Office of Surface Mining Annual Report Fiscal Years 1988 and 1989

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Office of Surface Mining Annual Report Fiscal Years 1988 and 1989

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1. INTRODUCTION

This report was compiled for the President and the Congress as required by Section 706 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The report describes the operations of the Office of Surface Mining (OSM) for the period October 1, 1987, through September 30, 1989 -- fiscal years 1988 and 1989.

Included in this report are activities regarding Titles IV, V, VI, and VII. SMCRA responsibilities of other bureaus or agencies are omitted. These responsibilities include Title III, the Mining and Mineral Research Institutes, which are administered by the Bureau of Mines; Titles VIII and IX, the University Coal Research Laboratories and the Energy Resource Graduate Fellowships, which are administered by the Secretary of Energy; and Section 406, the Rural Abandoned Mine Program (RAMP), which is administered by the Secretary of Agriculture. Information about these activities is reported directly to the Congress by the responsible organizations.

Due to delays in producing the 1988 annual report, both the 1988 and 1989 reports would have been issued at approximately the same time. For efficiency, therefore, the two reports have been combined. As a result, the 1989 report has been expedited, facilitating distribution immediately following the end of the year.

The report format differs from previous OSM annual reports, which were written not only to meet the reporting requirement of SMCRA but also for widespread distribution to the coal industry and the public. This report, containing data and only brief background, was written primarily for the President, the Congress, and the State Regulatory Authorities. The condensed format and more specific focus have resulted in a publication cost savings of approximately $22,000 (95 percent) over the 1987 report.

This brief report has been written and organized to give an overview of OSM's principal activities and accomplishments during this period. The information is organized to facilitate examination of specific elements, or to review the entire program.

Section 2 provides a summary of the six principal issues confronting OSM during 1988-89. Although these issues may be further described with text and statistics in the body of the report, they are presented here to give the reader both an understanding of the issues and a status report on them during this period.

Sections 3 through 6 describe OSM's activities and accomplishments in administering the SMCRA Regulatory and Abandoned Mine Land Programs. Statistics are provided in tabular form. Where appropriate, a graph is included showing trends since the beginning of the program. To eliminate extraneous text and aid readers requiring more detailed information about OSM operations, citations of OSM technical publications and reports describing OSM activities developed during this reporting period are provided at the end of each section. Some of these materials are unpublished; however, machine copies are available from OSM on request.

Section 7 provides a directory of the 32 OSM office locations.

Information about OSM activities, news releases, and publications, or additional copies of this report, can be obtained from:

Public Affairs
Office of Surface Mining
1951 Constitution Ave., NW
Washington, D.C. 20240
(202) 343-4953

2. EXECUTIVE SUMMARY

OSM has moved into its second decade at a time in our Nation's history when coal production is at an all time high. Yet, along with this unsurpassed production, the Nation is experiencing improved compliance with the requirements of SMCRA. Despite the fears of many when SMCRA became law, this is confirmation that ever-increasing production and environmental protection can occur together.

1988-1989 has also been marked with much controversy for OSM, as well as noteworthy accomplishments. For example,

- Through OSM's effort, the availability of bonds has improved, including the use of phased and incremental bonding and State bonding pools.
- Major improvements occurred in OSM training provided to State regulatory authorities and in increased technical assistance to States, providing state-of-the-art analytical software for use in the State permitting process.
- Significant improvements to the wide range of financial management systems were achieved.
- The civil penalty debt backlog of nearly $200 million for over 50,000 violations was processed over a 2-year period. Of the civil penalty receivables balance of $32 million, as of September 30, 1989, all but $6 million was referred to the Solicitor for legal action.
- Major enhancements to the Applicant Violator System (AVS) resulted in greatly improved accuracy.
- The process used for oversight of State regulatory programs was examined.
- Improvements to the State program amendment process were achieved.

In addition, this year is marked by a change in Executive Branch administration; this new leadership is finding effective solutions to many of OSM's long-standing problems.

Following are the principal issues where much of the controversy centered and on which OSM expended major effort during the 1988-1989 period.

VALID EXISTING RIGHTS (VER)

Section 522(e) of SMCRA prohibits surface coal mining operations in certain areas (e.g., the National Parks, Wilderness Areas, within 300 feet of an occupied dwelling), unless the operations were in existence when SMCRA was enacted or an operator has VER to mine.

In 1979, OSM issued a rule that required an operator to have obtained all permits before August 3, 1977, in order to establish VER. As a result of a court remand, the rule was changed in 1980 to provide for a "modified all permits" test which required a good faith effort to obtain necessary permits. In 1983, OSM issued a new rule, which defined VER in terms of takings under the 5th and 14th Amendments to the Constitution. This rule was remanded on a failure to comply with the Administrative Procedure Act. In 1986, OSM suspended the 1983 rule, leaving a modified all permits test in effect in all States except those whose State programs use a VER takings test (West Virginia and Illinois).

On December 27, 1988, OSM proposed rulemaking which contained two options:

1) VER exists when an applicant has obtained, or had made a good faith effort to obtain, all necessary permits; or

2) VER exists when an applicant has a legal right to the coal resources and has authority to mine by the method intended, as determined by State law.

At the same time, the Secretary of the Interior published a policy statement declaring that if anyone initiates an action to exercise VER in the federally designated areas covered by 522(e)(1), the Secretary shall use all available authorities to acquire such rights through exchange, negotiated purchase, or condemnation. As a result of the public objection to this proposed rule, it was withdrawn in July 1989 to allow the new officials in the Interior Department and OSM to take a fresh look at the VER issue. OSM believes that the best option to address the VER issue is to develop a new proposed rule, involving all parties with an interest in the issue. Work aimed at development of such a rule was just beginning at the end of 1989.

OVERSIGHT OF STATE REGULATORY PROGRAMS

The role of OSM and the States respectively in regulating surface coal mining operations has been the subject of much discussion since passage of SMCRA. However,

Section 517(a) requires OSM to perform oversight of each State program annually. During 1988-1989, changes to the oversight process were proposed that included major revisions to the existing process on a prototype basis. This action resulted in considerable public concern and questions from the Congress. OSM is currently re-examining the oversight process to ensure that progress made by the States is recognized, while a complete, consistent national database is maintained that will enhance the capability of OSM to meet oversight responsibilities. On August 24, 1989, OSM Director Harry M. Snyder instructed the field offices to ensure that data needed to assess State progress and on-the-ground conditions are included in OSM's annual reports on State programs. Furthermore, the States slated for a trial or "prototype" testing of the revised oversight process are also required to retain these data.

APPLICANT VIOLATOR SYSTEM (AVS)

In response to litigation brought by several environmental groups, OSM in 1985 entered into a settlement agreement to build a computer system capable of identifying all permanent program permit applicants and permittees, all persons who own or control such applicants or permittees, all business entities (including corporations, partnerships, and individuals) that are responsible for unabated federal cessation orders or unpaid federal civil penalties, and all persons who own or control such entities. Use of the system must result in identification of all those entities having federal violations so they can be blocked from obtaining permits until their compliance problems are resolved.

This system, called the Applicant Violator System (AVS), went into operation in October 1987. However, there have been numerous expansions and enhancements since that time. The effectiveness and accuracy of the system has increased since its initiation, but operational problems and widespread criticism have continued. Earlier this year, plaintiffs filed a motion with the court alleging that the Department and OSM were in substantial noncompliance with the Parker Order. The motion called for assigning a Special Master to implement the agreement and asked that the Secretary be held in contempt.

OSM and the plaintiffs have agreed to stay litigation for a period of 60 days, ending early in FY 1990. In an attempt to settle differences, the plaintiffs have dropped their request that the Secretary be held in contempt. Negotiations are ongoing and there are encouraging prospects that this highly controversial issue will be settled in the near future.

REAUTHORIZATION OF THE ABANDONED MINE LAND FUND

SMCRA provides for a fee to be collected on each ton of coal produced to pay for reclaiming lands damaged by mining prior to the date of enactment (August 3, 1977). This provision will expire in 1992, unless it is reauthorized. Even though many thousands of acres of abandoned mine lands have been reclaimed through the use of the fund, many more posing public health and safety problems will remain unreclaimed if the authorization expires and the fund runs out. Although expiration is still more than two years in the future, the AML fund reauthorization issue has generated special interest among legislators, environmentalists, and the coal industry.

OSM has undertaken a study to analyze issues surrounding a fee extension.

STATE PROGRAM AMENDMENT PROCESS

Whenever the federal program regulations are revised, OSM reviews State programs to ensure that each State program is "as effective as" the federal program, and advises States of necessary changes. The resulting State program amendment process has become time consuming and cumbersome, and none of the participants are satisfied with it. Problems have occurred both because of the time spent by OSM on reviewing proposed amendments, and because States do not always propose effective amendments in a timely manner.

During 1988-1989, OSM took a number of steps to improve the process. For example, the process within OSM has been decentralized. Legal review is also currently being decentralized and additional staff added in the field to expedite legal review.

KENTUCKY SETTLEMENT AGREEMENT

On May 22, 1986, the National Wildlife Federation filed a notice of intent to sue Kentucky and the Department of the Interior over major deficiencies in the implementation of the surface coal mine regulatory program in Kentucky. The Interior Department participated in negotiations, leading to a Settlement Agreement between the National Wildlife Federation and Kentucky in September 1987. At the same time, a Supplemental Memorandum of Understanding was entered into between OSM and Kentucky. Congressional funding was approved in December 1987, and a Cooperative Agreement between OSM and the State of Kentucky, which became effective on February 23, 1988, provides 100 percent federal funding to the State for costs of meeting the agreement. The Congress approved a three-year Cooperative Agreement for $12,900,000, of which Kentucky is to receive $10,540,000.

Kentucky's progress in improving its regulatory program under the Settlement Agreement has been substantial. The State has completed 100 percent of the interim program mine site inspections; completed 80 percent of the aerial video tapes of surface mines; completed the inventory of 568 on-site construction exemptions; evaluated 59 sites for enforcement action; completed a policy on what amounts of highwall will be allowed to remain at interim program sites; developed a "Reclamation Process Monitoring Program" for the Kentucky inspection staff; and is implementing major management changes to its computer system.

During 1988 and 1989, Kentucky expended nearly $5.7 million, and showed a significant expenditure shortfall only in the contractual cost category. The bulk of this shortfall is for computer-related contracts. Recently submitted budget revisions reprogram the funds for FY 1990 and propose several promising computer initiatives which would obligate the funds during the coming year.

Kentucky has been highly successful in conveying to its inspection staff and the industry the importance of the success of the Settlement Agreement. Kentucky has met at the bargaining table with industry, OSM, and the environmental community to discuss surface mining issues of concern to all parties.