



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



OCT 21 2005

Joseph M. Lovett, Executive Director
Appalachian Center for the Economy and the Environment
Post Office Box 507
Lewisburg, West Virginia 24901

Dear Mr. Lovett:

This letter is to inform you of the Department's final decision of the matters raised in your April 19, 2005, request that the Office of Surface Mining (OSM) inspect the Mettiki E Mine pursuant to section 517(h)(1) of the Surface Mining Control and Reclamation Act of 1977 (the Act) and the implementing regulations at 30 CFR, Part 842. For reasons set forth herein, OSM will not conduct an inspection.

Your request expresses dissatisfaction with decisions by the West Virginia Department of Environmental Protection (WVDEP) to issue permits which you allege may result in acid mine drainage. Specifically, you identify the recently-issued permit for the Mettiki E Mine and request an inspection "because the company plans to mine soon." In support of your request, you submitted material that is comprised ostensibly of documents and testimony from your appeal of WVDEP's decision to the West Virginia Surface Mine Board. In short, you are requesting OSM to review the permit decision of WVDEP with which you disagree.

SMCRA provides specific provisions in section 514 for seeking review of permit decisions. In this instance, because West Virginia has an approved state program, the appeal of the permit decision at issue here would lie under the state laws and regulations that West Virginia adopted to assume exclusive regulatory jurisdiction pursuant to section 503 of the Act. Section 517(h)(1) allows a person who is or may be adversely affected by a surface coal mining operation to request an inspection by providing written notification of a violation of the Act which that person "has reason to believe exists at the surface mine site." Your request does not provide any basis to conclude that a violation exists at the mine site. Rather, your request consists of your disagreements with findings made by WVDEP in reaching its decision that the permit application complies with applicable requirements of the West Virginia program.

A request for inspection under section 517 (h)(1) is not an alternative avenue for seeking review of the regulatory authority's decision to issue a permit. If the permit decision here were one issued by OSM as the regulatory authority under a federal program, any objections would have to be raised and resolved through the specific appeal process pursuant to section 514. Section 514 expressly requires that any person adversely affected by a decision to approve a permit application request a hearing on the reasons for

the final determination within 30 days of notification of the final decision. Both the plain language of section 517(h)(1) and the specific procedures in section 514 for an appeal of a permit decision precludes one from simply recasting objections to a permit decision as a violation at a mine site in an attempt to collaterally attack a regulatory authority's decision to approve a permit application. Such an approach is impermissible since it would allow anyone dissatisfied with the decision of the regulatory authority, administrative review board, or a court to circumvent the appeal process established under the Act, including the express limitation periods for seeking such review.

Another aspect of the Act's statutory scheme precludes granting your request. West Virginia has been granted primacy under the Act, and therefore has exclusive jurisdiction over the regulation of surface coal mining operations within its borders. Section 503(a). As federal courts have repeatedly held, the Act's allocation of exclusive jurisdiction was "careful and deliberate" by providing for "mutually exclusive regulation by either the Secretary or the state, but not both." *Bragg v. West Virginia Coal Ass'n*, 248 F. 3d 275, 293-94 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002); See also *Pennsylvania Federation of Sportmen's Clubs, Inc. v. Hess*, 297 F. 3d 310, 318 (3d Cir. 2002); *Haydo v. Amerikohl Mining Inc.*, 830 F. 2d 494, 497 (3d Cir. 1987).

In a primacy state, permit decisions and any appeals are solely matters of the state jurisdiction in which OSM plays no role. The role of the state and federal governments were explained by the U.S. Court of Appeals for the District of Columbia Circuit as follows:

[T]he state is sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. It decides whether a permittee's techniques for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable.

* * * *

Administrative and judicial appeals of permit decisions are matters of state jurisdiction on which the Secretary plays no role.

In re: Permanent Surface Mining Regulation Lit., 653 F. 2d 514, 519 (DC Cir 1981) (*en banc*) (herein after "Regulation Litig.").

In short, OSM does not possess concurrent or parallel jurisdiction over this matter. See *Pennsylvania Federation*, 297 F. 3d at 318. ("Exclusive, in other words, means just that.....It doesn't mean 'parallel' or 'concurrent'"). OSM does not retain "veto" authority over state permit decisions. *Regulation Litig.*, 653 F. 2d at 519 n. 7. Accord *Bragg*, 248 F. 3d at 295. OSM intervention at any stage of the state permit review and appeal process would in effect terminate the state's exclusive jurisdiction over the matter and frustrates the careful and deliberate statutory design. See *Bragg*, 248 F. 3d at 295. It would

encourage persons dissatisfied with state decisions to circumvent the very state laws and procedures that the Act insists states enact and maintain in order to exercise exclusive regulatory jurisdiction. The statutory design requires citizens in primacy states to pursue their claims under the procedures and in the forums established under the state laws enacted to obtain primacy.

This matter demonstrates the very concerns just expressed about circumventing the deliberate statutory scheme. You initially appealed the WVDEP permit decisions to the West Virginia Surface Mining Board. After the decision was left intact, you appealed to the circuit courts of West Virginia. Later, you filed a request with OSM for an inspection, and informed OSM that your appeal to the state circuit court was in the process of being voluntarily dismissed. As we explained earlier, such an approach conflicts with the Act in two ways. First, it would allow persons dissatisfied with a permitting decision to circumvent the specific appeal process set forth in the Act for permit decisions. Those dissatisfied with a regulatory authority's decision to approve a permit application could then pick and choose where and when to contest such a decision without regard to the specific procedure, forum and limitation period established under the Act. Second, where the decision in question is issued by a primacy state, it would conflict with the federalism established under the Act by allowing OSM to commandeer the state permit review and appeal process whenever a person forgoes the right to appeal a permit decision or, as is the case here, abandons an administrative or judicial appeal under state law. In sum, the Act does not provide for alternative avenues or forums for seeking relief from a permit decision.

The Charleston Field Office (CHFO) issued a ten-day notice (TDN) to WVDEP upon receipt of your request. WVDEP responded to the TDN by asserting that OSM cannot issue a TDN in such circumstances because it would be tantamount to allowing a federal appeal of a state permit decision. WVDEP also explained why the permit decision conformed to applicable requirements under state law. The CHFO proceeded to undertake a protracted three-month review of the state permit and then concluded that it would conduct an inspection. However, the CHFO apparently recognized that the nature and circumstances of your request did not fit comfortably within the scope of section 517(h)(1) and 521(a)(1) of the Act since, according to the CHFO, "the federal inspection process will be somewhat different from that normally occurring after an inappropriate response determination." Rather than conducting an on-the-ground inspection of the mine site, the CHFO stated that it would evaluate further available information concerning the permit including consulting anyone else having relevant information. WVDEP sought informal review of the CHFO determination under 30 CFR 842.11.

The Regional Director of OSM's Application Region is informing WVDEP that the CHFO erred in issuing the TDN for reasons consistent with this final response to your request for an inspection.

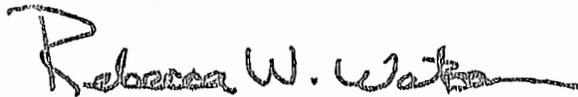
Your complaint of April 19th states that the Mettiki E Mine, as permitted, will violate water quality standards established under the Clean Water Act. Neither surface water quality standards nor effluent limitations apply to ground water, including mine pools.

Should this mine have post-mining surface discharges into waters of the U.S. or of the state of West Virginia, they would be subject to applicable effluent limitations and surface water quality standards in accordance with the State counterpart to 30 CFR 817.42. However, the Mettiki E Mine will not have a post-mining gravity discharge to the surface.

The only water to leave the mine pool after mining will be groundwater, primarily reaching the abandoned Dobbin mine, with the possibility of some reaching the abandoned Alpine mine. The applicable standard for such groundwater flow is the State counterpart to 30 CFR 817.41(a). Further, such flow will not necessarily make Mettiki responsible for meeting effluent limitation at any existing discharges from those mines. There is no basis in the Secretary's regulations for the term "SMCRA discharge" as used and characterized by the CHFO in its letter of September 15th to WVDEP. Responsibility and accountability for establishing applicable standards and accountable parties for existing surface discharges at other mines falls within the CWA authority.

This decision to not conduct an inspection as requested in your letter of April 19, 2005, constitutes the final decision of the Department of the Interior.

Sincerely,



Rebecca W. Watson
Assistant Secretary,
Land and Minerals Management