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FEDERAL AND STATE REGULATORY AUTHORITY UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

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INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) establishes a unique, complex and multi-faceted federal scheme which seeks to mitigate the environmental effects of coal mining operations. The initial (interim) regulatory phase of SMCRA, in a typical manner of federal regulation, vests essentially plenary regulatory power in the Office of Surface Mining Control and Reclamation (OSM). However, the second phase of SMCRA (the "permanent" regulatory program) provides for the transfer of regulatory lead to the states. During the interim regulatory phase, the states are to develop a permanent state program, including state laws, regulations, and enforcement procedures, which are then submitted to OSM for review. If approved by OSM, the state then assumes "exclusive jurisdiction" over the regulation of surface coal mining and reclamation subject only to federal monitoring and oversight under sections 521 and 523 of the Act.

OSM, however, has interpreted SMCRA as a blanket Congressional license allowing for a continued exercise of plenary federal regulatory power over surface mining activities even after a state program has been approved. In OSM's permanent regula-


tions, with which a state must comply in order to obtain state program approval, OSM promulgated extraordinarily detailed permit application and reclamation plan data gathering requirements under a guise of authority which SMCRA had apparently delegated to the state regulatory authorities under sections 507 and 508 of the Act.5

While extensive and pervasive federal regulation has become common, it is unusual if not unprecedented for Congress to legislate in extraordinary detail the actual procedures for daily regulation. Sections 507 and 508 of the Act set forth fifty-two categories of information which are required to fulfill the detailed permit application and reclamation plan provisions. The permanent regulations promulgated by OSM then expanded this extraordinary data demand to seventy-seven categories of information, arbitrarily adding an even greater measure of restrictive detail.

The precise scope of OSM's authority under SMCRA has been the subject of ongoing litigation in the United States District Court for the District of Columbia.6 Numerous aspects of the interim regulations have already been litigated.7 However, it is the permanent regulatory phase, now in litigation, which directly presents the threshold issue of whether Congress delegated primary regulatory power for the development and administration of that program to OSM or to the states.

The litigation of this issue has raised, in unique fashion, classic questions of federalism, and requires the resolution of federal-state conflicts that subsist in such a dual regulatory scheme. The

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5 SMCRA §§ 507, 508, 30 U.S.C. §§ 1257, 1258 (Supp. I 1977). The "regulatory authority" is a statutorily defined term, referring to the "state regulatory authority where the state is administering [SMCRA] under an approved State program or the Secretary where the Secretary is administering [SMCRA] under a Federal program." 30 U.S.C. § 1291 (22). OSM has been designated to act for the Secretary of the Interior under SMCRA. 30 U.S.C. § 1211(c). SMCRA requires each state to have its own individual regulatory program, administered by the state with OSM approval, or by OSM itself. Section 507(b), defining the contents of a permit application, states: "The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things. . . ." 30 U.S.C. § 1257(b).


importance of this issue need not be emphasized. Surface mining, because its techniques must be adapted to the diverse terrain, climate, soil, and other physical conditions of each minesite, does not easily lend itself to uniform national regulation. Moreover, the energy crisis has generated a strong need for rapid development of the nation's massive coal reserves. It is within the framework of SMCRA that Congress, the courts, OSM, and the states are facing the delicate and detailed problem of providing the regulation necessary to protect the environment without unnecessarily burdening or inhibiting coal production.

This article focuses on the most fundamental issues arising from that scheme. Did Congress impose restraints and limits on OSM's power as a federal regulatory agency? Did Congress intend for the states, to whom they delegated "primary governmental responsibility," to have the bulk of regulatory power? The enactment of SMCRA and its subsequent development by OSM bring these issues of federalism and federal regulation into clear focus and may well foreshadow the greatest change of direction in federal regulation and federal-state relationships since the New Deal.

I. The Act

Background

A historical perspective is invaluable in understanding SMCRA and the dual regulatory scheme chosen by Congress. In the last two decades there has been a significant shift in the methods chosen for coal extraction. Whereas, historically, underground mining had been the predominant form, by 1976 over 60% of the coal produced in this country came from surface mines. However, the extent to which surface mining was regulated varied drastically from state to state, with only slight environmental regulation in some areas. This resulted in unequal regulatory bur-

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8 One need only compare the small mines on Appalachian hills with coal seams of several feet and overburden of twenty to forty feet to the giant coal mines in the West with coal seams and overburden a hundred feet thick or more to realize the vast spectrum of diverse conditions that must be provided for in any federal regulatory scheme.
11 Id.
dens on coal producers of different states.

Congress began actively considering surface coal mining legislation in 1971, and during the next four years, numerous proposals were debated. This process was interrupted, however, by the 1973 Mid-East Oil Embargo. The resulting energy crisis and economic upheaval made painfully obvious the compelling need for quick development of domestic energy supplies and reduced dependence on foreign oil.

In 1975, Congress passed a surface mining bill, H.R. 25 that was subsequently vetoed. President Ford rejected the bill because it did not "strike a proper balance between our energy and economic goals and important environmental objectives." The President was also troubled by the incursion of federal government into a field which had been traditionally regulated by the states.

Two years later, SMCRA was passed by Congress and signed into law. Congress had responded to the Ford veto message and the changing public sentiment with a law designed to protect the environment without imposing unnecessary administrative burdens and costs on coal production. Congress also realized that, because of the unique conditions and special problems of each state, and in fact, each mining site, statutory requirements had to be flexible. While minimum uniform federal goals were required, the legislators recognized not only that the methods for achieving those goals had to be flexible, but that enforcement had to be on a state-specific and site-specific basis.

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12 Id. at 50.
14 Id. at IV.
15 The House Committee stated: "The House can support with confidence that enactment of the measure will result in the correction of the abuses of strip mining without resulting in any significant interruption of coal supply." H. R. REP. No. 1445, 94th Cong., 2d Sess. 5 (1976).
16 This factor was extensively discussed in several committee reports. For example, the Senate Committee stated:
Because mining conditions, climate, and terrain vary so greatly among the different coal fields, administration of a coal surface mining regulation and reclamation program is more properly done by the States. For example, a program geared to insure proper mining and reclamation in the mountains of Appalachia must understandably be different from one
In order to allow for the achievement of state primacy and to minimize administrative impediments on coal production, Congress carefully constructed a detailed and complex statutory scheme of procedures and minimum standards which also achieved the goal of protecting the environment. Various standards and requirements were set out in much greater detail than is typical in Congressional regulatory statutes. Furthermore, the regulatory authority is carefully defined.

The Statute

Seeking to preserve a delicate relationship between state and federal governments while simultaneously balancing the competing interests of coal production and environmental protection, SMCRA establishes a discriminating distribution of authority between state governments and the federal agency. Fairly summa-
rized, the Act gives OSM the authority to prescribe regulations under Title V regarding the review of state programs, to promulgate performance standards, to supervise federal coal lands, and to authorize Federal inspections of mining sites to insure adequate administration of state programs. There are no general provisions authorizing state regulation of the other parts of Title V, for the authority in such an instance flows from the sovereign state's police power. However, there are ample references to requirements for state regulations to provide a clear and comprehensive, if episodic, indication of the areas where the state regulatory authority was expected to have rulemaking authority. These are in addition to the basic requirement that the state regulations be a part of the state program. SMCRA section 508(a)(14) relates to additional information required in a reclamation plan. Guidelines for information needed on permit revision applications are contained in section 511(a)(2). The review and revision of outstanding permits, exploration permits, and notice of decisions on pending permit applications are also explicitly left to state regulation. Congress also provided some insight into this pattern of regard to the environmental control of surface mining. Under the Act, OSM is granted regulatory control regarding the implementation, development, and approval of state programs and federal programs within a state (SMCRA § 501(b), 30 U.S.C. § 125(b) (Supp. I 1977)); the implementation of performance standards specified in SMCRA §§ 515, 516, 30 U.S.C. §§ 1255, 1265 (Supp. I 1977) both under the interim and the permanent programs (SMCRA § 501(a), (b), 30 U.S.C. § 1251(a), (b) (Supp. I 1977)). Additionally, OSM has been given rulemaking authority in the following specific areas: special bituminous mines in the event state regulations become inapplicable, (SMCRA § 527(b), 30 U.S.C. § 1277(b) (Supp. I 1977)); mining in Alaska, (SMCRA § 708(e), 30 U.S.C. § 1298(e) (Supp. I 1977)); anthracite mines, (SMCRA § 529(a), 30 U.S.C. § 1279 (Supp. I 1977)); where federal lands are involved (SMCRA §§ 523, 601, 30 U.S.C. §§ 1273, 1281 (Supp. I 1977)); where joint action with another Federal agency is required (SMCRA § 510(d)(1), 30 U.S.C. § 1260(d)(1) (Supp. I 1977)); and in insuring the adequacy of inspections (SMCRA § 517(a),(b)(1)-(2), 30 U.S.C. § 1267(a), (b)(1)-(2) (Supp. I 1977)).

1 Regulation of mining was always within the traditional concept of the state police power. SMCRA § 527(b), 30 U.S.C. § 1277(b), authorizing state regulations which provide more lenient standards for special bituminous mines should not be viewed as an exception since federal authority would be needed to depart from the federal act and accompanying regulations defining the performance standards.


3 These areas are covered in SMCRA §§ 511, 512(a), 514(b), 30 U.S.C. §§ 1261, 1262(a), 1264(b) (Supp. I 1977), respectively. Other relevant sections include: environmental performance standards, SMCRA § 515(a), 30 U.S.C. § 1265
authority through statements of findings, policy and purposes incorporated into the Act.\textsuperscript{24}

The Congressional Committee Reports contain repeated declarations that coal production should not be deterred or curtailed by administrative and bureaucratic delay and red tape, especially when no legitimate environmental interests are being served.\textsuperscript{25} Since Congress determined that the primary regulatory responsibilities should lie with the states rather than with OSM, the Act divides responsibility for the control of surface mining between the states and the federal government, giving primary responsibility to the states. Congress included an express finding that "the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations should rest with the States."\textsuperscript{26} Congress made specific note of the diverse conditions existing in the various states,\textsuperscript{27} and also recognized the need for the establishment of appropriate national environmental standards.\textsuperscript{28} Therefore, the Act permits the establishment of uniform minimum environmental performance standards,\textsuperscript{29} while allowing each state to develop a regulatory program tailored to its unique conditions.\textsuperscript{30} If a state does not have an approved plan, then OSM must implement a federal program for that state;\textsuperscript{31} however, recognizing the diverse conditions, Congress requires the federal program to recognize local state conditions.\textsuperscript{32}

Moreover, the Act also distinguishes between the interim and

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\textsuperscript{26} Id., see subsection (a).
\textsuperscript{28} Id., see also SMCRA § 504(a), 30 U.S.C. § 1254(a) (Supp. I 1977).
\textsuperscript{29} SMCRA § 101(d), 30 U.S.C. § 120(d) (Supp. I 1977).
\textsuperscript{32} Id., see subsection (a).
permanent regulatory programs. During the interim period, OSM is given broad authority to set environmental performance standards and to establish an interim enforcement program. Under the permanent regulatory scheme, OSM's authority is significantly curtailed. OSM is empowered to promulgate procedural rules for the preparation and submission of state programs, but the states are responsible for implementing and enforcing their own program. OSM is not given primary enforcement responsibility unless a state fails to implement an approved program, and even then the Secretary must develop a state-specific regulatory program.

In summary, the Act represents a detailed, comprehensive scheme for distributing regulatory power between OSM and the states. The benefits from such a meticulous scheme are obvious; regulations can be tailored to the various types of surface mines, allowing for a maximum of environmental protection while avoiding superfluous provisions.

II. OSM's Interpretation of Its Rulemaking Authority in the Permanent Regulations

In promulgating the permanent regulations, OSM has broadly interpreted SMCRA as a typical federal remedial statute, investing them with pervasive regulatory power over the coal industry. Assuming this view, and given the traditional deference granted to agency action by the courts, OSM's scope of authority would be unlimited by SMCRA as long as the regulations were rationally related to the broad remedial purposes of the legislation. Against this backdrop, OSM has assumed rulemaking au-

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33 In discussing OSM's duties, the Committee distinguishes between its responsibility during the interim regulatory period, its role in approval of state enforcement programs, and its role in permanent Federal regulatory programs on Federal lands and in states without approved state programs. See H. Rep. No. 218 supra note 25 at 132, reprinted in [1977] 2 U. S. CODE CONG & AD. NEWS 664.
36 Id.
37 Transcript of oral argument on motions for summary judgment, In re Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C., filed Feb. 26, 1980) [hereinafter cited as Transcript].
authority over "regulatory procedure" as well as performance standards and approval of state programs, 39 conceding to states only the authority "to enforce State laws or regulations which are not inconsistent with the Act and [the permanent regulations], including the authority to enforce more stringent land use and environmental controls and regulations." 40

Relying on its asserted plenary authority, OSM's permanent regulatory program thus covers every aspect of surface mining under SMCRA. 41

A state program, to be approved under section 503 of the Act, must include every provision of the permanent regulations unless a specific alternate provision is approved by OSM. 42 In order to obtain approval of an alternative, a state must identify the specific provision of the regulations which the alternative would replace and demonstrate that the alternative is both "consistent with" the Act and the permanent regulations and "necessary because of local requirements." 43 "Consistent with" is defined as "no less stringent than and meets the applicable provisions of the [permanent] regulations." 44 In summary, under OSM's interpretation of SMCRA, the federal agency has plenary rulemaking authority. The states, in order to assume primary enforcement authority, must submit a regulatory program that is either consistent with the OSM program or more stringent.

OSM's interpretation of its plenary authority has its greatest impact in the permit data gathering regulations. For example, OSM chose to require a fish-and-wildlife survey in every permit application, 45 despite the fact that in some states, such as Pennsylvania, state agencies may have extensive fish and wildlife information already available. Another survey by the prospective permittee would thus be superfluous. Although Congress chose to make protection of fish and wildlife a specific performance standard, 46 they did not choose to include a fish and wildlife survey in

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40 30 C.F.R. § 700.3(c) (1979).
the statutory permit application requirements. Instead, they contemplated a state-specific determination of whether such a survey is needed in order to satisfy the performance standards.

Similarly, OSM requires a soil survey for each permit application.\textsuperscript{47} In contrast, the Act only requires a soil survey for potential prime farmlands.\textsuperscript{48} Of course, states may require soil surveys in other circumstances, but very often, the physical conditions of the mine site, the proposed post-mining land use, or existing information will render the soil survey unnecessary. Such unnecessary studies add costs to the mining operation but contribute nothing in the way of environmental protection.\textsuperscript{49}

As a final example, OSM requires permit application information for the entire "mine plan area" rather than just the "permit area."\textsuperscript{50} Without a mention of mine plan areas, the Act requires information beyond the actual permit site in only certain specific instances.\textsuperscript{51} In the opinion of the District Court, those articulations by Congress were intended to be the exclusive, limited instances in which information outside the permit area was to be required, and thus the court suspended the requirement of supplying mine plan area information in the permit application.\textsuperscript{52} This regulation, had it been upheld, would have required information which was duplicative for successive permits and unnecessary if the operator chose not to mine the entire coal seam.

Three different arguments have been offered in support of OSM's expansive interpretation of its rulemaking authorization

\textsuperscript{47} 30 C.F.R. § 779.21 (1979).


\textsuperscript{49} The D. C. District Court also found that this regulation lacked a statutory basis. See \textit{In re} Permanent Surface Mining Regulation Litigation, No. 79-1144 slip. op. at 39-40 (D.D.C., Filed Feb. 26, 1980).

\textsuperscript{50} "Mine plan area" is defined in 30 C.F.R. § 701.5. The mine plan area would encompass all lands that would be affected during the lifetime of a surface mining operation, extending through several separate permits. \textit{Id.} Particularly on large coal seams, the practice is to mine only sections of the entire coal seam at any one time. Separate permits would be required for each of the areas mined, but OSM's regulations would have required inclusive mine plan data for each individual permit.


\textsuperscript{52} See \textit{In re} Permanent Surface Mining Regulation Litigation, No. 79-1144 slip op. at 35-36 (D.D.C., filed Feb. 26, 1980).
for the permanent regulations. First, it is argued that under section 503(a) of the Act, OSM has the right to approve state programs, and further, under section 503(a)(7) state programs must be consistent with OSM's regulations. Therefore, the argument goes, OSM must have the authority to promulgate comprehensive regulations to serve as the basis for state programs.

While this argument seems appealing on its face, its validity rests on the contention that the Act establishes no distinction between performance standards and regulatory procedure. Under most regulatory statutes, this question would be resolved by the traditional doctrine that the authority to regulate includes the authority to prescribe methodologies and procedures by which the purposes of the regulatory scheme are to be accomplished.

Under SMCRA, the application of this doctrine merely begs the question, since it must first be determined who has the authority to regulate a given subject matter at a given time.

It is beyond doubt that Congress intended rationally-based uniform minimum performance standards. However, Congress also recognized the diversity in conditions among the states where surface mining would be regulated. The counter-point, then, is that Congress has allowed the states, if they so choose, to retain their power to regulate surface mining, subject only to minimum

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53 Transcript, supra note 38 at 100 provides in pertinent part:
(a) Each State in which there are or may be conducted surface coal mining operations on non-federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in Sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteenth month period beginning on August 3, 1977, a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes through . . .

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.


55 See SMCRA §§ 101(g), 501(b), 515, 30 U.S.C. §§ 1201(g), 1251(b), 1265 (Supp. I 1977). There is also a plethora of legislative history on this point. See text accompanying notes 72-90 infra.

performance standards and oversight through OSM. Under this view, section 503 merely recognizes OSM's authority to promulgate performance standards and insure that state programs are consistent with those standards.

The importance of the distinction between performance standards and regulatory procedure is highlighted in the second argument offered to support OSM's interpretation. Section 501(b) of the Act provides in pertinent part:

[T]he Secretary shall promulgate . . . regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of [Title V] and establishing procedures and requirements for preparation, submission, and approval of State programs; and development and implementation of Federal programs under [the Title].

Section 501(b) specifically refers to three areas of OSM's responsibility under Title V-Control of Environmental Impacts of Surface Coal Mining. Those areas are: 1) performance standards (section 515); 2) requirements for the submission and approval of state programs (section 503); and 3) implementation of federal programs (sections 504 and 523). The other provisions of Title V concern regulatory procedure such as, inter alia, permits and permit application requirements, reclamation plans and bonding. OSM's expansive interpretation would reject this distinction, contending that the power to promulgate regulations on performance standards includes the power to promulgate regulations which provide the regulatory authority with the necessary information and regulatory tools to insure compliance with the performance standards.

Once again, OSM's position is facially attractive but not en-

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57 Of course, OSM would have responsibility for mining on federal lands and for implementing programs for states electing not to regulate themselves under SMCRA. See SMCRA § 504, 30 U.S.C. § 1254 (Supp. I 1977), and note 16 supra. OSM would also be responsible for the grant-in-aid provisions of SMCRA (see note 16 supra), to help the states continue effective regulation.


completely consistent with Title V read as a whole. That portion of the Act contains numerous specific grants of rulemaking authority, not to OSM, but rather to the "regulatory authority." "Regulatory authority" is statutorily defined as "the [s]tate regulatory authority where the [s]tate is administering this chapter under an approved [s]tate program or the Secretary where the Secretary is administering this chapter under a [f]ederal program." Of course, when OSM is the "regulatory authority," it must promulgate regulations in a state-specific manner, but OSM will not be the "regulatory authority" until the time period has passed for state programs to be submitted and either approved or denied. Only after that time period has passed will OSM be able to identify those states for which a federal program must be implemented. Significantly, even that program must take into consideration the nature of the particular state's terrain, climate, biological, chemical and other distinct physical conditions.

An example of rulemaking authority granted to the regulatory authority under the Act is section 512, regarding coal exploration policies. Section 512(a) reads, in pertinent part:

Each State or Federal program shall include a requirement that coal exploration operations which substantially disturb the natural land surface be conducted in accordance with regulations issued by the regulatory authority. (Emphasis added).

Consistent with the definition of regulatory authority, this specific grant of rulemaking authority is apparently made to the states, and only in the event that a federal program must be implemented because no state program is submitted and approved, is OSM empowered with that authority. Other examples include section 508(a)(14) regarding reclamation plans and section 509.
Thus, a plain reading of the statute would seem to support the distinction between performance standards and regulatory procedure. Since Title V establishes minimum requirements for regulatory procedures, such a distinction would also reflect Congressional recognition of the diverse conditions existing in the areas subject to regulation, allowing amplification of regulatory procedures to reflect the actual needs of insuring compliance with the performance standards in the unique environments of individual states.

The final statutory basis offered for OSM's interpretation is section 201(c)(2), which is the general grant of rulemaking power to OSM. Under a general doctrine of administrative law, where the empowering provision of a statute states simply that the agency may make "such rules and regulations as may be necessary to carry out the provisions" of an act, courts generally give the agency broad discretion. However, additional specific statutory language can limit the scope of this otherwise broad discretion. Moreover, authority committed to one agency should not be exercised by another. Therefore, any conclusion on section 201 is dependent on whether Title V of the Act is interpreted to commit authority over regulatory procedures to the states.

III. LEGISLATIVE HISTORY

The legislative history of SMCRA raises further doubt concerning OSM's expansive interpretation of its rulemaking authority. The committee reports and references on the floors of both Houses of Congress described the bill as "providing for the cooperation between the Secretary of the Interior and the States with respect to the regulation of surface coal mining operations."
In introducing the legislation in the House of Representatives, Congressman Whalen noted that the purpose of the Act was to establish "minimum federal environmental standards." The House Committee Report described the purpose of the Act as establishing "a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with back-up authority in the Department of Interior."

Moreover, Congressional committees often reiterated that, because of diversity in conditions, states should have "primary governmental responsibility" for regulating surface mining. This is again recited as a finding in the Act itself. Congress was, however, aware that inadequate regulation in some states could only be remedied by federal action. Thus, OSM was created, in part, to:

assist the States in development of State programs for surface coal mining and reclamation operations which meet the requirements of the Act, and at the same time, reflect local requirements and local environmental and agricultural conditions.

The House Committee explained that SMCRA was a "delegation of primary regulatory authority to the states" with a "limited Federal oversight role." It is a fundamental principle that the bill was "to be enforced by the State[s] with back-up authority in

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the Department of the Interior.\textsuperscript{31}

There is also discussion in the legislative history, albeit somewhat ambiguous, concerning the distinction between performance standards and regulatory procedure. For example, in discussing the flexibility of the Act, the House Committee stated:

\begin{quote}
[we base our] approval of [the Act] on the expectation that Federal regulations promulgated under the act will fully implement the environmental performance standards. Obviously, the mere reproduction of the statutory environmental performance standards in the regulations would be inadequate.\textsuperscript{2}
\end{quote}

Significantly, the committee specifically contemplated some elaboration of the environmental performance standards but did not mention anything concerning OSM's authority to elaborate on the various enforcement procedures, including data gathering, contained in the Act. When this is read together with the numerous references to the state's primary enforcement responsibility under the Act, it is arguable that Congress did intend some distinction between regulatory procedure and performance standards.

The House Committee, while elaborating on this point in discussing federal-state relationships under the Act, stated that:

\begin{quote}
The committee believes . . . [t]hat the implementation of minimal Federal standards, the availability of Federal funds, and the assistance of the expertise of the Office of Surface Mining Reclamation and Enforcement in the Department of the Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the act.\textsuperscript{33}
\end{quote}

The major support in the legislative history for OSM's interpretation comes from a statement in the House Report that OSM would have authority to "promulgate regulations to implement the full regulatory program including technical requirements, permit processor [sic], and procedures for submission of State programs."

The weight of this statement is tempered, however, because it was made in the context of discussing amendments to

\begin{footnotes}
\item[34] Id. at 62, reprinted in [1977] U. S. Code Cong. & Ad. News 601.
\end{footnotes}
section 501 of the Act to "expedite the issuance of regulations covering the so-called interim period after enactment of the act but prior to the implementation of a full State or Federal surface mining program under the act."

It has also been pointed out that section 503(a)(7) of the Act was added during conference. However, since the meaning of that section depends on the overall interpretation of the Act, this addition, is, at best, ambiguous.

A final piece of legislative history must be mentioned. In 1979, the Senate overwhelmingly passed S. 1403 by a vote of 68-26. S. 1403 would remove, inter alia, the requirement of section 503(a)(7) of the Act that a state program include regulations consistent with OSM's regulations. This action was motivated by the "fact that rather than issuing rules advising the states of the minimum statutory performance standards their programs must meet, OSM has promulgated even more detailed federal regulations ... establishing uniform national rules specifying exactly how all states must proceed to comply with the standards of the Act." The Committee expressed concern over "the sensitive mechanism for achieving the high goals of environmental protection without confronting or diminishing the land use planning and police powers constitutionally reserved to the States," concluding the OSM's interpretation of the Act, and the permanent regulations, create "federal lead," rather than the "state primacy" intended by Congress.

Although S. 1403 is post hoc legislative history, and therefore not conclusive, it does provide an indication of the direction

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86 SMCRA § 503(a)(7) provides that state programs must include "rules and regulations consistent with regulations issued by the secretary pursuant to this chapter." 30 U.S.C. § 1253(a)(7).
89 Id. at 11, 13.
90 TVA v. Hill, 437 U.S. 153, 192 (1978); Regional Rail Reorganization Cases, 419 U.S. 102, 132 (1974); but see Citizens to Save Spencer County v. EPA, 600 F.2d 844, 867 (D.C. Cir. 1979).
Congress is apparently heading in the field of federal regulation.

IV. RELEVANT CASELAW

Since SMCRA presents a unique statutory scheme, there is no truly relevant caselaw. If OSM's interpretation is accepted, OSM would be accorded the great deference given federal agencies by the courts under broad remedial statutes. If the statute is read to leave regulatory procedure to the states, then many of the permanent regulations, especially the permit application regulations, are beyond the authority of OSM. A leading case on this point is Textile and Apparel Group v. F.T.C., where the court of appeals noted the general principle that authority committed to one agency should not be exercised by another. In Textile, the court was faced with an FTC regulation under the Wool Products Labeling Act. The regulation provided that the FTC could intercept imported wool at customs and test it before it was released into the country. The FTC was given general rule-making authority under the Act. The court found, however, that Congress had not intended to give this detention power to the FTC, because the Bureau of Customs, under the Secretary of the Treasury, was given the authority under the statute to exclude imported wool products which were misbranded. The court voided the regulation.

Courts are increasingly recognizing the "growing popular conviction that government agencies too often transgress the statutorily imposed boundaries of their authority." This recognition may well affect the interpretations of SMCRA by the courts, and Congress's future efforts with regard to federal agencies.

V. THE DISTRICT COURT DECISION

On February 26, 1980, the United States District Court for

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\textsuperscript{93} Id. at 1057.
\textsuperscript{95} 16 C.F.R. § 300.36 (1968).
\textsuperscript{97} See note 92 supra at 1055-57.
\textsuperscript{98} See Lubrizol Corp. v. EPA, 562 F.2d 807, 819 n.27 (D. C. Cir. 1977).
the District of Columbia filed its Memorandum Opinion on the coal industry’s challenges to the permanent regulations based on OSM’s lack of statutory authority. Many of the challenges raised the issue of the scope of OSM’s rulemaking authority and the grant of rulemaking authority to the states or “regulatory authority.” In its opinion, the district court partially accepted OSM’s interpretation of SMCRA insofar as OSM asserted authority to promulgate regulations covering the permitting process, reclamation plan requirements, bonding, coal exploration and other regulatory procedures.

However, the court refused to accept the contention that OSM had authority to establish permitting and reclamation plan regulations related to performance standards, without an authorizing statutory provision in sections 507 or 508 of the Act.

Specifically, the court accepted several possible justifications for a broad interpretation of the scope of OSM’s rulemaking authority. First, the court noted the general grant of rulemaking authority in section 201(c) of the Act and cited traditional cases holding that an agency’s regulations may cover areas not specifically delineated in its enabling statute, as long as the regulations “conform to an act’s purposes and policies.” Secondly, the court noted that state programs must conform with OSM’s regulations to be approved. Thus, the court accepted OSM’s argument that the Act’s grants of rulemaking authority to the “regulatory authority” did not limit OSM’s rulemaking power. Third, the court looked at the language of section 501(b) of the Act.

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99 See In re Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C., filed Feb. 26, 1980).
100 Id. at 38-40.
104 For a discussion of the various contentions on this point, see notes 54-58 and accompanying text supra.
and found it provided both procedural and substantive rulemaking authority to OSM.106 Finally, the court relied on two quotes from the legislative history of the Act: the House Report statements that "the mere reproduction of the statutory environmental performance standards in the regulations would be inadequate,"107 and, "[OSM may] promulgate covering the full regulatory program including technical requirements, permit processor [sic], and procedures for submission of state programs."108

However, when the court addressed specific challenges to permit information requirements in the regulations, it was far less deferential to OSM. For example, the regulations required permit application information for the mine plan area, rather than the permit area. OSM had attempted to justify this requirement by pointing to two sections of the Act which did require information beyond the mine plan area.109 The court rejected this justification, stating, "[t]he court can only draw the conclusion that Congress articulated, with specificity, those instances in which information outside the permit area was necessary."110

The court adopted similar reasoning in rejecting regulations requiring fish and wildlife studies, and soil surveys in every permit application.111 The court was unwilling to accept OSM's reliance on performance standards for permit information rulemaking authority, absent any statutory reference in the permit section of the Act.112

106 In re Permanent Surface Mining Regulation Litigation, No. 79-1144 slip op. at 7, 30-33 (D.D.C., filed Feb. 26, 1980).
110 Id. at 35.
111 Id. at 38-40.
112 Id. This reasoning is particularly perplexing, since the court had earlier upheld OSM's broad interpretation of its rulemaking authority, noting that the permit and bonding regulations were "inextricably linked to the environmental performance standards," and would "help to ensure compliance with the standards." Id. at 33.
In so doing, the court apparently took a middle ground, recognizing that Congress broke with tradition in SMCRA, but refusing to interpret SMCRA as a radical departure from traditional federal supremacy. The paradox in this holding is that it does not reach what is arguably the key issue of whether Congress intended a distinction between performance standards and regulatory procedure.

By upholding, in general, OSM's authority to promulgate regulations covering the permitting, bonding and other regulatory processes, the court seemingly rejected that contention. However, the court also rejected several specific regulations concerning permit application information because there was no statutory authorization to require this information accompanying the authority to promulgate performance standards. Hence, the court rejected the theory that the authority to regulate includes the authority to prescribe methodologies for accomplishing the regulatory scheme.

The court's apparent failure to directly address the issue of potential statutory distinction between performance standards and procedure is magnified somewhat by the reference to legislative history. One quote from the House Report refers specifically to elaboration of only "statutory environmental performance standards." The second quote deals with OSM's role in the absence of an approved state program, where OSM is the regulatory authority. Thus, despite the Court's considered opinion, questions remain.

Pending appeal, this interpretation, with its unanswered questions, stood as the interpretation of SMCRA. The district court had recognized the federal-state tensions inherent in SMCRA. The Court upheld OSM's authority based on SMCRA § 501(b), 503(a)(7), 30 U.S.C. §§ 1251(b), 1253(a)(7) (Supp. I 1977), both of which required a rejection of the standards procedure distinction. See *In re Permanent Surface Mining Regulation Litigation*, supra note 6, at 30-33.

Id. at 38-40. This discussion concerns the fish and wildlife study (30 C.F.R. §§ 779.20, 780.16 (1977)), and the soil survey (30 C.F.R. §§ 779.21, 783.21 (1977)).

See text accompanying notes 62-71 supra.

See notes 108-109 and accompanying text supra.

See text accompanying note 82 supra.

See text accompanying notes 84-85 supra.
CRA, and made an attempt to resolve them in a manner consistent with Congressional intent. However, it remains an open question how OSM will react to this resolution in applying the permanent regulations. Perhaps more enlightening will be Congressional reaction regarding S. 1403\textsuperscript{119} and other regulatory schemes now in the legislative process.

VI. THE COURT OF APPEALS DECISION

On July 10, 1980, a panel of judges from the United States Court of Appeals for the District of Columbia Circuit addressed the issue of OSM's statutory authority under SMCRA, and reversed the district court's judgment upholding OSM's authority to promulgate permitting regulations which transcend the minimum requirements set forth in the Act.\textsuperscript{120} The court of appeals adopted a far narrower view of OSM's statutory authority than the district court.\textsuperscript{121}

The court of appeals recognized the federalist tensions inherent in SMCRA, and Congressional efforts to "carefully [devise] a statutory scheme that would take all these concerns into account."\textsuperscript{122} Within that framework, the court proceeded to analyze OSM's authority under SMCRA.

OSM relied on the various grants of rulemaking authority contained in the Act.\textsuperscript{123} The court rejected these arguments, finding the cited provisions ambiguous, and recognized the key issue of consistency with the Act.\textsuperscript{124} The court also found the legislative history ambiguous.\textsuperscript{125}

Thus, the court turned to the purposes and structures of the Act. In so doing, the court found:

that Congress intended to rest in the states primary regulatory and decision-making authority and to place the Secretary in an oversight role to ensure that the states provide some minimal

\textsuperscript{119} See text accompanying notes 87-90 supra.
\textsuperscript{120} In re Permanent Surface Mining Regulation Litigation, No. 80-1308 (D.C. Cir., filed July 10, 1980).
\textsuperscript{121} Id. at 15-16.
\textsuperscript{122} Id. at 3.
\textsuperscript{123} Id. at 6-8.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 8-9.
level of regulation and control.\textsuperscript{126} This interpretation was supported by Congressionally declared purposes,\textsuperscript{127} the structure of the Act,\textsuperscript{128} and the allocation of authority.\textsuperscript{129} Applying the established rule that the decision-maker is ordinarily vested with authority to determine what information is needed,\textsuperscript{130} the court held that the Act, itself, imposed minimum requirements on the States which OSM could not expand.\textsuperscript{131} OSM's interpretation would "in effect . . . permit [OSM], by regulation, to take away the very discretion Congress sought to vest in the states."\textsuperscript{132} The court of appeals concluded:

Congress intended states to assume the primary governmental responsibility for enforcing the Surface Mining Act. To ensure states would live up to this duty, the Secretary of the Interior was given certain supervisory power. We would turn Congress's scheme on its head were we to allow that supervisory authority to consume state discretion and to reduce state power to a purely ministerial implementation of a federally devised program.\textsuperscript{133}

On August 28, 1980, the court of appeals granted OSM's motion for reargument before the court of appeals \textit{en banc}. The court of appeals decision apparently recognized SMCRA as a new direction in Congressional regulation, within the framework of federal-state relationships. Congressional reaction to the court of appeals final disposition of the issues raised in this case may well determine the direction of federal regulation for years to come.\textsuperscript{133.1}

\section*{VII. Future Directions}

Despite Congressional efforts, the SMCRA is inherently

\begin{itemize}
  \item \textsuperscript{126} \textit{Id.} at 10.
  \item \textsuperscript{127} \textit{Id.} at 10-11.
  \item \textsuperscript{128} \textit{Id.} at 11.
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.} at 12.
  \item \textsuperscript{131} \textit{Id.} at 12-15.
  \item \textsuperscript{132} \textit{Id.} at 13.
  \item \textsuperscript{133} \textit{Id.} at 15.
  \item \textsuperscript{133.1} The content of many state regulatory programs under SMCRA will await the outcome of the litigation in the court of appeals and the Supreme Court. In Pennsylvania, industry plaintiffs have successfully enjoined the submission of
\end{itemize}
flawed since it attempts the impossible task of prescribing detailed national minimum environmental performance standards for surface coal mining operations, located in diverse areas and employing various mining techniques. The surface mining of hundred foot coal seams with several hundred feet of overburden in the arid west raises completely different regulatory needs and problems from those of Appalachian surface mines with coal seams of several feet and less overburden. In fact, within the Appalachian coal fields, the mining techniques and regulatory needs can vary tremendously from state to state and within a state. Congress attempted to codify different needs for arid western mines “west of the one hundredth meridian west longitude.”

Similarly, Congress recognized the unique needs of steep slope surface mining which is typical in West Virginia, Virginia, and parts of Tennessee and Kentucky. Congress recognized and attempted to respond to each unique surface mining practice; however, there are other divergent practices and techniques which have not yet been recognized.

In an area of this importance, policy choices predominate. Obviously, there is a desire to afford maximum protection to our environment, and also to maximize our energy resources. In the case of SMCRA, these goals can be mutually accomplished only through efficient regulation. The issue thus focuses on which in-

Pennsylvania’s state program pending resolution of this litigation. Pa. Coal Mining Ass’n of Pa. Dep’t of Environmental Resources, Nos. 2718 and 2719 (Commw. Ct., Nov. 26, 1980)(preliminary injunction granted), stay denied, No. 80-3-817 (Dec. 12, 1980). Under § 503(d) of SMCRA, OSM cannot implement a program for a state where submission of a state program was enjoined, nor can federal funds under SMCRA be cut off. 30 U.S.C. § 1253(d)(Supp. I 1977). Similar injunctions have been issued in Indiana, Kentucky, Alabama, Virginia, and Ohio. See Meadowlark Farms, Inc. v. Indiana Dep’t of Resources, No. 80-1952 (Cir. Ct., Marion County, July 29, 1980); Morris Marshall v. Commonwealth of Kentucky, C.A. No. 80-CI-238, (Cir. Ct., Marion County, Oct. 31, 1980); Alabama Surface Mining Reclamation Council v. Alabama Surface Mining Comm’n, C.A. No. CV-80-369 (Cir. Ct., Walter County, Nov. 12, 1980); Virginia Surface Mining and Reclamation Ass’n v. Virginia Dep’t of Economic Dev. and Conservation, C.H. No. 48-03 (Cir. Ct., Dickerson County, Dec. 3, 1980); Ohio Coal and Energy Ass’n v. State of Ohio, No. 80-CV-11-6152 (C.P. Franklin County, Nov. 24, 1980); Consolidation Coal v. State of Ohio, No. 80-CIV-266 (C.P., Belmont County, Nov. 26, 1980).


OSM's interpretation of plenary rulemaking power for the permanent regulations can lead to a regulatory straitjacket for the states. For all provisions of Title V where Congress delegated authority to the "regulatory authority," OSM has substituted itself for the regulatory authority and prescribed extraordinarily detailed requirements for permit applications, reclamation plans, bonding, and coal exploration. This amounts to unwarranted OSM interference in day to day procedures and operations. This is not "state lead" or "state primacy" but rather federal dominance. Such OSM interference only compounds the problem of prescribing national minimum environmental performance standards in a diverse industry such as coal mining.

In support of OSM's expansive interpretation, it can be argued that some states have tried and failed to effectively regulate surface mining. Therefore, extensive federal regulation is necessary to protect the environment. Further, OSM will contend it is as sensitive to energy problems as the states.

It is more likely that regulatory detail on administrative functions, such as data gathering for permits or bonding, can only prevent effective regulation with arbitrary and inflexible burdens and costs. Similarly, nationally uniform regulation will of necessity be overgeneralized, placing many unnecessary administrative burdens on all mines because those requirements are necessary in some sections of the country. Thus, state regulations, tailored to local conditions, would provide more efficient regulation. Moreover, the federally mandated performance standards, and OSM's oversight of state enforcement would adequately protect the environment.

**CONCLUSION**

SMCRA may represent a cross roads in federal regulatory legislation. Since the New Deal, Congress has increasingly centralized regulation in federal agencies. The power to regulate and the scope of regulation have expanded at a geometric rate. Faced with growing public discontent with federal bureaucracies, and an industry where uniform federal regulation may be largely impractical, Congress enacted SMCRA. Despite statutory language indicating state regulatory lead or primacy with federal oversight, OSM has misinterpreted its enabling legislation as a typically
broad federal remedial statute. While the courts decide the proper interpretation, the underlying questions of effective federal regulation remain. Today the integrity of surface mining regulation in the states is directly affected, but the entire field of federal regulation may soon be swept into the same debate.