

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

ACTIONS THAT POTENTIALLY BURDEN THE PRODUCTION OF COAL

1. Ten-Day Notices and Independent Inspections – Directives INE-24, INE-35, & REG-8

As a result of revisions to Directive REG-8 in January 2011, OSMRE conducts 10% of all routine oversight inspections with 24 hours' notice to the state regulatory authority. If the state inspector is unavailable to accompany the OSMRE inspector, OSMRE will conduct the inspection alone. These and other oversight inspections sometimes result in the issuance of Ten-Day Notices (TDNs) to the state regulatory authority, as do citizen complaints. State regulatory authorities, particularly in the Appalachian Region, have expressed concern that the number of hours required to prepare TDN responses can be significant. As part of the SMCRA Government Efficiencies Project, the Program Efficiency Work Group, comprised of OSMRE and State/Tribal staff, assessed various topics, including the use of TDNs and independent inspections. The final report issued on July 30, 2014, made six specific recommendations for the TDN process and four recommendations regarding the independent inspection process. IMCC has recommended that OSMRE revisit these recommendations, and others, in an effort to implement the recommendations.

2. Directive INE-35 – TDNs and Permit Defects

On January 31, 2011, the Director of OSMRE reissued Directive INE-35 regarding policy and procedures for the issuance of TDNs. This directive requires the issuance of a TDN whenever a permit issued by the state regulatory authority (RA) contains a “permit defect,” which the directive defines as meaning “... a type of violation consisting of any procedural or substantive deficiency in a permit-related action taken by the RA (including permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights).” The directive further states that OSMRE will not review pending permitting decisions and will not issue a TDN for an alleged violation involving a possible permit defect where the RA has not taken the relevant permitting action (e.g., permit issuance, permit revision, permit renewal, or transfer, assignment, or sale of permit rights). Since the issuance of this directive, concerns have been raised by some states and industry regarding the potential impact on mining operations where the RA has issued a permit, revision, or renewal, and the operator has commenced activities based upon RA approval. OSMRE should examine this issue with the IMCC in conjunction with further evaluation of the overall TDN process as referenced in the previous action above.

3. Processing State Program Amendments – Directive STP-1

Most changes in State law and/or regulations that impact an approved SMCRA regulatory program require submission of a formal program amendment to OSMRE. Such changes to primacy programs cannot be implemented until a final amendment is approved by OSMRE.

In addition, no state/tribal program amendment concerning air or water quality standards adopted under the authority of the Clean Air Act or the Clean Water Act may be approved until EPA concurrence is received. The Program Efficiency Work Group also evaluated the process for approving state program amendments and found that the processing times varied significantly. The final report made five recommendations concerning process improvement. OSMRE should revisit these recommendations and consider implementation, as appropriate. Additionally, as a part of the Internal Control Review (ICR) process, OSMRE reviewed the state program amendment process from submission to OSMRE through publication of the final rule in the Federal Register. Based upon the results of the ICR, OSMRE is developing new training guides and revising Directive STP-1, which establishes policy and procedures for the state program amendment process.

4. OSMRE Policy Advisory: Self-Bonding

On August 5, 2016, the Director of OSMRE issued a policy advisory on self-bonding. The advisory was in direct response to three of the largest coal mine operators in the nation filing for Chapter 11 protection under the U.S. Bankruptcy Code between 2015 and 2016. Those companies held approximately \$2.5 billion of unsecured or non-collateralized self-bonds that various states with federally approved SMCRA regulatory programs previously accepted to guarantee reclamation of land disturbed by coal mining. The advisory stated that “the bankruptcy filings confirm the existence of significant issues about the future financial abilities of coal companies and how they will meet future reclamation obligations.” While recognizing the action of certain state programs to address self-bonding issues, the advisory went on to say that “each regulatory authority should exercise its discretion and not accept new or additional self-bonds for any permit until coal production and consumption market conditions reach equilibrium, events which are not likely to occur until at least 2021.” Since the issuance of this advisory, all three companies of concern have completed their plans for Chapter 11 reorganization, and are expected to replace all self-bonds with other forms of financial guarantees.

In addition to the issuance of the policy advisory on self-bonding, OSMRE accepted a petition for rulemaking submitted March 3, 2016, by WildEarth Guardians. The petition requested that OSMRE revise its self-bonding regulations to ensure that companies with a history of insolvency, and their subsidiary companies, not be allowed to self-bond coal mining operations. In view of the current status of the self-bonding bankruptcies and recent executive orders concerning rulemaking, OSMRE should reconsider the scope of the policy advisory as well as the need for and scope of any potential rulemaking.

5. OSMRE Enforcement Memorandum – Relationship between CWA and SMCRA

On July 27, 2016, the Director of OSMRE issued a policy memo to staff providing direction on the enforcement of the existing regulations in regard to violations of the Clean Water Act

caused by SMCRA-permitted operations and related issues such as responses to self-reported violations of NPDES limits and OSMRE responses to Notices of Intent to Sue alleging CWA violations at SMCRA-permitted operations. State regulatory authorities, as well as industry, have raised issues with this guidance document concerning overlap and potential conflicts between SMCRA and the CWA. Some of these issues and concerns were raised at the IMCC meeting in April 2017. In view of the questions raised and potential misunderstandings with regard to the intent of this guidance, OSMRE should consider revisiting the policy issues. OSMRE Proposed and Final Rules.

6. Policy on Reclamation Fee for Coal Mine Waste (Uram Memo)

On July 22, 1994, then-Director Robert Uram issued a memorandum outlining the conditions under which OSMRE would waive the assessment of reclamation fees on the removal of refuse or coal waste material for use as a waste fuel in a cogeneration facility. Recently, the Pennsylvania regulatory authority (PADEP) requested that OSMRE revise the policy to incentivize reclamation efforts on sites with coal refuse reprocessing activities. The PADEP believes that the reclamation fees deter operators from reclamation efforts on sites with coal refuse reprocessing activities. There are several coal refuse sites, located within the Anthracite Coal Region, which are unable or have ceased the removal of coal refuse to be used as waste fuel at co-generation facilities. This is partly or totally due to the cost of reclamation fees. In addition PADEP recommended that OSMRE consider waste derived from filter presses at existing coal preparation plants to be a “no value¹” product, which would encourage its use as a waste fuel rather than requiring it to be disposed in a coal refuse pile.

7. OSMRE Proposed and Final Rules

OSMRE has a total of six pending rulemakings at various stages (five proposed, one final), including the proposed rule on self-bonding previously mentioned. Two of the proposed rules resulted from decisions to accept citizen petitions for rulemaking (self-bonding and blasting-related toxic gases). The one final rulemaking, known as the cost recovery rule, would replace the existing permit fee requirements for permit applications for surface coal mining operations on lands for which OSMRE is the regulatory authority with a fee structure that would recover processing costs for a broader range of permit applications and permit reviews. The final rule also would assess fees for midterm permit reviews and routine mandatory inspections. Fees would be adjusted annually. In relative terms, adoption of this rule would significantly increase costs to the industry for operations on lands for which OSMRE is the regulatory authority because the existing permit fee schedule recovers only 2% of OSMRE’s processing costs and none of the costs of inspections and midterm permit

¹ No value determinations are based upon the criteria established in the 1994 Uram Memorandum.

reviews. Once adopted by OSMRE, the state regulatory authorities would be expected to amend their regulatory programs accordingly.

The five proposed rulemakings involve dam safety (primarily the addition of requirements for development and exercise of emergency action plans for certain impoundments), control of toxic gases from the use of explosives, limitations on the temporary cessation of mining operations, more restrictive eligibility criteria for the use of self-bonds, and establishment of specific requirements governing the placement of coal combustion residues on active and abandoned minesites. With the possible exception of the rulemaking concerning control of toxic gases from the use of explosives, all of these rulemakings would result in increased costs to the industry. The cost increases likely would be minor, with the possible exception of the self-bonding rule. For that reason, with the possible exception of the self-bonding rule, impacts on coal production are likely to be negligible. The temporary cessation of operations rule might result in a very minor increase in coal production by limiting the circumstances and length of time that a mine could remain inactive. The coal combustion residues rule likely would not have any impact on coal production because coal combustion residues are a by-product of power generation, not coal mining. Power plants have other options for management of coal combustion residues.