Effectiveness of the Surface Mining Control and Reclamation Act: Reclamation or Regulatory Subversion

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EFFECTIVENESS OF THE SURFACE MINING CONTROL AND RECLAMATION ACT: RECLAMATION OR REGULATORY SUBVERSION?

LOUISE C. DUNLAP*
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I. INTRODUCTION

August 3, 1985 marked the eighth anniversary of the passage by Congress of the landmark Surface Mining Control and Reclamation Act (SMCRA or the Act). In 1977 it was unprecedented legislation in many substantive areas. SMCRA blazed the trail in providing the public with broad sweeping rights to participate in the regulatory process, national minimum environmental protection standards and mining performance regulations, mandatory penalties for gross strip mining abuse, and an industry funded program to reclaim past abandoned and unreclaimed mine sites. The citizens across the nation battled uphill for seven years to get this legislation passed by Congress. Major hurdles, including two presidential vetoes, were overcome. SMCRA is a strong but necessary response to decades of reckless and irresponsible strip mining abuse that plagued coalfield communities, destroyed personal property, ruined (permanently in all too many cases) millions of acres of land, and polluted thousands of fresh water streams, as well as underground water supplies.

Despite dire predictions by the coal industry, SMCRA has not contributed to a downfall in coal production. In fact, since SMCRA was enacted, annual coal production has soared from 691 million tons in 1977 to approximately 830 million today.1 While the coal market has been soft in the 1980s, that has not been a result of SMCRA's implementation but rather due to external factors such as falling oil prices, energy conservation, increased foreign coal development, and coal transportation costs.

Almost immediately after implementation of SMCRA had begun, the face of surface coal mining changed dramatically in the coalfields. No longer was the regular operator practice of dumping topsoil and mining spoil over the downslope permitted by law. No longer was it permissible to blast flyrock through community homes while regulators looked the other way. No longer was it permitted to allow the water runoff from a mine to cause erosion, stream sedimentation, or acid drainage without severe penalties. Prime farmland soils were now required to be protected and preserved prior to coal extraction so that post-mining productivity could be ensured. Alluvial valley floors that are so critical to hydrology of western lands were now prohibited from being mined. While initial compliance failures by mining operators hindered progress, SMCRA almost immediately curbed much of the systemic mining abuse that plagued the nation.

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1 DEPARTMENT OF ENERGY, QUARTERLY COAL REPORT, Doc. No. DOE/EIA-0121.
The controversy over strip mining regulations, however, was not put to rest in 1977. It continues today. Many coal companies and many states have strongly resisted the new requirements of SMCRA. Particularly since the Reagan Administration came to power in 1981, the Office of Surface Mining (OSM), the federal regulatory agency charged with SMCRA’s implementation and enforcement, has been subjected to enormous pressures from the coal industry, the states, and within the Department of Interior to weaken the effectiveness of SMCRA. In answer to these assaults, environmental and citizen organizations responded, with the help of several key members of Congress, by calling for congressional oversight hearings and independent investigations into OSM’s roll-back policies. More importantly, the citizens’ coalition has aggressively challenged many of these policy changes in the courts. At every turn, special studies, congressional reports, and numerous court decisions have been scathingly critical of OSM’s roll-back policies and have supported strong enforcement and stringent interpretation of the law. Nevertheless, the persistent efforts to undermine the effectiveness of SMCRA have taken a terrible toll on OSM and the ability of its staff to meet its responsibilities under the law. In 1985, by almost everyone’s account in the surface mining arena, including the Department of Interior, OSM is in complete disarray. It is confused about its purpose. It lacks stable management and sound policy direction. Its staff is totally demoralized, and it is regularly victim to chronic bureaucratic bungling.

In light of OSM’s failures to meet its responsibilities and adequately enforce the law, some are now beginning to question the effectiveness of the Act itself. It is the purpose of this paper to explore some of these questions, as well as to expose certain false assumptions regarding the intent of SMCRA that are presently being aired.

II. Is THE ACT WORKING?

The question raised most frequently concerns the effectiveness of the Surface Mining Control and Reclamation Act. Is the Act really working? Is it changing how surface mining and reclamation occur? Is SMCRA meeting its congressional intent? There is no single answer to these questions.

The Surface Mining Control and Reclamation Act is very complex and multifaceted in character. The law regulates surface mining activities on private,
state, federal, and Indian lands in over twenty-six coal states. Most states have chosen to be the primary regulatory authority (primacy). SMCRA regulates thousands and thousands of coal mining operators who run the gamut from small independent operators to mid-size companies to large multinational energy conglomerates. It regulates the surface effects from both underground and surface mining, and it applies to all types of coal (bituminous, anthracite, and lignite) and mining terrain from Appalachian steep slopes to midwestern prime farmland to western arid lands. The Act also protects millions of people who live in the coalfields from the adverse effects of mining, as well as millions of people who live outside of the coal regions but who are impacted by longer term factors such as flooding and water quality. SMCRA's environmental protection provisions also address such diverse issues as blasting practices, revegetation, dust control, water quality and quantity, slope reconstruction and stability, topsoil and farmland protection, national park and forest protection, cemetery protection, and appropriate post-mining land use.

In reexamining the sweeping scope of SMCRA, it is obvious that it is extremely difficult to present a blanket statement as to the effectiveness of this law. Its varied requirements all have been implemented with both successes and failures since 1977. In order to evaluate the effectiveness of the Surface Mining Control and Reclamation Act, it is necessary to examine key provisions of the law and compare them with congressional intent when the law was passed.

Aside from the sheer complexity of the Act, another difficulty in evaluating its effectiveness is that not enough time has yet passed for a fair assessment. Due to the continuing major conflicts over the Act, implementation and enforcement of the law has been in a constant state of flux since its inception over eight years ago. Thus, it is probably still premature to offer a fair assessment of the effectiveness of the Act's principles in practice.

Where and why did this conflict originate? Congress passed the Act in 1977 in response to a crisis in the coalfields. There was undisputed evidence of widespread systemic mining abuse across the nation. Equally obvious at the time was the fact that the states, with a few notable exceptions, had failed miserably to regulate mining within their borders. Congress sought to resolve the massive problem through the concept of national minimum performance standards. OSM was created in 1978 and charged with the responsibility of implementing and enforcing SMCRA. Since SMCRA's concepts were new, the enormity of OSM's task should not be overlooked. The Department of Interior, under the leadership of Secretary Cecil Andrus, moved vigorously to implement OSM's regulatory program. Interior's assertiveness was attributable in part to the Secretary's strong support for the Act's passage and his commitment to implementing the fullest intent of the law.

At the same time, the environmental citizen community had many differences with the Andrus Administration’s initial attempts to assemble the program. But specific policy differences aside, the public was confident that the Department of Interior was engaged in a good-faith effort to implement the intent of the law.

Immediately upon final promulgation, OSM’s federal surface mining regulations were challenged in the courts by the coal industry. A coalition of environmental and citizen organizations intervened in opposition. The industry challenge was rejected by the courts, thus upholding OSM’s first regulations. Also during the late 1970s, several states filed suit challenging the constitutionality of SMCRA. The Supreme Court later ruled on this challenge in 1981 by unanimously upholding the Act’s constitutionality.

Conflict came early to OSM, but fortunately it did not hinder the progress toward full implementation of this new law. In fact, these early challenges may have actually strengthened OSM since both the Act and its regulatory program were tested and affirmed by the courts. This progress, however, was brought to a grinding halt with the election of President Reagan in 1980. Interior Secretary James Watt immediately singled out OSM as an example of regulatory zealotry. Using a Heritage Foundation report as a blueprint for action, Mr. Watt sought to undermine the Act by revising the federal regulations and reorganizing the agency to drive out its career staff and weaken OSM’s ability to meet its responsibilities.

First came the Secretary’s reorganization of OSM. Disguised as “management realignment,” it ruthlessly forced over fifty percent of OSM’s experienced personnel to leave the agency through firings, undesirable field transfers, and sheer intimidation. This misguided undertaking probably did more to permanently cripple the agency’s effectiveness than any other action. Even today, this “brain drain” has left OSM understaffed, inexperienced, disorganized, and demoralized.

At the same time, Secretary Watt ordered OSM to rewrite over ninety percent of the federal regulations that had just been tested and upheld in court. Under the excuse of regulatory reform, the changes in the regulations substantially weakened many environmental protection provisions and reduced opportunities for public participation. In response to Secretary Watt’s gutting of the regulations, the Environmental Policy Institute (EPI) and eight other environmental and citizen organizations filed a massive lawsuit against Secretary Watt. The court has now

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9 See Department of the Interior, Proposal to Reorganize the Office of Surface Mining (April 1981); Letter from Representative Patricia Schroeder, Chairwoman of the House Subcommittee on Civil Service, to James G. Watt, Secretary of the Interior (October 28, 1982).
10 In re Surface Mining II, supra note 3.
ruled in all three rounds of decisions overwhelmingly in favor of the citizens. Virtually every major change sought by the Watt Administration has been rejected. Accordingly, the agency must now propose yet a new set of regulations to take the place of those rejected by the court. As a result of this reckless effort by Secretary Watt, OSM's regulatory program has no more stability or finality than it did immediately after OSM's creation in 1978.

OSM also lost several major court cases filed by citizen organizations regarding OSM's failure to enforce the law in key areas. Particularly noteworthy is the "megabucks" lawsuit\(^\text{11}\) which challenged OSM's failure to collect tens of millions of dollars in civil penalties and its laxity in forcing mine operators to remedy the scores of serious environmental violations.

Due to this disruptive history, it will now take a minimum of several years under stable OSM management, coupled with vigorous enforcement of an unfluctuating regulatory program, to be able to make a meaningful judgment as to the effectiveness of SMCRA's principles in actual practice. In the meantime, however, it is possible to judge the current status of some key provisions of the law in light of Congress' intent in passing SMCRA.

III. STATE PRIMACY AND OSM OVERSIGHT

Central to the Surface Mining Control and Reclamation Act is the concept of state primacy. Under the law, states have an opportunity to be the primary regulatory authority for mining within their borders if they develop, implement, and enforce a regulatory program which meets the requirements of the federal law. OSM has the responsibility under the law to use enforcement oversight to ensure that the states are meeting these standards. When the states fail, OSM is explicitly required to directly enforce the law.

The concept of primacy was a political compromise accepted by citizen organizations to obtain passage of SMCRA. In proposing surface mining legislation in the 1970s, EPI promoted a general federal regulatory approach. The political climate at that time, however, was not conducive to a solely federal regulatory program in the coalfields. Recognizing this reality, EPI and the citizen coalition opted for the greater goal of achieving national minimum standards by accepting the compromise of state primacy. At the time it was not an unpalatable decision for citizen groups because the threads of ultimate federal authority are woven throughout the fabric of the primacy concept. In EPI's opinion, implementation and enforcement of the national standards was the greater goal. We believed that if the states would regulate mining within their borders according to federal standards, that would meet our goal. If, however, the states failed to enforce these standards, EPI saw

that ultimate federal enforcement responsibility would be the insurance for meeting that goal.

Privately EPI acknowledged that a purely federal program would have cost much less than a state primacy—federal oversight program and would have been much less complicated to implement. However, faced with the political reality of accepting the primacy concept over no federal statute at all, and supported by the assurance that ultimate federal responsibility would be exercised in cases of state breakdowns, EPI accepted primacy and continues to support it today. As long as ultimate federal authority is an integral part of SMCRA, EPI still believes that the stated goals of SMCRA can be met through state primacy.

The Watt Administration distorted the concept of primacy by promoting a "states rights" approach. This approach was evident under Watt in the quality of state programs that OSM approved, the reduced level of meaningful citizen participation OSM allowed in the formation of state regulatory programs, and in the cooperative agreements OSM negotiated with the states regarding mining regulations on federal lands. These approved programs and agreements fostered the attitude that SMCRA was a state regulatory approach with diminished federal authority rather than the federally-oriented program intended by Congress in 1977.

This "states rights" approach was even further promoted by Secretary Watt to reduce OSM’s enforcement presence in the coal fields. The OSM reorganization of 1981 greatly reduced the number of federal inspectors in the field from over 220 to only 69. Through other policy directives, the total number of mining violations cited by OSM inspectors in 1981 also plummeted. The quality and quantity of oversight data collected by OSM to evaluate state compliance with SMCRA was significantly reduced. This data collection problem was in part due to OSM’s crippled state of management after the reorganization, but it was also due to calculated efforts by Watt to reduce OSM’s federal oversight and provide the state with carte blanche, knowing full well that many states would yield to industry pressure and reduce the vigor of their regulatory programs.

In sum, Watt sent a very strong signal to the states starting in 1981. His message was that the federal government was no longer going to be diligent in its oversight responsibilities and that the states were for the most part free to implement and enforce the law as they saw fit. Secretary Watt called this his "good neighbor" policy with the states. Citizens saw it as a repudiation of congressional policy in favor of state primacy and a return to the pre-SMCRA pattern of state exclusion of citizens and knuckling under to industry pressure for lax enforcement.

Prior to 1977, most states had a dismal record of surface mining regulation. This was attributable to several things. State mining agencies have always had a difficult time insulating themselves from the political and economic pressures of
the coal industry. Coal mining is not only essential to the economy of many coal states, but, in many cases, it is the only major industry in a region. Without economic diversity to balance the interests of coal development with the need for regulation, state mining regulation has usually been compromised. The coal industry has shown itself to be very capable of influencing state legislatures, governors' offices, local governments, and even state courts. Often, its influence is quite direct. Key positions in the legislature and state governments are regularly filled by former coal industry representatives and supporters. With this political reality, it is easy to see why many state regulatory efforts failed so miserably prior to the passage of SMCRA.

Because of the states' inability to insulate themselves from such influence, EPI initially proposed a single federal regulatory program for SMCRA. As earlier discussed, state primacy was the compromise in the final version. The Watt Administration then turned primacy into an excuse for virtually eliminating federal involvement. As a result, state compliance with SMCRA again started sliding to the lowest common denominator. This trend could be seen by examining OSM's own data. Despite EPI's criticism of the lack of quality of data that OSM collected, certain glaring problems in state compliance were obvious even to OSM. In state after state, year after year the problems have been the same. For instance, many states fail to make the required number of mine site inspections. State inspectors are conducting incomplete and inadequate inspections. State inspectors fail to cite all observed violations as required (Kentucky for example only cites one in every fourteen violations observed), and states continue to approve permit applications which are environmentally deficient.

Under the state primacy concept, when such failures are noted by OSM, SMCRA requires federal intervention either to have the state correct the problem or to impose direct federal enforcement. However, ultimate federal responsibility has been a paper tiger under the Reagan Administration. These repeated and increasing state failures are ignored.

Eventually the states' problems were so great that even OSM could not overlook them. The breakdowns in the Tennessee and Oklahoma state programs, for example, were so pervasive and the state response so uncooperative that OSM had no other choice, after trying to avoid any federal role, but to revoke their primacy authority. This, however, was an exception to the rule. Tennessee and Oklahoma are minor coal producing states where it is more politically acceptable for OSM to assert itself.

Larger problems in major coal states continue to be ignored. In 1985, for example, Kentucky was experiencing regulatory breakdown and gross mining abuse.
of pre-Act severity. Breakdowns in the Kentucky program continue to abound.17 Thousands of mine operators have illegally claimed to be exempt from the regulation and reclamation requirements of SMCRA by facetiously claiming a two-acre or coal exploration exemption. State inspectors seldom cite any observed violations. Bonds are released despite the lack of complete reclamation. All of these problems and the incredible on-the-ground environmental degradation are well documented, but OSM has done little to assert its SMCRA responsibilities. OSM officials unofficially admit that they do not have the political power to revoke primacy from such a powerful coal state. If primacy were revoked, OSM's weakened management ability and reduced funding would prevent it from undertaking direct federal control.

In response to OSM's unwillingness and inability to exercise its regulatory responsibilities, Congress is presently working to correct these major state primacy breakdowns by forcing OSM to withhold abandoned mine land funds from states with chronic failures.18

This, however, is not the way Congress intended state primacy to operate. When the threat of ultimate federal authority is removed or even reduced, state primacy is no longer an effective tool. Without the clout of federal enforcement, states are vulnerable to the very same anti-regulatory pressures and influences which produced the serious damage to the environment that led to SMCRA's passage.

Another aspect of state primacy is the responsibility of mine plan review. A key SMCRA goal is preventing environmental degradation before it occurs. One way in which Congress envisioned this being accomplished was through the assembly of a professional regulatory organization to assure the adequate review of mining permit applications. A sound mining permit adequately addresses the manner in which the operator will comply with performance standards, thereby aiding in the prevention of environmental degradation. A deficient permit, on the other hand, increases the potential for abuse. In the past, the states have generally not had adequate resources, the technical expertise, and at times, the institutional fortitude to ensure proper mine plan review. Historically, the states' shortcomings were often overcome through OSM's technical assistance. Secretary Watt, however, sought to cut OSM's technical services budget during his tenure.19 While OSM's technical services budget has been restored by Congress, its technical assistance and oversight capabilities remain limited due to the agency's reorganization. As a result, some states are regularly approving deficient permits which have and will cause environmental degradation.

17 OFFICE OF SURFACE MINING, ANNUAL EVALUATION REPORT, KENTUCKY PERMANENT PROGRAM (1984-85) (two reports).
IV. Citizen Participation

SMCRA is unprecedented in providing the public with a panoply of rights to participate in the regulatory decision making process for coal mining. Citizens are entitled to participate in every aspect of mining regulation from permit application to bond release. The power of the affected public to file a citizens’ complaint, in court if necessary, with the right to recover costs and attorney fees, is critical to the enforcement of the Act.

Congress recognized that surface coal mining caused severe hardships for coalfield citizens and therefore guaranteed the public an opportunity to play a major role in regulating that mining. It was Congress’ intent that public concerns be taken into account by state and federal decisionmakers in the establishment and implementation of regulatory programs and policies. In practice, however, regulatory authorities (both the states and OSM) often give SMCRA public participation only superficial lip service. The public may be grudgingly afforded the right to file comments and make presentations at public hearings and meetings on rules and permit applications, but in reality their articulated concerns are given short shrift by the regulatory agencies when making the final decisions.

This hypocritical practice became most apparent when Secretary Watt rewrote the federal regulations in 1981. While we were afforded the opportunity to file comments and meet with officials, our substantive concerns were completely ignored. We then had no option other than to turn to the courts for relief. As previously discussed, the court ruled overwhelmingly in our favor. However, this process was extremely costly to the citizen groups, and even more so to the Department of Interior. All of this could have been limited or avoided altogether if government had allowed public concerns to play a genuine role in rulemaking as Congress intended.

The same pattern is repeated all too frequently in the coalfields on mine-specific issues, from reviewing permit applications to releasing bonds, and from filing unsuitability petitions to state program amendments. A strong frustration is now arising within the public interest community because OSM and the states are ignoring citizens’ valid, documented concerns. Therefore, SMCRA’s public participation provisions are now perceived by citizens not as an avenue for influencing regulatory policy but solely as a prerequisite for future litigation.

The intent of SMCRA’s public participation provisions was to do more than just establish required filing and meeting procedures. Public participation provisions are intended to ensure that public concerns are reflected in regulatory decisions.

21 In re Surface Mining II, supra note 3.
Not all public concerns are always ignored by the regulatory authorities. There have certainly been some notable examples to the contrary. For instance, Pennsylvania is to be applauded for its very broad public participation approach to unsuitability petitions. Pennsylvania has consistently been open and helpful to citizens interested in filing unsuitability petitions, traditionally a very complex and controversial issue. By providing the public with advice, resources, data, and a spirit of cooperation, Pennsylvania’s implementation of section 522 of SMCRA is a model of citizen participation as Congress intended.

V. PERFORMANCE STANDARDS

The issue of performance standards must be discussed in its broadest definition as these standards are set forth in section 515 of SMCRA. This essay is not intended to revisit the controversy over distinguishing performance standards from design criteria. That debate would require much more space than this essay’s limitations permit, and in any event, it has largely been a red herring for creating additional chaos and uncertainty about how mine operators must comply with the Act. Furthermore, this issue has already been discussed in other publications.

SMCRA’s performance standards are the centerpiece for achieving uniform nationwide improvements in mining methods and environmental protection. Hereeto, the Act is unprecedented in the amount of regulatory specificity that Congress included in the statute itself. One of the reasons that states’ regulatory programs were largely ineffective prior to SMCRA was their vagueness, lack of objectivity, and the unenforceability of their permitting and performance standards. As Congress recognized during its prolonged debate, the coal industry generally complies with only the lowest common denominator in regulatory restrictions. Performance standards which allow for broad operator interpretation usually lead to the least expensive mining method, which can produce massive environmental degradation and impose external costs on coalfield communities while generating higher profits for industry. Because the coal industry is a very competitive business, other mine operators are continually seeking the least expensive methods of mining and reclamation. In the 1960s and 70s, it was unworkable to give coal operators broad regulatory platitudes and vague goals to achieve without requiring the specific manner to meet them. It was unworkable to simply require that blasting practices not threaten the safety of nearby residents. It was not enough to require only that water runoff at a mine site not degrade the environment. It was not enough to require that sites be regraded and revegetated with plant growth. Prior to 1977 when some state regulatory laws required only such broad platitudes, the on-the-ground results of reclamation were limited at best. Instead, degradation increased, and more often than not, the states encountered total failure in meeting their stated goals.

22 Pennsylvania Bureau of Mining and Reclamation, Dep’t of Environmental Resources, Petition Package for Designating Areas Unsuitable for Mining, Doc. No. ER-MR-88 (June 1982).
Because SMCRA established such specific performance standards and required mine operators to follow specific mining and reclamation practices, the face of surface mining reclamation has radically changed in this country. SMCRA's performance standards have dramatically reduced the widespread environmental abuse that plagued the coalfields for decades. Through the use of sedimentation ponds and erosion controls, water quality has substantially improved. Safety hazards from irresponsible blasting practices have been greatly diminished by SMCRA's specific requirements for handling explosives. Compliance with the performance standards for topsoil preservation, regrading practices, revegetation techniques, and hydrology has successfully restored many mine sites into productive lands once again.

Despite these improvements, compliance with the performance standards has been a qualified success. As already discussed, haphazard levels of enforcement by state regulatory agencies has significantly reduced the potential effectiveness of SMCRA. No matter how detailed they are, performance standards will not produce improved mining and reclamation if they are not adequately enforced. Just as operators usually seek the lowest common denominator in mining practices, so too they seek the least possible regulatory compliance. If a state or OSM does not regularly take enforcement action against operators who fail or refuse to meet performance standards, other operators are encouraged by competition to ignore the standards as well.

This situation arose when the Texas Railroad Commission failed to enforce performance standards regulating topsoil substitution and proper disposal of acid-forming material. This failure to enforce produced a wholesale breakdown in compliance by Texas coal mine operators and produced thousands of acres of topsoil that are now illegally contaminated by acid-forming material.

SMCRA's basic performance standards do have a legitimate flexibility that allows for the development of new and more efficient mining and regulatory techniques. Undoubtedly some could be revised to reflect the latest technology and experience. Discussion of potential changes in performance standards should not be construed solely as an effort to bring more flexibility to the standards. There is a legitimate need for less flexibility in some standards such as final cut lakes, valley fills, and coal waste dams, due to demonstrated abuse. Nevertheless, soon after SMCRA's passage it was anticipated that the regulations, and even SMCRA itself, would probably need to be fine-tuned after a few years of experience. However, as previously discussed, fine-tuning was not Secretary Watt's intent in 1981. Instead, he launched a wholesale assault on SMCRA, and support for reasonable regulatory adjustment has been lost due to heightened suspicions by citizens. Even some of SMCRA's harshest congressional critics in 1985 are no longer willing to

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consider amending the Act in the foreseeable future. Moreover, the environmental/citizen community, in light of recent history, is distrustful and wary of suggestions from industry, the states, or OSM, of any need to fine-tune SMCRA at the present time.

VI. OSM's Future

Because OSM is currently so plagued with management, resource, and morale problems, the House Government Operations Committee has raised an important question regarding OSM's ability to correct the situation. The House Committee warned that unless OSM made significant progress within six-to-nine months in meeting its mandated responsibilities, the committee would recommend to Congress that OSM be moved out of the Department of Interior's jurisdiction. The legislative history of SMCRA debated the alternatives of placing OSM in the Environmental Protection Agency (EPA) or the Department of Interior back in 1975. Members of Congress voiced concern over the Department of Interior's dismal regulatory history and capabilities. Congressman Udall acknowledged the Department's failures, but he assured Congress that OSM could be adequately insulated from the coal development factions within the Department. As previously discussed, such insulation was achieved in part by Secretary Andrus but promptly eliminated by Secretary Watt.

We agree with the concern of the House Government Operations Committee that OSM's enforcement and state oversight must improve. Continued OSM failures cannot be permitted to undermine the very real effectiveness of SMCRA. If improvement does not occur, however, careful consideration must be given to the appropriateness of moving OSM to another federal agency. Removing OSM from Interior will not resolve OSM's problems. In fact, there is a risk that such an action will act as an illusion of improvement when in essence little is changed. There is also a danger that OSM's confusion, instability, high staff turnover, and management problems would simply be exacerbated by such a move. Moving and/or establishing a new federal agency is no simple matter. It would require an amendment of SMCRA and would certainly mean yet another protracted period of uncertainty for the regulatory program. However, if the Department of Interior continues to fail in its mission to enforce SMCRA, OSM's removal is likely to occur. Central to this debate is the question of whether to move OSM to EPA, or to make it an independent administrative agency. In our opinion, moving OSM to EPA would do little to solve OSM's problems and would likely create new ones. EPA's environmental regulatory programs have been subjected to repeated assaults by the Reagan Administration, and that agency's effectiveness has been frequently unstabilized, just as OSM's has been undermined.
Establishing OSM as an independent administrative authority, however, does merit consideration. The desirability of this option greatly depends upon the structure of the commission, its independence, its method of selecting leadership, and other factors. In order for the environmental/citizen community to support even the concept of OSM as an independent regulatory commission, there must be firm assurances that it will be truly insulated and independent from the political and economic pressures of the local industry and state governments which it is charged with regulating. Unless such assurances are written into the law transforming OSM, we cannot lend any support to the idea.

In sum, we see no merit in moving OSM within the Executive Branch or changing OSM to an independent regulatory agency unless those amendments include strong safeguards and explicit, enforceable standards that will address and abate OSM's past problems with primacy, oversight, enforcement, adequate resources, and public participation.