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GAO

Report to the Chairman, Committee on Interior and Insular Affairs, House of Representatives

August 1987

SURFACE MINING

State and Federal Use of Alternative Enforcement Techniques

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GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-224852

August 20, 1987

The Honorable Morris K. Udall
Chairman, Committee on Interior
and Insular Affairs
House of Representatives

Dear Mr. Chairman:

As a result of your July 23, 1986, request and subsequent discussions with your office, we have reviewed state and federal use of the alternative enforcement techniques provided under the Surface Mining Control and Reclamation Act (SMCRA). Alternative enforcement techniques which can be taken include injunctions, individual civil penalties, criminal action, and suspension or revocation of the mining permit. As agreed with your office, we focused on determining (1) whether those states granted primary responsibility (primacy) for regulating mining activities in their states have the statutory authority to use, and are using, alternative enforcement techniques to enforce state mining requirements, (2) whether the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) is using such techniques in those states and other areas where it retains regulatory authority, and (3) the extent to which OSMRE monitors the states' use of these techniques.

In summary, we found that:

- All 22 primacy states we reviewed have the statutory authority to use the act's alternative enforcement techniques. However, none of the states have developed systems to ensure that all the techniques are appropriately used.
- When the states use alternative techniques to induce the permittee to correct unabated violations, they generally choose to revoke or suspend the mining permit.
- Thirteen of the 22 states have established a specific deadline (or trigger) for initiating alternative enforcement action when an operator fails to correct (abate) a violation. Nine states have not adopted such a trigger.
- In areas where OSMRE retains regulatory authority, it has referred most of its cases against uncooperative permittees to Interior's Office of the Solicitor for the purpose of obtaining injunctive relief.
- Initial OSMRE reviews of state programs generally focused on confirming the states' authority to use alternative enforcement techniques and then tabulating that use, although some OSMRE field offices performed more

in-depth reviews. However, beginning with the 1987 oversight reviews which are currently underway, OSMRE has directed its field offices to expand their assessments of how the states are implementing the various alternative enforcement techniques.

We conducted our review from October 1986 through May 1987. We reviewed SMCRA and OSMRE's implementing regulations and guidelines and interviewed OSMRE headquarters and field office officials responsible for using the various alternative enforcement techniques or monitoring the states' use of them. We also obtained OSMRE inspection and enforcement statistics for the period July 1, 1984, to June 30, 1986. To determine whether the states had the authority to use the various alternative enforcement techniques and the extent they were used during the July 1984 - June 1986 time period, we sent a questionnaire to 22 of the 24 states granted primacy for regulating surface coal mining activities within their borders.[1] (See App. I for a list of the primacy states.) Through a review of applicable provisions of state laws, we verified the states' authority to use each of the techniques. We also visited six states to verify or clarify responses to the questionnaire. However, we did not verify the accuracy of the usage data provided by the state regulatory agencies. Our work was performed in accordance with generally accepted government auditing standards.

Background

Under SMCRA, OSMRE and state regulators have been given broad enforcement powers to assure that permittees adhere to federally mandated performance and environmental standards. As stated in the act's legislative history, strong, equitable enforcement goes hand in hand with sound reclamation performance standards. In addition to assessing monetary penalties and ordering cessation of mining by permittees who violate mining standards, the act provides a broad arsenal of alternative enforcement techniques to induce compliance with the act's standards.

The surface mining regulatory process outlined in SMCRA begins with the requirement that individuals or corporations desiring to mine coal are required to first obtain a permit for each mining operation from the

[1]Questionnaires were not sent to (1) Oklahoma because it did not have primary enforcement authority during the entire period under review and (2) Mississippi because, even though it is a primacy state, there is no active coal mining taking place.

appropriate regulatory authority—either OSMRE or the state.[2] In addition, permittees are required to post bonds to assure that mine sites are returned to their original condition after mining.

After approving a mining permit, the regulatory authority must periodically inspect the mine for compliance with the act's standards and any additional permit conditions. If inspectors find that a mine is not in compliance, they must issue either a Notice of Violation or an Imminent Harm Cessation Order. In a Notice of Violation, the regulatory authority notifies the operator of a practice or condition that does not comply with mining standards, and directs abatement (correction) action within 90 days but allows mining to continue. When the regulatory authority identifies a violation that is especially serious and threatens the health and safety of either individuals or the environment, it issues an Imminent Harm Cessation Order. The Imminent Harm Cessation Order also requires abatement action normally within 90 days but, until the corrective action is completed, it stops all or part of the operator's mining. When a violation is identified, in addition to taking corrective action, the permittee may be assessed a civil penalty of not more than $5,000 by the regulatory authority.

If the violator fails to correct a cited violation within the period allowed for its abatement, an additional penalty of not less than $750 must be assessed for each day the violation continues unabated. At the same time, unless mining has already been halted by an Imminent Harm Cessation Order, the regulatory authority must issue a Failure to Abate Cessation Order (FTACO) to stop the entire mining or reclamation operation or that portion relevant to the violation.

If the monetary penalties assessed against the violator do not result in corrective action, SMCRA provides the regulatory authority several alternative enforcement techniques to induce compliance with the act's mining standards. These alternative enforcement techniques, which may be used at any time at the discretion of the regulatory authority, are (1) civil suits and injunctions, (2) fines against individual corporate officials, (3) criminal prosecution of individual operators or corporate officials, and (4) permit suspension or revocation based on a "pattern of violations" review. Under a pattern of violations review, the regulatory authority reviews the permittee's prior violation history to determine whether the permittee has demonstrated a pattern of violating mining

[2]Once a state is granted primary regulatory responsibility, OSMRE must periodically review the state program to assure that it is being implemented in accordance with SMCRA.

standards or regulatory requirements. If a pattern exists or has existed and it is found that the violations were caused by the willful or unwarranted actions of the permittee, the regulatory authority must issue an order requiring the permittee to show cause why his or her permit should not be suspended or revoked. When a permit is revoked, the permittee must reclaim the mine site within the time specified by the regulatory authority or forfeit the performance bond.

SMCRA does not spell out precisely when alternative enforcement techniques should be used. However, where OSMRE retains regulatory jurisdiction, it is required under its own regulations to take "appropriate action" if the permittee fails to abate a violation within 30 days after an FTACO has been issued. The regulations require OSMRE to decide whether any or all of the available actions are appropriate for a given case and, if so, to take action. Concurrent with triggering alternative enforcement action, OSMRE limited, or "capped", the mandatory $750 a day penalty at 30 days. While placing these requirements on itself, OSMRE has not required states with primacy to institute a comparable trigger in their programs.

States Have Alternative Enforcement Authority but Lack Systems to Assure Appropriate and Consistent Use

As a condition to receiving primacy, SMCRA requires the states to have laws in place that provide the state with the authority to use all of the act's alternative enforcement techniques. To demonstrate this authority and other aspects of regulatory capability, OSMRE regulations further required the states to submit program plans to OSMRE for its review and approval. Among other provisions, these plans were to provide a complete description of the system for enforcing the administrative, civil, and criminal sanctions of the state laws. While not being so prescriptive as to deny the use of regulatory judgment, two of the more important elements of such a system are written policies and procedures to guide the regulator's actions. For example, to ensure that the various enforcement techniques are appropriately used by state regulators, the policies and procedures established by the state should answer such questions as "When and under what conditions will a particular enforcement technique be used?" and "What methods will be used to carry out activities needed to support the prescribed policies?"

Our review of state laws demonstrated that each state had the statutory authority to use the act's alternative enforcement techniques. However, none of the states had enforcement systems, including policies and procedures, to guide the state's use of all these techniques. OSMRE officials told us that OSMRE's initial review of state program plans was limited to

verifying that the states had the statutory authority to use the act's alternative enforcement techniques and did not address whether the states had established systems for implementing them. The officials said they limited their program plan review because at the time they believed there would be little need for alternative enforcement techniques since SMCRA already provides stringent civil penalty sanctions.

Although none of the states have comprehensive enforcement systems to guide the use of alternative enforcement techniques, all have policies and procedures for suspending or revoking mining permits. In addition, several states either have developed, or are developing, policies and procedures for using the other alternative enforcement techniques. Kentucky, in December 1984, established a policy governing when individual corporate officials should be fined and West Virginia has policies and procedures for pursuing criminal sanctions that were carried over from the state's pre-SMCRA state program. Six other states (Illinois, Indiana, New Mexico, Ohio, Pennsylvania, and Utah) are in the process of developing criteria and procedures to use one or more of the enforcement techniques.

In addition, of the 22 states, 13 have adopted a trigger mechanism that, like OSMRE's, requires its state regulatory agency to take appropriate alternative enforcement action if a violation remains unabated more than 30 days after an FTACO is issued. The remaining 9 states have not adopted a trigger mechanism and do not require any additional enforcement action although they may take action at their discretion.

OSMRE did not require the states to adopt its mechanism for initiating the alternative enforcement techniques in conjunction with capping the mandatory penalty because it said that allowing the monetary penalty to rise without limit could be viewed as being more stringent than its requirements. While allowing states to levy higher civil penalties if they so desire, OSMRE incorporated the 30-day cap in its federal regulatory program because, according to OSMRE, civil penalties had become excessive, in some instances; thus forming a deterrent to enforcement and reclamation. Penalties beyond $22,500 ($750 a day for 30 days) were forcing permittees into bankruptcy and out of business, leaving behind unreclaimed abandoned mine sites.

States Used Alternative Enforcement Techniques on About Half of Unabated Violations

States used one or more alternative enforcement techniques on about half the unabated violations which occurred between July 1, 1984, and June 30, 1986. According to state supplied data, occasions where alternative enforcement techniques could be used are limited because permittees correct most violations. Our analysis of inspection and enforcement data provided by the 22 states indicated that about 92 percent of the 20,000 violations cited on 301,000 inspections during the period from July 1, 1984, through June 30, 1986, were corrected within allowed time frames. Information provided by the states responding to our questionnaire showed that the states had a total of 741 unabated FTACO violations during our review period.[3] In addressing these unabated FTACO violations, the states used one or more alternative enforcement techniques to force compliance on 350 occasions (or 47 percent of the violations) as shown in table 1.1.

[3]The violations data exclude Pennsylvania which did not respond to this aspect of our questionnaire. Further, Kentucky and Maryland were only able to estimate the number of Failure to Abate Cessation Orders not abated within 30 days. Of the 21 states providing responses (including Kentucky and Maryland), 7 reported no unabated FTACOs during the review period.

Table 1.1: Alternative Enforcement Actions Initiated on Unabated FTACO Violations

State	Unabated FTACOs	Alternative Enforcement Technique Used: Civil or criminal sanctions	Permit suspension or revocation	No additional enforcement action taken
Alabama	70	4	70	0
Alaska	0	0	0	0
Arkansas	60	1	13	46
Colorado	2	0	2	0
Illinois	8	3	7	0
Indiana	66	0	66	0
Iowa	4	0	4	0
Kansas	14	0	14	0
Kentucky	185	24	8	153[a]
Louisiana	0	0	0	0
Maryland	18	0	21	0
Missouri	44	0	44	0
Montana	0	0	0	0
New Mexico	0	0	0	0
North Dakota	0	0	0	0
Ohio	94	12	7	75[b]
Pennsylvania	[c]	[c]	[c]	[c]
Texas	0	0	0	0
Utah	0	0	0	0
Virginia	46	9	8	29
West Virginia	130	0	42	88[d]
Wyoming	0	0	0	0
Total	**741**	**53**	**306**	**391**

[a]Trigger mechanism instituted during our review period. Also, since December 1984, corporate officials are fined when the FTACO is issued.

[b]Trigger mechanism instituted during our review period.

[c]State does not maintain records on unabated FTACOs and therefore could not provide information on enforcement actions taken.

[d]This represents violations for which a pattern of violations review either (1) was not performed because the permittee was working to correct the violation or (2) did not reveal that a pattern existed and therefore a show cause order was not issued.

Source: State questionnaire responses.

As shown in the table, the states overwhelmingly opted to suspend or revoke the permittee's right to mine rather than pursue individual civil or criminal penalties or injunctive relief through the courts. Permit suspension/revocation represented more than 85 percent of the alternative

enforcement actions taken and were carried out in 13 different states. The decision to suspend or revoke the mining permit was either based on the SMCRA pattern of violations review provision or separate authority provided for under state law. Of the 306 suspension or revocation actions initiated, 32 are still under review or litigation, 65 obtained corrective action, and 209 did not result in the permittee correcting the violation. In these 209 cases, the state forfeited the permittee's performance bond so that it could apply the proceeds toward mine reclamation expenses.

In contrast to the relatively heavy use of the permit suspension/revocation technique, states infrequently pursued individual civil or criminal penalties or injunctions (about 7 percent of the opportunities). In the six states that used these techniques during our review period, abatement had been achieved or was in process on 16 of the 53 actions, abatement was not achieved on 2, and 35 are still under review or are in litigation.

In responding to our questionnaire, state officials commented that, as a general rule, they favored the alternative of suspending or revoking the mining permit. Although they recognize that this alternative is sometimes less effective in getting the permittee to abate the problem, it is an administrative action that has the advantage of being less cumbersome to implement. In this connection, they commented that the other civil and criminal enforcement techniques can be effective because they hold individual corporate officers responsible for the actions of the corporation. However, they noted that these techniques take longer to complete, require a higher standard of evidence, generate an increased demand for legal resources, and depend heavily on the local court systems to support vigorous enforcement actions.

In addition to using alternative enforcement techniques on unabated FTACOs, some states have used them at other times to induce compliance with state coal mining regulations. Five states have used alternative enforcement techniques for other than unabated FTACOs on 171 occasions during the period July 1, 1984, through June 30, 1986. Table 1.2 provides information on each state's use.

Table 1.2: State Use of Alternative Enforcement Techniques for Other Than Unabated FTACOs

	Alternative Enforcement Techniques			
State	Criminal penalty	Individual civil penalty	Civil suit or injunction	Total
Alabama	9	1	1	11
Arkansas	1	0	0	1
Kentucky	0	136	4	140[a]
Utah	0	0	3	3
West Virginia	16	0	0	16
Total	**26**	**137**	**8**	**171**

[a]Since December 1984, Kentucky has fined corporate officials when the Failure to Abate Cessation Order is issued

OSMRE Use of Alternative Enforcement Techniques

Several court suits alleging that OSMRE was not aggressively enforcing SMCRA's regulatory provisions have resulted in settlement agreements which, in part, require OSMRE to pursue alternative enforcement action when mining violations remain unabated. In response to these settlement agreements, OSMRE established a policy of referring unabated FTACOs to Interior's Office of the Solicitor for obtaining a court injunction when the permittee has sufficient assets to abate the violation or to substantially reduce the environmental harm or danger to public health and safety.

OSMRE's Branch of Compliance has referred 135 of the 164 unabated FTACO violations the agency issued from July 1, 1984, to June 30, 1986, to Interior's Office of the Solicitor for civil action. In each case, the alternative enforcement technique selected was civil suits or injunctions. Of the 135 unabated FTACOs referred, 18 were terminated because corrective action had been taken by the violator. Abatement had been achieved or was in process on 5 which were litigated. The remaining 112 are either still under review or are in litigation. According to the Branch Chief, the 29 FTACOs which were not referred were either withdrawn before action was initiated because operators corrected the violations or OSMRE's tracking process failed to identify violations for which additional action was warranted.

OSMRE stated that it pursued the civil suits/injunction technique exclusively because this technique was the only recourse available to OSMRE. With respect to criminal penalties, OSMRE said such cases are extremely difficult to pursue because criminal intent is hard to prove and because the Justice Department is not giving priority attention to prosecuting such cases. OSMRE further asserted that criminal penalties are not an

appropriate way of achieving abatement. OSMRE said it did not pursue individual civil penalties because the agency was under a court-ordered rulemaking process to establish better criteria for guiding their use. It has therefore suspended exercising this technique until it issues the revised rule. OSMRE expects to issue the new rule by the end of September 1987. Finally, OSMRE said it considered the suspension/revocation of permits but found no pattern of violations to provide a basis for such action.

OSMRE Oversight

SMCRA requires OSMRE to evaluate the states' implementation of their regulatory programs. To accomplish this, the OSMRE Division of State Program Assistance prepares oversight guidelines to be followed by the OSMRE field offices in annually reviewing and reporting on each state's program implementation. According to the division chief, the oversight guidelines have evolved over the years as OSMRE gained experience with the program.

Initially, OSMRE's oversight reviews did not address alternative enforcement. However, in 1984, the field offices were required to report on the states' authority to use alternative enforcement techniques, how often they were being used, and whether the states have procedures to assess individual civil penalties. According to the Chief, OSMRE Division of State Program Assistance, the guidelines have been expanded each year to the point where the 1987 reviews, which are currently underway, and the 1988 reviews should provide OSMRE field offices a basis for assessing how the states are implementing the alternative enforcement techniques.

Our review of the OSMRE 1984 and 1985 oversight reports shows that most of the OSMRE field offices simply reported on the state authority and use of alternative enforcement techniques. However, a few regional offices went beyond the guidelines and performed more in-depth reviews of the state alternative enforcement systems. For example, the OSMRE Lexington Field Office in its 1985 annual report on Kentucky, stated that based on its review of Kentucky's administrative and judicial systems, OSMRE found that the state does not have an overall system to assure consistent application of alternative enforcement measures.

Conclusion

Although the states have the authority to use the act's alternative enforcement techniques against operators who do not correct violations,

none have developed a comprehensive system for enforcing the alternative enforcement techniques. Furthermore, although 13 of the 22 states specifically identify when additional enforcement action should be considered if the permittee fails to correct a violation; the remaining 9 state programs allow the mandatory $750 a day penalty to continue without end for unabated violations, an approach which OSMRE has found may force the permittee into bankruptcy, leaving behind unreclaimed abandoned mine sites. We believe that more comprehensive enforcement systems can provide regulators the guidance needed to assure that appropriate enforcement action envisioned by SMCRA is taken while still preserving needed regulatory flexibility.

Recommendation

In order to improve the enforcement of SMCRA, we recommend that the Secretary of the Interior require the Director, OSMRE, to require states to develop systems necessary to assure that alternative enforcement techniques are appropriately used. Such systems should allow for the use of regulatory judgement, but should include written policies and procedures to guide regulators' actions on such matters as when and under what conditions alternative techniques would be used.

Agency Comments

The text of the Department of the Interior's comments on a draft of this report and GAO's detailed responses are included as appendix II. OSMRE generally agreed with our findings and recommendations. It believed, however, that the report could be strengthened by a more detailed discussion of the level of action already taken by OSMRE and the states to improve and extend their alternative enforcement processes. Changes have been made to the report where appropriate to reflect OSMRE's concerns.

OSMRE also stated that as it takes steps to establish additional rules related to alternative enforcement, it will require the states to amend their programs to meet new federal standards. As part of this process OSMRE said it would require states to submit adequate documentation of authority, policies, procedures, and systems for approval by OSMRE.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 15 days from the date of this report. At that time we will send copies to the Secretary of the Interior and to the Directors of OSMRE and the Office of Management and Budget. Copies will also be made available to others upon request.

This work was performed under the direction of James Duffus III, Associate Director. Other major contributors are listed in appendix III.

Sincerely yours,

J. Dexter Peach
Assistant Comptroller General

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Abbreviations

FTACO	Failure to Abate Cessation Order
GAO	General Accounting Office
OSMRE	Office of Surface Mining Reclamation and Enforcement
RCED	Resources, Community, and Economic Development Division
SMCRA	Surface Mining Control and Reclamation Act

Primacy States

State	Date Primacy granted	Number of inspectable units as of June 30, 1986
Alabama	May 20, 1982	322
Alaska	March 23, 1983	2
Arkansas	November 21, 1980	41
Colorado	December 15, 1980	57
Illinois	June 1, 1982	114
Indiana	July 26, 1982	538
Iowa	January 21, 1981	26
Kansas	January 21, 1981	26
Kentucky	May 18, 1982	6,838
Louisiana	October 10, 1980	3
Maryland	December 1, 1980	124
Mississippi	September 4, 1980[a]	[b]
Missouri	November 21, 1980	96
Montana	April 1, 1980	21
New Mexico	December 31, 1980	13
North Dakota	December 15, 1980	68
Ohio	August 10, 1982	997
Oklahoma	January 19, 1981[c]	[b]
Pennsylvania	July 30, 1982	3,968
Texas	February 27, 1980	22
Utah	January 21, 1981	29
Virginia	December 15, 1981	1,135
West Virginia	January 21, 1981	3,898
Wyoming	November 26, 1980	45

[a]No active coal mining is taking place in the state. Further, on October 28, 1985, OSMRE informed the state that it would have to submit program revisions should mining activities develop.

[b]Questionnaires were not sent to these two states.

[c]On April 30, 1984, OSMRE assumed responsibility for portions of the Oklahoma program. On January 1, 1986, OSMRE started to return the program to the state.

Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix

United States Department of the Interior
OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, DC 20240

JUL 22 1987

In Reply
Refer To:
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Honorable J. Dexter Peach
Assistant Comptroller General
of the United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Peach:

In response to your June 29, 1987, transmittal letter to Secretary Hodel, we have completed our review of the General Accounting Office's (GAO's) draft report entitled, Surface Mining: State and Federal Use of Alternative Enforcement Techniques (GAO/RCED-87-160). The Office of Surface Mining Reclamation and Enforcement (OSMRE) agrees with the general direction of the recommendation and has taken significant action to ensure that States do develop systems for governing the use of alternative enforcement techniques.

Although we generally agree with the report, we believe that the report can be strengthened and the recommendations made more meaningful. Specifically, the following comments are provided:

GAO Recommendation

In order to improve the enforcement of the Surface Mining Control and Reclamation Act of 1977, we recommend that the Secretary of the Interior require the Director, OSMRE, to require States to develop systems necessary to assure that alternative enforcement techniques are appropriately used. Such systems should allow for the use of regulatory judgment, but should include written policies and procedures to guide regulators' actions on such matters as when and under what conditions alternative techniques would be used.

Response

We generally agree with the recommendations in the report. However, we feel that the report does not properly convey the level of action presently underway in many States to improve and extend their alternative enforcement processes.

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As the draft report notes, several States are already developing criteria and procedures for implementing program provisions governing criminal penalties, individual civil penalties and injunctive relief. Moreover, GAO acknowledges that all States have procedures for suspending or revoking permits.

Furthermore, as OSMRE takes steps to establish additional rules related to alternative enforcement, such as the pending individual civil penalty rule, States will be required to amend their programs to meet Federal standards. That process necessarily requires States to submit adequate documentation of program authority, policies, procedures and systems for approval by OSMRE.

Page 11 - OSMRE's Use of Alternative Enforcement Techniques

See comment 1

The report should explain in a more complete manner the Federal rules governing alternative enforcement. Under 30 CFR 845.15(b)(2), OSMRE is obligated to decide whether any or all of the available actions are appropriate for a given case and, if so, to take that action. That was OSMRE's policy during the review period and continues to be OSMRE policy.

See comment 2.

In addition, information provided to the GAO in a letter on March 9, 1987 (attached), was not fully utilized in developing information for the report. We would like to see more of this information pertaining to OSMRE's use of alternative enforcement included in the text of the report.

See comment 2.

The GAO draft report correctly states that most cases were referred to the office of the Solicitor for civil action. However, the following refinements to the discussion within the report should be made to make the report more informative and provide a balanced picture of OSMRE's position:

1. The injunctive relief option was often the only available recourse for OSMRE to use during the takeout period and during the period reviewed by GAO. Criminal penalties are extremely difficult to pursue because of the lack of substantiating evidence needed to prove, beyond a shadow of doubt, that the violator acted in a knowing and willful manner. Further, such cases require concurrence and are subject to the priorities of the Department of Justice. At present, the Justice Department, because of other priority workloads, is not giving expedited treatment to these cases.

   Obviously, the most important result of alternative enforcement is to achieve abatement. Seeking criminal penalties such as incarceration is not the most effective or appropriate way to achieve abatement of the violation and reclamation of the mining site.

   Individual civil penalties were not used during the review period because OSMRE was under a court ordered rulemaking process to establish more specific criteria and policies regarding their use. OSMRE suspended exercising its authority to issue such penalties pending the issuance of a new individual civil penalty rule. This rule is expected to be issued within the next 60 days.

Honorable J. Dexter Peach 3

2. The draft report did not explain that OSMRE considered, but deemed inappropriate, the suspension or revocation of permits based on a pattern of violations. This option was inappropriate because for Federal permittees no patterns were found under the criteria of 30 CFR 843.13. Of course, for State permittees with Federal violations, OSMRE has no authority to suspend or revoke a State permit. Moreover, in many instances, there was no permit (i.e., wildcat operator) or the permit had expired. The key point for the report to make, however, is that OSMRE considered the use of this alternative.

Page 12 - OSMRE Oversight

See comment 3.

All States with approved programs must have the capability to pursue alternative enforcement actions. OSMRE, in oversight of States' activities, determines whether States are effectively implementing their approved programs. OSMRE determines whether States have had occasion to use alternative enforcement actions and, if so, whether appropriate alternative enforcement actions have been pursued. OSMRE also monitors whether the State has been successful in pursuing these actions. Annual oversight reports under current oversight guidance are focusing more on this aspect of State program enforcement, and 1986 and 1987 data was collected concerning systems used by States and the success of the States' alternative enforcement efforts.

The fact that States used alternative enforcement on only half of the unabated violations during the review period may or may not be indicative of a problem. If the States considered using such actions but deemed them to be inappropriate, then no program deficiency would exist.

Thank you for the opportunity to provide our written comments. I hope that our comments will be of assistance in finalizing the draft report.

Sincerely,

Fred Christensen

Director

Attachment

The following are GAO's comments on the letter from the Director, Office of Surface Mining Reclamation and Enforcement, dated July 22, 1987.

GAO Comments

1. We had already noted that where OSMRE retains regulatory jurisdiction, it is required under its own regulations to take "appropriate action" if the permittee fails to abate a violation within 30 days after an FTACO has been issued. As suggested by OSMRE, we added language to indicate more specifically that the regulations require OSMRE to decide whether any or all of the available actions are appropriate for a given case and, if so, to take that action.

2. OSMRE's March 9, 1987, letter explains the agency's policy on use of alternative enforcement actions, including criminal actions, individual civil penalties, and injunctions. We added language to p. 9 of our report elaborating on the agency's use of these techniques, including its rationale for using or not using specific alternatives.

3. Our draft report had already discussed these matters, noting in particular that OSMRE has expanded its guidelines in recent years to better assess how the states are implementing alternative enforcement techniques.

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