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United State House of Representatives

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Essays
Perspectives on the Effectiveness of SMCRA

HOW EFFECTIVE IS THE FEDERAL STRIPMINING LAW?

JOHN F. SEIBERLING*

At this juncture in the history of coal mining in the United States, a reflective pause to survey the landscape is certainly appropriate. In doing so, I will pose some questions about how well the environmental controls established by Congress are functioning and attempt some observations, strictly from my own perspective. My thoughts will focus on the principal actors in the ongoing implementation of the federal strip mining law. I hope this will provide a helpful overview of this tremendously important effort to preserve our nation’s natural heritage.

I. IS THE SURFACE MINING CONTROL AND RECLAMATION ACT EFFECTIVE?

Those of us in Congress who were deeply concerned during the '70s about the environmental impacts of coal mining—Mo Udall, Patsy Mink, Scoop Jackson, John Melcher, and Lee Metcalf, to name a few—did our best to see that the end result of the years of acrimonious debate was workable legislation. In 1977, when President Carter signed the bill into law we felt we had enacted, not a perfect law, certainly, but a pretty good one. We thought it would guarantee protection to everyone in the neighborhood of future coal mining operations, particularly downstream water users, farmers, ranchers, Indians, and the people of the southern Appalachian region. We were aware of a powerful mandate to preserve natural resource values while fostering coal mining and respecting the rights of the states.

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Unfortunately, the new Office of Surface Mining (OSM) got off to a rocky start. There was an eight month delay in funding, followed by increasing confrontation with the governors of the major coal-producing states. When James G. Watt took over as Secretary of Interior, he launched an aggressive program to dismantle OSM, which he once characterized as representing "everything that is wrong and evil in the federal government." Through a drastic "reorganization," he drove out most of the experienced people in the agency, and by rewriting the new federal regulations, he triggered a spate of lawsuits. The architect of this debacle was OSM Director Dick Harris, ably assisted by his deputy, J. Steven Griles.

Since Watt’s departure, OSM has gone from bad to worse. Three recent assessments of OSM have spelled out the problems in detail. Reports issued by a joint task force of the House Interior and Insular Affairs Committee¹ and the Department of the Interior in July 1985;² by the House Committee on Government Operations’ Subcommittee on Environment, Energy and Natural Resources in July 1985;³ and by the National Wildlife Federation in October 1985⁴ paint a depressing picture of mismanagement and confusion. All agree that OSM’s own annual state-by-state evaluation reports offer a poor measure of the law’s effectiveness.

Eight years after enactment of the Surface Mining Control and Reclamation Act (SMCRA), what it all boils down to is whether or not the quality of our land, our water, our air, and the right of citizens to enjoy that quality have been improved by the passage of the Act. Despite the flood of justifiable criticism of OSM and the way it is being handled, I do believe the nation is better off under SMCRA. My reasons follow.

A. A Case in Point: Ohio Farmers vs Long-Wall Coal Miners⁵

SMCRA requires all coal mine operators to protect affected water resources, among other things. This provision is vitally important to farmers whose land overlies minable coal resources in my home state of Ohio. The Southern Ohio Coal Company (SOCCO) has been using an underground mining technique known as long-wall mining, which causes massive land subsidence and consequent damage to ponds,

² United States Dept. Of The Interior, Management Review Of The Office Of Surface Mining (June 1985).
⁵ Citizens Organized Against Longwalling v. Division of Reclamation, No. R.B.R-6-84-078 (Ohio Dep’t of Natural Resources Nov. 6, 1985).
springs, streams, and buildings. Angry landowners who have been harmed by SOCCO's operations organized themselves to block the state's issuance of a permit to the company. Under the acronym of COAL (Citizens Organized Against Longwalling) they have collected baseline data and presented evidence showing that the state regulatory authority's assessment of SOCCO's hydrologic impacts (required by SMCRA) was grossly inadequate.

Spurning an offer of technical assistance from OSM, the state authority went ahead and issued a five-year permit to SOCCO and also attempted to block legal action by the citizens. For its part, OSM—after considerable public pressure—dropped a proposed rule barring recovery of litigation costs by citizens who successfully sue to protect their rights under SMCRA. Subsequently, the Ohio farmers got a ruling allowing them to join a lawsuit enforcing the hydrologic requirements in the case of SOCCO. This case is still pending.

B. Are Citizens Better Off with SMCRA?

As can be seen in this struggle between Ohio landowners and a coal company, the record shows that state reclamation officials are often responsive to citizen complaints only when prodded by the federal courts or by OSM. The prodding usually comes by action of three provisions in the law which together constitute a real bulwark against bureaucratic indifference. These three provisions are: the right to sue the Secretary of the Interior or the state regulatory authority in the federal court system, the right to go onto the mine site with a federal inspector, and the right to be reimbursed for legal fees. Whatever else may be said, SMCRA does offer these useful avenues for relief.

Without the access to federal courts which SMCRA affords, the Ohio farmers in the case cited would have been almost helpless to get the protection they deserved. In a comparable situation, federal courts recently enabled the rural community of White Oak, situated in Laurel County, Kentucky, to require another coal company which was responsible for the destruction of the community water supplies to make long-overdue restitution. Thus, it is apparent that where citizens can come up with reasonably good organization, with effective publicity, and most importantly, with competent, dedicated legal counsel, they still have a fighting chance to protect their property and their quality of life under SMCRA.

II. IS THE OFFICE OF SURFACE MINING PROPERLY IMPLEMENTING THE LAW?

The discussion above mentioned three recent evaluations of OSM's performance. Basically, these reports focus on problems relating to poor management, demoralized employees, and, underlying all else, a confusion over goals: Is the purpose of OSM to provide a strong, flexible federal presence, or is it not? The Reagan Administration apparently thinks not. This Administration seems bent on carrying out James
Watt's mission, which was to accomplish a kind of vivisection of OSM by constantly shifting people, positions, and functions thus creating turmoil and uncertainty, always ostensibly in the interest of improved efficiency.

As a result, according to these reports, hundreds of millions of dollars of reclamation fees remain uncollected, and the dispersion of these funds for reclaiming pre-SMCRA abandoned mined lands is in some disarray. The so-called "megabucks problem," a vast backlog of uncollected fines which began accumulating during the Carter Administration, continues as part of the pervasive inability to assess penalties and process the data necessary for effective enforcement.

In a hearing before the House Environment, Energy and Natural Resources Subcommittee, OSM officials have acknowledged that as many as 6000 post-SMCRA strip mines have been abandoned unreclaimed in direct violation of the law. In the southern Appalachian coal fields, abuse of the two-acre exemption in the law is rampant. Making attempts to clean up this appalling situation even more difficult, most of Watt's watered-down rules and regulations have been overturned by the courts, thereby creating a tangled area of legal controversy which remains almost completely unattended by OSM leadership and the Department of Interior.

III. ARE COAL MINE OPERATORS COMPLYING WITH THE LAW?

Lawlessness and non-compliance with SMCRA are widespread in the Appalachian coal fields. The evidence of abuse in the record is disturbing enough, but by the same token, one of the most ironic consequences is that the law-abiding operators find themselves put at a severe competitive disadvantage at a time when the market for coal is weak and unemployment is high. This is the very situation SMCRA was designed to avoid through the establishment of uniformly-enforced nationwide performance standards. Beyond Appalachia, compliance seems to improve as one goes further west. Montana and Wyoming operators are at the opposite end of the compliance spectrum.

Coal industry leadership, although generally preoccupied with the threat of cheap imported coal, high rail transportation costs, and federal coal leasing restrictions, has repeatedly complained about the regulatory confusion and redundancy surrounding SMCRA. In Oklahoma, in fact, it was mine operators who insisted that OSM undertake a partial take-over of the state regulatory program due to inequities in the state's permitting and enforcement.

Although publicly unhappy with the Interior Department's new Management Action Plan for OSM, the industry's leadership should be more than pleased at the further weakening of the agency which is bound to result if the plan is implemented. I suspect that some of the largest companies would probably accept a stronger OSM—if necessary—in return for the stability and predictability they need for their long-range planning efforts; however, watering-down environmental protection standards and enforcement, getting rid of the onerous requirement for
returning the mined site to the approximate original contour, as well as abolishing the strict bond release provisions remain high on the industry's wish list of legislative priorities.

IV. Has the Environmental Movement Lost Interest in SMCRA?

In many ways, the law is a monument to the tenacity of environmental leaders like Louise Dunlap of the Environmental Policy Center. Walter Heine, the first OSM Director, was their candidate and they virtually ran the show during the Carter years. Since then, their activity in the area of coal mining impacts has fallen off.

Nevertheless, environmental leadership is aware of the gathering crisis at OSM, even though their attention has been understandably diverted to other pressing issues like acid rain, toxic wastes, and national parks preservation. Their lobbying in Congress continues to be a model for other interest groups, but their focus since President Reagan took office has been on litigation. The orders emanating from the courts of federal district court Judges Parker, Gasch, Flannery, and Ritchie have served to keep OSM near, if not actually on track. Attorneys Tom Galloway, Mark Squillace, and Norman Dean, acting for groups such as the National Wildlife Federation, Save Our Cumberland Mountains, the Natural Resources Defense Council, the Environmental Policy Center, and the Sierra Club, and backed by sophisticated grass-roots organizations, have led the way in countering the Administration's attack on OSM. Opening up the Act to amendment except in the most restrained circumstances, is a matter of intense concern, something all environmental groups would staunchly oppose.

V. Are the States Enforcing SMCRA?

Watt's extensive alteration of the rules allowed state regulatory programs to be as effective as the federal standards, rather than no less stringent than. This was a turning point. It brought about state programs significantly weaker than they would otherwise have been. The subsequent remanding of the great majority of the Watt revisions (the courts did uphold the as effective as change) has caused widespread uncertainty and promoted further laxness in state enforcement. Oklahoma, Tennessee, Kentucky, and Virginia are notable among the states showing signs of slackening enforcement—particularly in the last two where the two-acre exemption abuses are thought to be widespread.

OSM's takeover of the regulatory program in Tennessee, while ostensibly only a temporary arrangement, has begun to take on the appearance of a long-term commitment. While many state regulatory officials no doubt welcomed Watt's deregulation mania and the consequent shift of authority to their agencies, Tennessee's current reluctance to resume primacy may be a straw in the wind. In some
states an OSM takeover may offer a way to weaken, not strengthen, enforcement of SMCRA at much less cost to the state. For states whose administrative costs are not being offset adequately by federal grants and whose portion of abandoned mine lands funds is dwindling, federal takeover may look increasingly attractive.

VI. ARE THE COURTS AN EFFECTIVE LAST RESORT?

In 1981 the Supreme Court unanimously upheld the constitutionality of key federal-state aspects of SMCRA, thereby quelling a suit triggered in part by Harris and Griles. Since that time the federal courts have served in what is essentially an oversight capacity, acting to correct the more egregious deviations from the law. While environmental lawyers have adroitly made use of the leverage available in SMCRA, OSM's progress in complying with the resulting court orders has been dilatory at best. Currently the Administration is dragging its feet in meeting the requirement to clean up the remanded Watt regulations. Furthermore, the movement toward developing a computerized data processing system enabling states to withhold permits from violators crossing state lines has been glacial.

By and large, the federal court system has carried the burden of extricating meaningful case law from the tangled mass of litigation in a timely and forthright fashion which does honor to our system of checks and balances. By contrast, state courts in the coal fields have shown themselves generally incapable of freeing their decision-making from the heavy hand of coal interests. Thus, federal courts have provided injured citizens an invaluable escape hatch from this historic cul-de-sac.

VII. DOES THE SECRETARY OF THE INTERIOR WANT SMCRA TO WORK?

Shortly after Secretary Donald Hodel came on board at Interior, he introduced his hand-picked Acting Director of OSM, Jed Christensen, and took the occasion to tell OSM employees about his determination to bring about tough enforcement of the law. His speech was forceful and to the point. I took this to be a heartening sign of his good intentions. Christensen's reputation as an effective administrator, free of the ideological bias which has marked previous OSM heads, was another hopeful indication that perhaps a turn for the better was in store.

However, it soon became apparent that all the real policy decisions were being made by Hodel aides, thereby undercutting Christensen's authority and throwing his reputation into question. Reportedly, top OSM appointments and the newly-unveiled Management Action Plan were imposed on Christensen against his better judgment and in some cases over his protests. Watt holdovers like Griles continue to exert day-to-day influence on events at OSM. Thus, behind the public relations smokescreen, the disassembly of OSM is being quietly carried forward.

I am increasingly convinced that this trend, if allowed to go unchecked, will end with OSM becoming little more than an appendage of the states' apparatus.
This hardly jibes with Secretary Hodel's declared intentions. Of course, if states were enforcing the law consistently and well, that would be one thing; however, as I have already pointed out, the record indicates the contrary. Consequently, I must reluctantly conclude that the Secretary is in fact dedicated to carrying out the Watt mission in its entirety.

VIII. IS THE WHITE HOUSE WEDDED TO DEREGULATION OF THE COAL INDUSTRY?

Despite the departure of James Watt from the official scene, his departure seems to have been the result of one too many political indiscretions rather than any disagreement with his policies. After all, President Reagan publicly praised him after his resignation, and he has given no sign of ever having repudiated Watt's environmental policies. Under the administrations of Secretary Clark, Watt's immediate successor, and current Secretary Hodel, the controversy over OSM has quieted, since neither of these gentlemen appear to have Watt's appetite for confrontation. The strip mining controversy has, by and large, been defused and the once-angry states placated. The nomination of Steven Griles to be Assistant Secretary of Interior for Land and Minerals Management would tend to refute any idea of a break from past Administration policy.

All of this would appear to suit well the White House game plan—perhaps even more so if OSM were to vanish completely. The public excitement over Watt's OSM policies never reached the fever pitch generated by the federal coal leasing issue, the public lands giveaway issue, or the national parks issue. Still, I image it was a source of concern among the political strategists on the Reagan team. There may be some lingering regret that Watt was unable to abolish OSM with the stroke of a pen, as he did the Old Heritage Conservation and Recreation Service.

IX. SHOULD OSM BE REMOVED FROM THE INTERIOR DEPARTMENT?

Early in the congressional debate on strip mining legislation, the idea of locating OSM within the Environmental Protection Agency was seriously considered. However, perceived organizational ties with the Bureau of Mines, the Bureau of Land Management, and the Geological Survey, as well as committee jurisdictional concerns dictated otherwise. Today a growing perception that OSM's myriad problems are being exacerbated by Interior's leadership has led to talk of moving the agency to some other spot in the federal concatenation. The House Government Operations Committee in the previously cited report recommends that "Congress consider transferring administration of (OSM) . . . to another appropriate agency"6 if there is no "demonstrable improvement" in six to nine months time.

6 H.R. REP. No. 206, supra note 3.
More recently Secretary Hodel—perhaps conscious of the dangers of further adverse publicity—asked the National Coal Council to advise him as to the wisdom of moving OSM out of the Department of Interior. What the Council's response will be is not known, and whether his inquiry shows any serious intent on the Secretary's part to explore various options for OSM seems to be a matter of conjecture.

What are the drawbacks to shifting OSM out of Interior? I think the two most obvious problems are first the inevitable disruption, which would certainly set back reclamation a year or more while the agency is getting used to its new surroundings and, second, the fact that EPA (the most logical candidate) seems to have plenty of its own problems without being saddled with still more. What about the Department of Energy? It is hard to see how OSM's environmental capability could possibly be enhanced in that atmosphere. Agriculture? Independent status? None of the options stands out as a clear improvement over the present set of circumstances. I am inclined to think that any transfer—except as a desperate expedient—is highly questionable.

X. Is Congress Exercising Adequate Oversight of OSM?

Mo Udall, the acknowledged father of SMCRA, was testifying before the House Appropriations Committee in April when he made this statement: "I cannot recall any time in my entire Congressional career when I have been faced with such overwhelming evidence of bureaucratic incompetence and dereliction of duty as I see at OSM today."

Similar feelings of frustration and disgust have been voiced by Chairman Udall's colleagues on the Committees on Government Operation, Appropriations, and Post Office and Civil Service at hearing after hearing over the past few years. The Interior Committee has held numerous hearings itself to document the complaints of citizens, the coal industry, and the states, but the effect of these hearings has in the main been nominal.

Of course, there is one kind of legislative action to which OSM responds with alacrity, and that is the insertion of language and budget items into appropriation bills. Money still talks. For example, the current House Interior Appropriations Committee legislation requires a substantial boost in the number of OSM inspectors. This is one of several controversial items opposed by the Administration. If it survives in the enacted bill, OSM will presumably respond appropriately or there will be more court suits.

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On the Senate side, the relevant committees under Republican leadership have been understandably solicitous of the Administration’s desires where OSM is concerned. The late example is the Senate Energy and Natural Resources Committee vote in favor of the nomination of Steven Griles as Assistant Secretary for Land and Minerals Management. In my opinion, Griles’ confirmation will further lock into place the Watt policy of piecemeal dismemberment of OSM.

XI. SHOULD SMCRA BE OVERHAULED?

I am still convinced that the Surface Mining Control and Reclamation Act of 1977 is fundamentally sound. It places ultimate responsibility for enforcement on the Secretary of the Interior, where it should be. Its federal-state format, while admittedly fraught with complexities and possibilities for all kinds of game-playing, is in keeping with our Constitution. It has produced nationwide environmental protection standards with the requisite degree of flexibility in the main. It is rehabilitating orphaned mine lands and will continue to do so through 1992. Had a less hostile Administration taken charge in 1981, the kinks could have eventually been worked out of OSM’s relations with the states. In due course the states and the industry would have received a fair shake while the environment got the protection it so badly needs.

At some point fine-tuning of the law is obviously called for. Certainly the two-acre exemption should be re-examined and maybe even eliminated altogether. Perhaps we should also see whether there is an acceptable way to encourage remining of improperly reclaimed mine sites. There are plenty of loopholes and ambiguities in the law which should be looked at sooner or later. But having said all that, I believe that opening up the law to amendment now would run the risk of gutting the environmental protection standards. For one thing, the industry would like nothing better than to knock out the approximate original contour provisions along with other expensive requirements in Title V of SMCRA.

Presumably, the leadership of the Senate Energy and Natural Resources Committee is ready and willing, if not eager, to consider a raft of amendments to the Act. The last serious attempt to open the Act was the so-called Rockefeller amendment, named in honor of then-Governor John D. Rockefeller III of West Virginia. Introduced during the Carter Administration, the bill would have stripped OSM of much of its statutory oversight authority. It passed the Senate by a large majority and died in the House only because of Chairman Udall’s steadfast opposition.

Although a package of amendments was prepared and peddled around Congress during the Harris Administration at OSM, Secretary Hodel has come out against amending the Act. I imagine he has his hands full without taking on the expected opposition in the Interior Committee, where the feeling prevails that any rash tampering with the Act would lead to reversion to pre-SMCRA balkanized regulation, with all of its attendant evils.
XII. WHAT DOES THE FUTURE HOLD?

In the present impasse, what is likely to happen? My guess is that economic and technological factors are far more important determinants for the coal industry than the provisions of SMCRA. Coal mining is being squeezed between cheap imports from Central America and elsewhere, the withering away of the steel coal market, high rail transportation rates, and the world-wide oil glut. Historically subject to boom-bust cycles, it is going through yet another trough which is slowing strip mining activity in the coal fields.

In the long run, technology may have even more to say about how much land is going to be torn up for coal mining in this country. For example, the domestic copper industry, which has fallen on hard times due to competition with foreign imports faces even more serious competition from other materials in the housing and communication industries such as plastics and glass. The coal mining operator is sure to be confronted with new technological advances eroding his or her traditional markets in ways we can hardly foresee. I have in mind particularly the development of inexpensive solar cells, which I am told will soon reach the market, which enable the average householder to produce electricity to run his home fixtures. Carried further, this type of development could well put the smaller coal operators permanently out of business.

Be that as it may, today the overwhelming need is for a strong, consistent, equitable implementation of the law. I believe that Secretary Hodel has it within his power to accomplish this. He eloquently articulated such a policy not too long ago, but he has yet to put it into practice. Ultimately, this is the only way he can serve the best interests of all parties and the nation.

I sincerely hope Secretary Hodel will consider adopting the following suggestions, which are in accord with his earlier statement of intent. First, abandon the ill-conceived Management Action Plan, implementing in its place the proposals set forth in the Shafer-Trause report already endorsed by Acting Director Christensen but substantially ignored by the plan. Second, personally see to carrying out the Shafer-Trause recommendations. Third, vest OSM Director Christensen with full authority to act by freeing him from the overriding influence of those who represent Watt policies and by allowing him to put into responsible positions those who are committed to an effective federal presence. Fourth, seek increased funding for federal inspection and enforcement. Fifth, place all state regulatory programs with significant problems under a tight schedule for the resolution of those problems—and—if this fails—prepare to initiate either partial or complete federal takeover. Sixth, promote the timely and efficient implementation of the Parker/Gasch court orders and the two-acre exemption court settlement and aggressively move to put an end to lawlessness in the Appalachian coal fields. Seventh, develop a nationwide computer data base covering all strip mine violations to ensure that violators of SMCRA, including those who have not paid their abandoned mine lands fees,
are denied permits to mine. Finally, cooperate with the House Interior Committee in extending the Shafer-Trause review and in making available information needed for investigations of two-acre exemption abuses and the Tennessee and Oklahoma takeovers.