



---

Volume 89  
Issue 3 *Issue 3, The National Coal Issue*

Article 9

---

April 1987

## Discovery in State and Federal SMCRA Proceedings

G. Daniel Kelley Jr.  
*Ice Miller Donadio & Ryan*

Stephen M. Terrell  
*Ice Miller Donadio & Ryan*

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



Part of the [Civil Procedure Commons](#), [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

---

### Recommended Citation

G. D. Kelley Jr. & Stephen M. Terrell, *Discovery in State and Federal SMCRA Proceedings*, 89 W. Va. L. Rev. (1987).

Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss3/9>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## DISCOVERY IN STATE AND FEDERAL SMCRA PROCEEDINGS

G. DANIEL KELLEY, JR.\*  
STEPHEN M. TERRELL\*\*

### I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 ("SMCRA"),<sup>1</sup> establishes a pervasive system regulating the surface mining industry under which SMCRA adjudicatory proceedings can occur both in the federal enforcement of state or federal programs and in the state enforcement of state programs. Discovery rules have been promulgated by the Office of Surface Mining Reclamation and Enforcement ("OSM") for federal proceedings and adjudicatory proceedings under state programs.<sup>2</sup> State discovery rules applicable to state enforcement proceedings may vary from one state to another and can differ from the federal rules. Furthermore, no single set of discovery rules is applicable to all types of SMCRA adjudicatory proceedings. Such proceedings can vary widely, encompassing permit hearings, assessments and notices of violations hearings, hearings on cessation orders, proceedings for suspension or revocation of permits, discrimination hearings, bond release hearings, and possibly certain areas unsuitable hearings. Each has its own discovery considerations.

This Article presents an overview of the discovery provisions of the Federal Rules of Civil Procedure which have been incorporated into the OSM discovery regulations with an "eye" to potential variations occurring under state programs.<sup>3</sup>

---

\* Partner, Ice Miller Donadio & Ryan, Indianapolis, Indiana; A.B. 1962, American University Hanover College; J.D. 1967, Indiana University.

\*\* Partner, Ice Miller Donadio & Ryan, Indianapolis, Indiana; B.A. 1974, Ball State University; J.D. 1980, Indiana University.

This work originally appeared as part of the Eastern Mineral Law Foundation's Special Institute on Surface Mining (Arlington, Virginia, Mar. 21-22, 1986). Copyright 1986 by the Eastern Mineral Law Foundation.

<sup>1</sup> 30 U.S.C. § 1201 to -1328 (1982 & Supp. III 1985).

<sup>2</sup> See 43 C.F.R. §§ 4.1130 to -4.1141 (1986).

<sup>3</sup> For example, Indiana, in 310 IND. ADMIN. CODE § 05.1-13 (1986), makes the discovery provisions of Rules 26-37 of the Indiana Rules of Trial Procedure applicable to administrative adjudicatory hearings although this was unnecessary since the discovery rules already applied to "proceedings before administrative agencies" through Trial Rule 28(F).

In the Illinois regulations, the OSM discovery regulations were basically followed. ILL. ADMIN. CODE § 184.21 (1986). This, of course, will make Illinois administrative discovery procedures substantially different from Illinois civil practice discovery techniques which, for example, still retain the

The fundamental differences between a court and an administrative agency, particularly as to inherent powers and evidentiary matters, also will be considered. Furthermore, the interaction of the Freedom of Information Act with OSM regulations and the federal rules will be highlighted. The reader is cautioned that this Article is not an in-depth analysis but is merely intended to heighten awareness.

## II. AGENCY POWERS RELATING TO DISCOVERY AND SUBPOENAS

The beginning point of analysis for most administrative law questions involves authority or delegated powers. In the context of discovery, some case law has questioned the power or authority of an administrative agency to require pretrial discovery under particular statutory provisions.<sup>4</sup> When considered with the case law concerning the restricted subpoena power of an agency, these cases could present difficult problems as to non-party discovery.

In *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*,<sup>5</sup> the Commission's pretrial discovery procedures were found invalid as unauthorized absent express statutory power and pursuant to the general rulemaking power granted under the enabling statute.<sup>6</sup> The court held "that there inheres in discovery procedure involving the prehearing production and copying of documents, a potential impact upon litigants so much greater than that associated with ordinary procedural rules, that the failure of Congress to affirmatively authorize the same should be taken as a deliberate choice."<sup>7</sup>

In the same vein, it is a well-accepted principle that an administrative agency only has the subpoena power authorized by statute.<sup>8</sup> Significantly, the Admin-

distinction between discovery and evidentiary depositions.

Kentucky's discovery provisions are found at 400 KY. ADMIN. REGS. 1:030, 1:040, and 1:050 (1986). 405 KY. ADMIN. REGS. 1:020-7, 3:015-7, and 7:090-5 (1986) require recognition of evidentiary privileges at the hearing.

Alabama appears to have incorporated the Alabama Rules of Civil Procedure which presumably include discovery rules. See ALA. ADMIN. CODE r. 880-X5A-.36. Alabama also applies the same general rules of evidence to the administrative hearings as are applicable in Alabama's state courts. See 800-X-5A-.30(2).

<sup>4</sup> See *NLRB v. Interboro Contractors Inc.*, 432 F.2d 854 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971); *Federal Maritime Comm'n v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964); *Louisville Builders Supply Co. v. Commissioner*, 294 F.2d 333 (6th Cir. 1961).

<sup>5</sup> *Anglo-Canadian Shipping Co.*, 335 F.2d 255.

<sup>6</sup> Some courts have indicated that this decision has been eroded. See *Atlantic Richfield Co. v. United States Dep't of Energy*, 769 F.2d 771, 775 (D.C. Cir. 1984). Whatever the case, the parties must exhaust administrative remedies before attempting to get the matter into federal court in an enforcement proceeding. See *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060 (7th Cir. 1978).

<sup>7</sup> *Anglo-Canadian Shipping Co.*, 335 F.2d at 260. See *Louisville Builders Supply Co.*, 294 F.2d 333; *NLRB v. Interboro Contractors Inc.*, 432 F.2d 854.

<sup>8</sup> See generally 1 KOCH, ADMINISTRATIVE LAW AND PRACTICE § 5.32 (1985).

istrative Procedure Act contains no special grant of subpoena power to agencies.<sup>9</sup>

Under section 1211(c) of SMCRA, the Secretary of OSM is authorized to “conduct hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and production of written or printed material as provided for in this Act . . . .”<sup>10</sup> Section 1264(e), regarding rehearings, authorizes the hearing officer to:

subpoena witnesses, or written or printed materials, compel attendance of the witnesses, or production of the materials, and take evidence including but not limited to site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation . . . .<sup>11</sup>

This language is essentially repeated in section 1269(h) concerning bond release hearings,<sup>12</sup> but not in other hearing sections relating to permit revocation<sup>13</sup> or notice of violation assessment hearings.<sup>14</sup> This omission is probably unimportant because of the general subpoena power provided for in section 1211(c) of SMCRA. The Act does not give prehearing subpoena power to the agency but this is probably of no consequence as to permittees (except in extraordinary situations) because of the broad inspection powers of the regulatory authority and OSM under sections 1267 and 1271.<sup>15</sup>

The authority may be questionable for regulations allowing prehearing discovery as to non-permittees or non-parties as well as for the validity of any such subpoena which may issue. Such questions probably will arise in enforcement proceedings before district courts having personal jurisdiction.

The OSM regulations basically have no counterpart to Rule 45 of the Federal Rules of Civil Procedure, which does not apply to administrative proceedings. As the Advisory Committee on Rules noted, Rule 45 “does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes.”<sup>16</sup> There is no enforcement provision in SMCRA except for section 1271(c),<sup>17</sup> which does not seem specifically applicable to the subpoena power. Federal question jurisdiction probably could be established for the enforcement of an OSM-issued subpoena. Based on the general subpoena

---

<sup>9</sup> See 5 U.S.C. § 555 (1982).

<sup>10</sup> 30 U.S.C. § 1211(c) (1982).

<sup>11</sup> *Id.* at § 1264(e).

<sup>12</sup> *Id.* at § 1269(h).

<sup>13</sup> *Id.* at § 1275(d).

<sup>14</sup> *Id.* at §§ 1268(b), 1271.

<sup>15</sup> *Id.* at §§ 1267, 1271.

<sup>16</sup> FED. R. CIV. P. 45 (Notes of Advisory Committee on Rules).

<sup>17</sup> 30 U.S.C. § 1271(c).

powers in SMCRA, if an agency has subpoena power other than for hearings, there appears to be no geographical limitation to this power. However, the regulations in the general provisions of 43 C.F.R., subpart B, provide that a witness only "be required to attend a deposition or hearing at a place not more than 100 miles from the place of service"<sup>18</sup> and that "witness fees and mileage shall be paid by the party at whose instance the witness appears."<sup>19</sup>

In state proceedings, parties are limited as to discovery or even evidentiary hearing matters occurring out-of-state. In court proceedings, many states authorize depositions to be taken out-of-state while also providing special procedures to allow for foreign state proceedings to be enforced in the state.<sup>20</sup> These statutes or rules do not seem to contemplate administrative proceedings; therefore, under most state laws, it is unlikely that discovery proceedings occurring out-of-state can be enforced.<sup>21</sup>

### III. COMPARING THE FEDERAL CIVIL DISCOVERY RULES TO REGULATION 4.1130

The easiest manner in which to consider discovery issues is by comparing discovery methods provided for under the SMCRA regulations (*i.e.*, depositions, interrogatories, production of documents, and requests for admission) to the corresponding federal discovery rules. No meaningful regulatory history exists explaining the reasoning for the differences between the regulations and the federal rules, other than the reference to the stated purpose of the original discovery regulations set out in the *Federal Register* comments: "Some of the commenters indicated that they were in agreement with a stated purpose of the discovery rules, *i.e.*, to avoid confusion when general Federal civil discovery rules were made applicable to the specialized procedures and terminology of Office of Hearing and Appeals hearings on surface coal mining matters."<sup>22</sup> These commenters appear to have recommended that the general provisions of the Federal Rules of Civil Procedures relating to discovery be incorporated by reference. However, the OSM and the Secretary of Interior rejected the comments stating:

[Section] 4.1142 was deleted in order to avoid any confusion which might have arisen in trying to determine what discovery procedure to follow. The discovery procedures to be used in proceedings before the administrative law judges under the Act are set forth in §§ 4.1130-41. However [these rules] track closely the language of the "Federal Rules of Civil Procedure" and it is the intention of the Department that, where possible, in interpreting these rules, the body of case law

---

<sup>18</sup> 43 C.F.R. § 4.26(a) (1986).

<sup>19</sup> *Id.* at § 4.26(c).

<sup>20</sup> See UNIF. INTERSTATE & INT'L PROC. ACT, §§ 3.01, 3.02, 13 U.L.A. 388-91 (1986).

<sup>21</sup> See *infra* notes 71-72 and accompanying text and notes 75-78 and accompanying text for a discussion regarding FED. R. CIV. P. 26(c), 30.

<sup>22</sup> 43 Fed. Reg. 34,379 (1978).

regarding discovery which has evolved under the "Federal Rules" be applicable to the discovery problems arising under this Act.<sup>23</sup>

#### A. *Timing*

Regulation 4.1131<sup>24</sup> provides for discovery after the initiation of the proceeding, and only limits the time for discovery to the extent that it "does not interfere with the conduct of the hearing."<sup>25</sup> Regulation 4.1132 does not specifically allow a hearing officer to enter orders as to the planning and termination of discovery deadlines. Most discovery limitation orders under the federal rules are pursuant to the pretrial procedure of Rule 16, which is not incorporated in the regulations. Rule 26(f), relating to discovery conferences, also is not included in the regulations. This could raise questions as to the authority of the hearing officer to order disclosure of witnesses for the hearing. However, the prehearing conference reference under Regulation 4.1121(b)<sup>26</sup> might be used even though the subject of timing of discovery is not set forth.

#### B. *Scope of Discovery*

Regulation 4.1132<sup>27</sup> concerning the scope of discovery, is modeled after Rule 26(b) with certain exceptions. The rules as to privilege and work product, the most widely litigated aspects of Rule 26, are followed in Regulation 4.1132. Otherwise, discovery is limited only to the extent that "information sought [must be] reasonably calculated to lead to the discovery of admissible evidence."<sup>28</sup> Of course, even to the extent that a state has adopted the federal regulations, the rules of evidence probably will be governed by the administrative procedure act of the particular state. To varying degrees, such acts have adopted the common law rules of evidence<sup>29</sup> but such evidentiary rules could differ from the rules of evidence pursuant to the Federal Administrative Procedure Act.<sup>30</sup> Hence, the discovery limit of "lead[ing] to the discovery of admissible evidence" may vary depending on applicable state law.

#### C. *Privileges Generally*

The regulations have brought into play privileged matter and work product at least to the extent of discovery proceedings. The Federal Administrative Pro-

---

<sup>23</sup> *Id.*

<sup>24</sup> 43 C.F.R. § 4.1131 (1986).

<sup>25</sup> *Id.* at § 4.1132.

<sup>26</sup> *Id.* at § 4.1121(b).

<sup>27</sup> *Id.* at § 4.1132.

<sup>28</sup> *Id.*

<sup>29</sup> See *supra* note 2.

<sup>30</sup> 5 U.S.C. § 551 to -576 (1982).

cedure Act provides only for the exclusion of "irrelevant, immaterial or unduly repetitious evidence," and the common law rules of evidence do not control.<sup>31</sup> Indeed, the agency decision may rest solely upon hearsay evidence<sup>32</sup> although this may not be so in state proceedings.<sup>33</sup>

Difficult issues may arise in the area of privileges (*e.g.*, attorney-client and governmental privileges not based on constitutional grounds). Most of these privileges are evidentiary considerations and are procedural rather than substantive matters.

To what extent is an agency not bound by common law rules of evidence at its hearings? Is it bound by evidentiary privileges? What is the effect of discovery regulations which protect privileged information? Case law under Rule 26(b) develops common law privileges;<sup>34</sup> however, such case law and rules are not applicable to administrative proceedings.<sup>35</sup>

The concept of matter "not privileged" under Rule 26(b)(1) is basically an adoption by the federal rules of the common law of evidentiary privileges. Hence, the same privilege rules apply both to discovery and trial.<sup>36</sup> Rule 26(b) applies equally to discovery and evidentiary depositions, as does Regulation 4.1132(a). Since Regulation 4.1132(a) is modeled after Rule 26(b), the common law of privileges may be applicable to administrative discovery and hearings.

In *Upjohn Co. v. United States*,<sup>37</sup> the United States Supreme Court held that communications within the attorney-client privilege are protected from a tax summons issued pursuant to 26 U.S.C. section 7602, as are matters within the work product privilege. In determining the protection afforded by the attorney-client privilege, the Court looked to Federal Rule of Evidence 501. However, it is difficult to imagine the applicability of Rule 501 except as it might come into play because Rule 81(a)(3) of the Federal Rules of Civil Procedure makes the Federal Rules of Civil Procedure applicable to "proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . . ."<sup>38</sup>

<sup>31</sup> *Id.* at § 556(d).

<sup>32</sup> See *Steadman v. Securities and Exchange Comm'n*, 450 U.S. 91, *reh'g denied*, 451 U.S. 933 (1981).

<sup>33</sup> See *Burns v. State Bd. of Embalmers & Funeral Directors*, 250 Ind. 696, 238 N.E.2d 663 (1968); *Indiana St. Bd. of Dental Examiners v. Levin*, 247 Ind. 186, 213 N.E.2d 897 (1966).

<sup>34</sup> See FED. R. EVID. 501.

<sup>35</sup> See FED. R. EVID. 1101.

<sup>36</sup> See *Stiftung v. Zeiss*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd. sub nom.* 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

<sup>37</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>38</sup> FED. R. CIV. P. 81(a)(3).

The Supreme Court apparently will read into statutes concerning administrative subpoenas “the traditional privileges and limitations”<sup>39</sup> unless the legislative history indicates otherwise. Regardless of the result, the requirements or privileges “relating to evidence or procedure apply equally to agencies and persons.”<sup>40</sup>

Under state law, the applicability of privileges to administrative proceedings may be less troublesome since some states have made rules of evidence applicable to *any proceeding* in which testimony or evidence can be compelled.<sup>41</sup>

#### D. *Executive Privilege—Freedom of Information Act—Work Product*

Probably the most widely encountered privilege in SMCRA discovery matters is the governmental privilege. In light of the fact that state law has not developed to the extent of federal law, most states probably will look to the federal law for guidance.

The area of governmental privilege is further complicated by the existence of the Freedom of Information Act (“FOIA”).<sup>42</sup> The more important exceptions to FOIA tie into the common law of privileges through Rules 26(b) and (c) of the Federal Rules of Civil Procedure, as well as in the history of the 1974 amendments to FOIA and the demise of the initially proposed Rule 501 of the Federal Rules of Evidence, all of which coalesced during Watergate.<sup>43</sup> While ignoring the constitutional nuances of executive privilege,<sup>44</sup> federal courts have long recognized an evidentiary and discovery governmental privilege under Rule 26(b) encompassing various subjects which cannot be capsuled in this Article.<sup>45</sup>

The most common facet of this governmental privilege likely to occur in administrative proceedings is the qualified executive privilege. Before the enact-

---

<sup>39</sup> *Id.* at 398. See also *United States v. Euge*, 444 U.S. 707, 714, *reh'g denied*, 446 U.S. 913 (1980).

<sup>40</sup> 5 U.S.C. § 559.

<sup>41</sup> See CAL. EVID. CODE § 901 (Deering 1986); Annot., 31 A.L.R. 4th 1226 (1984); FED. R. EVID. 1101(c).

<sup>42</sup> 5 U.S.C. § 552.

<sup>43</sup> See generally 23 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5421 (1980); FED. R. EVID. 501 (not enacted); Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747 (1976).

<sup>44</sup> See *United States v. Nixon*, 418 U.S. 683 (1974), and *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), in which the Court stated:

Our remarks in *United States v. Nixon*, were made in the context of a claim of “executive privilege” resting solely on the Constitution of the United States. No such claim is made here and we do not mean to intimate that any documents involved here are protected by whatever constitutional privilege content the doctrine of executive privilege might have.

*Id.* at 151, n.17.

<sup>45</sup> See generally 8 C. WRIGHT & A. MILLER, *supra* note 43, at § 2019.



ment of FOIA, this privilege generally encompassed governmental documents used or considered prior to the making of a formal decision or policy, with the possible exception of factual matters contained in the documents.<sup>46</sup> Additionally, the discoverability of the results of law enforcement investigations, including statements of witnesses and other documents, were determined using a balancing approach. In *Machin v. Zuckert*,<sup>47</sup> an injured crewman sought a report prepared by the Air Force following an airplane crash. The court held that the privilege was applicable only to conclusions and recommendations on policy matters, but not to mechanics' opinions on the cause of the crash.

In 1966, FOIA was enacted.<sup>48</sup> The primary exemptions which can be expected in OSM-type proceedings are set out in section 522(b)(5) of FOIA, exempting "inter-agency or intra-agency memorandums,"<sup>49</sup> and in section 522(b)(7), concerning investigatory records compiled for law enforcement purposes. Subsequently in 1974, Exemption 7 was enlarged and liberalized to its present form.<sup>50</sup> At first, it was unclear whether FOIA had enlarged the common law of government privileges. Obviously, Exemption 5 is closely related to the common law executive privilege.<sup>51</sup>

Initially, the Supreme Court found that it is "not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery."<sup>52</sup> So far, the Supreme Court has included within the government privilege agency mem-

<sup>46</sup> See *Stiftung v. Zeiss*, 40 F.R.D. 318; *Securities and Exchange Comm'n v. Shasta Mineral & Chemical Co.*, 36 F.R.D. 23 (D. Utah 1964); *Fusco v. Kaase Baking Co.*, 205 F. Supp. 459 (D. Ohio 1962).

<sup>47</sup> *Machin v. Zuckert*, 316 F.2d 336, 341 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).

<sup>48</sup> Freedom of Information Act, 5 U.S.C. § 552 (1982). The administrative procedure and remedy to be exhausted before going into a federal district court for FOIA requests to the Department of the Interior is set forth in 43 C.F.R. §§ 2.11 to 2.20 (1986).

<sup>49</sup> 5 U.S.C. § 552(b)(5). This section states: "[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." *Id.*

<sup>50</sup> *Id.* at § 522(b)(7). This section states:

[I]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

*Id.*

<sup>51</sup> See *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in pretrial discovery contexts . . . .").

<sup>52</sup> *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 354 (1979).

orandums, reports or working papers concerning "predecisional deliberations,"<sup>53</sup> or as referenced in the legislative history, "the working papers of the agency attorney and documents which come within the attorney-client privilege if applied to private parties."<sup>54</sup>

In *Federal Open Market Committee v. Merrill*,<sup>55</sup> the Court determined that under Rule 26(c)(7), the qualified evidentiary privilege for trade secrets and confidential commercial information in the government contract was within Exemption 5 of FOIA. The Supreme Court expressly declined to rule on the other asserted basis for the privilege, including official government information, a disclosure of which would be harmful to the public interest<sup>56</sup> and Rule 26(c)(2), concerning the requirement that discovery could be "only on specified terms and conditions."<sup>57</sup>

The Supreme Court continued the applicability of Rule 26(b) and common law privileges in *United States v. Weber Aircraft Corp.*<sup>58</sup> The Court held that statements by two Air Force employees were "unquestionably intra-agency memorandum or letters,"<sup>59</sup> and further declined to differentiate between civilians and Air Force employees. Since the statements were given in a safety investigation to determine the proper course of corrective action, they were within the *Machin* privilege.<sup>60</sup> The Court reasoned that this common law privilege, recognized in Rule 26(b), made the statements "not . . . available by law to a party other than an agency in litigation with an agency."<sup>61</sup> Moreover, it appears the Court determined in *Weber Aircraft Corp.* that the Exemption 5 was intended to incorporate almost all privileges known to civil discovery.

However, there are subtle distinctions. For instance, in *Federal Trade Commission v. Grolier, Inc.*,<sup>62</sup> the Court held that attorney work product is exempt from mandatory disclosure regardless of the status of the litigation for which it was prepared.<sup>63</sup> At the same time, the Supreme Court recognized that prior to the adoption of Rule 26(b)(3), the circuits were in disagreement as to whether an attorney's work product prepared for one case could be made available in subsequent litigation and whether this could vary depending on the demonstration

<sup>53</sup> *NRLB v. Sear, Roebuck & Co.*, 421 U.S. 132.

<sup>54</sup> See *Federal Open Mrkt. Comm.*, 443 U.S. at 355, n.15. See also *E.P.A. v. Mink*, 410 U.S. 73, 86-87, (1973).

<sup>55</sup> *Federal Open Mrkt. Comm.*, 443 U.S. 340.

<sup>56</sup> See the initial proposed form of FED. R. EVID. 501.

<sup>57</sup> FED. R. CIV. P. 26(c)(2).

<sup>58</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

<sup>59</sup> *Id.* at 798.

<sup>60</sup> *Id.* at 803.

<sup>61</sup> *Id.* at 794-95.

<sup>62</sup> *F.T.C. v. Grolier Inc.*, 462 U.S. 19 (1983).

<sup>63</sup> *Id.* at 28.

of need. However, the Court emphasized that Exemption 5 relates to matters which would be disclosed "routinely" or "normally"<sup>64</sup> upon a showing of relevancy, holding that:

Under the current state of the law relating to the privilege, work product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5.<sup>65</sup>

As the Supreme Court originally held in *National Labor Relations Board v. Sears, Roebuck & Co.*,<sup>66</sup> a FOIA applicant's need for information cannot be taken into account. When discovery is sought of matters which could conceivably come within a work product situation when some degree of need or necessity might have to be shown, discovery in front of the agency may be safer than a FOIA procedure.

It would appear that the Supreme Court is intent on closing the gaps and creating as much similarity between civil discovery and FOIA as possible. In *Weber Aircraft Corp.*, the Court noted:

Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA . . . . We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented . . . .<sup>67</sup>

Respondents also argue that their need for the requested material is great . . . . We answered this argument in *Grolier*, noting that the fact that in a particular litigation a party's particularized showing of need may on occasion justify the discovery of privileged material in order to avoid unfairness does not mean that such material is routinely discoverable and hence outside the scope of Exemption 5 . . . . Respondents must make their claim of particularized need in their litigation . . . since it is not a claim under the FOIA.<sup>68</sup>

The Supreme Court has held that witness statements taken by agencies such as the National Labor Relations Board in the course of investigating and bringing an unfair labor practice charge, are protected pursuant to Exemption 7(a) of FOIA since the production of such statements generally would interfere with enforcement

<sup>64</sup> These words essentially come from the legislative history cited in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16.

<sup>65</sup> *Grolier Inc.*, 462 U.S. at 27.

<sup>66</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132.

<sup>67</sup> *Weber Aircraft Corp.*, 465 U.S. at 801-02 (citations omitted).

<sup>68</sup> *Id.* at 802 n.20 (citation omitted). See also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 238 (1978).

proceedings.<sup>69</sup> In addition to looking to potential intimidation of current employees, the Court noted that “[u]nlike ordinary discovery contests, where rulings are generally not appealable until the conclusion of the proceedings, an agency’s denial of a FOIA request is immediately reviewable in the district court. . . .”<sup>70</sup> Therefore, as to statements, the result is generally the same under Rule 26(b)(3), FOIA, and Regulation 4.1132(c), except that the regulation does not give a party or person a discovery right to his own statements.

The widely varying nature of SMCRA proceedings should be considered. The term “law enforcement purposes” requires particular analysis and emphasis under SMCRA proceedings. For instance, are permit denial hearings and bond release hearings enforcement action? Probably, the discovery procedures in the latter two instances more properly involve Exemption 5 issues while notice of violation proceedings and similar proceedings involve Exemption 7 issues. However, Exemption 5 issues are largely repetitive of Rule 26(b) and (c) issues with some additional hurdles. Even though the quick entry into a *de novo* proceeding in a federal court on issues under FOIA is appealing, as is the lure of recovery of attorney fees if successful, other advantages, particularly on the merits of discovery issues, are much more difficult to find. While the statements generally are still protected under the work product rule pursuant to Rule 26(b)(3), this may not be the case in all states even though the states’ rules are patterned after the Federal Rules of Civil Procedure. Furthermore, a non-agency employee statement might not be an intra- or interagency document or memorandum.

#### E. *Experts*

A notable exclusion from the regulations is Rule 26(b)(4) concerning experts. Again, the regulatory history does not support this omission. The Department may not have perceived any difference between testimony as to fact and opinion. This omission may be totally at odds with evidentiary considerations under applicable state law. Moreover, this absence in the regulations as to experts could lead to the total obliteration of the distinction between experts obtained for the specific hearing and those experts consulted only to assist in preparation of the case.

#### F. *Protective Orders*

Regulation 4.1132(d)<sup>71</sup> largely is patterned after Rule 26(c) concerning protective orders. The only real difference is that under the rule, the district court presiding where a deposition is to be taken may make such orders. As previously

---

<sup>69</sup> *Robbins*, 437 U.S. 214.

<sup>70</sup> *Id.* at 238.

<sup>71</sup> 43 C.F.R. § 4.1132(d).

noted, under SMCRA there does not appear to be a geographical limitation to a hearing officer's subpoena power as to discovery matters (except under 43 C.F.R. section 4.26(a)). Subpoenas are issued upon written application of the party with no apparent differentiation between a subpoena and a subpoena duces tecum.<sup>72</sup> No provision in the regulations corresponds to Rule 45, relating to the issue of subpoenas and subpoenas duces tecum, both as to trials and depositions. Rule 45(d) expressly limits subpoenas for taking depositions and subpoenas duces tecum to matters not protected by Rules 26(b) and (c). The regulations, do not contain such express provisions, nor time limitations or designated places concerning non-parties and the venue for which a non-party can make objections as do the federal rules. A non-party, as well as a party, may have to seek relief pursuant to Regulation 4.1132(d), or face an exhaustion of administrative remedies problem. However, the enforcement of a subpoena for depositions will have to be by action in a federal district court, presumably within the district or division where the witness resides.

#### G. *Sequence of Discovery*

Regulation 4.1133,<sup>73</sup> concerning sequence of discovery, is the same as Rule 26(d), while Regulation 4.1134,<sup>74</sup> relating to supplementation of responses, is identical to Rule 26(e). As previously noted, Rule 26(f), concerning discovery conferences, has been omitted from the regulations.

#### H. *Certifications*

Rule 26(g), relating to the signing of discovery requests, responses, objections, and certifications by attorneys, is not included in the regulations. This absence may result in abuse of discovery as well as problems with discovery responses and objections under the regulations. Probably the most troublesome omission from the regulations is the requirement that the attorney make certain the client has made reasonable inquiry as to the matter sought in discovery. However, if sanction powers are used properly by the hearing officer, this may be of no consequence.

#### I. *Preaction Depositions*

Rule 27, concerning depositions before an action or pending appeal, has no counterpart in the regulations. However, if truly needed, one might attempt to make a case for the use of Rule 27, or a state counterpart, to the extent that future proceedings are expected.

---

<sup>72</sup> See *Id.* at § 4.26(a).

<sup>73</sup> *Id.* at § 4.1133.

<sup>74</sup> *Id.* at § 4.1134.

### J. *Stipulations*

Rule 29, addressing stipulations as to discovery procedures, also is omitted from the regulations. This certainly reduces flexibility. Even though there is no authority to make such stipulations, a stipulation should result in a waiver by a party to an administrative proceeding.

### K. *Depositions*

Rule 30, concerning oral depositions, has several important differences from the corresponding Regulation 4.1137.<sup>75</sup> First, notices of deposition are to be taken “without leave of the administrative law judge”<sup>76</sup> and a subpoena must be applied for pursuant to a written motion, presumably under 43 C.F.R. section 4.26. In addition to the normal matters, the notice of deposition must include “the matter upon which each person will be examined.”<sup>77</sup> The federal rules have no counterpart to this regulation except Rule 30(b)(6) pertaining to corporate agency depositions, under which a party must designate “with reasonable particularity the matters on which examination is requested.”<sup>78</sup> Whether some degree of specificity attaches to the regulation is unknown, as is the source of this requirement and the reason for it.

The regulations omit Rule 30(b)(6) with respect to the taking of a deposition of a corporation, governmental agency, or other entity. Obviously, the absence of such a tool, particularly when dealing with an agency, could be extremely burdensome and result in games of “hide ’n seek” with witnesses who have personal knowledge of matters.

The regulations also omit Rule 30(b)(5) allowing a motion to produce to accompany a notice to take a deposition, Rule 30(b)(7) providing for telephone depositions, and Rule 30(b)(4) allowing a deposition by other than stenographic means. In addition, the Rule 30(c) requirement of noting objections as to procedural and substantive matters in the deposition, is not set forth in the regulations.

Rule 30(d), concerning motions to terminate or limit the examination, is not encompassed within the regulations. The regulations, with respect to the submission of the deposition to a witness for signing and changes, as well as certification and filing, are not as complete as Rules 30(e) and (f). Furthermore, the regulations do not contain a provision as to any changes in form or substance that a witness may desire to make. The regulations also have no counterpart to

---

<sup>75</sup> *Id.* at § 4.1137.

<sup>76</sup> *Id.* at § 4.1137(a).

<sup>77</sup> *Id.* at § 4.1137(a)(3).

<sup>78</sup> FED. R. CIV. P. 30(b)(6).

Rule 30(g), pertaining to the failure to attend or serve a subpoena and the charging of expenses. Rule 31, concerning depositions upon written questions, is largely duplicated in 43 C.F.R. section 4.1137. Both provisions are probably equally useless.

Rule 28, relating to persons before whom depositions may be taken, has no exact counterpart in the regulations, at least as to foreign depositions. Regulation 4.1137(b)<sup>79</sup> authorizes the deposition to be taken "before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held." The general rules in subpart B, made applicable by Regulation 4.1104,<sup>80</sup> are somewhat ambiguous in Regulation 4.26 in which an application is necessary for the issuance of a subpoena "requiring the attendance of witnesses at hearings to be held before . . . [the administrative law judge] or other officers . . ."<sup>81</sup> Presumably, "other officers" refers to notary publics. This application procedure may conflict with Regulation 4.1137 in which depositions may be taken "without leave of the administrative law judge."

#### L. *Use of Depositions in Court Proceedings*

Regulation 4.1138<sup>82</sup> is substantively equivalent to Rule 32 except at the beginning where the regulation provides "so far as admissible,"<sup>83</sup> instead of the federal language of "so far as admissible under the rules of evidence."<sup>84</sup> The regulation, as does the federal rule, makes a distinction between impeachment evidence and substantive evidence. Regulation 4.1138(b) allows the deposition of "an officer, director, or managing agent or a person designated to testify on behalf of a public or private corporation . . . or governmental agency . . ."<sup>85</sup> to be used for any purpose. However, the corresponding provision under Federal Rule 30(b)(6), is not included in the regulations. Obviously, this demonstrates the in-depth understanding of the drafters of the regulations.

Finally, the entirety of Rules 32(b) and (d), concerning objections as to admissibility of evidence and objections as to the form and notice, have been omitted from the regulations. This leaves an administrative law judge in a substantial quagmire in making rulings and objections as to the form of the deposition and substantive evidentiary matters.

---

<sup>79</sup> *Id.* at § 4.1137(b).

<sup>80</sup> *Id.* at § 4.1104.

<sup>81</sup> *Id.* at § 4.26(a).

<sup>82</sup> *Id.* at § 4.1138.

<sup>83</sup> *Id.*

<sup>84</sup> FED. R. CIV. P. 32.

<sup>85</sup> 43 C.F.R. § 4.1138(b).

### M. *Interrogatories to Parties*

Regulation 4.1139<sup>86</sup> is substantially similar to its counterpart in Rule 33, including the allowance of interrogatories as to opinions or contentions which relate to fact or law. However, Rule 33(c), concerning the option to produce business records in response to an interrogatory, has been senselessly omitted. This omission probably will create a substantial burden for an agency, particularly in responding to interrogatories in permit proceedings.

### N. *Production of Documents*

There are only two basic differences between Rule 34 and Regulation 4.1140.<sup>87</sup> First, the regulation does not require a party to produce records maintained in the usual course of business or to organize them to correspond with the categories in the request for production. As a result, the scrambling of documents produced may be a problem in discovery. Second, the section of Rule 34(c) stating that the "rule does not preclude an independent action against"<sup>88</sup> a non-party for similar relief, is omitted from the regulations. Some state rules, including Indiana, specifically allow such an independent action as to non-parties. However, according to the Advisory Committee under the federal rules, there are both "jurisdictional and procedural problems" which prevented the Committee from recommending that such a provision be included in the rules.<sup>89</sup> Obviously, a subpoena duces tecum, along with a deposition, can cure this problem as to non-party discovery. However, permission to enter upon land and inspection of matters other than documents would present a more difficult discovery problem which may be insoluble at the administrative level, given the lack of authority to entertain a bill in equity.

### O. *Physical and Mental Examinations*

Rule 35, concerning physical and mental examination of persons, has been omitted from the regulations. In cases involving discriminatory treatment of employees pursuant to section 1291 of SMCRA,<sup>90</sup> such procedures may be useful, at least in supporting an employer's reason for discharge or other treatment of an employee. Many states also have not included similar provisions in that at the time of the enactment of state programs, OSM was taking the position that this provision was solely for enforcement by the Secretary.

---

<sup>86</sup> *Id.* at § 4.1139.

<sup>87</sup> *Id.* at § 4.1140.

<sup>88</sup> FED. R. CIV. P. 34(c).

<sup>89</sup> FED. R. CIV. P. 34 (Notes of Advisory Committee on Rules).

<sup>90</sup> 30 U.S.C. § 1291 (1982).



#### P. *Requests for Admissions*

Regulation 4.1141<sup>91</sup> is substantially similar to its federal counterpart, Rule 36, except for two matters. First, under the regulations, a denial or a statement as to the reason a party can neither admit nor deny a matter for which an admission is requested must be under oath. This requirement may result in more careful attention to responses to requests for admissions. Second, the regulation concerns "any specified relevant matter of fact,"<sup>92</sup> while the federal rules counterpart allows requests to admit "statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request."<sup>93</sup> This difference will allow the pre-1970 case law to resurface distinguishing a fact, mixed law and fact, and an opinion.

#### IV. CONCLUSION

SMCRA has progressed through its early implementation stages, and is now fully in place, as are the numerous approved state programs. Attention has shifted from implementation to enforcement and, as it has done so, the focus has changed to the workings of the administrative proceedings. As in all adjudicatory proceedings, the availability of discovery procedures is of vital importance. The ability to obtain information to prepare a case is frequently more important to the final outcome than the actual presentation of the case.

Under SMCRA, discovery is available for adjudicatory hearings. While similar in many respects to the discovery rules provided for in the Federal Rules of Civil Procedure, the practitioner must be aware of the many differences. Furthermore, the practitioner must recognize that alternative sources of information, such as the Freedom of Information Act, exist and realize the potential benefits and drawbacks of using these alternative sources.

Many unanswered questions remain as to the scope and extent of discovery in adjudicatory proceedings under SMCRA, as well as enforcement powers concerning such discovery. These questions will be answered only through the development of case law or the promulgation of more finely-tuned regulations. In the interim, the practitioner must consider these issues to effectively plan his strategy and approach to SMCRA adjudicatory proceedings.

---

<sup>91</sup> 43 C.F.R. § 4.1141 (1986).

<sup>92</sup> *Id.* at § 4.1141(a).

<sup>93</sup> FED. R. CIV. P. 34.