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Robert J. Shostak

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ESSAYS

THE PIT AND THE PENDULUM: THE SENATE AND S. 1403

ROBERT J. SHOSTAK*

This essay and the next examine and comment upon legislation proposed in Congress on behalf of Governor Rockefeller of West Virginia. The proposed legislation seeks, by amending the Federal Surface Mining Control and Reclamation Act, to limit federal involvement in the development of state surface mining reclamation and enforcement programs. These essays review the proposed legislation from quite different points of view; the discussions contained therein should be of great interest to those who are interested in the historical development of surface coal mining regulation in the United States.**

INTRODUCTION

Deplorable market conditions coupled with the recent promulgation of allegedly strangulatory federal performance standards have precipitated an intense lobbying effort by the American coal industry which has resulted in the passage of Senate Bill¹ 1403 designed to break the "regulatory stranglehold" of the Office of Surface Mining (OSM) under the guise of states rights.

Yet in those states such as Pennsylvania where stringent strip mine performance standards have existed for years, many operators have taken a hard and soul-searching look at S. 1403 and its ultimate impact on their operations within the state and have reached the conclusion that S. 1403 is not in their best inter-

* B.A. Bowling Green State University, B.G., Kentucky; J.D. University of Pittsburgh, 1971; Member Pennsylvania Bar.
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ests. Their reasons are quite simple. First, coal production like any business venture must be competitive. S. 1403 will not promote parity in the coal marketplace. Second, those operators have emerged from the shadow of the insensitive strip miner that ravaged the land and polluted the waters leaving unsightly scars upon the face of the earth.

Enlightened operators concede that existing technology for the mining of coal and simultaneous control of its environmental impact is not incompatible with the preservation goals of environmental legislation. The "albatross" which has hung so heavily and so long upon Appalachia should now take wing.3

I. LEGISLATIVE HISTORY OF THE SURFACE MINING CONTROL AND RECLAMATION ACT


The history of SMCRA is lengthy.5 Surface mining legislation was introduced as early as the 90th and 91st Congresses. In 1972, the House Committee on Interior and Insular Affairs reported on a surface mining bill which passed the House by a vote of 265 to

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3 The executive board and general membership of the United Surface Mine Operators voted to oppose publicly section 3 of S. 1403 at their membership meetings in September and November of 1979 and again in January 1980. More recently at the Coal Conference held by Governor Richard Thornburg in Hershey, Pennsylvania, the United Surface Mine Operators publicly presented its position as part of its participation in the conference.

4 See McGinley & Sweet, Acid Coal Mine Drainage: Past Pollution and Current Regulations, 17 Duq. L. Rev. 67, 97 (1978), where the authors have stated:
In the past, the [acid mine drainage] albatross has hung heavily around the Appalachian region as a symbol of depression and despair . . . The law now clearly compels treatment and abatement. If even one more mile of Appalachian stream is subjected to centuries of . . . pollution, the responsibility must rest squarely on the shoulders of those government officials charged with protecting our environment and upon the coal industry which has for so long turned a deaf ear to the complaints of its Appalachian neighbors.

75. The Senate Committee on Interior and Insular Affairs reported a similar bill but the 92d Congress adjourned before the Senate took any action on the legislation.6

From April 1973 through May 1975, Subcommittees on the Environment and on Mines and Mining of the House Committee on Interior and Insular Affairs held hearings in which more than 100 witnesses either appeared or submitted statements for the record.7 During this time the joint subcommittees inspected reclaimed areas and surface mine operations in West Virginia, Kentucky, Ohio, Pennsylvania, Montana, Wyoming, Arizona and New Mexico.

The end result of the hearing and field inspections was a committee bill which incorporated various features of the bills pending before the committee and responded to issues raised in the hearings and during the inspection trips.8

The House passed the committee bill, and a similar bill was adopted by the Senate, but the Act was vetoed by President Nixon. The 94th Congress enacted substantially similar legislation but it too was vetoed, this time by President Ford. Finally, in 1977, President Carter signed a bill passed by the 95th Congress. The President's view was summarized by his assistant, Dr. James Schlesinger: “Negative arguments have characterized the strip mining debate for too long. Adequate safeguards of the land are not in conflict with a policy of expanded coal production.”9

By its own terms the purpose of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations and surface impacts of underground coal mining operations,”10 to “assure the coal supply essential to the nation's energy requirements, and to its economic and social well-being . . . .”11 and to “strike a balance between protection of the environment and agricultural productivity and the nation’s need for coal as an essential source of

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7 Id. at 122.
8 Id.
11 Id. at § 1202(f).
energy."

In addition to setting performance standards, SMCRA was especially designed to provide "authority for a Federal regulatory program to augment State programs if necessary on non-Federal lands." The regulatory program was included in the federal legislation because the House Committee on Interior and Insular Affairs was "mindful of the past failure on the State level and thus base[d] it['s] approval of the SMCRA on the expectation that Federal regulations promulgated under the Act will fully implement the environmental performance standards." In enacting SMCRA Congress and President Carter recognized the importance of encouraging independent state regulatory programs in the area of surface mining. Thus the federal regulatory scheme was designed only as a back-up in the event that states' programs fail to comply with federal standards. Where minimum federal performance standards are complied with, SMCRA recognized that because states have diverse terrains, climates and biologic, chemical and physical conditions, they should be permitted to develop and enforce independent regulatory schemes for surface mining and reclamation operations.

Federal standards combined with federal regulatory authority are essential to the accomplishment of the Act's energy, environmental and economic goals which are designed to ensure that competition in interstate commerce among sellers of coal produced in different states will not be used to undermine the ability of the states to regulate effectively coal mining operations within their borders.

This article will establish that if S. 1403 is enacted the uniformity requirement promulgated by SMCRA will be defeated, and coal operators in states which establish and enforce adequate environmental standards will be placed at a competitive disadvantage.

12 Id.; see also § 1201(d).
13 Id. at § 1201(f).
16 Id. at § 1201(g).
II. SENATE BILL 1403

This article will focus only on section 3 of S. 1403.17

Subparagraph (b) of that section changes the existing definition of state program by deleting the requirement that a state program be “in accord with” the regulations promulgated by the Secretary of the Interior. It leaves intact the requirement that the state program be “in accord with” the Act itself.18

Thus section 3, the so-called “Rockefeller Amendment,” would remove from the Act the substantive requirement that a state’s rules and regulations be “consistent with” the Secretary’s regulations; states would be required only to comply with the more general requirements of the SMCRA itself. Proponents of section 3, most notably Governor John D. Rockefeller IV of West Virginia, have advanced the argument that the Amendment will re-establish the state lead contemplated by the Act by eliminating a provision that they believe requires states to duplicate the federal regulatory scheme.

This article will demonstrate that the federal Act properly envisioned a state lead only after the federal uniform minimum performance standards were established; the law thus requires each state wishing to direct its own regulatory scheme to design a program which complies with these minimum standards. The historic effects and future consequences of individual state enforcement (as opposed to the existing SMCRA emphasis on uniform minimum standards applied to all coal states) were and are clearly and demonstrably not in the best interest of the nation.

17 This section provides: “Sections 503(a)(7) and 701(25) of the Act are amended as follows: (a) in section 503(a)(7) of the Act, strike the phrase ‘regulations issued by the Secretary pursuant to.’ (b) in section 701(25) of the Act, strike the phrase ‘and regulations issued by the Secretary pursuant to this Act.’”

Section 2 extends the times for issuance of permits by an approved state regulatory authority from 42 months to 54 months; the time for submittal of state programs in section 503(a) of SMCRA from 18 months to 30 months; and the imposition of federal regulatory programs in non-approved states in section 504(a) of SMCRA from 34 months to 46 months.

III. ADVERSE IMPACT OF S. 1403

A. Economic impact on operators in states with strong existing enforcement programs

The State of Pennsylvania imposes strict mining and reclamation requirements upon its coal operators.10 Other states such as Virginia, Alabama, Kentucky, Indiana, Illinois and Utah, on the other hand, have only minimal reclamation standards.20 A Senate committee has pertinently observed the impact of the lack of uniform national reclamation standards:

Reclaiming mined land is expensive and the proponents of mining legislation have not denied this. Such additional costs are usually added to the price of coal along with other costs such as labor and amortization of the physical plant and equipment. If mine operators are not required by the state to reclaim mined land, they can pass this saving on to their consumers in the form of lower prices, thereby undercutting mine operators in other states who must reclaim land at additional costs. Therefore, the nonexistence of a uniform set of requirements for mine operators simultaneously favors some and impairs the ability of others to compete in the open market for coal customers.21

This was precisely the situation which existed prior to the enactment of SMCRA. The promulgation of "uniform, national standards" was designed to remedy this inequity by mandating minimum mining and reclamation standards across the board. The Rockefeller Amendment would re-establish competitive disparity.

A 1975 study of regulatory capability and enforcement in Kentucky, West Virginia and Pennsylvania conducted by the Center for Science in the Public Interest (CSPI)22 concluded that

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21 Id. at 104.
22 CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ENERGY SERIES No. 8, THE ENFORCEMENT OF STRIP MINING LAWS IN THREE APPALACHIAN STATES: KENTUCKY,
"Pennsylvania appeared to have the most diligent enforcement operations;" that in West Virginia the "... staff of the regulatory agency had, in some instances, become too closely allied with the operators they were responsible for regulating" and that the problem was not one of having an adequate staff, but rather, one of inefficient application of the staff that was available; while Kentucky's inspectors were found to be "overworked and incompetent." A Senate Committee reviewing the CSPI report reported that "no statement by the coal mining industry refuting the findings of the CSPI report could be found."23

A 1978 study of the effectiveness of the regulatory agencies of the coal-producing states conducted by the Senate Committee on Energy and Natural Resources concluded that: "[s]ome of the state programs for the regulation of the industry and the reclamation of mined lands are relatively effective while others are little more than token efforts. Similarly, enforcement of the existing laws, in some of the states is very strict, while in others it may be non-existent."24

It is clear that nothing has changed since the SMCRA was passed, for report on H.R. 2, the House version of the Act, as reported out of the Interior Committee stated:

The Committee amendment recognizes the urgent need for minimum environmental protection standards in light of the pending increases in coal production to meet national energy needs and in order to eliminate competitive advantages or disadvantages caused by possible production cost savings due to inadequate environmental protection standards.25

Finally, the Office of Surface Mining (OSM) in an attempt to follow through on the intent of the Act promulgated minimum standards for the protection of the environment. Thus, it proposed regulations, accepted and published voluminous comments,

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23 The Coal Industry, supra note 20, at 105-06.
24 Id. at 91.
Section 101 of S. 7, the Senate version of the surface mining law, contained provisions identical to subparagraphs (d) and (g) of H.R. 2 § 101. These provisions were carried unchanged into the Conference bill which ultimately became the SMRCA. S. 7, 95th Cong., 1st Sess. §§ 101(d), 101(g) (1977).
and became embroiled in extensive litigation over the validity of its regulations.26

Yet despite the Senate's previously expressed concern over potential economic disparity resulting from the absence of minimum uniform environmental protection standards affecting all the coal producing states; despite its own studies and reports showing that historically these states had adopted varying inadequate laws and requirements; despite the fact that states had chosen significantly different, erratic and often ineffective methods of enforcement; despite the overwhelming evidence that the Office of Surface Mining had attempted to flesh out SMCRA by establishing through its regulations minimum standards for the protection of the environment and the public interest; the Senate approved the Rockefeller Amendment, a bill calculated to resurrect the very evils which led to the SMRCA.

B. The Environmental Impacts of Section 3 of S. 1403

The record is replete with evidence of the devastating environmental and social impacts caused by irresponsible elements in the coal mining industry.

Acid drainage which has ruined an estimated 11,000 miles of streams; the loss of prime hardwood forest and the destruction of wildlife habitat by strip mining; the siltation and sedimentation of the river systems; the destructive movement of boulders; and perpetually burning mine waste dumps — these constitute a pervasive and far-reaching ambience. Tragically, coal mining in America has left its crippling mark upon the very communities which labored most to produce the energy which once impelled the Nation's industrial plant and now generates much of its electrical power.27

Fifteen years ago a study by the Department of the Interior showed that as of January 1, 1975, 3,187,800 acres of land had been disturbed by strip mining, of which 2,040,600 acres had not been reclaimed.28

28 U.S. DEPT. OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT, A SPECIAL REPORT TO THE NATION, 110 (1967).
The impact of coal mining on water resources is equally well documented.\textsuperscript{29}

Some of the most serious offsite environmental impacts result from exposure of overburden to the weather with consequent erosion, sedimentation, siltation, acid drainage, landslides, and leaching of toxic chemicals. The essence of good reclamation therefore consists of reducing as much as possible the time from initial disturbance of the land surface to the successful reestablishment of a vegetative cover on stable spoil areas. In order to achieve this, performance standards relating to environmental protection must be carried on concurrently with the mining operations . . . .\textsuperscript{30}

The suggestion here is not that S. 1403 will return America to the years of the "robber barons." Rather it is submitted that because coal mining, wherever conducted, creates similar problems without regard to local geographic and physical conditions, these problems can and must be dealt with by federally imposed uniform minimum standards.

In the absence of such standards state administrations which have little or no environmental sensitivity will have carte blanche to adopt weak and ineffective regulations with little fear of effective federal oversight.

For example, to the uninitiated observer the difference of five milligrams per liter of total suspended solids (silt) between effluent discharge standards of neighboring states would appear insignificant. However, discharge of such material over the course of years from hundreds of coal operations may add thousands, indeed millions, of pounds of silt and other sediment to a state’s streams causing navigation problems, loss of top soil, flooding and destruction of aquatic life. If the Rockefeller Amendment were enacted there would be no authoritative benchmark by which to gauge whether a state regulation was stringent enough to ameliorate damage caused by siltation. All the Act (as amended by S. 1403) would require is that a state program be "in accord with" its very general statutory language which sets forth no suggestion

\textsuperscript{29} H.R. Rep. No. 95-218, supra note 9, at 110. See also The Coal Industry, supra note 20, at 105-06. For an analysis of the legal problems attendant to control of pollution for coal mining activities see McGinley & Sweet, supra note 3.

\textsuperscript{30} H.R. Rep. No. 95-218, supra note 9, at 79.
as to what appropriate effluent standards are. One may rightfully question whether under the Act, as amended by S. 1403, it could be shown that a difference of five milligrams per liter in a state effluent regulation would cause a state program not to be "in accord with" the SMCRA.

C. Senate Bill 1403 will destroy a workable legislative scheme to the detriment of industry, citizens and the environment.

In its present form SMCRA authorizes OSM to determine what the best available reclamation technology is and further gives OSM enforcement powers over coal operators. The industry, citizen groups and state governments all have an opportunity to add input into the identification of such technology through the federal notice and comment rulemaking process. Indeed, any rule or regulation deemed inappropriate by any party can be and has been challenged in court.31

The Rockefeller Amendment would take regulations passed following months of intense study of best available technology by literally thousands of people from government, industry and the public and thrust them aside for a system where states would be free to decide on their own what quality of technology should be applied.

Even the most cursory examination of the laws and regulations currently extant in coal-producing states dramatically demonstrates the differences in technology to mine coal, backfill, reclaim and best provide for the environment.32

For example, Edgar Imhoff of the U.S. Geologic Survey, one of the authors of the report on "The Coal Industry: Problems and Prospects,"33 found that Alabama's requirement for backfill and grade was to "strike-off top of soil to depth greater than or equal to 10 feet above the bottom of the coal seam . . . ."34 He further found that to reduce the highwall or pitwall in Alabama the requirement was to "eliminate coal mine highwall except at final

31 Id.
32 THE COAL INDUSTRY, supra note 20.
33 Id.
34 Id. at 95.
Such a requirement assures that the unsightly highwalls that blight Appalachia will be found on most "reclaimed" Alabama surface mines.

In Virginia, the requirements for backfill and highwall elimination were to "[r]etain spoil on bench insofar as feasible . . . [and] reduce [the highwall] to the maximum extent practicable." The presence of highwalls in Virginia was assured under

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25 Id. On August 18, 1978, the State of Alabama amended the Alabama Surface Mining Reclamation Act of 1975 to provide that the Surface Mining Reclamation Commission shall:

a. Enforce the provisions of Section 502 of the Federal Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87) and Parts 700.5, 710.5, 710.11, 710.12, 715-718 of the Interim Surface Mining Regulations promulgated thereunder, and any subsequent amendments or revisions to said regulations.

b. The commission shall make every effort to obtain full reimbursement from the Director of the Office of Surface Mining Reclamation and Enforcement for the costs of performing its duties under paragraph (23)a, hereof.

c. If P.L. 95-87 or the federal laws it amends are adjudged unconstitutional or invalid in their application, or stayed pending litigation in any court of competent jurisdiction, the Alabama surface mining reclamation commission shall suspend the enforcement of this article to the extent of such adjudication, unconstitutionality, inapplicability or stay.

d. The state of Alabama, by any provision, part or all of this article, does not waive any rights and powers reserved to it by the tenth amendment to the Constitution of the United States, and this subdivision (23) shall not be interpreted so as to prevent the state of Alabama from protecting any and all of its rights and governmental powers through any legal action as might be determined by duly constituted officials of the state of Alabama.

e. The provisions of this subdivision (23) shall expire on June 4, 1980, and shall have no further force, effect or applicability. Ala. Code § 9-16-34(23) (Cum. Supp. 1979).

26 Id. at 98 (emphasis added).

On March 20, 1979, the Virginia legislature passed an act which does not repeal the reclamation requirements until the state program is approved on February 3, 1981. That act states in relevant part:

The General Assembly finds and declares that federal enforcement and administration of the regulatory program established by the federal Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87), would not be in the best interests of the Commonwealth. It is the objective of the General Assembly to preclude, or minimize the adverse effects of federal enforcement and to allow the regulation of coal surface mining to remain within the powers of the Commonwealth, to the fullest extent possible.
that state's regulatory program.

Pennsylvania is one of the few states that has long required the total elimination of the highwall and a return to approximate original contour.\textsuperscript{37} Pennsylvania has found that its operators can comply with this requirement and still prosper, notwithstanding alarmists in the industry who contended that such regulation would destroy them.

Thus, it is obvious that in those areas where protection of the environment can be specifically and accurately delineated, federal regulations to establish minimum and uniform standards are essential. There is no reason why a coal operator in Alabama cannot discharge the same quality of water, control fugitive dust emissions from his haul roads and coal preparation plants and restore the land and hydrologic regime to its pre-mining conditions in the same manner as a coal operator in Pennsylvania or West Virginia. As a practical matter lenient or non-existent reclamation standards are not indicative of the speculative nature of applicable technology; rather they are the result of legislative sensitivity to lobbying by vested interests.

Moreover, it should be emphasized that the Act as written does reflect a concern for those situations where uniform standards cannot be identified because of peculiar local conditions. In those instances where the state is convinced an exemption or variance is required, OSM regulation section 731.13 (the so-called "state window") is available, as are various provisions in the Act

\begin{footnotes}
\footnote{It is the purpose of this chapter to enable the Commonwealth through its own instrumentalities, to enforce and administer the provisions of the federal program, in order to lessen federal enforcement and administration thereof.

Nothing in this chapter, however, is intended, nor shall be construed, as expressing the Commonwealth's approval of or satisfaction with the standards or provisions contained in the regulatory program of the federal act, so as to limit or affect any suit, action or other proceeding brought by the Commonwealth or any person, to invalidate, set aside or modify, in whole or in part, the federal act or regulations promulgated thereunder. Va. Code § 45.1-227 (Cum. Supp. 1980).

\textsuperscript{37} Id. at 97. Kentucky on May 3, 1978, put into effect a law similar to the SMCRA requiring approximate original contour (AOC) reclamation. On February 13, 1979, a small operators program was enacted modifying slightly the strict AOC requirements. See Ky. Rev. Stat. § 350.410 (Cum. Supp. 1978).} \end{footnotes}
itself. For example, section 515(c)(3) of the Act allows the state to issue a permit for restoration other than to approximate original contour provided certain criteria are met. Where a question arises on how to best meet the Act's requirements relating, for instance, to ground water monitoring, a state could obtain from OSM an interpretation such as the Heine/Callaghan letter wherein OSM Director Heine allowed the West Virginia Department of Natural Resources (DNR) to employ "alternate means to monitor the underground water." DNR subsequently issued a memorandum, on October 2, 1978, to its personnel requiring ground water monitoring by the use of wells only if there were no uses of water within one-half mile.

While some argue, with considerable logic, that this interchange may have resulted in an erroneous decision by the state regulatory agency because of Director Heine's misinterpretation of the Act and interim regulations, it is clear that section 731.13 will allow such ad hoc determination by OSM with a greater degree of uniformity than would result if the federal regulations were eliminated (by the Rockefeller Amendment) and would permit each state to establish a subjective rather than objective

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This regulation provides:

As part of its program submission or as an amendment to an approved State program, a State may request approval for alternatives to the provisions of the regulations of this Chapter. For each alternative provision the State shall —

(a) Identify the provision in the regulations of this Chapter for which the alternative is requested;

(b) Describe the alternative proposed and provide statutory or regulatory language to be used to implement the alternative; and

(c) Explain how and submit data, analysis and information, including identification of sources, demonstrating —

(1) that the proposed alternative will be in accordance with the applicable provisions of the Act and consistent with the regulations of this Chapter and

(2) That the proposed alternative is necessary because of local requirements or local, environmental or agricultural conditions.

Letter from Walter N. Heine, Director, Office of Surface Mining, Department of Interior, to David Callaghan, Director, West Virginia Department of Natural Resources (DNR) (August 3, 1978).

Departmental memorandum issued by James E. Pitsenbarger, Chief, Division of Reclamation, West Virginia DNR (October 2, 1978).
Because OSM is, at least theoretically, less susceptible to local political and economic pressures than the states, its objectivity should be less suspect and thus more defensible in court.

On the other hand, if enacted, S. 1403 will emasculate section 503(a)(7) of SMCRA by eliminating compatibility with federal regulations as a state program criteria. Thus, the Rockefeller Amendment would create a fertile field for litigation. The many broad environmental initiatives contained in the Act will provide inventive lawyers with the opportunity to litigate the means of implementation by each state if S. 1403 is enacted.\footnote{An excellent example of such litigational opportunities is 30 U.S.C.A. § 1265(b)(24) (West Supp. 1980).}

IV. THE FALLACY OF THE STATE LEAD CONCEPT

The Rockefeller Amendment (section 3 of S. 1403) seeks to amend section 503(a)(7) of SMCRA which, as noted earlier, requires state regulatory programs to contain rules and regulations “consistent with” the Secretary's regulations.\footnote{Id. at § 1253(a). This section provides: “Each State . . . shall submit to the Secretary . . . a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through—

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter.” (The underscored language would be deleted by S. 1403.)} Governor Rockefeller argues that: “S. 1403 will not weaken the Federal Surface Mining Control and Reclamation Act of 1977. Section 3 of S. 1403 is consistent with the intent of Congress as expressed in Section[s] 101(f), 201(c)(9) and 504. S. 1403 would simply enable each state to tailor its regulations to local conditions and local needs.”\footnote{Letter from Governor Jay Rockefeller to Robert J Shostak.} Rockefeller’s position ignores the legacy of the coal industry in America — the raison d’être of the Act\footnote{See notes 29-33 supra.} as well as the woeful role played by the states in creating that legacy.

Sections 101(f), 201(c)(9) and 504 express Congress’ recognition that differences in geography, geology and environment exist but do not detract from the true intent of the Act as expressed in section 102 — “[i]t is the purpose of this Act to — (a) establish a
nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."46

Congress intended the Secretary to take the lead in formulating the regulatory scheme and thus pre-empted the states' authority to do so. The House Interior Committee in its report on H.R. 2 emphatically states: "the committee is mindful of the past failures on the state level and thus bases its approval of H.R. 2 on the expectation that Federal regulations promulgated under the Act will fully implement the environmental performance standards."47

Section 102(g) of the Act clearly spells out that the role of OSM is to "assist the States in developing and implementing a program to achieve the purposes of this Act."47

If, however, there remains any doubt that Congress intended to give the states only limited power to regulate, that doubt is quickly dispelled by reading section 102(m): "It is the purpose of this Act to wherever necessary, exercise the full reach of Federal Constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations."48

Thus, the SMCRA script as written by Congress played OSM in the starring role with each state either supporting that role or not participating. Both the House and Senate approved the script but it is interesting to note that the Senate wrote it. The conference report on the SMCRA states:

The conferees agreed to clarify the language of the bill dealing with the consistency of the state laws and regulations with the Federal laws and regulations. They adopted the principle of the Senate amendment that an approved state program requires: (1) a state law consistent with the Federal law and (2) state rules and regulations consistent with the Secretary's regulations. The Conference Report retains the basic principle

46 H.R. Rep. No. 95-218, supra note 9, at 85.
47 30 U.S.C.A. § 1202(g) (West Supp. 1980). This section states: "assist the states in the 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."
48 Id. at § 1202(m). Those constitutional powers were recently determined to have been exceeded in Virginia Surface Mining and Reclamation Ass'n., Inc. v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980).
that the Federal laws and regulations are minimum standards which may be exceeded by the state.\textsuperscript{49}

Now two years later, the Senate has significantly retreated from that position.

Governor Rockefeller and proponents of section 3 attempt to justify their position on a rather mystical misinterpretation of section 503(a)(7) that \textit{consistent with} means "identical to."\textsuperscript{50}

In point of fact, Senator Melcher (D. Montana) one of Pub. L. No. 95-87's draftsmen in rejecting such arguments said it best:

Contrary to any impression that might have been garnered from the remarks that have been made by the proponents of this bill, as it is presented to the Senate, the 1977 Reclamation Act does not require that each State's plan be identical with the Federal regulations. In fact, the whole thrust of the bill was that, having set the minimum Federal standards, a State, on its own volition, could exceed the minimum standards.\textsuperscript{51}

Rockefeller also ignores OSM's position on section 503(a)(7). OSM defines \textit{consistent with} to mean:

(a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act.

(b) With regard to the Secretary's regulations, the State laws and regulations are no less stringent than and meet the applicable provisions of the regulations of this Chapter.\textsuperscript{52}

\begin{itemize}
  \item \textsuperscript{49} S. Con. Rep. No. 95-337, 102 (emphasis added).
  \item \textsuperscript{50} 125 Cong. Rec. S. 12,350-389 (daily ed. Sept. 11, 1979). For example: Mr. Ford:
    We have gotten into a cookbook proposition. Federal officials say that State law must be identical to Federal law. But when the laws are identical and an agreement is reached on intent, the States are told that the regulations have to be identical. That becomes a cookbook in which states have no standing and the intent of the legislation is usurped. (S. 12,353).
  
  Mr. Hatfield:
    But what we have here now is that, through regulatory authority, the OSM has come up with a cloning effect, saying in effect to each state, 'You shall clone the regulations that we have recreated', not giving the States even an opportunity to know the criteria that are expected beyond the statements of the law. (S. 12,363).
  \item \textsuperscript{51} Id. at 12,354.
  \item \textsuperscript{52} 30 C.F.R. § 730.5 (1979).
\end{itemize}
OSM explains that the standard "no less stringent and meets the minimum requirements" ensures that:

[s]tate programs will achieve a certain minimum level of environmental control and regulation as mandated by Sections 101(g), 503(a), and 505 of the Act and at the same time utilizes a test set out in Sections 503, 518(i), and 521(d) for judging alternative regulatory provisions proposed by the States. Minimum requirements, however, pose a substantial problem when applied to the regulations of this Chapter. Minimum requirements can readily be equaled to minimum design criteria, thus requiring a very high degree of conformity to the regulations and negating the flexibility intended. OSM's solution is to apply no less stringent to both the Act and regulations and meets the minimum requirements to the Act alone.

Finally, United States District Court Judge Flannery recently upheld the interim regulations as a reasonable and authorized method of fleshing out stage one of the Act. In a memorandum opinion dated May 18, 1980, Flannery held that the Secretary of the Interior may disapprove suspended and invalidated regulations and still approve a state's program. Once the courts have ruled on the permanent program regulations, the states will be able to rely confidently on those regulations when dealing with situations common to the industry. In cases where a state claims total terrain or climate makes the federal regulations inapplicable, OSM regulation section 731.13 affords the state the opportunity to develop an effective regulatory program while simultaneously giving consideration to local needs.

One may agree with Governor Rockefeller that S. 1403 "does not impair the capacity nor the authority of the Secretary of the Interior to review, approve or disapprove proposed state regulation," but we are not convinced that the threat of the Secretary's disapproval of a state regulation will somehow cajole a state seeking primacy to embrace regulations of the quality and stringency of those promulgated by OSM. If S. 1403 becomes law it is more than likely that a crazy quilt of state regulatory schemes

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55 See note 39, supra.
56 Letter, note 45 supra.
manipulated and emasculated by local lobbying, politics and litigation will develop.

CONCLUSION

Billy Loughry has strip mined coal in Pennsylvania for eight years. In that time span, Mr. Loughry has never been cited for an environmental infraction by what is generally regarded as the nation's toughest regulatory agency, the Pennsylvania Department of Environmental Resources (DER). Even though Mr. Loughry has mined on some of the steepest slopes in Pennsylvania, he has made a comfortable profit each year from his mining operations without running afoul of stringent state environmental standards. Mr. Loughry testified before Federal Judge Williams in a Virginia lawsuit which challenged the constitutionality of several provisions of SMCRA, particularly that section requiring reclamation of steep slopes (or alternatively prohibiting the mining of steep slopes if reclamation is not feasible). In court, Mr. Loughry stated that more than fifty percent of his mining was on slopes steeper than twenty percent but reclamation to approximate original contour was achieved without difficulty and the other requirements of the law satisfied. Candidly admitting on cross-examination that some Pennsylvania terrain may be different from Virginia's, Mr. Loughry tenaciously maintained that compliance with steep slope regulation was generally not a problem.

The SMCRA is an unusual statute because of its detailed address of sensitive environmental issues. While most legislation attempts to define broadly the concerns of the people and the goals to be attained without describing the means of attainment, the Act specifically describes the means to be used to achieve the required result. In addition the SMCRA calls for a comprehensive regulatory scheme. Both aspects of the Act were carefully considered by Congress during the Act's seven year legislative history. Strong guidance by federal regulatory authority is vital if the

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68 The federal law is closely patterned after the Pennsylvania law in terms of reclamation and performance standards. See note 19 supra.

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Act's goals are to be attained, particularly its environmental goals which will impact heavily on future generations. S. 1403, if enacted, will open the door to state recalcitrance and encourage the states to retreat from the strict salutary goals of the SMCRA.60

The Senate has now swung away from an acute sensitivity to the environmental concerns of America's coal regions; it now stands poised to bludgeon those environmental aspirations with S. 1403. I agree with the sentiments of former Associate Solicitor for OSM William Eichbaum:

[T]he most restrictive amendment [S. 1403, section 3], proposed by Governor Jay Rockefeller of West Virginia, would essentially destroy the Interior Secretary's regulations for approval of state programs, thereby making it easier for states to force approval of inferior programs. This could result in a return to the system of nonregulation that existed before 1977. First, the Amendments would significantly damage an important statute. Second, Congress ought not abandon so quickly a program it thoughtfully created so recently: major provisions of the act have not even gone into effect. Third, amending in a crisis atmosphere a statute already subjected to intense and prolonged debate can only lead to a debased legislative product.61

Eichbaum's concerns are shared by S. David Freeman, chairman of TVA. In a recent letter to Representative Morris Udall (D. Arizona) he states that S. 1403 "would be a set-back to adequate control of the surface effects of coal mining." Freeman expressed concerns that the Rockefeller Amendment would plunge "the entire regulatory program back into the uncertainty that preceded that national law . . . [and] inevitably lead to time-con-

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60 If one doubts that states such as Virginia have the profit interest of their surface operators at heart, one need only read the amendment offered by Senator John Warner of Virginia during the floor debate of S. 1403 which would have changed the AOC requirement of SMCRA. Fortunately, Senator Warner withdrew his amendment.

Subsequently, the Virginia Senator held "town meetings" to gain grassroots support for his proposed legislation which would require that land disturbed by surface mining would be reclaimed at 75% of its original contour and the remaining highwall left in place. Coal Now, Newsletter of Mining and Reclamation of America (Dec. 6, 1979, p. 2).

summing litigation” over state programs.\textsuperscript{62}

I agree.

\textsuperscript{62} \textit{Mine Regulation and Activity Report} (McGraw-Hill, Nov. 23, 1979, p. 3).