States Make the Surface Mining Control and Reclamation Act Work

Jed C. Christensen
Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Environmental Law Commons, and the Oil, Gas, and Mineral Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol88/iss3/9
STATES MAKE THE SURFACE MINING CONTROL AND RECLAMATION ACT WORK

JED D. CHRISTENSEN*

I. SMCRA Works

The Surface Mining Control and Reclamation Act (SMCRA) is working. It works because the states are making it work. How can it be made to work better? The states, working with the coal industry and the Office of Surface Mining Reclamation and Enforcement (OSMRE), will systematically resolve the remaining problems—not all at once, but one or a few at a time—until all significant deficiencies have been corrected. What is OSMRE’s role in this? It is to help the states—not to dictate each state activity or impose direct federal regulation, except under extreme conditions.

SMCRA works. Is this an over-simplified statement? Perhaps, but look at some key facts. First, all but a handful of mining operations have new permits which require compliance with the performance standards set by SMCRA. Second, mining operations across the United States are complying with SMCRA standards. Third, mined lands are being reclaimed to SMCRA standards. Fourth, performance bonds are being raised to levels sufficient to assure that lands are properly reclaimed in case of operator default.

II. SOME PROBLEMS

There are some important exceptions to this claim. While we cannot ignore them, neither should we allow them to divert attention from our successes.

a. **Two acre abuse.** Operators in Virginia and Kentucky have taken advantage of the exemption for two acre mines provided in SMCRA by exceeding two acres in the actual mining operation, making them subject to SMCRA requirements. In Virginia, OSMRE has compiled an inventory of such “two-acre” mines and is now conducting inspections and taking enforcement action. Virtually all of these mines date from the interim program, or prior to the date Virginia attained regulatory primacy. In Kentucky, the state is actively inspecting and enforcing on two acre permits with detailed oversight by OSMRE.

b. **Civil penalty collection.** OSMRE has substantially increased its efforts to collect past due fines and has revamped its program to collect penalties on current violations to assure that they are collected promptly. Although this problem stems primarily from the interim program, OSMRE believes that it is important to collect these accounts to maintain enforcement credibility.

c. **“Megabucks” cases.** These cases, so named because of the huge penalties incurred by operators who refused to correct violations, are being addressed through

---

a combination of enforcement actions and denial of permits to those violators who wish to continue to mine. Recalcitrant violators are also serving jail terms for their continued refusal to correct violations. A computerized system to match permit applicants to violators will assure that these and future operators who fail to pay penalties or correct violations are denied permits for new mines.

All of these problems are well on the way to correction. OSMRE has made the philosophical, organizational, and resource commitments needed. With those decisions and commitments made, we must turn to our future needs. Correcting past problems and implementing mechanisms to prevent their recurrence, coupled with the broad successes being achieved at the mine sites, provide a sound foundation for building total program success.

III. SOLUTION: ASSIST THE STATES

Where should we focus our future efforts? There can be only one answer: the states. States are the primary regulators. Twenty-four states have regulatory primacy and govern over ninety percent of the operating mines. Success will rest on state efforts. What, then, can and should OSMRE do to assist these states and achieve an optimum implementation of SMCRA in future years?

With this question in mind, OSMRE has undertaken an extensive review of its programs. Although this review has encompassed both the regulatory program and the Abandoned Mine Land (AML) program, this essay focuses on the regulatory program because it is the most difficult, controversial, and the source of today's most serious problems. Our examination began at the most basic level—what is the OSMRE mission? We concluded that it is essential to encourage state authority and responsibility. Regulation is most responsive when conducted closest to those regulated. It is more flexible. Policies and regulations can be tailored to fit local needs and circumstances. State regulation also brings more management focus and resources to the particular problems and issues faced by the state. Finally, it reduces the number of issues per manager and reduces the number of decision levels.

From this and related principles, we developed a set of decision principles to be applied as we detailed our strategy. Several of these are particularly applicable to OSMRE-state relations and state regulatory activities: (1) Seek efficiencies in time to expedite final decisions and resolutions; (2) Seek acceptance of responsibility and accountability at the local level to the maximum extent practicable; (3) Provide tools and remove impediments as an incentive to states, industry, and others to accomplish the mission; and (4) As part of any policy decision, assure full and clear communication with affected parties.

The next step was to develop premises which would provide a basis for specific program initiatives. SMCRA makes OSMRE responsible for setting national policies and standards. States choose to implement these when they gain primacy. Then, through oversight, OSMRE is required to assure that primacy states effectively carry
out these policies and standards, recognizing that some variation tailored to state needs and preferences is appropriate. Within this framework, we have established the following premises: First, OSMRE supports the concept of primacy, yet will be unyielding in requiring that SMCRA provisions be carried out. Second, the focus of primacy oversight is on the state, not the industry, even though the measure of effectiveness is the results with industry. However, industry should not be punished because of conflict between the state and OSMRE. Third, OSMRE should not be substituted for the state unless the state is unable or unwilling to perform and cannot be otherwise encouraged or forced to comply with the state laws. Fourth, OSMRE must have graduated response capability, both as an assistance to states and to assure SMCRA is carried out by the state. Oversight focus and resource allocation should be commensurate with need. Fifth, there must be a clear delineation of responsibility between OSMRE and the primacy state. Sixth, the evaluation of the state’s performance is to identify trends and determine a program for corrective actions, either by the state or OSMRE. Seventh, OSMRE must move to reduce areas of conflict with states as they arise, not on a case-by-case basis, but generically (e.g., through new regulations, policies, information systems, etc.). Confusion and miscommunication between OSMRE and the states can be avoided by frequent communication and sharing of common data.

From this list of premises, we have developed a set of proposed initiatives which we expect to undertake over the next year. These initiatives include incentives designed to motivate primacy states to do a better job, tools to help states, and, finally, methods to compel a state to carry out an effective program in the event that it is not successful in correcting basic deficiencies and carrying out an effective program. The total list of initiatives is too long to repeat here; a few examples in each category will illustrate OSMRE’s intent and direction.

1. Incentives

   a. Provide awards for superior performance. Based on the results of annual evaluations, OSMRE will make awards to states which demonstrate superior performance. A group of representatives from various interests will be established to develop the guidelines for this program, including the types of awards to be presented. There could be special awards for superior performance in a specific category, such as permitting or data processing systems, as well as for overall performance.

   b. Federal oversight tailored to performance. For those states with superior performance, OSMRE will adjust the level of oversight to the level necessary to assure that state performance continues at a high level.

2. Tools and Techniques

   a. Provide a major increase in training for both state and OSMRE personnel at all levels. OSMRE training has been limited to a few inspector oriented courses.
Recently, OSMRE has increased its course offerings, solicited state participation in course development, and included both state and OSMRE personnel in the same training sessions. This has produced a substantial improvement in course quality, applicability to real problems, and acceptance by state personnel. Based on this success, OSMRE plans to expand its training program to cover program training aimed at both inspectors and personnel involved in other aspects of the regulatory process. A course in regulatory program management and issues will be offered to state and OSMRE program managers to assist them in understanding the regulatory mandate which each must meet and to help them keep abreast of the evolution in program requirements. States will be invited to participate in the training process, including shaping course content and providing instructors. Other groups, including industry and public interest groups, will be invited to provide comments and suggestions on a case-by-case basis as appropriate.

b. Establish management-by-objective (MBO) type work plans to address state program problems. Many problems require multiple actions. Evaluation of progress requires a clear understanding of what must be done and when each step is to be accomplished. In the past, OSMRE has identified problem areas for states to address but has given little guidance on timing or assistance to help define the multiple actions that may be required. Joint state-OSMRE MBO type planning, including setting priorities, identifying all steps required to complete an action, and determining evaluation points will provide a systematic approach to resolving issues. State and OSMRE managers will then use the MBO plan to manage the process, monitoring progress on a regular basis and identifying obstacles before they become serious. Finally, by having such mutually agreed upon goals, the states can be assured that OSMRE will focus on the major issues at hand rather than pursuing minor subissues.

c. Provide management information systems to states. Computer technology provides great opportunity for enhancing program effectiveness and efficiency. The SMCRA regulatory program, in particular, includes numerous requirements which can be assisted through the use of computers. OSMRE is expanding the use of this technology to assist in management of its program and oversight responsibilities. Several existing systems will be made available to the states for their use in meeting SMCRA requirements. These include the applicant violator system (AVS), which matches permit applicants with violators. It will be used to deny new permits to operators who have unabated violations or unpaid fees or penalties. OSMRE will make this system available to states for use in meeting the requirements of SMCRA section 510(c), which provides that permits may not be issued to operators who have not corrected violations. This will include providing necessary computer hardware and software to those states which need it in order to use the system.

Other assistance to states will include, for example, a listing of delinquent Abandoned Mine Lands (AML) fees for permit blocking, tracking systems for inspection program management, analytical programs for states to use in evaluating their
own performance, and programs that will provide technical assistance to help states in the permitting process.

3. Methods to Compel

   a. Grant conditions. Specific performance requirements will be made an explicit condition of regulatory and AML grants.

   b. Grant withholding. If grant conditions and other steps do not produce the improvements required, OSMRE may withhold regulatory and AML grant funds as a means to compel performance.

   c. Public attention. OSMRE will report each state regulatory agency’s inadequacies to the state’s congressional delegation, to the governor and legislature, and to the general public and seek assistance to compel the state to improve.

This sample of initiatives illustrates the higher level of activity now underway to upgrade state performance. As mentioned at the outset, SMCRA is working within its basic outline. These initiatives are designed to assure that all major requirements are met and that the level of regulation is consistent between states.

Implementation of these initiatives requires commensurate changes within OSMRE. The agency must increase its ability to deal with states decisively and effectively. Past delays and administrative bottlenecks must be eliminated if OSMRE is to be able to guide and respond to individual state needs. Accordingly, I have initiated a major decentralization of authority and responsibility for both program and administrative functions.

The first step was to realign policy and operations responsibilities. All programmatic functions have been consolidated under a Deputy Director for Operations and Technical Services. All financial and administrative functions have been placed under a Deputy Director for Administration and Finance. Within Operations and Technical Services, all headquarters’ functions have been consolidated under an Assistant Director for Program Operations. Field activities, previously split along both functional and geographical lines, have been realigned into a strictly geographic breakdown. Eastern field offices and the Eastern Technical Center now report to the Assistant Director for Eastern Field Operations, who will be located in Pittsburgh, Pennsylvania. Western field offices and the Western Technical Center report to the Assistant Director for Western Field Operations in Denver, Colorado. By placing all programmatic field resources under the control of two field assistant directors, OSMRE has eliminated an artificial division between technical centers and field offices and has focused its field resources on oversight of and assistance to states.

The next step is to provide field managers with the authorities and resources needed to do their jobs. This means that administrative and program support functions and resources will be moved out of Washington, D.C. and assigned to the
lowest organizational level consistent with the accomplishment of the function. Some functions and resources will be placed in the field offices. Others will be located in the field assistant directors’ offices in Denver and Pittsburgh. Only those functions and resources essential to overall program management and policy direction will be retained in headquarters. Up to forty percent of the resources now concentrated in Washington, D.C. will be moved to the field.

When these steps are complete, OSMRE’s efforts will be focused on supporting state regulatory programs—where the action is.