Conservancy and other ENGO groups upped the

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<sup>56</sup> See Griffin, *supra*, 105, 117, 119-85; see also OSM, Charleston Field Office, West Virginia's Alternative Bonding System: A National Priority Bonding Review (Jan. 2011), available at [http://www.arcc.osmre.gov/FOs/CHFO/Reports/2011/WV\\_Bonding\\_Review\\_Final\\_01\\_26\\_2011.pdf](http://www.arcc.osmre.gov/FOs/CHFO/Reports/2011/WV_Bonding_Review_Final_01_26_2011.pdf).

<sup>57</sup> See W. Va. Code § 22-3-12; W. Va. Code R. § 38-2-11.5.c.

<sup>58</sup> W. Va. Code § 22-3-11(h)(B). The Special Reclamation Fund is also funded by forfeited bonds that are not completely exhausted by reclamation, administrative civil penalties collected by the West Virginia Department of Environmental Protection (WVDEP), and interest. See Griffin, *supra*, 105, 117.

<sup>59</sup> OSM, Charleston Field Office, West Virginia's Alternative Bonding System: A National Priority Bonding Review at 1-4 (Jan. 2011), available at [http://www.arcc.osmre.gov/FOs/CHFO/Reports/2011/WV\\_Bonding\\_Review\\_-\\_Final\\_01\\_26\\_2011.pdf](http://www.arcc.osmre.gov/FOs/CHFO/Reports/2011/WV_Bonding_Review_-_Final_01_26_2011.pdf).

ante when they sued the State of West Virginia in two federal district courts, seeking to force the state to issue itself Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) permits in treating water at bond forfeiture sites and to treat those sites in accordance with applicable water quality based standards.<sup>60</sup> Such treatment would significantly drive up the state's cost of reclamation, which in turn would put pressure on the Special Reclamation Fund and likely inspire a tax increase.

And that is exactly what happened. Although WVDEP argued that it was not required to issue NPDES permits *to itself* to clean up water pollution and acid mine drainage generated *by others* (a bizarre concept), the district courts disagreed and were affirmed on appeal.<sup>61</sup> The ENGOs then threatened to sue the state on the remaining bond forfeiture sites, which led to an August 2011 consent decree in which West Virginia agreed to prioritize water treatment at existing bond forfeiture sites and to issue itself NPDES permits for those sites, with permits for all 171 sites to be issued by December 2015.<sup>62</sup>

The West Virginia Legislature increased the special reclamation tax in July 2012 to 27 and 9/10 cents per ton of coal mined.<sup>63</sup> WVDEP is in the process of a phased roll-out of its NPDES permits for those sites, under which the WVDEP Special Reclamation Division will conduct water treatment, construct treatment facilities, acquire the necessary land, and run electricity

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<sup>60</sup> ENGOs brought suit against WVDEP in the U.S. District Courts for the Northern and Southern Districts of West Virginia. *See* W. Va. Highlands Conservancy v. Huffman, No. 1:07-cv-00087 (N.D. W. Va.); W. Va. Highlands Conservancy v. Huffman, 2:07-cv-00410 (S.D. W. Va.).

State regulations require WVDEP to treat acid mine drainage at bond forfeiture sites in accordance with the EPA's effluent limitations for coal mining point sources and "applicable water quality standards." W. Va. Code R. § 38-2-12.5.e (referencing standards set forth in 40 C.F.R. § 434); *see id.* at § 38-2-12.4.b.

<sup>61</sup> *See* W. Va. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159 (4th Cir. 2010); W. Va. Highlands Conservancy, Inc. v. Huffman, 651 F. Supp. 2d 512 (S.D. W. Va. 2009); W. Va. Highlands Conservancy, Inc. v. Huffman, 588 F. Supp. 2d 678 (N.D. W. Va. 2009).

<sup>62</sup> *See* West Virginia Department of Environmental Protection Press Release (Aug. 2, 2011), *available at* <http://www.dep.wv.gov/news/Pages/DEPentersIntoconsentdecreeonSpecialRepermits.aspx>.

<sup>63</sup> *See* Senate Bill No. 579 (Mar. 9, 2012); W. Va. Code § 22-3-11(h)(1)(B) (as amended).

to these often remote locations. Those efforts almost undoubtedly will drive up the cost of reclamation and may lead to additional tax increases.

And the ENGOs are not finished. In 2000, the West Virginia Highlands Conservancy sued the Department of the Interior and OSM seeking to force the federal government to withdraw approval of the state reclamation program.<sup>64</sup> That suit has been on the docket ever since, having been the subject of multiple motions to reopen the case and place it back on the active docket. Essentially, the ENGOs have used that suit as a Sword of Damocles (as that term has been (mis)used in recent political parlance)<sup>65</sup> over the metaphorical head of WVDEP in an attempt to inspire changes in West Virginia's reclamation bond program.

Moreover, when the outline for this chapter was circulated to conference attendees, the authors predicted that those groups might not be satisfied until surface mining regulation rests in federal, not state, hands. And in fact, shortly after the 34th Annual Institute, the West Virginia Highlands Conservancy, the Sierra Club, Earthjustice, Coal River Mountain Watch, and the Ohio Valley Environmental Coalition fulfilled that prediction. Those groups joined 13 other ENGOs in filing a Part 733 petition with OSM under SMCRA Section 521(b) and 30 C.F.R. § 733.12. Under the Part 733 process, OSM may institute proceedings to substitute federal enforcement of state programs or even withdraw approval of state programs and promulgate a federal program for the state.<sup>66</sup> In over 100 pages, those groups appeal to OSM to terminate West Virginia's *entire* SMCRA program because they allege that the state is not properly implementing, administering, enforcing, and maintaining

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<sup>64</sup> The West Virginia Highlands Conservancy filed suit in 2000 against the Department of the Interior and OSM challenging West Virginia's bond program and asserting that the Secretary should withdraw his approval of the State's program. *See W. Va. Highlands Conservancy v. Norton*, Case No. 2:00-cv-1062 (S.D. W. Va.). Although WVDEP was originally named as a party in that case, it has been dismissed on Eleventh Amendment grounds. That case has been alternately stayed and reopened over the past 13 years as West Virginia and OSM have negotiated changes to the bond system.

<sup>65</sup> *See* NPR, 'Sword of Damocles' Reference Sometimes Misused, available at <http://www.npr.org/2011/08/19/139799434/sword-of-damocles-reference-sometimes-misused> (last visited June 28, 2013).

<sup>66</sup> *See* 30 C.F.R. Part 733.

its program.<sup>67</sup> Those groups assert that WVDEP has failed to adhere to SMCRA's permitting processes, has failed to properly enforce SMCRA, has failed to protect water quality and quantity, has failed to properly reclaim mine sites, and has failed to comply with the Endangered Species Act. The petition also makes an emotional appeal. For example, it begins by saying that "The situation could not be more dire nor the stakes higher. . . . Forested mountain ridges and valleys have been flatted into moonscapes incapable of supporting any meaningful use or vegetation. Mountain streams have been permanently buried beneath the rubble of what were once mountaintops."<sup>68</sup>

That petition has been matched with public advocacy. On June 24, 2013, those groups held a public demonstration in Charleston, West Virginia to launch a public relations campaign called "Citizen Action for Real Enforcement" to support that petition.<sup>69</sup> That rally, combined with the sheer size of the Part 733 petition, and the number of ENGO groups that signed onto it, indicate that West Virginia's struggle is far from over. This is not an isolated complaint but appears to be a well-organized, well-funded attack on state primacy and cooperative federalism under SMCRA. A brief scan of the Table of Contents of the petition reveals that many of the hot button issues mining are at play: selenium, conductivity, SMCRA violations for exceedances under NPDES permits, understaffing, show cause orders — and the list goes on.

OSM must respond to the petition, which will take a significant amount of time, during which OSM will examine the West Virginia program and reach a conclusion on the various claims asserted by the ENGOs. If OSM does not institute Part 733 proceedings, the ENGO groups likely will sue to force it to withdraw its approval of West Virginia's program, hoping to tip the scales even farther away from coal mining and toward environmental protection. And OSM and the state (to the extent it is involved in any future litigation)

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<sup>67</sup> A copy of the petition may be found at <https://www.documentcloud.org/documents/717004-733-petition-to-osm-june-2013.html>.

<sup>68</sup> *Id.*

<sup>69</sup> Ken Ward, Jr., "Breaking news: Citizen groups seek OSMRE takeover of West Virginia DEP's mining program," <http://blogs.wvgazette.com/coalattoo/2013/06/24/breaking-news-citizen-groups-seek-osmre-takeover-of-west-virginia-deps-mining-program/> (June 24, 2013).

will once again become embroiled in costly litigation with potentially wide-ranging consequences for other primacy states and SMCRA's cooperative federalism system.

**[c] — OSM Instituted Part 733 Proceedings in Kentucky, Forcing the Commonwealth to Revise Its Bond Program.**

The Part 733 process has also been at issue in Kentucky. Although ENGOs have been the major drivers of change in West Virginia, that has not been the case in Kentucky, where OSM has been even more critical of the adequacy of the bond program than it has been in West Virginia. In 2012, OSM even began the Part 733 process to substitute federal enforcement for Kentucky's reclamation program. To avoid losing part of its program, Kentucky has recently overhauled its bond system to increase the amount of reclamation bonds.

Kentucky law requires the Commonwealth of Kentucky Cabinet of Energy and Environment to compute a performance bond amount sufficient to assure completion of reclamation if, in the event of forfeiture, the Cabinet must complete the reclamation.<sup>70</sup> Until recent events, however, Kentucky had not adjusted its bonding protocols since 1993.

After studying Kentucky's program for several years, including conducting a national priority review similar to that conducted in West Virginia, OSM issued Kentucky a Part 733 Notice on May 1, 2012.<sup>71</sup> OSM determined that federal substitution of enforcement was necessary because Kentucky was not implementing, administering, enforcing, and maintaining its reclamation bond program in accordance with SMCRA.<sup>72</sup>

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<sup>70</sup> Ky. Rev. Stat. Ann. § 350.060(11).

<sup>71</sup> See 30 C.F.R. Part 733; Letter from Joseph Pizarchik, Director, OSM, to Leonard Peters, Secretary, Kentucky Energy and Environment Cabinet (May 1, 2012), available at <http://archives.wfpl.org/wp-content/uploads/2012/05/OSM-letter.pdf>; see also OSM Lexington Field Office, National Priority Oversight Evaluation: Adequacy of Kentucky Performance Bond Amounts (Jan. 4, 2011), available at [http://www.arcc.osmre.gov/fos/lfo/ky/ts/ey2011-ky-ts-fi-bond\\_adequacy.pdf](http://www.arcc.osmre.gov/fos/lfo/ky/ts/ey2011-ky-ts-fi-bond_adequacy.pdf).

<sup>72</sup> For example, in 2008, OSM had concluded that four out of five permanent program bond forfeitures in Kentucky did not have adequate bonding. In 2009, OSM concluded that two out of five permanent program bond forfeitures in Kentucky did not have adequate

Those proceedings prompted Kentucky to overhaul its bond program, finally satisfying OSM. Kentucky issued an emergency rulemaking in May 2012, making several changes to the bond program, including increased individual bond amounts, increased rates per acre, and establishment of an emergency statewide bond pool.<sup>73</sup> At the same time, Kentucky proposed identical revisions through the state's normal rulemaking process.

On September 28, 2012, the Kentucky Department for Natural Resources submitted to OSM proposed amendments to its approved permanent regulatory program that would incorporate the increased bond amounts, rate per acres, bond pool, and other improvements that were first announced in Kentucky's emergency rule.<sup>74</sup> OSM published that proposed amendment to Kentucky's program for public comment on February 20, 2013. It remains pending.<sup>75</sup>

Intensified federal oversight of state reclamation programs similar to that in West Virginia and Kentucky likely will continue for the foreseeable future (driven in part by ENGO pressures as the recent Part 733 petition in West Virginia demonstrates), at least for so long as state programs include alternatives to full-cost bonding.<sup>76</sup> What many states and operators see as

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bonding. And in 2010, OSM found that 10 out of 12 bond forfeitures in the state did not have an adequate bond to complete reclamation. OSM Lexington Field Office, National Priority Oversight Evaluation: Adequacy of Kentucky Performance Bond Amounts (Jan. 4, 2011), available at [http://www.arcc.osmre.gov/fos/lfo/ky/ts/ey2011-ky-ts-fi-bond\\_adequacy.pdf](http://www.arcc.osmre.gov/fos/lfo/ky/ts/ey2011-ky-ts-fi-bond_adequacy.pdf).

OSM and Kentucky had worked together to address the bond program deficiencies in 2011 and 2012, but those negotiations were unsuccessful.

<sup>73</sup> For example, the minimum bond amount was raised from \$10,000 to \$75,000 for a permit bonded as a single area. See 405 Ky. Admin. Regs. 10:015E. For more information about those rules, see Reclamation Advisory Memorandum No. 155 (May 4, 2012), available at [http://minepermits.ky.gov/RAMS/RAM\\_155.pdf](http://minepermits.ky.gov/RAMS/RAM_155.pdf).

<sup>74</sup> See 78 Fed. Reg. 11796 (Feb. 20, 2013).

<sup>75</sup> *Id.*

<sup>76</sup> Pennsylvania provides another example of combined OSM and ENGO scrutiny of and challenges to alternative bonding systems that led to state reclamation bond changes. The Commonwealth converted to a conventional full-cost bonding system in 2001 after OSM sent Pennsylvania a Part 732 Notice notifying the state that its regulatory program must be amended and an ENGO group sent a notice of intent to sue to the Pennsylvania Department of Environmental Protection alleging that the bonding system had been insolvent for over a decade. See Pa. Fed'n of Sportsmen Clubs, 497 F.3d at 341-45.

the federal assault on the prerogatives of primacy states (aided and abetted by ENGOs) continues.

**[3] — EPA Involvement in SMCRA Permitting: *National Mining Association v. Perciasepe*.**

OSM is not the only federal agency seeking to broaden its influence over state regulation of surface mining past heretofore unchallenged statutory and regulatory boundaries. In the inter-agency MOU, EPA, the Corps, and the Department of Interior pledged to coordinate reviews of pending permit applications under the Clean Water Act as well as SMCRA.<sup>77</sup> EPA has joined what some see as a widespread attempt at greater federal control over surface mining (as promised in the MOU) by asserting that it has the authority to oversee (or at least have influence over) SMCRA permitting.

In EPA's July 21, 2011 Final Guidance document, EPA fulfilled its promise by providing ostensibly non-binding suggestions to EPA Regions III, IV, and V in commenting on and objecting to Clean Water Act and SMCRA permits for surface coal mining operations in six Appalachian states, including Kentucky and West Virginia.<sup>78</sup> But as those primacy states and the industry that they regulate soon discovered, in practice, those "suggestions" were effectively binding mandates that (once again) substantially changed the balance of surface mining regulation without notice-and-comment rulemaking or the necessary statutory changes.

West Virginia, Kentucky, and several members of the coal mining industry filed suits challenging, *inter alia*, the Final Guidance (which have now been consolidated into one challenge), arguing that it constituted final and binding agency action that imposed mandatory standards that (i) should

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<sup>77</sup> See June 11, 2009 MOU, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 2, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009\\_06\\_10\\_wetlands\\_pdf\\_Final\\_MTM\\_MOU\\_6-11-09.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf).

<sup>78</sup> See July 21, 2011 Final Memorandum: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order. EPA also "recommended" that the Corps incorporate upland Best Management Practices into Section 404 dredge-and-fill permits. *Id.*

have been adopted in notice-and-comment rulemaking and (ii) exceeded the agency's authority under SMCRA and the Clean Water Act.<sup>79</sup>

On July 31, 2012, Judge Reggie B. Walton of the U.S. District Court for the District of Columbia granted partial summary judgment in that consolidated case in favor of the Plaintiffs National Mining Association, the State of West Virginia, the Commonwealth of Kentucky, the Kentucky Coal Association, and the City of Pikeville, Kentucky, invalidating the Final Guidance as contrary to SMCRA as well as the Clean Water Act and the APA.<sup>80</sup> The court explained in relevant part that SMCRA provides “only a limited role for EPA”<sup>81</sup> and that EPA had exceeded that role in the Final Guidance. The court interpreted those provisions as establishing the boundaries of EPA's involvement in surface mine permits, holding that

[t]he SMCRA grants to the EPA only the ability to comment on and provide its written concurrence prior to the Secretary's approval of a state SMCRA permitting program. In other words, once the EPA has given its assent to approve a state SMCRA permitting program, the SMCRA affords it no further authority in the oversight or administration of the SMCRA regime. . . . It is thus beyond the EPA's purview to declare that ‘[p]rojects should fully evaluate and, where appropriate and practicable, incorporate the following general aspects of effective impact minimization’ or to attempt to specify

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<sup>79</sup> That consolidated litigation also challenged agency actions outside of SMCRA, namely, the Enhanced Coordination Process for certain Clean Water Act Section 404 permits for Appalachian surface mining operations, the screening process used by EPA to divert permits to that process, and the Final Guidance's interference in the Section 402 permitting process, all of which were invalidated by Judge Walton. Those actions are, however, beyond the scope of this chapter. See *Nat'l Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119 (D.D.C. 2012); *Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011). But it is worth noting that the vacated Enhanced Coordination Process, the screening tool used to divert permits to that process, and the Interim and then Final Guidance documents were all inspired by the June 11, 2009 MOU. See June 11, 2009 MOU, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 2-5, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009\\_06\\_10\\_wetlands\\_pdf\\_Final\\_MTM\\_MOU\\_6-11-09.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf).

<sup>80</sup> *Nat'l Mining Ass'n*, 880 F. Supp. 2d 119, 135-42.

<sup>81</sup> *Id.* at 124.

to the Office of Surface Mining or the state SMCRA agency what constitutes an ‘appropriate’ best management practice.<sup>82</sup>

In other words, EPA may preliminarily participate on a programmatic level, but after it provides its written concurrence, EPA’s role under SMCRA is over.

That case is now on appeal to the D.C. Circuit and has been restyled as *National Mining Association v. Perciasepe* after Administrator Lisa Jackson’s departure from EPA.<sup>83</sup> In its opening brief, EPA has argued that the Final Guidance does not, in fact, create a new role for the agency under SMCRA. The appeal will be briefed throughout the summer of 2013 and oral argument has yet to be scheduled. The Act’s competing interests, environmental regulation and the facilitation of coal mining, hang in the balance.

The Final Guidance is remarkable for EPA’s unprecedented intrusion into the states’ and OSM’s authority under SMCRA. EPA has attempted to insert itself into SMCRA permitting and regulation, overriding OSM’s and the states’ expert judgment and regulatory authority and disregarding the limits placed on EPA’s authority under SMCRA. If EPA prevails on appeal, the addition of this new heavyweight player into the regulatory balance will likely skew it even further in favor of federal control over the environmental regulation of coal mining.

### **§ 10.03.           Litigation Against Regulators and Mine Operators By Environmental Non-Governmental Organizations.**

As the recent Part 733 ENGO petition in West Virginia demonstrates, ENGOs have been major contributors to the evolution of surface mining regulation in recent years by bringing an increased number of suits against federal and state regulators and mine operators under SMCRA.<sup>84</sup> To illustrate that point, this chapter focuses on two significant pending ENGO cases — (1)

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<sup>82</sup> *Id.* at 136.

<sup>83</sup> *See Nat’l Mining Ass’n v. Perciasepe*, Nos. 12-5310, 5311 (D.C. Cir.).

<sup>84</sup> Those suits both have been brought as regulatory challenges and challenges under SMCRA’s citizen suit provision. *See* 30 U.S.C. § 1270(a).

two related cases challenging the federal 2008 Stream Buffer Zone Rule, recently revived due to OSM's delay in issuing a replacement rule, and (2) a challenge to Montana's permitting program implicating the state's primacy under SMCRA, among other things.

**[1] — The Stream Buffer Zone Rule: *National Parks Conservation Association v. Salazar* and *Coal River Mountain Watch v. Salazar*.**

One of the ongoing cases which could tip the scales in favor of environmental protection is aimed at what is known as the Stream Buffer Zone Rule. OSM issued the Stream Buffer Zone Rule in 2008. That rule made it clear that mine operators could mine in certain areas near streams provided that certain requirements intended to be protective of the environment were satisfied. However, the rule was immediately challenged by ENGOs. And the administration, having taken office one month after the rule was issued and having made it extraordinarily clear that it vehemently disagrees with the actions taken by its predecessor, is actively working to replace it through notice-and-comment rulemaking.

The 2008 Stream Buffer Zone Rule had modified and replaced an earlier stream buffer zone rule, issued in 1983, that had prohibited surface mining disturbances within 100 feet of a perennial or intermittent stream unless specifically authorized by a regulatory authority upon a finding that the mining activities would not cause or contribute to the violation of water quality standards and would not adversely affect water quantity or quality.<sup>85</sup> The new rule was seen by some as overly accommodating to industry's needs, by liberalizing the federal minimum standards regulating mountaintop mining. It allowed for surface mining activities within 100 feet of streams upon a showing by the operator that avoidance of such disturbance is not reasonably possible, and that the plans submitted with the application for a permit meet other conditions, such as use of the best technology currently available to prevent the contribution of suspended solids to streamflow or runoff outside the permit area and to minimize disturbances to and adverse

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<sup>85</sup> See 48 Fed. Reg. 30,312 (June 20, 1983).

impacts on fish, wildlife, and other environmental considerations.<sup>86</sup> The new rule did not require that the regulator find that the mining activities would not cause or contribute to the violation of water quality standards or that they would not adversely affect water quantity or quality. It also exempted activities from the prohibition under the old 1983 rule when the regulatory authority approved filling or diverting the stream segment, consistent with SMCRA's provisions authorizing mountaintop mining.<sup>87</sup>

However, the new Stream Buffer Zone Rule also required that mine operators must return as much of the overburden as possible to the excavation area, that operators must minimize the volume of excess spoil generated, and that operators must design and construct fills to be no larger than needed to accommodate excess spoil.<sup>88</sup> The rule further provided that the operator must avoid constructing excess fills, refuse piles, or slurry impoundments to the extent possible. When it is not possible to avoid such construction, the rule required that the operator identify a range or reasonable alternatives and select the alternative with the least overall adverse impact.<sup>89</sup> Despite those requirements intended to be protective of the environment, the rule was immediately targeted for challenge by ENGO groups.

Two lawsuits were filed in short order. The eight ENGOs involved in the *Coal River Mountain Watch* case have claimed that OSM (in issuing the rule) and the EPA (in its concurrence determination) violated SMCRA, the APA, the Clean Water Act, and the National Environmental Policy Act (NEPA),<sup>90</sup> while the group that brought the *National Parks Conservation Association* case claimed that OSM and the EPA violated SMCRA, the APA, and the Endangered Species Act (ESA).<sup>91</sup> Although the Stream Buffer Zone Rule

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<sup>86</sup> See 30 C.F.R. §§ 780.28(e), 784.28(e).

<sup>87</sup> See *id.* §§ 816.57(a)(1) and (b), 817.57(a)(1) and (b).

<sup>88</sup> See *id.* §§ 780.35(a), 784.19(a).

<sup>89</sup> See *id.* §§ 780.25(d)(1), 780.35(a)(3), 784.16(d)(1), 784.19(a)(3).

<sup>90</sup> That case was brought by the Coal River Mountain Watch, the Kentucky Waterways Alliance, the Ohio Valley Environmental Coalition, Save Our Cumberland Mountains, the Sierra Club, Southern Appalachian Mountain Stewards, the Waterkeeper Alliance, and the West Virginia Highlands Conservancy. See *Coal River Mountain Watch v. Kempthorne*, 1:08-cv-2212 (D.D.C.).

<sup>91</sup> See *Nat'l Parks Conserv. Ass'n v. Kempthorne*, 1:09-cv-115 (D.D.C.).

was five years in the making, it was immediately condemned as a midnight rush to rulemaking because it was published on December 12, 2008, weeks before the George W. Bush administration left office.<sup>92</sup>

A new administration often disagrees with its predecessor. But what makes this case so unique is that after the Obama administration took office, the new Secretary of the Interior Ken Salazar took the unprecedented step of publicly renouncing his own agency's rule, stating that the Stream Buffer Zone Rule was "a major misstep," that it was "bad public policy," and that the Rule "just doesn't pass the smell test."<sup>93</sup> Subsequently, the Department of Justice (with the blessing of the ENGO plaintiffs) filed motions in the pending court cases asking the court to vacate the rule and remand it to the Department of the Interior, without reaching the merits and without regard for APA rulemaking requirements.<sup>94</sup> Defendant-Intervenor National Mining Association resisted the movants' sue-and-settle tactic<sup>95</sup> and successfully

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<sup>92</sup> The Stream Buffer Zone Rule was first proposed in January 2004. 69 Fed. Reg. 1036 (Jan. 7, 2004). After conducting an Environmental Impact Statement, OSM published an amended proposed rule in August 2007. 72 Fed. Reg. 48,890 (Aug. 24, 2007). The final rule was then published in December 2008. 73 Fed. Reg. 75,814 (Dec. 12, 2008).

<sup>93</sup> See Remarks on Mountaintop Mining Rule (Apr. 27, 2009), available at [http://www.wvpubcast.org/uploadedFiles/WVPubcast/News/News\\_Stories/Salazarmountaintopremarks.pdf?n=9871](http://www.wvpubcast.org/uploadedFiles/WVPubcast/News/News_Stories/Salazarmountaintopremarks.pdf?n=9871).

<sup>94</sup> That motion was based on Secretary Salazar's public renunciation of the rule. If the rule were vacated and remanded, OSM indicated that it planned to issue guidance to states regarding the application of the 1983 rule and to gather public comment on how to update and improve the Reagan-era rule.

<sup>95</sup> "Sue and settle" refers to the controversial practice where plaintiffs reach prearranged agreements with the defendant government agency without industry's participation, thus effecting an end-run around the notice-and-comment rulemaking process. That practice, widely and successfully used by environment groups since the election of President Obama, has been widely criticized. See U.S. Chamber of Commerce, *A Report on Sue and Settle: Regulating Behind Closed Doors* (May 2013), available at <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf>. NMA's successful opposition to the sue-and-settle tactic in this case illustrates the importance of industry intervention in ENGO challenges where industry has a stake in the outcome.

The Ninth Circuit recently set the stage for widespread challenge to such "friendly" consent decrees in *Conservation Northwest v. Sherman*, No. 11-35729 (9th Cir. Apr. 25, 2013). The court overturned the district court's approval of a consent decree between a coalition of environmental groups and several federal agencies (and to which the lone industry defendant-intervenor objected), holding that "a district court abuses its discretion when it enters a consent

opposed those motions on the ground that a court may not simply vacate a rule under the APA without reaching its merits and finding it to be arbitrary, capricious, or otherwise not in accordance with law.<sup>96</sup>

Undaunted (but forced to continue its efforts in a more open and time-consuming public rulemaking process), on November 30, 2009, the Department of the Interior published an advanced notice of proposed rulemaking (ANPR) and notice of intent to file a supplemental environmental impact statement, announcing its intent to revise the Stream Buffer Zone Rule as the agency previously had agreed to do in the interagency June 11, 2009 MOU.<sup>97</sup> In the ANPR, OSM explained that revision to the Stream Buffer Zone Rule “is necessary to implement the interagency action plan that the administration has developed to significantly reduce the harmful consequences of surface coal mining operations in Appalachia, while ensuring that future mining remains consistent with federal law.”<sup>98</sup> It also recommitted the agency to reducing the adverse impacts of surface coal mining in Appalachia and concluded that “[a]ccomplishing that goal will involve revision or repeal of certain elements of the 2008 rule.”<sup>99</sup> The anticipated new rule is known as the Stream Protection Rule.

After the court had refused to vacate the Stream Buffer Zone Rule as OSM had requested, EPA, OSM, and the ENGO plaintiffs thereafter agreed to

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decree that permanently and substantially amends an agency rule that would otherwise have been subject to statutory rulemaking procedures.” Slip op. at 12. For more discussion of that decision, see Kirsten L. Nathanson *et al.*, *Citizen Suit Watch: Ninth Circuit Rejects “Sue and Settle” Consent Decree* (June 12, 2013), available at <http://www.crowell.com/Practices/Environment-Energy-Resources/alerts-newsletters/Citizen-Suit-Watch-Ninth-Circuit-Rejects-Sue-and-Settle-Consent-Decree>.

<sup>96</sup> The court denied both motions on August 12, 2009.

<sup>97</sup> 74 Fed. Reg. 62,664 (Nov. 30, 2009). In the June 11, 2009 MOU, the Department of Interior had pledged that OSM would issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts in the event that the 2008 Stream Buffer Zone Rule was vacated “as requested by the secretary of the Interior on April 27, 2009.” See June 11, 2009 MOU, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 3, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009\\_06\\_10\\_wetlands\\_pdf\\_Final\\_MTM\\_MOU\\_6-11-09.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_06_10_wetlands_pdf_Final_MTM_MOU_6-11-09.pdf). The agency also pledged to consider revising that regulation. *Id.* at 4.

<sup>98</sup> 74 Fed. Reg. at 62,664.

<sup>99</sup> *Id.*

a stay of those proceedings. As part of that stay agreement, OSM committed to use its best efforts to propose the Stream Protection Rule by February 28, 2011, and issue a final rule by June 29, 2012. And the ENGOs agreed not to ask the court to lift the stay unless OSM failed to meet those deadlines. The court granted their request to hold those cases in abeyance.

OSM thereafter issued a notice of intent to prepare an environmental impact statement and a revised notice of intent to prepare an environmental impact statement, expanding the scoping opportunities for comment.<sup>100</sup> But over three years after OSM announced its intent to replace the Stream Buffer Zone Rule with the Stream Protection Rule, OSM still had not issued a proposed rule. Moreover, those three years have been filled with controversy. For example, in January 2011, a copy of the draft Environmental Impact Statement (EIS) for the Stream Protection Rule was leaked to the press along with allegations of improper administration and agency influence being asserted on the contractors working on the EIS. The House Committee on Natural Resources also is conducting a vigorous oversight investigation into the agency's rulemaking process and the millions of dollars in agency resources that have been expended during that process.

Because OSM failed to meet its agreed upon deadlines for rulemaking, the ENGO plaintiffs have now successfully moved to lift in the stay in both cases. After the cases were placed back on the active docket, the federal agencies filed an answer in each case on May 20, 2013.<sup>101</sup> Once again, the Interior Department has taken the unusual step of disavowing the Stream Buffer Zone Rule. Specifically, in the *National Parks Conservation Association* case, OSM has admitted that it should have consulted with the National Parks Service under the ESA in issuing the Stream Buffer Zone Rule, even though the agency had not believed such consultation was necessary at the time.<sup>102</sup> In other words, in its answer, OSM admitted that

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<sup>100</sup> See 75 Fed. Reg. 22,723 (Apr. 30, 2010); 75 Fed. Reg. 34,667 (June 18, 2010).

<sup>101</sup> Intervenor-Defendant National Mining Association already had filed an answer in moving to intervene in the case.

<sup>102</sup> See, e.g., Answer ¶¶ 6-7, 9, 10, 59, 61-62, *Nat'l Parks Conservation Ass'n v. Jewell*, No. 1:12-cv-01690 (Aug. 20, 2013) [Docket No. 60].

Although OSM has admitted the validity of the ESA claim, the federal defendants have denied all of the other allegations made by the plaintiffs in these cases (i.e., plaintiffs'

the Rule should be vacated and remanded. However, because the federal agencies have now accepted the fact that the court must judge the merits of the ESA challenge before vacating the Stream Buffer Zone Rule, the federal defendants requested that the court vacate and remand the rule only “[t]o the extent the Court finds that the Federal Defendants failed to initiate consultation with the FWS under the ESA.”<sup>103</sup> Because OSM has announced that the proposed Stream Protection Rule will not be issued until sometime in 2014, this litigation may well proceed and the court has set a status conference for August 7, 2013.<sup>104</sup>

This litigation is unique and the ENGOs are challenging a rule that very well may eventually be replaced through notice-and-comment rulemaking before that litigation has been resolved. Whether the ENGO lawsuits bear meaningful fruit or are soon mooted by the new Stream Protection Rule remains to be seen.

That litigation is not the end of the story. When the proposed Stream Protection Rule is published, the public comment period will likely trigger vigorous opposition and this issue likely will see more litigation once rulemaking is completed. That litigation may in turn be complicated by the pending litigation over the Stream Buffer Zone Rule and the court’s ruling on the merits of that rule, so long as the case is not resolved on other grounds. Again, this case is one to watch, and serves as a good example of how ENGO litigation affects and influences federal rulemaking.

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allegations under the Clean Water Act, SMCRA, NEPA, and the APA). See Answer, Coal River Mountain Watch v. Jewell, No. 1:08-cv-02212 (May 20, 2013) [Docket No. 39].

<sup>103</sup> *Id.* at 22.

<sup>104</sup> In an April 2, 2013 letter to Doc Hastings, Chairman of the Committee on Natural Resources, Director Pizarchik revealed that OSM plans to publish the rule in 2014. He also indicated that OSM has already spent approximately \$8.6 million to develop this rulemaking, with approximately \$6 million funding portions of a new Environmental Impact Statement and Regulatory Impact Analysis, with the remaining \$2.6 million going to staff costs. Letter from Joseph G. Pizarchik, Dir., Dep’t Interior, to Doc Hastings, Chairman, Comm. Natural Res. (April 2, 2013) available at [http://www.eenews.net/assets/2013/04/04/document\\_gw\\_02.pdf](http://www.eenews.net/assets/2013/04/04/document_gw_02.pdf) (last visited Sept. 7, 2013).

**[2] — Sovereign Immunity and Cooperative Federalism:  
*Montana Environmental Information Center v. Oppen.***

ENGOs are challenging more than rulemaking, however. In a second significant ENGO suit, environmental groups have sought to further test the balance between OSM oversight and state primacy under SMCRA in the context of hydrologic balance concerns in the arid West by suing the state regulator rather than OSM. In a citizen suit case before the U.S. District Court for the District of Montana, *Montana Environmental Information Center v. Oppen*, the Montana Environmental Information Center (MEIC) and Sierra Club brought claims against the Director of the Montana Department of Environmental Quality (DEQ) for alleged violations of SMCRA and the Montana state law equivalent to SMCRA.<sup>105</sup> This case has the potential either to strengthen the sovereign immunity precedent established by the Third and Fourth Circuits that shields a primacy state from suit in federal court under SMCRA, or to create a circuit split on that issue.

The plaintiffs in *MEIC v. Oppen* have alleged that DEQ has engaged in what they call “a pattern and practice” of failing to comply with non-discretionary duties imposed by SMCRA and the Montana Strip and Underground Mining Reclamation Act<sup>106</sup> in preparing Cumulative Hydrologic Impact Assessments (CHIAs). CHIAs are used to determine whether a proposed mining operation is designed to prevent material damage to the hydrologic balance outside the proposed permit area and are often a target of ENGO challenge (as they also are in the Part 733 petition in West Virginia).<sup>107</sup> Plaintiffs asserted that DEQ had failed to prepare adequate CHIAs in its approval of mining permits over a number of years and invoked a litany of mining permits that they claim involved those inadequate CHIAs and faulty material damage determinations. They also alleged that DEQ would likely continue that pattern and practice for Western Energy Company’s

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<sup>105</sup> See *Mont. Env'tl. Info. Ctr. v. Oppen*, No. 12-cv-34, 2013 WL 485652 (D. Mont. Jan. 22, 2013).

<sup>106</sup> Montana is a primacy state and the Montana Strip and Underground Mining Reclamation Act is Montana’s SMCRA statute. See *Mont. Code Ann.* §§ 82-4-301, *et seq.*; *Mont. Admin. R.* 17.24.301 through 1309.

<sup>107</sup> See *supra* notes 66-68 and accompanying text.

pending permit application for an expansion of its mining operations at the Rosebud Mine near Colstrip, Montana. The ENGOs sought declaratory and injunctive relief, along with fees and costs.

In defending against the lawsuit, the State of Montana was joined by a group of defendant-intervenors made up of coal mine owners, operators, and employee representatives: Western Energy Company, Westmoreland Resources, Inc., Spring Creek Coal LLC, Great Northern Properties Limited Partnership, Natural Resources Partners L.P., Crow Tribe of Indians, and the International Union of Operating Engineers, Local 400. The state moved to dismiss, invoking its sovereign immunity from suit, and the Defendant-Intervenors moved for judgment on the pleadings. The ENGOs had brought suit for the Director's alleged "failure to perform any act or duty under this chapter which is not discretionary . . . with the appropriate state regulatory authority," but SMCRA provides that such suits may be brought against a governmental instrumentality or agency that is alleged to be in violation of SMCRA or of any rule, regulation, order, or permit issued pursuant to SMCRA only "to the extent permitted by the eleventh amendment to the Constitution."<sup>108</sup>

The Defendants prevailed. The district court dismissed the case, holding that the plaintiffs' claims were barred by the Eleventh Amendment and were not subject to the exemption from that bar set forth in *Ex Parte Young*.<sup>109</sup> The court's sovereign immunity holding addressed an issue of first impression in the Ninth Circuit — whether SMCRA's exclusivity clause prohibits federal court suits against states that have assumed primary jurisdiction over the regulation of coal mining and reclamation. Montana had obtained federal approval for its regulatory program in 1982 and also regulates coal mining on federal lands in the state pursuant to a Cooperative Agreement with OSM. The court agreed with the State of Montana and defendant-intervenors that plaintiffs' claims were barred by the Eleventh Amendment based on the plain language of the statute's exclusive jurisdiction provision, which provides that

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<sup>108</sup> 30 U.S.C. § 1270(a).

<sup>109</sup> *Ex Parte Young*, 209 U.S. 123 (1908); *See Mont. Env'tl. Info. Ctr. v. Opper*, No. 12-cv-34, 2013 WL 485652, at \*4.

actions to compel compliance “with this chapter” may be brought against the United States *or* any other government instrumentality or agency *only* “to the extent permitted by the eleventh amendment to the Constitution.”<sup>110</sup> The court also held that the *Ex Parte Young* exception to the sovereign immunity bar did not apply because plaintiffs sought to compel DEQ to comply with state law, the federal SMCRA provisions having “dropped out” once Montana gained primacy. According, “[a] suit against Opper would, in essence, be a suit against the State of Montana.”<sup>111</sup>

That holding was significant. With that holding, the District of Montana joined the Third and Fourth Circuits, the only courts of appeals to have addressed this issue.<sup>112</sup> The court’s ruling also broke new ground by going one step beyond *Bragg* and *Pennsylvania Federation of Sportsmen’s Clubs* in holding that the SMCRA citizen suit sovereign immunity bar also applies to state regulation of mining on federal lands under a cooperative agreement with the federal government, which is a particularly important issue for western states that regulate coal mining (and which was not at issue in either of the eastern cases).

The Montana federal court also resolved two other issues of first impression. The court held that dismissal was warranted because SMCRA’s citizen-suit provision permits federal court lawsuits only for failure to perform clear-cut or ministerial functions, and a material damage determination is a discretionary duty that requires agency technical knowledge and judgment.<sup>113</sup> Recognizing that a CHIA involves case-by-case factual findings and analysis,

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<sup>110</sup> 30 U.S.C. § 1270(a)(2) (emphasis added).

<sup>111</sup> See *Mont. Env’tl. Info. Ctr. v. Opper*, No. 12-cv-34, 2013 WL 485652, at \*4. The court also declined to “meddle in Montana’s coal permitting process” and noted that plaintiffs had appropriate state remedies under which they could seek state administrative and judicial review. *Id.* at \*4-5.

<sup>112</sup> See *Pa. Fed’n of Sportsmen’s Clubs v. Hess*, 297 F.3d 310 (3d Cir. 2002); *Bragg*, 248 F.3d 275.

<sup>113</sup> Plaintiffs had filed suit for Opper’s alleged failure “to perform any act or duty under this chapter *which is not discretionary* with the . . . appropriate State regulatory authority.” 30 U.S.C. § 1270(a)(2) (emphasis added).

the court found that preparation of a CHIA is discretionary and could not be challenged in a SMCRA citizen suit.<sup>114</sup>

Finally, the court held that even if plaintiffs could state a claim for relief, their action was not yet ripe for review — DEQ had not yet issued a CHIA in connection with the challenged expansion of Western Energy’s Rosebud Mine and plaintiffs had not exhausted their administrative remedies before the state agency for the permits challenged in the complaint. The court therefore dismissed plaintiffs’ suit without prejudice to plaintiffs’ right to seek available relief in state court. Both of those holdings may prove significant in future CHIA challenges.

The ENGO plaintiffs have appealed the case to the Ninth Circuit.<sup>115</sup> It will be briefed over the summer of 2013 and oral argument has not yet been scheduled. Because the issues on appeal are all of first impression in the Ninth Circuit, its outcome could have far-reaching consequences for mining in western states and could create a new and dangerous circuit split in an area of sovereign immunity jurisprudence, upsetting the already uneasy cooperative relationship between OSM and the states and opening the door to widespread ENGO challenges to state regulatory programs.

#### **§ 10.04. Prospective SMCRA Developments.**

The ENGO and Obama administration campaign to further tip the regulatory scales away from coal mining will continue as the coal industry struggles to survive in the face of considerable competitive, regulatory, and litigation pressures, and as the Obama administration and ENGO groups push for the end of coal mining in the name of the environment. This chapter closes with a brief exploration of two significant SMCRA issues on the horizon that may bear on the viability of coal mining in this time of economic stress: (1) OSM’s controversial proposed Cost-Recovery Rule and (2) the potential for reform of state ownership and control rules.

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<sup>114</sup> See *Mont. Env’tl. Info. Ctr. v. Oppen*, No. 12-cv-34, 2013 WL 485652, at \*5 (explaining that “[a] duty is nondiscretionary when its methodology is precise, exact, and beyond dispute” and that a CHIA “cannot reasonably be described as nondiscretionary,” particularly because Montana’s groundwater pollutant standards are narrative rather than numeric).

<sup>115</sup> See *MEIC v. Oppen*, No. 13-35107 (9th Cir.).

**[1] — Proposed Cost Recovery Rule.**

The government has proposed to increase the cost of coal mining even further with OSM's proposed Cost Recovery Rule, which proposes to expand existing permit fees under SMCRA to impose wholesale fees on industry (charging industry from soup to nuts, as the saying goes). Unless it is successfully challenged, that rule appears likely to impose significant financial costs on industry, at a time when it can least afford it.

OSM issued its proposed Rule on April 4, 2013. The Rule was one of OSM's 2012 National Priorities (along with the Stream Protection Rule) and is such a drastic departure from OSM's past practices that it already is a source of intense controversy throughout the industry.<sup>116</sup> OSM seeks to *wholly revise* its fee structure by shifting the financial burden of all of its administrative costs from inspections to permitting from the general public (that is, funds from the federal budget allocated to OSM) to the regulated industry.

SMCRA provides that each application for a surface coal mining and reclamation permit shall be accompanied by a fee determined by the regulatory authority and allows the assessment of fees for the cost of reviewing, administering, and enforcing permits.<sup>117</sup> That fee may be less than the actual or anticipated cost of reviewing, administering, and enforcing such permit, but may not exceed that cost.<sup>118</sup> OSM now proposes to obtain recovery for the vast majority of its costs from industry — including costs expended during the agency's permit review, costs of inspections, routine costs like travel, and overhead costs.<sup>119</sup> Currently, permittees are required to pay permit application fees that were set back in 1990 for new permit applications; they do not pay fees for other permit application or review services and they do not pay for agency inspections.<sup>120</sup> And according to

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<sup>116</sup> See 78 Fed. Reg. 20,394 (Apr. 4, 2013). While developing the proposed rule, OSM reached out at a regional level to mine operators, but does not appear to have incorporated any of their feedback into the Cost Recovery Rule.

<sup>117</sup> 30 U.S.C. § 1257(a).

<sup>118</sup> 78 Fed. Reg. at 20,395.

<sup>119</sup> *Id.* OSM also has explained that it has proffered the rule “[i]n an effort to promote fiscal responsibility.” *Id.* at 20,394.

<sup>120</sup> See 30 C.F.R. §§ 736.25(d), 750.25(d).

OSM, the current fees that it collects from permittees cover only 2 percent of the resources that OSM expends in reviewing permits.<sup>121</sup>

Under the Cost Recovery Rule, OSM would charge processing fees for a wider range of permitting activities, using an actual project-specific cost estimate rather than a fee schedule.<sup>122</sup> The processing fee would apply to an applicant for a surface coal mining permit; a permittee seeking a permit renewal or revision; a permittee who assumes a permit after a transfer, assignment, or sale of rights of an existing permit; and permittees for whom OSM conducts a mandatory mid-term permit review.<sup>123</sup> OSM would also charge processing fees for coal exploration removing more than 250 tons of coal or that occurs on land designated as unsuitable for surface coal mining operations.<sup>124</sup> To calculate those fees, OSM first would estimate the direct costs of processing an application by reviewing the scope and complexity of the application, the type of staff needed to review that application (like hydrologists, engineers, and reclamation specialists), and any estimated travel costs, excluding only interagency pre-application meetings and the cost of estimating the processing costs themselves.<sup>125</sup> OSM would use a cost estimation methodology to account for indirect, centrally paid costs.<sup>126</sup> OSM proposes to refund any monies paid in excess of OSM's costs, at the conclusion of the permit review process.<sup>127</sup>

In addition, OSM would charge an annual fixed fee to recover a large portion of OSM's yearly permit administration and enforcement services, including inspections. The fixed fee would be calculated based on the geographic region, the type of permit operation, mine site acreage, and the required frequency of inspections based on the permit's phase of bond release

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121 78 Fed. Reg. at 20,394.

122 *Id.* at 20,396.

123 *Id.* at 20,396, 20,398.

124 30 C.F.R. § 772.12.

125 78 Fed. Reg. at 20,397-98.

126 *Id.*

127 *Id.* at 20,399. Moreover, OSM has not yet determined whether or how the processing fee would be applied to services and actions that OSM is in the process of reviewing if and when the final rule is issued. *Id.*

or “special situations” like inactive permits or temporary cessation of mining operations.<sup>128</sup> OSM has proposed different rates for surface coal mining and reclamation operations based on those factors and on OSM’s review of its historic costs, with costs ranging from \$1,300 to \$96,000 annually.<sup>129</sup> OSM intends to adjust those fixed fee rates on an annual basis.

Members of the coal mining industry oppose the proposed rule because they believe that it exceeds the agency’s statutory authority to impose permit enforcement costs.<sup>130</sup> SMCRA Section 507(a) contemplates the assessment of fees *related to a permit application*, but they believe that it does not also contemplate the assessment of fees *for enforcement activities*. They further argue that it imposes unjustified costs, provides no recourse for appeal, does not provide sufficient information on what the fees will be or how they were derived, and contains no incentive for OSM to perform its tasks efficiently or within specified time periods. For example, there does not appear to be any way that a mining operator can obtain redress if OSM overcharges the operator for fees associated with a permit application; rather, the operator would be forced to pay the fee so that the application can go forward or to forfeit the permit for which it has applied. Operators also are concerned that they will be burdened with additional permit processing costs in the event that OSM fails to comply with NEPA, for example, causing the permit to be overturned or remanded to the agency. Some members also have argued that OSM cannot impose fees for services that provides benefits to the public at large, such as inspections, that take place after a SMCRA permit is issued.<sup>131</sup>

The proposed Cost Recovery Rule also potentially threatens the intersection between federal and state authority under SMCRA, which lately has become increasingly uneasy. OSM has made it very clear in the proposed rule that the agency intends to apply those fees to any lands for which OSM subsequently becomes the regulatory authority pursuant to a Part

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128 *Id.* at 20,396.

129 *Id.* at 20,400, 20,407.

130 30 U.S.C. § 1257.

131 In fact, OSM previously has acknowledged that “the primary benefits of inspection and enforcement activities accrue to the public.” 53 Fed. Reg. 17,568, 17,571 (May 17, 1988).

733 action.<sup>132</sup> That concerns both state regulators and industry. For example, the Maryland Department of the Environment commented on the proposed rule, asking OSM whether the agency is considering charging a fee to the state regulatory authority or reducing a state grant by the amount that OSM would have spent on that function in the event that OSM assumes part of a state program. The Maryland Department of the Environment urged OSM not to take that position because specific permitting fees are not attributed to individual portions of a permit review or ongoing field operations in a primacy state. That means that, should OSM partially take over enforcement of a state program, OSM would be unable to accurately quantify the actual cost incurred at the state level. And one industry representative has argued that federal fees cannot be assessed when OSM substitutes federal enforcement for all or part of a state program because, unless OSM withdraws its approval of that program, the approved program and state law remains operative.<sup>133</sup>

Moreover, although these new fees would nominally be applicable only to operations on lands where regulatory jurisdiction has not been delegated to the states, that is, states regulated under OSM's federal program and Indian lands for which no Tribal regulatory authority has been approved,<sup>134</sup> OSM clearly also wants states to recover more of their costs from the coal industry through fees. Some members of industry are concerned as a consequence that the implications of the proposed rule will stretch far beyond lands where OSM is the regulatory authority, reaching to primacy states.

Should the Rule be finalized in its current form, the costs imposed on industry may be so cost prohibitive (and so unfounded) that members of the coal mining industry will challenge the final Cost Recovery Rule in court. This issue will continue to develop as OSM moves through the rulemaking process and warrants monitoring.

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<sup>132</sup> 78 Fed. Reg. 20,396-97.

<sup>133</sup> See 55 Fed. Reg. 29,536 (July 19, 1990).

<sup>134</sup> The only federal program states are Tennessee and Washington. 78 Fed. Reg. at 20,395. OSM also may collect fees on surface coal mining operations on Indian lands for which no Tribal regulatory program has been approved pursuant to 30 U.S.C. § 1300(d), which are lands of the Crow Tribe, the Hopi Tribe, the Ute Mountain Ute Tribe, and the Navajo Nation. *Id.*

## [2] — State Ownership and Control Rules.

State ownership and control rules may also be an area of future SMCRA development. Although this issue is not a new one, the current economic and policy climate make the continued application of those arguably unlawful and overly stringent rules to mining operators potentially very damaging for the industry.

SMCRA provides that when a surface coal mining operation that has applied for a permit is owned or controlled by an applicant who is currently in violation of the Act or other environmental laws, the regulator cannot issue the permit.<sup>135</sup> In other words, the violative applicant is blocked from receiving future mining permits for that operation and other operations nationwide (through registry in the Applicant Violator System or AVS) until the violation is remedied.

The current versions of OSM's ownership and control regulations were the subject of hard-fought challenges by industry lasting more than a decade. Those challenges resulted in the narrowing of the circumstances in which OSM's rules provided for permit blocking and what it means to own or control a mine.<sup>136</sup> Prior to that litigation, OSM's 1988-1989 ownership and control rules allowed regulatory authorities to reach endlessly upstream and endlessly downstream to deny (or rescind) a permit to an applicant or permittee *on the basis of violations of any person who owned or controlled the applicant or permittee* (rather than based merely on *the applicant's or permittee's own unabated violations*).<sup>137</sup> OSM also had expansively defined what constituted

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<sup>135</sup> 30 U.S.C. § 1260(c).

<sup>136</sup> For more information on the history of that litigation, see Thomas C. Means, "The Applicant Violator System: A Critical Evaluation," 10 *E. Min. L. Inst.* ch. 6 (1989) (hereinafter Means 1989); Thomas C. Means, "The Applicant Violator System in 2002: An Update on Permit Blocking Under SMCRA," 23 *Energy & Min. L. Inst.* ch. 5 (2003) (hereinafter Means 2003); Thomas C. Means and J. Michael Klise, "Applicant Violator System Revisited: A Regulatory and Litigation Update," 13 *E. Min. Law Inst.* ch. 7 (1992); Power and Adkins, *supra*; Christopher B. Power and Blair M. Gardner, "OSM's Applicant Violator System: Recent Development, Continuing Uncertainty," 17 *E. Min. L. Inst.* ch. 11 (1997); Joseph J. Zaluski and Lesly A.R. Davis, "Liabilities of Non-Permit Holders Under the Surface Mining Control and Reclamation Act," 16 *E. Min. L. Inst.* ch. 8 (1997).

<sup>137</sup> See 53 Fed. Reg. 38,868 (Oct. 3, 1988); see also 65 Fed. Reg. 79,582, 79,582 (Dec. 19, 2000) (recounting history of ownership and control and AVS rules and subsequent litigation); Means 1989, *supra*.

ownership or control through a series of rebuttable presumptions designed to identify and deny permits to persons (or entities owned or controlled by those persons) that had any authority to determine the manner in which the surface coal mining operation was conducted, even if that authority was indirect, unexercised, and located far upstream.<sup>138</sup>

As a result of the ownership and control rules litigation, OSM may no longer reach upstream from the permit applicant in blocking permits and the agency has substantially narrowed its definition of what constitutes ownership or control of an operation.<sup>139</sup> OSM now defines ownership as simply being a sole proprietor or an owner of record in excess of 50 percent of the voting securities or other instruments of ownership of an entity.<sup>140</sup> It also now defines control as being a permittee, an operator, or any person that has the ability to determine the manner in which a surface coal mining operation is conducted.<sup>141</sup> Permit denials based on ownership extend only “one level down” from the permit applicant to the entity that the applicant owns, while denials based on control may extend as many levels down as the permittee still has the ability to determine the manner in which the operation is conducted.<sup>142</sup> The D.C. Circuit also struck down OSM’s rule that had blocked permits based on linkages to violations at mines no longer under an applicant’s current control.<sup>143</sup>

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<sup>138</sup> 65 Fed. Reg. at 79,583; *see also* 62 Fed. Reg. 19,451, 19,452, 19,458 (Apr. 21, 1997).

<sup>139</sup> The D.C. Circuit ruled that SMCRA provided for blocking permits where the applicant itself owned or controlled an operation that had an unabated violation, not for blocking permits upstream of the applicant. *Nat’l Mining Ass’n v. U.S. Dep’t of Interior*, 105 F.3d 691, 694 (D.C. Cir. 1997). The court later ruled that OSM’s definition of ownership and control could not include upstream relationships and that OSM could not presume ownership or control based on 10-50 percent ownership of the voting securities or other instruments or based on being an officer or director of a corporation, and that only *current* control of an operation in violation was a lawful basis for permit blocking. *Nat’l Mining Ass’n v. U.S. Dep’t of Interior*, 177 F.3d 1, 5-6 (D.C. Cir. 1999).

<sup>140</sup> 30 C.F.R. § 701.5.

<sup>141</sup> *Id.* OSM retains considerable discretion in determining what circumstances afford the ability to determine the manner in which surface coal mining is conducted. *See* 72 Fed. Reg., 68,000, 68,003-04 (Dec. 3, 2007).

<sup>142</sup> 30 C.F.R. § 773.12(a); *see also* *Power and Adkins, supra*.

<sup>143</sup> *Nat’l Mining Ass’n v. U.S. Dep’t of Interior*, 177 F.3d 1, 5.

That litigation inspired federal reform, but, perversely, that reform has not extended to most primacy states. As one of the authors of this outline noted over a decade ago, in 2002, “one of the most disappointing aspects of the . . . AVS picture [is] that most of the states have not amended their state programs to implement the fruits of” industry’s successful litigation against the federal ownership and control rules.<sup>144</sup> OSM has never required, much less notified, the states that they are free to amend their state programs to eliminate the elements of the ownership and control rules invalidated by the D.C. Circuit as arbitrary, capricious, and *ultra vires*, even though OSM had forced the states to adopt those unlawful rules in the first place.<sup>145</sup> Accordingly, most states, like Kentucky, Illinois, and West Virginia, have retained the ability to reach upstream in blocking permits and the unlawfully broad definitions of ownership and control struck down by the D.C. Circuit.<sup>146</sup> Not only have the states not updated their rules, but some states like Kentucky and Illinois have statutory provisions that restrict them from adopting surface mining regulations that are more stringent than required by SMCRA and therefore are arguably in violation of their own laws.<sup>147</sup>

These rules, though relics of an over-reaching regulatory scheme that was invalidated by the federal courts, have the very real potential to block new permits as well as sales or permit transfers, all of which would not otherwise be blocked under the liberalized federal regulatory scheme. Yet, because those

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<sup>144</sup> Means 2003, *supra*.

<sup>145</sup> *Id.*

<sup>146</sup> See 405 Ky. Admin. Regs. 8:001, Section 1(76); *id.* 8:010, Section 13(4); Ill. Admin. Code tit. 62, § 1773.5; *id.* § 1773.14-15; *id.* § 1778.13-14; W. Va. Code R. § 38-2-2.85; *id.* § 38-2-3.32.b, c.

<sup>147</sup> See Ky. Rev. Stat. §§ 13A.120(1)(a), 120(4), 350.028(5), 350.465(2); 225 Ill. Comp. Stat. 720/1.02(c); 225 Ill. Comp. Stat. 720/4.11(a).

Although West Virginia does not have a similar “no more stringent than” provision, the State clearly has intended to require a higher bar to adopt more stringent regulations — in the event that the Cabinet Secretary wishes to promulgate new or amended legislative rules that are more stringent than the federal counterpart, he must specifically demonstrate that such rules are reasonably necessary to protect, preserve, or enhance West Virginia’s environment or human health or safety. W. Va. Code § 22-1-3a. It is not clear whether that provision applies retroactively to regulations that (after adoption) later become more stringent as a result of the amendment of the federal rules.

old rules are still on the books, they create significant regulatory uncertainty and may be chilling mergers, acquisitions, and the sales of coal rights and coal mines. This is a matter of special concern today with the industry in jeopardy on so many fronts, and coal company bankruptcies in the news. Coal-based economies can ill afford such *de facto* encumbrances on key assets during a time of such distress.

It is unclear whether states have purposefully declined to amend their ownership or control rules or whether those rules have simply been left on the books because no one has asked the states to amend them. It may behoove the coal industry and local chambers of commerce to seriously consider initiating the administrative, legislative, or even judicial measures necessary to achieve the long-overdue state reforms. Indeed, the adverse effect on the coal industry from the failure of some primacy states to modernize their state programs to reflect the changes in the federal program has a national chilling effect because the AVS system effectively applies the ownership and control law of the most restrictive state to every state where entities and properties that may be deemed linked by OSM's original sweeping ownership and control concepts are located.

#### **§ 10.05. Conclusion.**

The current administration remains committed to eliminating the environmental consequences of coal mining, aided by ENGOs who seek to altogether end the use of coal as a fuel in the United States. Amid other high-profile environmental initiatives, like the Obama administration's recently announced Climate Action Plan, SMCRA regulatory changes and litigation are once again a central focus of environmental law, after a number of years of relative regulatory peace. The focus on SMCRA is likely to grow unless there is a drastic change in the federal policy announced in the June 11, 2009 MOU, which likely will not occur absent a new political party in the White House, or another energy crisis. In the meantime, the continued adjustments of SMCRA's balance toward environmental protection and away from coal mining bode ill for the coal industry and the communities that depend on it.

