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# Regulatory Enforcement of the Surface Mine Control and Reclamation Act of 1977, PL 95/87: A Comparison of State and Federal Compliance in Three Midwestern States

## ABSTRACT

*Section 502 of the Surface Mining Control and Reclamation Act of 1977, Public Law 95/87 contained a provision which required comparison of federal and state enforcement actions of the interim program regulations. Three midwestern states, Ohio, Indiana, and Illinois, were selected for study and their enforcement actions were compared with each other and the Federal Office of Surface Mining.*

*Wide variation in enforcement and inspection activities was found between the state and federal field personnel in Indiana and Illinois. Also, there was considerable variation in quality and quantity of inspections between all three states themselves. Factors were identified which help explain the findings in different levels of enforcement.*

After many years of controversy and two Presidential vetoes during the Gerald Ford administration, a federal surface mining law was passed in 1977. This resulted in the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Public Law 95/87.<sup>1</sup> As a result of this act, the Federal Office of Surface Mining (OSM) was created within the U.S. Interior Department, and began to administer the law through five regional offices. This federal control was to exist until coal-producing states were able to achieve primacy, at which time the states would assume the major responsibility for administering state regulations which were in accordance with the requirements of the Federal Act.<sup>2</sup>

Until the states assumed control of the reclamation laws, the interim program allowed the Federal OSM to inspect mines in the states and

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1. 30 U.S.C. §§ 1201-1328 (1982).

2. Primacy refers to the state assuming primary enforcement jurisdiction. This was accomplished when the state had adopted laws and regulations equal to or better than the federal law and regulations. The OSM has to approve and recommend primacy to the Secretary of the Interior. This was channeled through the appropriate regional office of OSM.

enforce the new law.<sup>3</sup> When an individual state achieved primacy, the federal enforcement reverted to merely an oversight or monitoring role.

Coincidentally, since most states by this time had some kind of state regulatory program, the federal and state mine inspectors worked at the same overlapping task. With the passage of Public Law 95/87 the state inspectors had to enforce the interim regulations of the new federal law.<sup>4</sup> The difference in the level of inspection between the two groups and identification of any variation in enforcement of Public Law 95/87 became a topic of research.

Most coal-producing states, eager to regain control of the mine regulation, began to modify state laws and develop state regulations which could demonstrate the state had the capability of carrying out the provisions of the Federal Act. This was not unusual and fit within the paradigm of most state officials that the states themselves are closer to actual mining activity and could, therefore, better serve a regulatory role. This would then reduce the federal mine inspectors to a remote oversight position and leave the state reclamation agencies to do the work more independently.

Soon after the Federal OSM had staffed the five regional offices and developed interim regulations, the 1980 Presidential election was held which resulted in the appointment of James Watt as Secretary of the Interior. His leadership caused a major redirection of the organization. Ultimately, this meant the elimination of the regional concept and placed greater reliance on two technical centers, Denver and Pittsburgh. One of the rationale for these changes was to reduce the federal bureaucracy. Also, this was consistent with the philosophy of the Reagan Administration to reduce the influence of the federal government in state affairs.

An attempt was made by the new administration to change many of the regulations promulgated by OSM. Lawsuits by environmental groups are still seeking a return to the original requirements.<sup>5</sup>

Among the procedures not modified by Mr. Watt and the newly appointed head of OSM, James Harris, was Section 502 of SMCRA which

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3. Interim regulations are the regulations developed by OSM which were enforced by both OSM and state inspectors until a state achieved primacy.

4. The most complete study of individual state laws and regulations is found in IMHOFF, FRITZ & LAFEVERS, *A GUIDE TO STATE PROGRAMS FOR THE RECLAMATION OF SURFACE MINED AREAS*, U.S.G.S. Circular 731 (1976).

5. Under the leadership of Secretary Watt thirty-eight regulations were weakened to make SMCRA more appealing to surface miners. The National Wildlife Federation, National Audubon Society and several other environmental organizations promptly sued the Department of Interior. Their suit had two major components. First, no environmental impact statement had been done to determine the effect of the new regulations on the environment. Second, the rule changes were not in compliance with SMCRA. To date the federal appellate courts have largely held on the side of the environmental groups. The U.S. Supreme Court will no doubt make the final decision.

required federal review of the states' interim programs. Among the program elements were:<sup>6</sup>

- (A) Review state inspection activities;
- (B) Compare state and federal enforcement actions;
- (C) Compare state and federal enforcement actions on permits inspected by OSM in response to three state inspection reports indicating violations; and
- (D) Review permits.

This research focuses only on Part B (above) of the 502 review program in three Midwest states: Ohio, Illinois, and Indiana. While the time frame varies slightly for each state, the inspection review period runs generally from October 1979 to late November 1980.<sup>7</sup>

### OHIO

There is a remarkable similarity between enforcement actions taken by the Ohio Division of Reclamation and OSM. Both agencies cited approximately 1000 violations during the review period. As shown in Table 1, the performance standard most frequently cited by both organizations was sediment pond violations. The second most frequently noted violation was effluent limitations. Combined, these violations accounted for 57 percent of the total number of violations cited by Ohio and 44 percent of those found by OSM.<sup>8</sup>

The greatest disparity in the number of violations reported by the state and OSM occurred in the Authority to Operate category. This difference is due to the matter not coming under OSM pervue. Signs and Markings show wide departure, but the difference is largely due to a slight variation in the wording preferred by the two regulatory bodies.

At first glance there appears to be wide variation in the water monitoring requirements. In Table 1, the state only found 52 violations while OSM identified 152. Investigation shows there are groundwater monitoring problems. The state cited fewer violations because Ohio's enforcement of this requirement became effective only half way through the review period. When the state began inspections in this area, they found the majority of their violations in a brief three-month period. The state vi-

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6. 30 U.S.C. § 1252 (1982), in substantially the same form as the original version in 1978.

7. The data for this study was taken from internal OSM documents and was obtained through the Freedom of Information Act. The data OSM used was collected on a state-by-state basis and there was some variation in the way the data was initially recorded. The format of OSM reports vary greatly and in some cases contain unnumbered pages and inserts without page or table numbers. This variation does not allow an easy comparison among the states. In addition, the researcher worked at OSM during the Spring of 1982 while on special leave from Ball State University.

8. U.S. Department of Interior, Office of Surface Mining, Initial Review of Ohio's Interim Program 3-16 (1981) (unpublished report).

olations then leveled off as did the federal violations for the remainder of the study period. This is the type of variation which is entirely logical as the state began to implement such a new program.<sup>9</sup>

TABLE 1

A Comparison of Ohio and OSM Violations During the 502 Review Period

	<i>Ohio</i>	<i>Federal</i>
Authority to Operate	110	4
Signs and Markings	25	89
Backfilling and Grading	15	10
Rills and Gullies	17	30
Improper Fills	4	13
Topsoil Handling	50	103
Sediment Ponds	344	309
Effluent Limitations	193	145
Water Monitoring	52	128
Buffer Zones	5	9
On Site Records	18	63
Blasting	9	19
Revegetation	8	6
Mine Water/Effluent Ponds	54	34
Water Discharge	10	18
Other Variations	14	44

Source: U.S. Department of Interior, Office of Surface Mining, Initial Review of Ohio's Interim Program, 1981 p. 10.

## INDIANA

The data in the Enforcement Review for the state of Indiana is less complete and more chaotic. The state and OSM were extremely hostile toward one another during this period. Indiana had joined with several coal companies in a law suit which asserted that SMCRA is unconstitutional.<sup>10</sup>

The state apparently did not in all cases supply complete information to OSM, and OSM had to base a large part of the review on data supplied by the state. This state data was necessary to document the state inspectors activities. Since the purpose of the review was to compare the two agencies, OSM was forced to use OSM inspection data only from the same mines during the same time period as those supplied by the state.

9. *Id.* at 8, and 10.

10. *Indiana v. Andrus*, 501 F. Supp. 452 (1980), *rev'd Hodel v. Indiana*, 452 U.S. 314 (1981). The trial court judge ruled in favor of the state on the grounds that requiring topsoil replacement was an attempt by the federal government to control land use in the state. During this litigation the state and OSM officials were barely on speaking terms, and the flow of paperwork from the state was at a minimum. *Andrews v. Indiana*, 501 F. Supp. 425, 458 (1980). *Hodel v. Surface Mining and Reclamation Association*, 452 U.S. 264 (1981). U.S. Department of Interior, Office of Surface Mining, Indiana Interim Program Memorandum 8 (Nov. 21, 1980).

Under these difficult circumstances, OSM drew the following conclusions from the available information.<sup>11</sup>

1. The inspection and enforcement treatment by the state of large mines appears to be inconsistent with the treatment of smaller operators. In reviewing 90 Indiana inspection reports, not one violation was reported for a large Indiana operation. This is inconsistent with OSM inspections which indicate that large Indiana inspectable units have been found in violation of interim program requirements.

2. The Indiana inspection reports reviewed indicate that Indiana inspectors observed water quality violations but Notices of Noncompliance were not written. Consequently, OSM enforcement actions are the only assurance that water quality problems will be addressed in Indiana.

3. It is clear from a comparison of Indiana and OSM inspection results that violations found by Indiana continued to exist until the operator became the subject of an OSM enforcement action 30-60 days after the last Indiana inspection found the violation. Over 60 percent of violations noted by Indiana inspectors were cited by OSM inspectors in later inspections.<sup>12</sup>

Table 2 indicates the violations found by both the state and federal inspectors during the review period. The largest variation between the two agencies was in topsoil handling and other earth-handling categories, and water related violations.

The topsoil handling can be explained as a dramatic change in the regulation. Prior to SMCRA the state of Indiana did not require topsoil replacement on surface mines. While a few mines had to replace topsoil in selected areas to meet revegetation requirements due to high acid conditions, this is the exception rather than the rule. Because SMCRA mandates topsoil segregation and replacement, the change was new to the state inspectors. More importantly, however, the change is new to the miners themselves. Given the legal climate of the time, miners could have been reluctant to replace topsoil hoping the regulation would be thrown out as the legal battle moved through the appeal process.

When comparing the total number of inspections in Indiana with the number in Ohio, it must be kept in mind that complete files were not received from Indiana. Thus, while there is apparent similarity in both type and number of violations presented in many categories in Tables 1 and 2, the state data supplied to OSM by Indiana is incomplete.

Internal OSM documents also indicate that the general lack of cooperation between the two agencies has contributed to the inadequacy of

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11. The 30 to 60 day waiting period is required by the interim regulations. Since such a large number of the violations cited by the state were found uncorrected by later OSM inspections, it is obvious the mine operators were not taking the Indiana inspections seriously.

12. Indiana Interim Program Memorandum, *supra* note 11.

TABLE 2

A Comparison of Indiana and OSM Violations During the 502 Review Period

	<i>Indiana</i>	<i>Federal</i>
Sediment Control Structures	31	30
Eliminate Highwalls and/or Depressions	23	22
Topsoil Handling	9	14
Mining Off/Without Permit	12	5
Revegetation and/or Methods	22	18
Signs and/or Markers	10	12
PFL Plan/Negative Determination or Improper PFL Soil Horizons		1
Mining within Stream Buffer Zone	1	1
Water Quality Discharge	5	3
Mining in Restricted Area	8	8
Toxic Spoil	4	7
Rills and Gullies	7	13
Access and Haul Roads	2	
Blasting and/or Blasting Records	2	3
Post Mining Land Use	4	2
Authority to Operate		1
Discharge H <sub>2</sub> O into Underground Mines		1
Ground Water Monitoring		6
Surface Water Monitoring		5

Source: U.S. Department of Interior, Office of Surface Mining, Indiana Interior Program, Supplement, Table 3, November 21, 1980. NPN.

the data.<sup>13</sup> Even if the data were complete, a comparison with the state shows a major shortcoming in the Indiana program. While both the federal and state inspectors found over 1000 violations in Ohio, Indiana officials reported only 140 violations. A small number of violations is indicative of inadequate mine monitoring.

OSM studies done in Ohio indicate that 12 inspections per mine permit per year would lead to detection of 84 percent of the violations that exist in the field. Such studies are conclusive that Indiana, by conducting such a small number of inspections, could not possibly have found a substantial number of violations.<sup>14</sup>

### ILLINOIS

As shown in Table 3, Illinois state inspectors tend to find violations in blasting. Most of the blasting problems were for air blasts.

13. U.S. Department of Interior, Office of Surface Mining, Indiana Interim Program Memorandum 1-3 (Nov. 21, 1980).

14. U.S. Department of Interior, Office of Surface Mining, Initial Review of Ohio's Interim Program 1-3 (1981).

TABLE 3  
A Comparison of Illinois and OSM Violations During the 502 Review Period

	<i>Illinois</i>	<i>Federal</i>
Blasting:		
Airblast	12	4
Records and Schedules	10	14
Flyrock	3	0
Other	5	4
Water:		
No Pond	11	35
Effluent	1	8
Monitoring	0	21
Stream Buffer	0	6
Other	11	20
Permit:		
Off Permit	9	8
Permit Condition	2	0
Grading:		
Highwall	0	3
Timely	0	11
Rills and Gullies	0	4
Other	0	2
Topsoil:		
Erosion	0	13
Segregation	18	4
Distribution	0	2
Storage	12	2
Other	0	3
Buffer Zone	3	1
Signs and Markers	6	29
Miscellaneous	7	8

Source: Data Adapted From, U.S. Department of Interior, Office of Surface Mining, Initial 502 Review of Illinois State Regulatory Authority, January 8, 1981. NPN.

Table 3 also indicates the federal inspectors found a large number of blasting violations, but also identified water quality problems. A significant number of the water violations indicate that no sediment ponds have been constructed by the mines. Further, federal inspectors had a large number of violations due to the lack of monitoring of sediment ponds at mines where they existed. OSM also cited more violations in topsoil, grading, and signs and markers. The state found no grading violations and only 30 topsoil problems.

Internal OSM documents provided additional data on Illinois which revealed a wide departure in federal and state inspection results. For example, in major mine operations the state conducted 1387 inspections and found only 71 violations. OSM inspected 621 times and found 121



violations.<sup>15</sup> During the period under study both regulatory units in Illinois inspected a total of 284 permits covering over 91,000 acres of land. The state conducted 1710 inspections and found just 100 violations, while OSM inspected the same mines 884 times and found 202 violations.<sup>16</sup>

### SUMMARY

The data presented in this study were collected on a state-by-state basis, and there was some variation in the way the data were initially recorded. This variation does not allow an easy comparison among the states. Thus, some broader classification aids in obtaining a better understanding of the situation.

Violations can be generally classified in the following manner. Due to the normal sequence of surface mine development, most hydrology and mining problems can be expected to occur early in the mining activity. Usually, permit and reclamation violations occur in the latter part of the mine life. Thus, there are four major phases of enforcement activity and violations: 1) hydrology, 2) reclamation, 3) technical, and 4) mining.

Table 4 illustrates these major categories, expressed in percent of total for the three states and OSM. Hydrology problems accounted for 65 percent of the state violations in Ohio compared to only 16 percent of those in Illinois. Reclamation totaled 41 percent of the state violations in Indiana and only 9 percent in Ohio. Technical violations were roughly equal across all three states. Mining accounted for 30 percent of the state violations in Illinois and only 4 percent in Ohio. One major rationale for SMCRA was to achieve comparable nationwide levels of reclamation. It was obvious from this data that this was not being accomplished.

Looking to the federal reports, OSM found 62 percent of the violations in Ohio to be hydrology related; in Indiana this totaled 27 percent. Reclamation violations ranged from a high in Indiana of 37 percent to a low of 12 percent in Ohio. Technical and mining violations were fairly constant across all three states.

Table 4 also depicts the wide variation in the number of violations. They range from over 1000 OSM violations in Ohio to only 100 state violations in Illinois during the same time period. While the number of OSM inspections were less in Indiana and Illinois, it should be kept in mind the goal of the entire 502 review was to compare state and federal enforcement actions. Thus, OSM had to use the same mines that were supplied by the state agencies. OSM conducted many more inspections in Indiana and Illinois, but these could not be included in the review because there was no comparative data from the states.

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15. U.S. Department of Interior, Office of Surface Mining, Initial 502 Review of Illinois State Regulatory Authority (Jan. 8, 1981) (unpublished report).

16. *Id.*

TABLE 4

State and Federal Violations Grouped into Major Categories Expressed in Percent of Total for Each Regulating Body

Violation	Indiana		Ohio		Illinois	
	State	Federal	State	Federal	State	Federal
Hydrology	27	30	65	62	16	45
Reclamation	41	37	9	12	30	22
Technical	23	18	22	15	17	18
Miniong	9	15	4	7	30	11
Other	0	0	0	4	7	4
Total %	100	100	100	100	100	100
Total Violations	140	152	928	1,024	100	202

Source: Data Compiled From, U.S. Department of Interior, Office of Surface Mining, Interim 502 Review Programs for Ohio, Indiana and Illinois, 1980-81.

### CONCLUSIONS

The data revealed a wide variation in enforcement and inspection activities between the state and federal field personnel in Indiana and Illinois. Also, there is considerable variation between the quality and quantity of inspections among the three states if just state inspections are compared. OSM also showed variation in the type of violations found within each state.

Several factors might explain the findings in the different levels of enforcement:

1. The difference in geography and geology between the states may account for some of the differences in enforcement. This would require different mining techniques and create reclamation problems unique to a specific coal seam or topography.

2. Differences in the age of the permits may also account for some of the variation. Different violations are normally found at different stages of mining and reclamation.

3. The independent judgement of state inspectors may have influenced enforcement of regulations. State inspectors had been enforcing the state regulations. Perhaps the variation is due to the new and sometimes radically different regulations developed by OSM. Ohio's state law, for example, required topsoil replacement long before SMCRA became the regulatory rule. Ohio inspectors then found it easier to adjust to the minor changes in doing their work than the other two states.<sup>17</sup>

Federal inspectors came to the situation knowing only the SMCRA regulations and did not have to concern themselves with changes in state

17. A GUIDE TO STATE PROGRAMS FOR THE RECLAMATION OF SURFACE MINED AREAS, *supra* note 4.

laws. It would then seem natural for the federal mine inspectors to find more violations concerning SMCRA than, perhaps, inspectors in Indiana and Illinois. Yet, this does not necessarily explain the wide variations among the states themselves.

4. A difference in attitude among the individual inspectors and the charge given to the state enforcement agencies may also account for the varying levels of enforcement.<sup>18</sup> The end result of these educational inspections was a delay in correcting environmental insults.

Copies of original mine inspection reports reveal that in Indiana and Illinois the state field inspectors were in the habit of giving educational inspections to the miners. They would visit the mine sites, find violations, and then explain the new law and regulations to the miners, suggest corrections, and not write up any closing orders, or assess any fines. They might return to the mine during the next inspection and find another violation, or the original violation uncorrected. They then would repeat the educational process again. In some cases, the educational process was repeated three times. Meanwhile, several months had passed and the environmental insult continued.

The federal OSM mine inspectors allowed no such delay. When they found a violation they immediately cited the operator, and in some cases immediately closed down part of a mine operation until the violation was corrected. The federal inspectors assumed it largely was the responsibility of the mine operator to educate himself about the new regulations and to adjust his business accordingly.<sup>19</sup>

The rationale for the OSM attitude was straight forward and at the heart of the need for a Federal law. OSM was created to enforce the same level of reclamation nationwide.<sup>20</sup>

OSM perceived its role to apply uniform standards which would create the same reclamation conditions wherever the mining took place. Thus, OSM felt it could not give educational visits due to the wide discretion given the mine inspector. This is because different inspectors in different parts of the country could view the situation based on their own perceptions or values.<sup>21</sup>

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18. Many actual state mine inspection reports were reviewed during the course of this research. It is clear from reading the mine inspector's comments that there was an attitudinal difference between the states.

19. Interview with E. Imhoff, Regional Director, Region III, Office of Surface Mining (Mar. 1982).

20. What can be implied from educational visits is that the state regulatory agencies in Indiana and Illinois were not enforcing the law as rigorously as they could have been. Perhaps this is the result of the states fear that stern enforcement would drive the coal companies to another state. This is of course exactly one of the reasons SMCRA was created in the first place. What had occurred in the past was the felt, if not real, threat that coal companies were shopping around state to state to find the area where the weakest surface mine legislation existed, or where the weakest enforcement of the state regulations was occurring.

21. Interview with E. Imhoff, *supra* note 21.

This research demonstrates that there is both a hierarchical and spatial variation in the enforcement of the interim regulations of SMCRA. Due to the change in the regulatory climate within OSM after the 1980 election and the massive reduction of the number of OSM field inspectors which resulted, it is difficult today to determine if the states are enforcing the SMCRA regulations as originally developed. All of the states now have achieved primacy and thus regulate coal mining activities within their borders. OSM has reverted to a minor oversight role, with few inspectors actually in the field.<sup>22</sup>

The Surface Mine Control and Reclamation Act of 1977 was praised by environmental organizations as a giant step forward in halting the past abuses of surface mining. There is some question now as to the desirability of having the same regulations applied nationwide. The tremendous geographic difference between the steep slopes found in the Appalachians, the prime farmlands in the Midwest, and the semi-arid West require specialized approaches to surface mine reclamation. Even if Public Law 95/87 had accounted for these regional differences, the question can still be raised as to the equality of enforcement within each area. States would still feel the intraregional competition for coal mining, and this could lead to the temptation to require minimum compliance with SMCRA.

The rationale of the Federal Act was to insure uniform enforcement of surface mining regulations. From the data in this study, it is apparent this was not occurring during the 502 review period. If one assumes that OSM was indeed enforcing the federal regulations, this research calls into question the often stated principle that the states can best administer the program because they are closer to the situation than the federal OSM. Certainly in Indiana and Illinois this was not the case. The large variation in these two states' enforcement and OSM's cannot be explained as disagreement over interpretations of the fine points in the regulations.

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22. OSM still attempts to monitor the situation in its oversight role.