



**Sarah Bordelon**

Partner  
775.327.3011  
Reno  
scbordelon@hollandhart.com



**Tina Van Bockern**

Partner  
303.295.8107  
Denver  
trvanbockern@hollandhart.com

# Agency Works to Streamline Surface Coal Mine Regulation

**Insight — 06/10/2020**

## **Bloomberg Law**

---

The coal mining regulatory agency recently published a proposed rule aiming to streamline regulatory coordination of alleged violations at surface mining sites. Holland & Hart attorneys outline the key details included in the notice and examine the impact of these changes on the mining sector.

---

The federal agency responsible for overseeing surface coal mines proposed a new rule on May 14 that would streamline the way it responds to citizen complaints of potential violations at surface coal mines under the Surface Mining Control and Reclamation Act (SMCRA).

The Office of Surface Mining Reclamation and Enforcement's (OSM) proposed rule strengthens the OSM's coordination with the states directly regulating coal mines, and clarifies the OSM's authority to consider all readily available information, including any information provided by the State regulatory authority, before providing a state with a "Ten-Day Notice" (TDN) of a possible violation.

The OSM's revisions under the proposed rule ensure that it can exercise its discretion in fully investigating the citizen complaint, including determining whether the state regulatory authority is already undertaking an investigation in response to a simultaneous citizen complaint, before serving a TDN.

The proposed rule is aimed in part at avoiding duplicative efforts between the OSM and the states. Often, simultaneous complaints about the same possible violation are submitted to both the OSM and the state regulatory authority. Under the current regulations, this results in the state regulatory authority and the OSM initiating two parallel processes and engaging in duplicative efforts without any significant benefit.

### **Clarifies Agency's Authority to Consider Any Info Available**

The proposed rule clarifies the OSM's authority under SMCRA to consider "any information available" before issuing a TDN. 30 U.S.C. § 1271(a). The existing regulation provides that the OSM should issue a TDN "if the facts alleged by the informant would, if true, constitute a condition, practice or violation" of SMCRA or permit terms.

Relying on the current language, some citizen complainants argue that before issuing a TDN, the OSM need only accept all facts alleged in a citizen complaint as true and determine if the alleged facts would constitute a violation. In other words, they argue that the OSM is a mere conduit of information between the complainants and the states.

The OSM has never shared this interpretation of SMCRA. The proposed rule would modify that section to recognize that the OSM always has and will continue to consider other readily available information in addition to the facts that a citizen complainant alleges in determining whether there is reason to believe a violation exists. In the information accompanying the proposed rule, the agency notes that it “should never be acting as a mere conduit for transmitting a citizen complaint to a State regulatory authority in the form of a TDN.”

### **State Responses Accepted**

If the OSM decides to issue a TDN to a state, the state is afforded the opportunity to respond. The current regulations provide that the OSM will accept a state's response if it demonstrates the state took “appropriate action” to correct the violation or if it shows “good cause” as to why it took no action. 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) through (4).

The proposed rule amends the regulations to define “appropriate action” and “good cause.” The new definitions identify common sense circumstances that constitute “appropriate action” and “good cause.” For example, “appropriate action” may be a joint effort of the OSM and the state to initiate steps to implement corrective action. “Good cause” for taking no action exists when the state needs more time to investigate or when the state lacks jurisdiction over the possible violation.

### **Process Established for Issue Identification**

Lastly, the proposed rule creates a process for the OSM to work proactively with states to identify deficiencies or issues with state programs that may need correction. The OSM considers this proposed new process beneficial for early identification, evaluation, and resolution of potential problems that may impact a state regulatory authority's ability to effectively implement, administer, enforce, or maintain its state regulatory program. The OSM believes these new mechanisms would avoid unnecessary substitution of federal enforcement and minimize the number of on-the-ground violations.

Importantly, the OSM makes clear that none of these proposed revisions diminish OSM's ability to issue a TDN when there is any condition, practice, or violation that creates imminent danger to the health or safety of the public, or might cause a significant, imminent, environmental harm. Increased cooperation between the OSM and the state regulatory authorities promotes both the common mission of effective SMCRA implementation and collaboration between federal and state agencies.

The OSM has developed each of the proposed modifications and clarifications in close coordination with state regulatory authorities. In

addition, the proposed clarifications are consistent with Executive Order 13777 of February 24, 2017, 82 Fed. Reg. 12,285 (March 1, 2017), because the proposed clarifications would alleviate unnecessary regulatory burdens.

The OSM is accepting comments on the proposed rule until June 15.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

#### **Author Information**

*Tina Van Bockern is of counsel with Holland & Hart. She litigates and appeals agency regulations, decisions, and orders affecting the oil and gas and mining industries.*

*Sarah Bordelon of counsel with Holland & Hart. She assists energy and natural resources clients to obtain and defend permit challenges and counsels clients on environmental compliance and enforcement.*

*John Martin is a partner with Holland & Hart. He is a seasoned environmental litigator, representing clients in the mining, oil and gas, and chemical industries in high-profile cases involving all major environmental statutes.*

---

*Originally published by Bloomberg Law online June 10, 2020. Reproduced with permission from Copyright 2020 The Bureau of National Affairs, Inc. (800-372-1033) [www.bloombergindustry.com](http://www.bloombergindustry.com). Further duplication without permission is prohibited.*

---

*Subscribe to get our Insights delivered to your inbox.*

*This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.*