

CHAPTER 7

The Applicant Violator System Revisited: A Regulatory and Litigation Update

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§ 7.01. Introduction.

The Applicant Violator System (AVS) is an automated information system maintained by the Interior Department's Office of Surface Mining Reclamation and Enforcement (OSM). Crafted to settle a lawsuit brought by environmentalist groups eleven years ago,⁽²⁾ the AVS has the avowed aim of denying surface mining permits to scofflaw operators who would mine a site, abandon it without reclamation, move to another site, and commence mining operations under a different name to avoid responsibility for unabated violations, unpaid civil penalties, and delinquent Abandoned Mine Land (AML) fees. But that noble goal

has proven elusive. Since its inception in the late 1980s, the AVS has grown progressively broader, delaying permit applications filed by law-abiding operators, as well as scofflaws, threatening existing permittees with the loss of their permits when they have done nothing wrong, and reaching companies that have never engaged in surface coal mining operations. It has become the long-arm statute of OSM's regulatory regime, transcending temporal, geographical, corporate, and legal boundaries to reach persons and entities far removed from the outstanding violations, unpaid penalties, or delinquent fees that OSM seeks to remedy.

Today, the AVS stands at a crossroads. *Save Our Cumberland Mountains, Inc. v. Watt (SOCM)*, the citizen suit that spawned AVS in 1985, was recently dismissed by the United States Court of Appeals for the District of Columbia Circuit.⁽³⁾ The D.C. Circuit held that the federal district court in the District of Columbia lacked jurisdiction to hear the suit under the Surface Mining Control and Reclamation Act⁽⁴⁾ (SMCRA). The AVS itself survives that dismissal, but faces an uncertain future in the regulatory world. It is shaped by regulations that, although issued years ago,⁽⁵⁾ are still being contested in long-pending consolidated judicial review proceedings brought by industry and environmentalist groups.⁽⁶⁾ OSM has also proposed supplemental implementing regulations,⁽⁷⁾ as required by its 1990 settlement agreement with the *SOCM* plaintiffs. Yet, the D.C. Circuit's dismissal of that case, coupled with President Bush's moratorium on unnecessary and burdensome rulemaking in early 1992, raise doubts that the proposals will ever be issued as final regulations, at least in their current form.

This Chapter reviews the statutory underpinnings of the AVS, its genesis in a seemingly unrelated citizen suit, and its evolution through rulemaking and litigation. It summarizes the current status of those proceedings and analyzes two related lawsuits in which the regulatory *status quo* has proven particularly problematic. The Chapter concludes with a discussion of directions the AVS might take now that the *SOCM* case has been dismissed, and OSM is free to administer the AVS without the attendant pressures and *ex parte* influences of the citizen-suit litigation and settlement.

§ 7.02. The Statutory Underpinnings of the AVS.

[1]--The Surface Mining Act's General Regulatory

Scheme.

SMCRA regulates surface mining through a system of permits and performance standards. The fundamental requirement, set forth in Section 506(a) of the Act,⁽⁸⁾ is that any person wishing to engage in "surface coal mining operations" must obtain a permit from the state regulatory authority pursuant to an approved state program, or from OSM pursuant to a federal program. A permit application must satisfy the provisions of Section 507 of the Act.⁽⁹⁾ Section 507 requires the applicant to submit detailed information about its identity and compliance history; the dates and types of mining to be conducted; maps of the affected areas; information pertaining to watersheds, climate, soil, and quality of coal; a reclamation plan (which itself must meet further detailed requirements in Section 508⁽¹⁰⁾); a blasting plan; and certification of public liability insurance. The regulatory authority reviews the application according to the procedures in Section 510⁽¹¹⁾ and, after public notice and an opportunity for hearing on the application,⁽¹²⁾ grants or denies the permit. The permit must require the permittee to meet all applicable environmental protection performance standards in the Act⁽¹³⁾ and the regulations.⁽¹⁴⁾ Enforcement⁽¹³⁾ of the permit can occur through inspections, administrative enforcement actions, injunctions, civil and criminal penalties, and, sometimes, citizen suits.⁽¹⁵⁾

Whether the permitting authority is the state or OSM depends upon whether the state has achieved