The Federal Surface Mining Control and Reclamation Act of 1977--First to Survive a Direct Tenth Amendment Attack

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THE FEDERAL SURFACE MINING CONTROL 
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AMENDMENT ATTACK.

DENNIS ABRAMS*

On June 15, 1981, the Federal Surface Mining Control and Reclamation Act¹ became the first federal environmental law to survive direct tenth amendment challenges in the United States Supreme Court.² These challenges, asserted by the sovereign states of Virginia and Indiana, have perhaps signaled the end of a very uncertain beginning for SMCRA.³ In Virginia Surface Mining and its companion case, Hodel v. Indiana, the Court put to

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³ SMCRA established two separate sets of regulations to implement its two part program. To date, countless provisions of both sets of regulations are being reconsidered by the Secretary of Interior or have been invalidated or are still on appeal in the federal courts of appeal. E.g., In re Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978), modified, 627 F.2d 1346 (D.C. Cir. 1980), and In re Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978), rev’d in part on other grounds, 627 F.2d 1346 (D.C. Cir. 1980). Only recently most of the permit requirement regulations were validated. In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981).

SMCRA had a slow birth; it took Congress six full years and two presidential vetoes before SMCRA became law. See Note, A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature, 81 W. VA. L. REV. 775 (1979).

The interim regulations were promulgated in December, 1977, one month after the deadline established by SMCRA. See 42 Fed. Reg. 62839. 30 U.S.C. § 1251(a) (Supp. IV 1980) set November, 1977, as the deadline. From this date forward, the Program fell further and further behind schedule.

30 U.S.C. § 1251(a) (Supp. IV 1980) required the Secretary of the Interior to promulgate the permanent regulations by August 3, 1978, but it was not until April 12, 1979 that these regulations took effect. 30 C.F.R. §§ 700-890 (1979). State programs or federal programs were supposed to be in place by June 30, 1980. 30 U.S.C. § 1254(a) (Supp. IV 1980). Not one state program had been approved by that date and, while many state programs are currently under federal review, no permanent federal program has yet to be implemented in any state.

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rest the notion that SMCRA violates the Constitution by infringing upon powers reserved to or preserved for the states by the tenth amendment.4

This note looks at the coal mining industry and highlights some of the many characteristics which distinguish coal mining from industries regulated by other federal environmental laws. It contends that the site specific nature of coal mining does not make it as amenable to regulation by uniform national standards as are other industries. It also contends that SMCRA was destined to end up in the Supreme Court because, by necessity, it had to regulate activities of a mine operation well after mining ceased if it was to be effective. Basically, the provisions found unconstitutional by the lower courts were prime targets for challenge because they have an impact upon post-mining land use. This factor clearly set SMCRA apart from previous federal environmental laws which do not regulate sources after production or manufacturing ceases.

While a thorough review of SMCRA’s far reaching program is beyond the purview of this Note, an attempt will be made to explain the tenth amendment issues which are the crux of the states’ constitutional challenge of SMCRA. Further, this paper will review the lower court orders and comment upon the Supreme Court decisions in each case.

I. SMCRA WAS DESTINED TO END UP IN THE SUPREME COURT

The Surface Mining Act cases presented the Supreme Court with its first opportunity to evaluate a major federal environmental program within the context of a tenth amendment challenge. Prior tenth amendment challenges to other major environmental programs had focused upon sections of the administrative regulations promulgated to implement those programs, and not to the programs *per se*. These two SMCRA cases were different; at issue in each were several provisions of the Surface Mining Act, and not the regulations pertaining thereto.

Like other pieces of comprehensive federal environmental

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4 The tenth amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. amend. X.
legislation, SMCRA established uniform national standards first, and then gave the states the opportunity to assume primary regulatory authority from the federal government. States could not qualify for primacy until after they had state programs which met federal requirements. If the laws and regulations, agency staffs and other regulatory portions of state programs were determined by a federal agency (in this case by the United States Department of the Interior) to be adequate to enforce the mandates of federal law, then the federal agency, as authorized by Congress, would delegate that authority to the state. The state would then issue permits and regulate the industry. At this point, however, SMCRA’s similarities with other major federal environmental legislation such as the Clean Water Act and Clean Air Acts ends. The basic reason why SMCRA differs from acts which regulate air and water exclusively, and the reason why SMCRA was destined to reach the Supreme Court on the tenth amendment issue, emanate from the unique nature of the industry it regulates and from the unique pollution control problems inherent in that industry.

SMCRA does not have the luxury of focusing exclusively upon the most obvious air or water pollution problems. It cannot determine what numerical effluent limits shall be imposed on a discharge into the nation’s water resources from a coal mine, nor can it dictate what emissions limits will be required to minimize air pollution from a coal mine. These limits are set by other


7 The Clean Water Act only regulates the actual discharge of pollutants through a defined point source. 33 U.S.C. §§ 1311, 1342 (1976 & Supp. IV 1980). Surface coal mines have point sources such as sediment control ponds, culverts and ditches which channel water through a permit area, and even rills and gullies which form a revegetated land. See Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980). SMCRA 30 U.S.C. § 1292(a)(3) (Supp. IV 1980) provides that it shall not supersede, modify, amend or repeal any provision of the Clean Water Act. SMCRA can only fill “gaps” left in the water pollution control program for mines established by EPA. See In re Surface Mining Regulation Litigation, 425 F. Supp. at 344.

8 With the exception of defined emission sources at preparation plants and other facilities and equipment related to mining, most air pollution problems emanate from “fugitive dust.” Dust is created by vehicles moving on roads, over-
federal laws. SMCRA must go well beyond these immediate air and water pollution sources to regulate the entire manufacturing (mining) process as well as the entire reclamation process if it is to be effective.9

During the construction (site preparation) and operational stages of mining, SMCRA establishes both performance standards and mandatory design standards in great detail. These standards treat mining and reclamation as a continuum. For example, SMCRA determines how close, in feet, reclamation operations must be to active coal removal.10 It regulates the design, construction, and later removal of excess spoil disposal areas,11 and establishes mandatory design and abandonment requirements for water pollution control devices.12 SMCRA establishes minimum distances for a myriad of activities,13 including the specific hours during which blasting will be authorized,14 and the specific seed mixture ratios for reclamation operations.15 Prevalent throughout the Act is the philosophy that tight regulatory control during mining and strict adherence to performance standards enable the operator to achieve the reclamation standards established by the Act.

Both mining and reclamation requirements are at first reflected on maps, plans, narratives and construction designs submitted to the permitting authority. Upon issuance of a permit, the operations are inspected at least once a month to insure that

burden being moved around the mining operation, etc. SMCRA will not even specifically address fugitive dust emissions. 47 Fed. Reg. 7384 (1982).

9. Under most federal laws, once the manufacturing process ceases, permits are no longer needed. Under SMCRA, once the operator ceases coal production he is still responsible for totally reclaiming the land. This commitment guaranteed by the bond can last for many years and, in some cases where reclamation or control of water pollution cannot be achieved, the commitment may be perpetual. See 30 U.S.C. § 1265(c)(3) (Supp. IV 1980) (no bond shall be released until compliance with all reclamation standards are met); 30 U.S.C. § 1265(b)(10) (Supp. IV 1980) (requires avoiding acid mine drainage). Thus, as long as an acid discharge exists, no bond may be released and treatment of the discharge must continue.


13. 30 U.S.C. § 1265(b)(15) (Supp. IV 1980) (explosives), (b)(12) (concurrent surface and underground mining); (b)(8) (mining near streams) and § 1272(e) (prohibits mining near various natural areas and many facilities and dwellings).


the prior approved plans are followed. Failure to follow those plans may result in an immediate shut-down of the operation or in a variety of penalties.\footnote{30 U.S.C. §§ 1268, 1271 and 1260(c) (Supp. IV 1980). SMCRA authorized state or federal inspectors to order the immediate cessation of a coal mining operation without a prior hearing. The Supreme Court found that the procedure did not violate due process. 452 U.S. at 335. SMCRA required the prepayment of civil penalties as a condition precedent to the operator challenging the initial violation which led to the assessment of penalties, but this and the takings issues were found not to be ripe for review. 452 U.S. at 335.}

Unlike most industry, coal mining is not a stationary source of pollution.\footnote{Environmental Protection Agency, Development Document for Interim Final Effluent Limitations Guidelines and New Source Performance Standards for the Coal Mining Point Source Category, EPA 440/1-76 1057-a at 34-35 (1976). Of course, underground mining also occurs throughout the United States.} Mining is a continuously expanding process where the amount of land actually disturbed by mining may depend upon the mining techniques chosen by the operator or upon unexpected occurrences. Surface mines cause most surface disturbances during active mining. Operators excavate down to a coal seam and then follow that seam wherever it leads as long as mining is economical. When surface operations employ the contour method of mining, the operation results in long sinuous bands of strip mined land around part or all of a mountain. Other operations employ a technique known as auger mining, where the coal seam is exposed and then a large drill bit is inserted horizontally into the seam to extract the coal. Other operations employ area mining techniques where large blocks of land are cordoned off and stripped in succession. In each technique, the total amount of disturbance is known before mining begins and is limited by the permit.

Most techniques of underground mining, on the other hand, cause a very limited amount of surface disturbance during the initial period of operation. Major surface disturbance by underground mining generally occurs after mining ceases. The surface land will subside as the underground cavities caused by coal extraction begin to cave in. However, the actual amount of land disturbed by underground mining is always variable. As mining progresses underground, an occasional surface breakthrough is necessary to ventilate the underground workings, and if mining has progressed into another watershed or valley, additional en-
try points may be necessary. It is not possible to pre-determine where additional underground entries may be needed, as roof falls or other unexpected underground conditions prevent accurate predictions.

The water pollution problems posed by coal mining differ significantly from most industries. Coal mines do not use water in the mining process; and no process waste water per se is produced during the actual excavation of mineral. Instead, most water enters the mine as a result of precipitation or percolation. Generally, however, coal mine operators are required to maintain the quality of all water discharging from their permit area without regard to its original source. Thus, as soon as rain hits the mine site, it turns into unwanted runoff. The runoff must be collected and treated even though the operator is not responsible for its presence. On the other hand, if the operator can divert water and prevent it from flowing onto his permitted area, he is not responsible for maintaining its quality. In certain underground mines, great effort is expended by pumping water out of the mine as it seeps down from the surface. Furthermore, at many mines, major water pollution problems develop well after mining ceases, as natural elements in the soil and the coal seam combine with air and water to form acid mine drainage. This discharge, which can last for many years, can completely destroy streams if left unattended.

Air pollution problems are also different from other industries. The major air problem at mine sites is fugitive dust caused by continuous earth moving activity aggravated by natural climatic conditions. Controlling dust is a difficult task in the open fields of a coal mine both during and after mining. Thus, control measures are also required throughout the mining and reclamation process.

Unlike other industries, it is not always possible to minimize the environmental impact of a mine by carefully selecting a site for operations. The decision as to where and how to locate a coal mining operation, unlike most other industries, is truly site

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19 Id.
21 Supra note 18.
specific. The location and thickness of the coal seam, the overlying rock strata, the terrain and the climate are but a few of the many uncontrollable factors which dictate where and how mining will progress. Also, any one of these elements may determine whether an operator will be able to comply with SMCRA's requirements and therefore obtain a permit.

Because of the recognized problems which result after mining ceases, SMCRA continues to specify performance standards applicable to an operator anywhere from five to ten years after initial revegetation is established. With few exceptions, all mined land must be returned to its pre-mining configuration. Various pollution control devices must be maintained, cleaned and then abandoned over a period of years. Operators must continue treating any water which may discharge from a permit area and must continue to revegetate the area until predetermined standards are met. These and many other post-mining responsibilities are imposed upon an operator well after his profit has been obtained from the land.

Undoubtedly, Congress faced a tough challenge in developing a nationwide, uniform coal mining and reclamation program. Other federal laws already regulated the discharge of water pollutants from surface mines and underground mines while they were active, and the same was theoretically true of air emissions. Many air and water pollution control practices which regulated an industry while it was active had survived claims that they interfered with state authority, but none of those practices extended to post-manufacturing activity as does SMCRA. SMCRA regulates the condition of the land during mining and, most importantly, also regulates the condition of the land after mining. Land can no longer be abandoned or left in an unreclaimed state, but must be restored at least to its pre-mining condition. If an alternate land use were desired by the operator or the landowner, a limited selection of alternative uses is offered by SMCRA. Hence, the Act both dictates and limits post-mining land use in a fashion unheard of in earlier federal programs.

25 See infra note 51.
Mining and reclamation are not static. They are inextricably tied to the land and to each other. The land use regulation under SMCRA, although necessary, became a prime target for the collective frustration of the states and industry who attempted to grapple with uniform standards on a site-by-site basis. The Virginia and Indiana cases exemplify the local difficulties generated by such a comprehensive program as SMCRA. Since most of Virginia’s surface coal mines operate on steep-slope lands, it was surely to be hardest hit by SMCRA’s rigid steep-slope requirements. In mountainous areas where flat land commands a high price, restoring steep-slope lands to their original condition seemed a waste of time and expense, yet it was mandated by federal law.

Similarly, in Indiana, where farming is king, the State thought it should determine whether some of its prime farmland would be removed from production by converting it into another use after mining ceased. Instead, Indiana contended that Congress, through SMCRA, was now indirectly making that choice. Since most of Indiana’s coal mining takes place on prime farmland, the State believed that it was constitutionally guaranteed the right to make such choices. Both Indiana and Virginia saw the Act as an impingement upon its power to make land use decisions, and as establishing what have to be deemed preferences for land use. This, they argued, was impermissible.

II. THE DECISIONS RENDERED BY THE VIRGINIA AND INDIANA FEDERAL DISTRICT COURTS

The federal district court in Virginia Surface Mining framed the major issue, confronting it thusly: “The issue before the court

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26 See also Developments Under the Surface Mining Control and Reclamation Act of 1977, 82 W. VA. L. REV. 1277 (1980). Senate Bill 1403 was offered in 1979 by a coalition of senators to amend SMCRA by deleting the requirement that state programs contain regulations consistent with the federal regulations.


...is whether the federal surface mining act is directed to the state as a sovereign entity, displacing its role as a decision-maker in areas of traditional governmental services, or whether the act is directed to private activity."  

The district court recognized that SMCRA was "a comprehensive statute designed to provide a set of national environmental performance standards" to be applied to all but a few surface and underground coal mining operations throughout the United States. It discussed the Act's two-tiered implementation scheme. The first tier consists of an interim program which, beginning in 1978, required all mines to upgrade their operations to meet selected performance standards from the Act and a set of interim regulations promulgated by the Secretary of the Interior. The second tier involves a permanent program which, beginning in 1979, required all coal mining operations to obtain permits in compliance with SMCRA, all of its performance standards, and an even more detailed set of regulations.

Then, in succession, Judge Williams found: (1) that while SMCRA "allows the state to elect" to adopt and then implement a federal program, once that election is made the state loses all freedom to tailor its program to its needs because the criteria for approving state programs essentially requires that they mirror the federal program; (2) that although land use control and planning is a traditional local government function, SMCRA infringes upon that tradition, displacing the states and depriving them of the opportunity to make essential choices regarding post-mining land use; (3) SMCRA not only causes the states to lose control over future economic development of land, but it also

29 Id. at 432.
30 Id. at 428.
31 SMCRA applies to surface coal mines and to the surface effects of underground coal mines as well as to facilities incidental to coal mines such as coal preparation plants, tipples, repair yards, rail sidings, etc. By definition, SMCRA's coverage is incredibly broad. 30 U.S.C. §§ 1291(28)(A) & (B) (Supp. IV 1980). 30 U.S.C. § 1278 (Supp. IV 1980) specifies three narrowly drawn exceptions.
32 SMCRA § 502(c) established the interim program. It consisted mostly of on the ground compliance with performance standards and very little paper work. Permit application and issuance requirements were to be regulated by the permanent program, 30 U.S.C. § 1252(c) (Supp. IV 1980). See also 30 U.S.C. § 1251(a) (Supp. IV 1980) providing for the promulgation of interim regulations.
33 30 U.S.C. §§ 1251(b), 1252(d) (Supp. IV 1980).
34 483 F. Supp. at 432-33.
35 Id. at 433.
adversely affects the value of land by severely limiting post-mining configuration of the land;\textsuperscript{28} and (4) SMCRA has and will cost the state much in lost revenue and added expenditures to enforce and administer the interim and permanent programs.\textsuperscript{37}

After this litany of criticism and findings of adverse impact were visited upon the State of Virginia by SMCRA, the court's conclusion was not surprising:

After having synthesized the cumulative effects of the evidence presented, the court finds that the Surface Mining Control and Reclamation Act of 1977 operates to 'displace the state's freedom to structure integral operations in areas of traditional governmental functions,' National League of Cities, 426 U.S. at 852, and, therefore, is in contravention of the Tenth Amendment.\textsuperscript{38}

In determining what relief would be appropriate in view of the perceived tenth amendment violations, the court balanced federal and state interests. Contrary to his earlier pronouncements, Judge Williams substituted his opinion for Congress'. Specifically, in deciding to enjoin the approximate original contour provisions applicable to mining operations on steep slopes,\textsuperscript{39} the court found that the provisions were "not environmentally sound" and did not serve the conservation interests of the federal government."\textsuperscript{40}

In the SMCRA case filed by Indiana,\textsuperscript{41} the lower court was called upon to determine whether SMCRA's provisions affecting mining on prime farmland, requiring return of surface mined land to approximate original contour, requiring topsoil removal, segregation, and replacement, and requiring post-mining land

\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 435.
\textsuperscript{31} Approximate original contour (AOC) is achieved once mined land is returned to its pre-mining configuration. All highwalls, the vertical face which is created to excavate coal, are eliminated and the land is graded to blend into the previous natural drainage pattern of the surrounding terrain. 30 U.S.C. § 1291(2) (Supp. IV 1980). Steep slopes are defined as those slopes in excess of twenty degrees. 30 U.S.C. § 1295(d)(4) (Supp. IV 1980).
\textsuperscript{40} 483 F. Supp. at 435. Earlier in his opinion, Judge Williams stated, "A court may neither examine the motive or purpose behind the legislation . . . nor substitute its own judgment for that of the Congress." Id. at 430. No explanation is offered in defense of this contradiction.
\textsuperscript{41} Indiana v. Andrus, 501 F. Supp. 452 (S.D. Ind. 1980).
reclamation plans violated the tenth amendment. Unlike the pinpointed issue facing Judge Williams, plaintiffs in the Indiana case launched a “shot-gun attack” against SMCRA. 42

Plaintiffs argued, and the court agreed, that the “prime farmland” provisions have but a trivial impact on interstate commerce and thus were outside the scope of the federal commerce clause powers. 43 The court found that the approximate original contour provisions, the topsoiling requirements, the reclamation plan requirements and the provisions to designate areas unsuitable for mining were not calculated to alleviate water or air pollution and thus were “not reasonably and plainly adapted to removing any substantial and adverse effect on interstate commerce.” 44 The lower court appeared to be comfortable with its decision to single out certain provisions of SMCRA and seemed insensitive to the consideration that the program established by the Act was comprehensive and interdependent.

Having easily disposed of the commerce clause issues, the court then proceeded to summarize the tenth amendment issues surrounding these same provisions. According to the court:

If Indiana does submit a state program, it will have to comport fully with both the Act and the Secretary's regulations, which contain explicit and implicit federal land use control and planning policies and decisions, as well as required state governmental structures and procedures for further land use decisions. This constitutes Federal regulation of the states as states under National League of Cities. (Emphasis supplied). 45

The following language is typical of the court's conclusions by which SMCRA was determined to dictate the land use policies:

The 'prime farmland’ provisions combine to have prime farmland defined by regulations of the Secretary of Agriculture, with an applicant's permit being conditioned upon a commitment to a post-mining farm use at least until the release of the bond, which will not be released until productivity has reached equiv-

42 Id. at 455-56. In all, twenty-one provisions of SMCRA were challenged.
43 Id. at 460. Contrary to the Indiana district court, Judge Williams in Virginia found that “Congress' enactment of the federal surface mining act is within the scope of the commerce clause. . . .” 483 F. Supp. at 430-31.
44 501 F. Supp. at 461.
45 Id. at 465.
alent levels of yield as non-mined prime farmland in the surrounding area under similar levels of management. [citation omitted]... These 'prime farmland' provisions are per se land use control and planning decisions.  

Since land use control and planning was deemed by the court to be a traditional area of state sovereignty, any federal regulation intruding into that area was seen as displacing the states, and hence violating the tenth amendment. The court assumed that SMCRA did regulate land use and thus found that SMCRA regulated not private activity but regulated the states as states. The pre-mining commitment to a specific post-mining land was confused by the court with traditional land use control measures. The court determined that Congress sought to guarantee that prime farmland was preserved, regardless of the possible alternative uses available. Then, just as Judge Williams had done in Virginia, Judge Noland substituted his opinion for that of Congress. Judge Noland dissected SMCRA's pollution control provisions and rejected many.  

In the end, it took Judge Noland one day's worth of testimony and evidence to overturn what it took Congress six years of testimony and evidence to decide.  

No explanation was given as to why the court deemed it necessary to decide the tenth amendment issues after having found certain provisions of SMCRA outside Congress' commerce clause powers. Since the tenth amendment limits the power of Congress under the commerce clause, if no authority exists within the commerce clause to support provisions of the Federal Mining Act, then the tenth amendment issue should not arise.  

The stage was set for the Supreme Court. Almost three years after SMCRA became law, two federal district courts had found provisions of the Act violate the United States Constitution.  

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46 Id. at 465-66.  
47 Later the Supreme Court would condemn this practice. Each and every provision of a comprehensive regulatory program need not be justified by one of Congress' powers. It is enough that the Act as a whole pass constitutional scrutiny. E.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).  
48 See supra note 3.  
49 "The Congress shall have power to... regulate commerce... among the several states..." U.S. CONST. art. I, § 8.  
50 At least three other federal district courts have upheld SMCRA against various constitutional challenges. In Concerned Citizens of Appalachia, Inc. v. Andrus, 494 F. Supp. 679 (E.D. Tenn. 1980) appeal pending, No. 80-1448 (6th Cir.
Never in the field of the federal environmental law had the tenth amendment been used to so decimate a comprehensive regulatory program. If the lower courts were correct in their assessment of SMCRA's impact upon the states, then neither the federal Clean Water Act nor the federal Clean Air Act would be safe from similar challenges. Decidedly, each has an impact upon land use in the states, although that impact is less direct than SMCRA's.

III. THE UNITED STATES SUPREME COURT SUSTAINS SMCRA AGAINST THESE TENTH AMENDMENT CHALLENGES

In finding that SMCRA is in part violative of the tenth amendment, the lower courts relied extensively upon the 1976 decision of the Supreme Court in National League of Cities v. Usery. In that case, the Court recognized the plenary power given

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1 Without significant exceptions, the lower courts have rejected tenth amendment challenges against federal environmental legislation. See, e.g., District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded per curiam sub nom, EPA v. Brown, 451 U.S. 99 (1977) (certain EPA regulations were invalidated under the tenth amendment but the Clean Air Act as not); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), vacated and remanded per curiam, 431 U.S. 99 (1977) (the Clean Air Act was found not to infringe upon the states as prescribed by the tenth amendment. The EPA regulations at issue were withdrawn while pending review in the Supreme Court, mooting the issue whether they violated the tenth amendment); NRDC, Inc. v. Costle, 564 F.2d 573 (D.C. Cir. 1977) (the court upheld the water quality planning requirements of the Clean Water Act); U.S. v. Duracell International, Inc., 510 F. Supp. 154 (M.D. Tenn. 1981) (holding that mandatory joinder of a state as a defendant in an enforcement action against a municipality as required by Section 309 of the Clean Water Act did not violate the tenth amendment); U.S. v. Plaquemines Parish Mosquito Control Bd. Dist., 16 Env'T Rep. (BNA) (1981), cert. denied, 50 U.S.L.W 3839 (April 20, 1982) (Finding that Sections 301 and 404, Clean Water Act permitting requirements, as applied to state or local governments did not violate the tenth amendment even though local police powers were involved); State of Minnesota by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981) (validating provisions of the Boundary Water Canoe Area Wilderness Act prohibiting motorboats and snowmobiles on lands under state control).

to Congress by the commerce clause. However, the Court cautioned that this power could not be exercised in a fashion contrary to the tenth amendment. It could not impair "the states' integrity or their ability to function effectively in a federal system."

A. National League of Cities.

The holding in National League of Cities generated much confusion, as it appeared at first blush to be inconsistent with established precedent. At issue were the 1974 amendments to the federal Fair Labor Standards Act. As originally enacted in 1938, the Act established a federal minimum wage for non-governmental employees. The Supreme Court in United States v. Darby upheld the Act as a valid exercise of Congressional authority under the clause. However, the Court ruled the opposite when the 1974 amendments extended the Act to cover all state and local government employees.

Unlike the original Act, which was directed solely to the activity of private employers, the 1974 amendments were found to regulate the "states as states." Not only were the states regulated directly, by regulating state employee pay scales, the federal government had infringed directly upon what the Court characterized as an "undoubted attribute of state sovereignty"—the states' power to determine the wages which shall be paid to those whom they employ. Having determined that this power was "traditionally" reserved to the states, the Court appraised this function to be so critical to the states' existence in the federal

53 Id. at 840.
54 Id. at 842.
57 312 U.S. 100 (1941).
58 426 U.S. at 845.
59 Id.
system that Congress lacked the power to "abrogate the states' otherwise plenary authority." The primary distinction between *Darby* and *National League of Cities* rested upon regulation of the states as states versus regulation of private activity. In 1938, Congress told private employers what they would pay their employees. In 1974, Congress told the states what they would pay their employees. Only the latter offended the Constitution:

The Court invalidated the 1974 FLSA amendments on the grounds that they exceeded the commerce clause's grant of authority since they contravened the tenth amendment. In the years subsequent to the decision in *National League of Cities*, many tenth amendment challenges were raised in the lower courts; many directed against federal environmental statutes which had an undeniable impact upon the states.2

When the two SMCRA cases emerged, the high Court was given an opportunity to judge whether federal efforts to protect the environment impermissibly infringed upon functions guaranteed to the states by the tenth amendment.

B. The Test in Virginia Surface Mining.

Out of the confusion that had entangled its *National League of Cities* decision, the Court in the SMCRA cases distilled a three part tenth amendment test. Each of these three tests had to be met in order for a clear tenth amendment violation to exist. In articulating these tests, the Court stated:

First, there must be a showing that the challenged statute regulates the 'states as states'... Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty'... And, third, it must be apparent that the states' compliance with the federal law would directly impair

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1 Id. at 846.
2 Id. at 845.
3 See supra note 51.
their ability 'to structure integral operations in areas of traditional functions'...63

As the Court noted, the 1974 Amendments to FLSA met all three tests. It regulated the states, usurped the states' function of setting wages for its employees, and threatened the states' ability to function effectively. Higher minimum wages meant less necessary police power services and higher costs for those services. SMCRA, the Court was quick to point out, was clearly distinguishable.

C. SMCRA Does Not Regulate the States as States.

Contrary to the decisions of the lower courts in the Virginia and Indiana cases, the Supreme Court quickly determined that SMCRA did not regulate the states, although it did take away from coal-producing states their power to regulate the activities of coal mining operations. But, the states were not compelled to undertake any affirmative action whatsoever by SMCRA. In reviewing the Act, the Court stated:

[T]he states are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any matter whatsoever. If a state does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the federal government.64

Section 504 of SMCRA makes it clear that should a state choose not to submit a state program or choose not to implement, enforce, or maintain a state program after having received approval to do so, no penalties attach.65 Section 504 requires only that the federal government, through the Secretary of the Interior, implement and enforce a federal program in that state. If a state

63 452 U.S. at 287-88.
64 Id.
65 30 U.S.C. § 1254 (Supp. IV 1980). The civil and criminal penalty provisions of SMCRA are directed to "persons," "operators" or "permittees" and all are defined so as to exclude a state. 30 U.S.C. §§ 1268, 1271, 1291(13), (18) and (19) (Supp. IV 1980).

If a state chooses not to assume responsibility for enforcing the Act, the federal citizen suit provisions cannot be used to sue the state. The citizen suits provision is only applicable to non-discretionary state acts or duties and then only to the extent permitted by the eleventh amendment. 30 U.S.C. § 1270(a)(1)-(2) (Supp. IV 1980).
opts to implement a state program and then, for whatever reason, decides not to administer or enforce that program, Section 504 requires the federal government to step in and enforce part or all of that program which the state is not enforcing.

If a state fails to submit a program within the time limits established by SMCRA or, similarly, fails to resubmit a program after it was initially rejected by the Secretary of the Interior, again no penalties attach. Moreover, the states always retain the right to submit a state program for approval even after a federal program is installed.66

Further evidence that SMCRA does not regulate the "states as states" are the permitting provisions. They apply to individuals or businesses only. Section 506(a) prohibits any "person" from engaging in any coal mining activity without a permit issued under either a federal or state program.67 Only coal mine operators must submit applications for permits,68 and only coal mine operators are required to comply with the many environmental performance standards of the Act.69

Both lower courts believed that SMCRA's impact upon the state was also indirect in nature, and both courts believed that Congress could not do indirectly that which the Constitution prohibited it from doing directly.70 From this perspective, SMCRA also threatened the state's function of regulating coal mining operations and thus coerced the states into enforcing the Act. Under this theory, the states were coerced into enforcing the minimum federal standards, including federal land use policies, within their borders simply to retain regulatory authority over coal mines.

The Supreme Court also rejected this argument, finding that the lower courts had confused preemptive federal legislation with the tenth amendment's proscriptions.71 Since the Act did not regulate the states directly as states, Congress was free to displace

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66 30 U.S.C. § 1254(e) (Supp. IV 1980). the federally installed and administered coal mining program in place at the time, if any, remains in effect until the state program is approved.


71 452 U.S. at 289-90.
state police power regulation of private activity as long as coal mining operations affected interstate commerce.\footnote{72}

The Court recited a “wealth” of precedent to support its position.\footnote{73} Thus, the preemptive provisions of SMCRA were not barred by the tenth amendment. States could not issue permits which did not require compliance with SMCRA’s provisions.\footnote{74} Any inconsistent state laws could be superseded by SMCRA regardless of when they were enacted.\footnote{75} In the end, a state’s only option was to submit a program to the Secretary of the Interior for approval, if it desired to continue regulating coal mining operations within its borders. This was not coercion prohibited by the tenth amendment.\footnote{76}

D. SMCRA Does Not Interfere with Traditional State Functions.

The lower courts assumed that land use planning and control was the type of traditional function of government or attribute of state sovereignty protected by the tenth amendments.\footnote{77} Since Congress displaced the states by establishing minimum performance standards which contained land use measures, the SMCRA,

\footnote{72} The Court noted that even if land use was, to quote the lower courts, a “local” activity, the tenth amendment could not prohibit extension of the commerce clause power over that “local” activity. 452 U.S. at 281. The Supreme Court viewed surface mining and reclamation as the “local” activity whereas the lower courts intended “local” primarily to mean SMCRA’s land use requirements.

\footnote{73} Id. Citing U.S. v. Darby, 312 U.S. 100 (1941), the Court reaffirmed the concept approved of forty years earlier. Even though state establishment of minimum wage for private employees was a “local” activity, the commence clause could preempt state regulation of that activity. The same was true of SMCRA’s post-mining requirements.

\footnote{74} The Court noted that Congress could have “constitutionally” prohibited “any state regulation of surface coal mining.” 452 U.S. at 290.

\footnote{75} 30 U.S.C. § 1255(a) (Supp. IV 1980).

\footnote{76} In previous cases, the Court rejected the word “coercion” and chose instead the term “inducement.” The inducement, also described as the “carrot and the stick” approach, did not violate the tenth amendment. The federal government could condition federal grants on state action. E.g., Steward v. Davis, 301 U.S. 548 (1936), and Shell Oil v. Train, 585 F.2d 408 (9th Cir. 1978).

Obviously, states wanted to retain jurisdiction over coal mining and at the same time demand federal grants to aid in regulatory costs. It was their choice. The Court would not inquire further.

\footnote{77} 483 F. Supp. at 432; 501 F. Supp. at 468.
they argued, had met the second test established in National League of Cities.78

In review of these decisions, the Supreme Court found that it did not have to determine whether land use planning and control was a governmental function protected by the tenth amendment.79 The Court determined that SMCRA's provisions were not land use measures in the traditional sense. In Hodel v. Indiana, the Court stated:

We also do not share the view of the District Court that the Surface Mining Act is a land use measure after the fashion of the zoning ordinances typically enacted by state and local governments. The prime farmland and other provisions at issue in this case are concerned with regulating the conditions and effects of surface coal mining. Any restrictions on land use that may be imposed by the Act are temporary and incidental to these primary purposes. The Act imposes no restrictions on post-reclamation use of mined lands.80

Traditionally, zoning restrictions are placed directly upon the land.81 The decision to alter or revise zoning ordinances and plans rests with the state or local agency which enacts the ordinance. Once in place, those restrictions limit the type of development which can occur. The usage of zoned land is then carefully regulated. For example, land zoned as residential will be off-limits to industrial or commercial establishments. The power to zone local land usually emanates from defined or undefined local police powers.82

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78 The "integral government function" step. See supra note 63.
79 The Court in Virginia Surface Mining assumed for sake of argument that land use was "an integral governmental function' as that term was used in National League of Cities." 452 U.S. at 293, n.34. Then, in Hodel, the Court distinguished SMCRA's provisions from typical zoning measures.
80 452 U.S. at 331, n.18.
82 Local or sovereign are terms usually contained in a description of police powers. "In brief the police power is an inherent attribute of sovereignty, existing independently of a constitutional grant thereof. In general terms it may be said that it is as broad and comprehensive as the demand of society for its exercise . . . . [I]t is capable of evolving . . . to meet the demands and needs of an increasingly dense population and an increasingly complex society." Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833 (1960).
However, the provision of SMCRA which the lower courts said dictated land use are tied not to the land but to permits. Their duration is measured by the life of the operator's permit, and the permit is tied to a bond as SMCRA requires all permitted operations to post a performance bond before they obtain a permit. The purpose of a bond is two-fold. First, it is designed to require the operator to comply with the performance standards in the Act. Second, it insures that adequate funds will be available at all times so that the land may be reclaimed by the state or federal government in the event the operator cannot do so. However, once the bond is released, the operator's statutory responsibility ends and SMCRA can no longer be used to exert influence over the land which was once under permit.

The performance standards found to violate the Tenth Amendment (such as (1) the requirement that land be returned to its approximate original contour after mining ceases, (2) the requirement that prime farmland be returned to prime farmland once mining ceases, (3) the requirement that operators segregate, stockpile and redistribute topsoil, and (4) the requirement that operators remain responsible for their once mined land for at least five years) are not imposed directly upon the land. Rather, they are standards of performance which become terms and conditions of permits applicable to permittees only.

The Supreme Court found that the performance standards collectively were calculated to enable the operator to return mined land to its prior condition or better, not to dictate land use per se, but to insure a minimum of environmental degradation. The language of the Act supports the Court's opinion. SMCRA focuses

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83 30 U.S.C. § 1256(b) (Supp. IV 1980) provides for five year permits which must be renewed until reclamation is finished, which is at least five or ten years after successful revegetation has been established. 30 U.S.C. § 1265(b)(20) (Supp. IV 1980).
85 Id. The bond "is conditional upon faithful performance of all the requirements of this Act and the permit."
86 Id. The decision on the amount of bond is left up to the regulatory authority, but at least $10,000 must be posted.
87 For this to be otherwise, the land would have to be remined or at least capable of being remined. If that were the case, the land might be designated unsuited for mining pursuant to 30 U.S.C. § 1272(a) (Supp. IV 1980). This would be an extremely rare case.
88 30 U.S.C. §§ 1265(a) and 1266(a) (Supp. IV 1980).
89 452 U.S. at 283.
upon the importance of preplanning all mining and all reclamation operations well before the first soil is disturbed on the ground. Its voluminous permit application requirements and reclamation plan requirements are meant to insure that the operator can comply with the Act. If the application shows otherwise, no permit is issued.\footnote{30 U.S.C. § 1260(b)(2) (Supp. IV 1980). The applicant for a permit must demonstrate that reclamation, as required by SMCRA and its programs, "can be accomplished under the reclamation plan contained in the permit application. . . ." This affirmative demonstration is made well before mining begins.}

The Congress, after six years of testimony and fact gathering, found a record containing evidence of the adverse impacts caused by both active and abandoned coal mining operations.\footnote{452 U.S. at 278-79.} To minimize the effects of active and abandoned operations, Congress chose to dictate mining and reclamation practices. Consequently, SMCRA mandates that reclamation proceed side-by-side with mining.\footnote{30 U.S.C. § 1265(b)(16) (Supp. IV 1980).} Thus, on any given mining operation, both mining and reclamation would take place concurrently. Mining practices are so intertwined with reclamation practices that it would be difficult to characterize any as zoning ordinances because the condition of the land, not its use, is a primary concern of SMCRA.

In order to insure that mined lands would no longer adversely affect commerce, SMCRA allowed the operator to select a proposed post-mine land use. By obtaining a permit, the operator must effectuate that use upon the land. SMCRA limits the number of acceptable post-mining land uses from which an operator may choose,\footnote{This is not an affirmative limitation of land uses. Rather, it is an affirmative limitation upon the condition the land is in after mining. See, e.g., Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), cert. denied, 430 U.S. 459 (1977) (upholding the preservation of significant interior regulations issued by EPA). The PSD regulations can severely limit the way land is used. Clean air areas of the country may well be foreclosed from welcoming new industry. In Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), the court noted that a PSD designation in one area may have an adverse impact on the decision to allow private citizens to mine coal in another. There, the Northern Cheyenne Tribe could redesignate its reservation, as a Class I (pristine) area even though it might curtail coal mining in surrounding states. This was not violative of the tenth amendment even if it occurred as a result of federal law.}

The most extreme example is the decision in U.S. v. 0.16 An Acre of Land, 517 F. Supp. 1115 (E.D.N.Y. 1981). In that case, the court upheld the Fire Island National Seashore Act, which authorized the Secretary of the Interior to judge the adequacy of locally enacted zoning ordinances.
the tenth amendment. The limitation, however, is not premised upon land use decisions per se, but upon interstate commerce decisions. As the Supreme Court held, the limited choice is a direct reflection of Congress' desire to regulate the "conditions and effects of surface coal mining."94

In sum, the Court's decisions in Virginia Surface Mining and Hodel v. Indiana affirm that the indirect impacts upon the states, whether it take the form of preempts preemption state regulation of coal mining in general or dictating how operators will restore their mined land, do not offend the tenth amendment or exceed the Congress' commerce clause powers. Federal mining and reclamation practices are not to be considered as traditional land use measures and thus may be forced upon any coal mine operator without infringing upon traditional state functions. If a state wishes to regulate mining, it must enforce those federal requirements.

IV. CONCLUSION

The United States Supreme Court decision in Virginia Surface Mining and Hodel v. Indiana may be broadly read to hold that detailed federal environmental legislation does not offend tenth amendment prohibitions simply because it usurps state permitting authority. Primarily, these two decisions stand for the proposition that as long as states are given a choice to participate or not, without fear of any penalty or other enforcement reprisal, the tenth amendment is not implicated.

The Court emphasized the significance of the fact that, under SMCRA, states could not be forced or coerced against their will to enforce federal law. As long as this were true and the legislation was amply supported by Congress' commerce clause power, the federal government could regulate private activities that impacted upon the environment.95

94 See supra note 80.
95 Mississippi v. F.E.R.C., No. J79-0212(c), slip op. (S.D. Miss. Feb. 27, 1981), rev'd, 102 S. Ct. 2126 (1982). The Court has to review the constitutionality of the Public Utilities Regulatory Policies Act of 1978 (PURPA) which requires state agencies to consider various federally proposed rate alternatives during state rate-making procedures. The Court at oral argument concentrated upon the issue of whether PURPA required the states to take any affirmative action. In closing, the government argued that whatever intrusion upon state sovereignty that occurred, was minimal. 50 U.S.L.W. 3648 (February 1982).
It is also true that Congress may regulate state facilities as long as that regulation is limited to requiring state facility compliance with national standards. Justice Blackmun, the deciding vote in National League of Cities, concurred in the majority opinion solely because he believed that the majority had endorsed a balancing approach regarding tough tenth amendment issues. He stated:

I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standard would be essential. (Emphasis supplied.)

Blackmun's assumption was reaffirmed by the Supreme Court in the SMCRA cases. The Court cautioned that even though the three-part test may be met, this balancing process, acting as a fourth step, may still justify intrusion into state functions. Certainly in the environmental legislation area, where compliance by all with national standards was essential, a state could be forced to regulate air emissions from its facilities, its automobiles, and the water discharges from its buildings and institutions.

Even when that regulation goes beyond state facilities, states may not use the Tenth Amendment to avoid compliance with federal environmental mandates if the federal interest is paramount. Almost uniformly, lower federal courts have refused to find a viola-

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426 U.S. at 856. Some have cited this concurring opinion as evidence that National League of Cities only dealt with legislation that directly affects the state. See, McGinley & Barrett, the Commerce Clause and the Tenth Amendment at Odds: Can the Federal Surface Mining Act Survive National League of Cities? 8 No. Ky. L. Rev. 107 (1981). The SMCRA cases show that the same test applies when the effect on the state may be indirect.

452 U.S. at 288, n.29.

The question yet to be resolved is how far the definition of facility may be stretched. In cases under the Clean Air Act, for example, attempts to define highways as state facilities in order to require states to impose standards on highway users have met with limited success. Compare, District of Columbia v. Train, 521 F.2d 971 (1975), with U.S. v. Ohio Dept. of Highway Safety, 635 F.2d 1195 (6th Cir. 1980), cert. denied, 451 U.S. 949 (1981) (holding that the federal interest in controlling air pollution far outweighed any state interest in allowing noncomplying vehicles to use public highways.).

tion of the tenth amendment when achievement of national goals would be jeopardized. This is true even though most environmental legislation, by nature, will either overlap or replace local police power regulation.

A state’s authority may be preempted; it may have to conform its own facilities to federal standards; it may have to bow to paramount federal interests; and, in each situation, the tenth amendment would not protect it. Moreover, once a state had chosen to adopt and implement a federal program, it will waive any tenth amendment claim it has no matter how coercive of state sovereignty implementation might become.

Thus, what the Supreme Court termed “cooperative federalism,” in the area of environmental protection, is actually cooperation out of necessity, and not by choice. Although the Court did not determine to what degree state submission would have to rise to trigger the tenth amendment, it would appear, in the wake of the SMCRA cases, that federal intrusion on most state police powers would stand the test. While functions such as setting wages for state employees or deciding questions such as where to locate the state capitol are definitely protected, there is already a host of state police power functions over which federal power has been exerted under the auspices of federal environmental legislation supported by the Commerce Clause.

Sewerage, general sanitation, drinking water, waste collection and disposal, manufacturing, transportation, landfilling, labeling, and other concerns are all regulated by federal environmental laws. The SMCRA cases will not slow down this ever expanding federal role. Rather, they will vindicate all programs which preempt state authority and then delegate responsibility for enforcing federal environmental laws back to the states.

100 See, Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), judgment vacated, 102 S. Ct. 1416 (1981) (solid waste disposal and recycling long reserved to the states as traditional functions should not be subject to federal anti-trust statutes); Friends of the Earth, Inc. v. Carey, 552 F.2d 25 (2nd Cir. 1977), cert. denied, 434 U.S. 901 (1977) (finding that serious problems may only be forestalled through collective action by the national government).


102 452 U.S. at 289.