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THE CURRENT EFFORT IN CONGRESS TO AMEND THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 (SMCRA)

Robert E. Beck*

INTRODUCTION

Congress passed the Surface Mining Control and Reclamation Act¹ (SMCRA) in 1977 to provide environmental controls on both surface mining and underground mining for coal and to provide for reclamation of the land after the mining process was over. Notwithstanding the explicit federalism² of environmental legislation of the time, such as the Clean Air Act of 1970³ and the Federal Water Pollution Control Act Amendments of 1972,⁴ it was immediately clear that SMCRA would require a greater degree of state-level administration. As the statute reads:

[B]ecause of the diversity in terrain, climate, biology, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States.⁵

Thus the approach favoring state administration was intended to be pragmatic rather than philosophical. However, controversy arose almost immediately about the primacy a state would have once it had taken over the administration of the program.⁶

The first controversy arose over the scope of the Secretary of

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1. Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1994)).

2. See generally Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

3. Pub. L. No. 91-604, 84 Stat. 1705 (codified at 42 U.S.C. §§ 7401-7671(q)(1994)).

4. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1387 (1994)).

5. 30 U.S.C. § 1201(f) (1994).

6. The Secretary of the Interior's approval would be given pursuant to the criteria contained in section 503 of SMCRA. See 30 U.S.C. § 1253.

the Interior's⁷ authority to promulgate substantive regulations that expand or flesh-out the specific requirements in SMCRA.⁸ The reasoning of the challenge was that the more the Secretary could do by substantive regulation, the less there would be for a state to do once it assumed administration of SMCRA.⁹ In an en banc decision, with four judges dissenting, the D.C. Circuit Court of Appeals upheld the Secretary's authority to promulgate substantive regulations.¹⁰ Subsequent controversies have thus involved the federal/state relationship within the context of the Secretary's established rule-making authority.¹¹

One such major controversy arose from federal nonrecognition of waivers that surface owners had given to mineral owners at the time that the mineral estate was severed from the surface estate.¹² Surface owners waived the right to subjacent support¹³

7. In section 201(a) of SMCRA, Congress created the Office of Surface Mining Reclamation and Enforcement (commonly abbreviated OSM) within the Department of the Interior. SMCRA assigns the duty of implementing the Act to "the Secretary of the Department of the Interior], acting through the Office." See 30 U.S.C. § 1211(c).

8. At the same time several states and/or mining associations challenged the constitutionality of SMCRA as beyond federal power and/or an undue encroachment on state powers. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Hodel v. Indiana*, 452 U.S. 314 (1981). These cases are discussed in Robert E. Beck, *Setting the Course for the Surface Mining Control and Reclamation Act of 1977*, NAT. RESOURCES & ENV'T, Fall 1995, at 24, 25-28 [hereinafter Beck, *Setting the Course*].

9. See Judge Tamm's dissent in *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 532-34 (D.C. Cir. 1981) (en banc), cert. denied, 454 U.S. 822 (1981).

10. 653 F.2d at 523. The case is discussed in Beck, *Setting the Course*, supra note 8, at 24, 28, 74-75.

11. Over the years numerous regulations have been challenged by both the industry, arguing that the specific regulation is not within the scope of the Secretary's authority, and environmental groups, arguing that the Secretary should have regulated where the Secretary did not regulate or should have regulated more stringently than the Secretary did. For an introduction to the broad range of challenges, see generally the district court opinions in *In re Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas.(BNA) 1083 (D.D.C. 1980); 19 Env't Rep. Cas. (BNA) 1477 (D.D.C. 1980); 21 Env't Rep. Cas. (BNA) 1724 (D.D.C. 1984).

12. See 30 C.F.R. § 817.124 (1979) and the Secretary's comments

and any liability on the mineral owner's part for surface subsidence damages due to development of the mineral.¹⁴ While the mining industry recognized that SMCRA prohibited subsidence where it was technologically and economically feasible to do so,¹⁵ it argued that the Secretary did not have authority to require the repair or restoration of the land and structures damaged where subsidence was not to be prevented.¹⁶ In particular, the industry objected to such a requirement when mine operators were the beneficiaries of waivers recognized under state law absolving them of the common law duty to provide subjacent support.¹⁷

After losing this argument before Secretary of the Interior Andrus in the Carter administration,¹⁸ and in court,¹⁹ they were successful in convincing Secretary Watt in the Reagan administration to meet them part way.²⁰ Secretary Watt maintained the requirement that the surface lands be restored or the damage compensated for, but required restoration or compensation for damaged surface structures only if state law required it.²¹ Of course, in situations where waivers existed, state law would not require restoration or compensation.

After the Watt approach was sustained by the D.C. Court of Appeals in 1991,²² Congress intervened in the Energy Policy Act

about the section at promulgation, 44 Fed. Reg. 15,275 (1979).

13. Under the common law, the surface owner had an absolute right to subjacent support from the mineral estate. *See Wilms v. Jess*, 94 Ill. 464 (1880).

14. *See Robert E. Beck & Sharon Sigwerth, Illinois Coal Mine Subsidence Law*, 29 DEPAUL L. REV. 383, 396-403 (1980) (stating that the surface owner can waive the right to support with express words of waiver or by necessary implication from the language used).

15. Except where planned subsidence is required. *See* 30 U.S.C. § 1266(b)(1) (1994).

16. *See National Wildlife Fed'n v. Lujan*, 928 F.2d 453, 459 (D.C. Cir. 1991); *National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 739-41 (D.C. Cir. 1988).

17. *See* sources cited *supra* note 12.

18. *See* 44 Fed. Reg. 15,422 (1979).

19. *See In re Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas. (BNA) at 1088.

20. *See* 48 Fed. Reg. 24,638 (1983).

21. *See id.*

22. *National Wildlife Fed'n v. Lujan*, 928 F.2d 453 (D.C. Cir. 1991).

of 1992²³ and amended SMCRA to require mine permittees to “promptly repair, or compensate for, material damage resulting from subsidence caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations.”²⁴ This amendment does not cover commercial structures, but in the proposed regulations for implementing the amendment,²⁵ OSM included a requirement that commercial structures be repaired as well: essentially a return to the Carter administration regulations. However, when the final regulations implementing the 1992 amendment were promulgated in 1995, the provision for commercial structures was omitted.²⁶

A second highly controversial promulgated regulation was the Applicant Violator System (AVS), applicable to both the SMCRA permit application and enforcement processes. Basically, SMCRA requires the denial of a coal mining permit to an applicant who owns or controls a coal mining operation that is already in violation of SMCRA or other relevant environmental laws.²⁷ In light of the rising number of mining companies with operations in different states — or with operations under different names within individual states — pursuing implementation of this provision on a national level seemed particularly appealing to environmental groups and groups of affected citizens. Thus the motivation for the Secretary to act appears to have come from these groups rather than from the Secretary himself.²⁸ Implementation

23. Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified as amended in scattered sections of 42 U.S.C.).

24. 30 U.S.C. § 1309a(a)(1).

25. 58 Fed. Reg. 50,181 (1993) (proposed § 817.121(c)(3)).

26. 60 Fed. Reg. 16,722 (1995).

27. *See* 30 U.S.C. § 1260(c).

Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act or such other laws referred to this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation

Id.

28. *See* *Save Our Cumberland Mountains v. Clark*, 22 Env't Rep.

has involved an unceasing sixteen year battle.²⁹ The most recent salvo was the January 31, 1997 decision of the D.C. Circuit throwing out the Secretary's regulations defining "ownership and control."³⁰

The most substantial and persistent major controversy, however, is the issue of federal oversight of state implementation once the regulations have been promulgated and the states have achieved primacy.³¹ The current posture of that controversy is the focus of this paper: particularly the effort in Congress to amend SMCRA to limit federal oversight after state primacy is achieved. However, the proposed amendments go far beyond that immediate controversy. To understand that controversy and the proposed changes, it is necessary first to describe the basic enforcement scheme provided for in SMCRA.

I. SMCRA'S BASIC ENFORCEMENT SCHEME

SMCRA provides that if a state "wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations," it must submit its program to the Secretary for approval.³² Moreover, this "exclusive" jurisdiction is subject to the limitations in section 521.³³

Cas. (BNA) 1217 (D.D.C. 1985) (amended decree).

29. For a synopsis of the history of the litigation, see *Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1544-46 (D.C. Cir. 1992) (holding that the district court that had acted did not have jurisdiction over the matter and remanded for dismissal).

30. *National Mining Ass'n v. Interior Dep't*, 43 Env't Rep. Cas. (BNA) 1961 (D.C. Cir. 1997) (reversing the federal district court which had granted summary judgment for the government). The overturned regulations were issued at 30 C.F.R. pt. 773 (1988); 30 C.F.R. § 778.13(b) (1989); and 30 C.F.R. pts. 773, 843 (1989). For the precise language of the statute, see *supra* note 27.

31. This controversy is discussed at length and in detail in Robert E. Beck, *The Federal Role Under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) on Nonfederal Lands After State Primacy*, 31 TULSA L.J. 677 (1996) [hereinafter Beck, *Federal Role*].

32. 30 U.S.C. § 1253(a). Such approvals have been subjected to judicial review. See, e.g., *Illinois S. Project, Inc. v. Hodel*, 844 F.2d 1286 (7th Cir. 1988); *Pennsylvania Coal Mining Ass'n v. Watt*, 562 F. Supp. 741 (M.D. Pa. 1983).

33. 30 U.S.C. § 1253(a).

Under section 521, the Secretary clearly may intervene in enforcement after state primacy is achieved in two different circumstances. First, if, based on any federal inspection, the Secretary³⁴ determines that there is any "condition, practice, or violation that creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources" hereinafter imminent danger and significant harm, the Secretary must intervene with a cessation order [CO] and if necessary "impose affirmative obligations."³⁵ Second, the Secretary clearly has authority to assume federal administration of the whole or a part of a state program if the Secretary follows the formal procedures specified in SMCRA and concludes that violations of SMCRA are resulting "from a failure of the State to enforce such State program or any part thereof effectively."³⁶

What led to controversy was the provision of section 521 providing that if the inspector finds a violation of SMCRA or any permit condition required by SMCRA in a situation where there is no imminent danger or significant harm involved, the Secretary "shall issue a notice to the permittee . . . fixing a reasonable time . . . for the abatement of the violation"³⁷ The basic argument is over whether this provision applies during periods of state primacy or applies only during periods of nonstate primacy.³⁸ Although the Secretary has often hedged the exercise of this authority with procedural limitations,³⁹ the Secretary⁴⁰ has generally assumed the authority to intervene by issuing a notice of violation (NOV) directly to the alleged violator even during state primacy.⁴¹ Under a second controversial provision in section

34. Generally the reference to Secretary includes as here "or his authorized representative." *See, e.g.*, § 1271.

35. § 1271(a)(2).

36. § 1271(b).

37. § 1271(a)(3).

38. Of course, it would apply to federal lands not under state primacy.

39. The first procedural limitation was the 1988 regulatory initiative. *See Beck, Federal Role, supra* note 31, at 708, 713-18. The second was the 1995 policy change initiative. *See id.* at 718-24.

40. Generally, from Secretary Andrus forward.

41. The Secretary's position was upheld, largely on procedural and

521, the Secretary has authority to suspend or revoke the mining permit of a permittee if, in addition to other preconditions, a specified federal inspection of the permittee reveals a "pattern of violations."⁴²

Except for the approach under which the federal government formally assumes administration of a state program,⁴³ the other oversight intervention approaches precondition federal action on a federal inspection. It thus becomes important to identify when federal inspections can be conducted under SMCRA after state primacy is achieved and which ones serve as preconditions in given SMCRA intervention provisions. Section 517 provides for the federal inspections necessary to evaluate state administration of approved state programs.⁴⁴ These inspections can serve as a basis for federal COs where there is imminent danger or threat of significant harm⁴⁵ as can any other federal inspection. However, these inspections do not serve as a basis for either of the two controversial intervention provisions.

Section 521(a)(1) also provides that when, based on any information available to him, the Secretary believes that any person is in violation of SMCRA or any permit condition in a permit issued pursuant to SMCRA, the Secretary is to notify the state regulatory authority.⁴⁶ If the state fails to take appropriate action within 10 days,⁴⁷ the Secretary "shall immediately order federal inspection."⁴⁸ However, SMCRA is silent as to what is to happen if the federal inspection finds that a violation of SMCRA exists which does not involve an imminent danger of significant harm. It can be argued that Congress must have intended the Secretary

limitations grounds, in *National Coal Ass'n v. Interior Dep't*, 70 F.3d 1345 (D.C. Cir. 1995).

42. 30 U.S.C. § 1271(a)(4).

43. *See supra* text accompanying note 36.

44. *See* 30 U.S.C. § 1267(a).

45. *See supra* text accompanying notes 34-35.

46. *See* 30 U.S.C. § 1271(a)(1).

47. Thus the abbreviation TDN for this procedure, to signify ten day notice.

48. *Id.* However, the TDN is waived if a person informing the Secretary about the alleged violation provides adequate proof that an imminent danger of significant environmental harm exists and that the state has failed to act. *See id.*

to intervene if the state failed to do so; otherwise, why require the Secretary to inspect?⁴⁹ The Secretary justified the regulation that provided for issuing NOV's directly to the permittee essentially on the basis that it "fills a void or gap in the Federal enforcement scheme"⁵⁰

However, each of the two controversial intervention provisions contains a list of five inspections which does not include section 521(a)(1) inspections. These listing and failure to list combinations make the use of a section 521(a)(1) inspection a dubious basis for the interventions here under discussion. Furthermore, four of these five listed inspections do not form any basis for allowing the Secretary to intervene during state primacy.⁵¹ However, in addition to those four inspections, the two controversial intervention provisions refer to "federal inspection pursuant to . . . section 504(b)."⁵² Section 504(b) provides that:

In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 521 . . . of that part of the State program not being enforced by such State.⁵³

49. The only other argument would be that this becomes one piece of evidence for the Secretary to rely on ultimately in a formal proceeding to assume administration of all or part of a state program. See *supra* text accompanying note 36.

50. 44 Fed. Reg. 15,302 (1979).

51. These four are: (1) federal inspection carried out during enforcement of a federal program in a state; (2) federal inspection carried out during enforcement of a federal lands program; (3) federal inspection pursuant to section 502 which covers the initial regulatory period before state primacy; and (4) federal inspection during enforcement of a state program after there has been formal assumption of such enforcement. See 30 U.S.C. § 1271(a). In the first three circumstances, state primacy does not exist. In the fourth circumstance state primacy has been superseded through the formal process established in section 521(b). See § 1271(b).

52. Except with respect to the pattern of violations section, the reference is to section 504 rather than section 504(b). See § 1271(a)(4). However, section 504(b) would be the operative part of section 504 anyway. See § 1254(b).

53. § 1254(b).

Thus, section 504(b) provides for federal enforcement pursuant to section 521 in which the two controversial intervention provisions appear. The general precondition for enforcement under those two provisions is the state's failure to enforce a part of its program. There is no further precondition in section 504(b) of a pattern of enforcement failure on the part of the state.

Consequently, reading sections 504(b) and 521 together indicates that if OSM finds a violation by a permittee that the state is not addressing, then this constitutes a failure of the state to enforce a part of its program. The court in *Annaco, Inc. v. Hodel*⁵⁴ relied specifically on section 504(b) to justify federal intervention under the NOV provision.⁵⁵ Thus based on either section 504(b) or the state's failure to intervene or satisfactorily explain its non-intervention when the state receives the TDN, or both, the Secretary can proceed with issuing an NOV directly to the permittee during state primacy.

II. THE EFFORT IN CONGRESS TO AMEND SMCRA TO LIMIT FEDERAL OVERSIGHT AFTER STATE PRIMACY

House Bill 2372⁵⁶ was introduced in the House of Representatives in 1995 under the primary sponsorship of Representative Cubin of Wyoming.⁵⁷ Its almost identical⁵⁸ counterpart in the Senate, Senate Bill 1401,⁵⁹ was introduced under the primary sponsorship of Senator Bennett of Utah.⁶⁰ Of the dozen substantive changes House Bill 2372 would make in SMCRA, all but one of them are directly related to the federal enforcement role in

54. 675 F. Supp. 1052 (E.D. Ky. 1987). For a discussion of the SMCRA cases, including those taking a position contrary to *Annaco, Inc.*, see Beck, *Federal Role*, *supra* note 31, at 710-18.

55. See 675 F. Supp. at 1058.

56. H.R. 2372, 104th Cong. (1995).

57. Also named as sponsors are 11 other representatives from Arizona, California, Colorado, Ohio, Oregon, Texas, Utah, and West Virginia. See *U.S. Coal Production - July 1997*, COAL WK., Sept. 1, 1997, at 6. Wyoming is now the leading state in production of coal in the United States. See *id.*

58. See *infra* note 1 for a discussion of the only difference.

59. S. 1401, 104th Cong. (1995).

60. Also named as sponsors are 4 other senators from Utah, Virginia, and Wyoming. See *id.*

primacy States.⁶¹ It appears that the principal purpose of the bill is to eliminate the Secretary's authority to intervene directly against a mine operator except in the imminent danger or significant harm situation⁶² or after formal assumption of enforcement of part or all of a state program.⁶³ However, because of other proposed amendments relating to state primacy, the discussion of House Bill 2372 will focus on the following four topics: (1) the Secretary's direct role in enforcement of SMCRA after primacy; (2) enforcement of the Clean Water Act as applied to mining operations; (3) judicial review under SMCRA, and (4) the statute of limitations for SMCRA enforcement.

A. *The Secretary's Direct Role in Enforcement of
SMCRA after Primacy*

The philosophy for limiting the Secretary's direct enforcement role after state primacy is achieved is expressed in two proposed subsections to be added to the findings section of SMCRA. They provide:

- (l) a majority of the coal-producing States have developed programs that regulate surface and underground coal mining operations within their borders in an environmentally sound manner, taking into account the diversity in terrain, climate, chemical, and other physical conditions in areas subject to mining operations; and
- (m) duplication in regulatory programs should be avoided and States assume the exclusive responsibility under approved State programs for permitting and enforcement of the provisions of this Act with respect to surface coal mining and reclamation

61. The unrelated amendment is section 10 of House Bill 2372 which would change the definition of surface coal mine operations in section 701(28)(B) of SMCRA by adding a provision to exclude construction, improvement, or use of roads that (1) are designated public roads under state law or are maintained under the authority of a governmental entity; (2) are constructed in a manner similar to other roads of the same classification in that jurisdiction; and (3) are open to public use. It is this author's interpretation that (3) is a separate criteria, although the Senate bill is less clear on this issue, being the only instance in which the later Senate bill language does not track the House bill language. *Compare* H.R. 2372 § 10 *with* S. 1401 § 10.

62. *See supra* text accompanying notes 34-35.

63. *See supra* text accompanying note 36.

operations within the States.⁶⁴

The major fallacy in the proposed amendments is apparent on the face of the above justifications. In (1) above, the proposed subsection states that "a majority of the coal-producing States have developed programs." The obvious problem is two-fold. First, not all the coal-producing states have developed such programs. Second, having a program is of no value unless it is enforced. The findings say nothing of enforcement by the states. At the time Congress passed SMCRA in 1977, it was known that a number of states had fairly comprehensive reclamation statutes on their books. Congress made clear its concern with (1) those states that did not have such legislation, and (2) the at-best-spotty enforcement of the statutes in many of those states that did have good legislation, which led to a lack of uniformity and the possibility of industrial blackmail.⁶⁵ Undoubtedly many coal mining states now have better environmental control and reclamation laws and regulations to deal with coal mining than they had in 1977. It is certainly arguable that some of the states enacted those laws and promulgated those regulations in a desire to take over administration of the federal law.

Furthermore, if the states are doing a credible job of enforcement as well,⁶⁶ it needs to be asked whether that is because of a desire to do so or because the Secretary is looking over the state's shoulder, ready to intervene if the state does not enforce its program. The economic pressures that existed in the early 1970's on a competitive coal mining industry may have changed, but in many instances the change has been for the worse,⁶⁷ so the assumption that a given state would continue rigorous enforcement after removal of stringent federal oversight is suspect.

64. H.R. 2372, 104th Cong. § 2(3) (1995).

65. See generally, Morris K. Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553, 553-54 (1979).

66. See *infra* text accompanying note 69 (quoting OSM Acting Director Henry).

67. The Clean Air Act amendments in 1990, 42 U.S.C. §§ 7651(a)-7651(o), will have a considerable adverse impact on the coal mining industry in the interior coal mining region. See Robert E. Beck, *Survey of Illinois Law: Natural Resources*, 18 S. ILL. U. L.J. 927, 934 (1994) (noting a prediction of a 17% decline in purchases of Illinois coal as a result of the 1995 deadline and growing to a 38 % decline when the year 2000 deadline is met).

There is recent evidence that states are still making efforts to give their coal mining industries an unfair advantage over those in other states.⁶⁸

Looking at the duality argument, it must be pointed out that a system in which the federal government seeks enforcement if the state fails to do so is not a duplicative effort; it is a complementary effort. In a recent review of OSM operations, Acting Director Henry noted that,

[F]or the evaluation years of 1993, 1994, and 1995, an average of twenty-three federal Notices of Violation (NOVs) were issued for on-the-ground violations during federal oversight inspections compared to an annual average of over 7,700 NOVs issued by state regulatory authorities for the same period.⁶⁹

These statistics - and there is no apparent reason to question them - suggest that any arguments about officious meddling with state programs by OSM are trivial. Perhaps there is indeed another agenda present in the proposed legislation.

The proposed substantive amendments that reduce the Secretary's role after state primacy is achieved do so by (1) removing or changing the language in SMCRA establishing the Secretary's authority, and (2) enacting specific limitations on that authority. There is, however, some apparent inconsistency in the language used in the proposed amendments and other instances of lack of clarity.

As can be seen in the discussion in Part I of this article, section 504(b) of SMCRA provided one of two bases for determining that the Secretary has authority to act directly against an operator even though the state has primacy.⁷⁰ The proposed amendments would strike reference to section 504 in several subsections that grant the Secretary specific intervention authority. Thus the reference to section 504(b) in section 521(a)(3), the

68. States are still seeking actively to support their coal mining industries in the competition with similar industries in other states. See *Alliance for Clean Coal v. Bayh*, 888 F. Supp. 924 (S.D. Ind. 1995), *aff'd*, 72 F.3d 556 (7th Cir. 1995) (striking down a recent Indiana statute as violative of the negative commerce clause); *Alliance for Clean Coal v. Craig*, 840 F. Supp. 554 (N.D. Ill. 1993), *aff'd sub nom.* *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995) (striking down a recent Illinois statute as violative of the negative commerce clause).

69. Kathrine L. Henry, *Coal Mining in the United States: SMCRA's Successful Blueprint*, NAT. RESOURCES & ENV'T, Winter 1997, at 7, 8.

70. See *supra* discussion accompanying notes 52-55.

NOV section,⁷¹ would be stricken,⁷² and the reference to section 504 in section 521(a)(4), the pattern of violations section,⁷³ would also be stricken.⁷⁴ Furthermore, turning the situation around, the reference in section 504(b) to section 521 would be changed to section 521(b),⁷⁵ thus eliminating the apparent inclusion of sections 521(a)(3) and (a)(4) and focusing solely on section 521(b) which contains only the formal assumption of federal administration of all or part of a state program.

The primary substantive addition limiting the Secretary's authority comes in a new subsection (6) added to section 521(a) of SMCRA. The bill language for that new subsection specifically states that:

[e]xcept as provided in subparagraph (B) and paragraph (2) of this subsection, the regulatory authority⁷⁶ shall have the sole responsibility for issuance of a notice to the permittee or his agent of a violation of any requirement of this Act or any permit condition required by this Act,⁷⁷ and the suspension or revocation of any permit issued pursuant to a State program,⁷⁸ which determination by the State regulatory authority shall be subject to administrative and judicial review in accordance with state law.⁷⁹

This proposed amendment deals expressly with the congressional intent or gap basis⁸⁰ for the direct NOV regulation. Excepted subparagraph B is the water quality enforcement provision⁸¹ and excepted paragraph (2) contains the imminent danger or signifi-

71. *See supra* discussion accompanying notes 37-41.

72. H.R. 2372, 104th Cong. § 7(a) (1995).

73. *See supra* discussion accompanying note 42.

74. H.R. 2372, 104th Cong. § 7(b) (1995).

75. *Id.* at § 5.

76. Under SMCRA, once a state has achieved primacy, the state or its agency becomes the regulatory authority. *See* 30 U.S.C. § 1291(22).

77. This language provides exclusively for State-issued NOV's in primacy states.

78. This language provides for exclusive pattern of violations enforcement in primacy states. *See supra* discussion at text accompanying note 42, regarding the Secretary's current authority with reference to revoking and suspending permits.

79. H.R. 2372, 104th Cong. § 7(c) (1995).

80. *See supra* discussion accompanying notes 46-50.

81. *See infra* discussion accompanying notes 91-95.

cant harm provision allowing the Secretary to issue COs.⁸² So, in effect, the bill provides for exclusive enforcement of an approved state program by the state except where the imminent danger or significant harm provision is implicated. Otherwise, the federal government must formally assume administration of all or part of the state program.

However, several of the other proposed changes to SMCRA contained in the bill are drafted so broadly that they seem to foreclose even paragraph (2) and its imminent danger or significant harm enforcement by the Secretary. Thus, the proposed amendment to SMCRA section 201(c) would, by implication, deny the Secretary any authority to investigate, inspect, conduct hearings, administer oaths, issue subpoenas, compel attendance of witnesses, require production of written material, review and approve, vacate or modify orders and decisions, or suspend, revoke, or withhold permits unless in a state without an approved State program.⁸³ The proposed amendment says that "except where there is an approved State program" the Secretary has authority to engage in the listed activities. Therefore, by implication, where there is an approved State program, the Secretary does not have the authority to engage in the listed activities.

Surely, however, it is necessary for the Secretary to perform some of these activities in enforcing the imminent danger or significant harm provision and in formally invoking the authority to assume administration of a state program where the state has failed to do so. Additionally, section 517 of SMCRA⁸⁴ gives the Secretary authority to inspect to determine that a state is carrying out the approved program. Surely this proposed amendment language is not intended to repeal that section. House Bill 2372 does not contain any proposed direct amendment to section 517.

Similarly, the proposed amendments to section 503(e) of SMCRA on state programs are drafted so broadly as to appear to require that a state program be amended before there can be enforcement action by the Secretary under the imminent danger or significant harm provision if the imminent danger or significant harm in question was not prohibited by the state program.⁸⁵ Congress clearly had determined in SMCRA that enforcement in

82. See 30 U.S.C. § 1271(a)(2).

83. H.R. 2372, 104th Cong. § 3 (1995).

84. 30 U.S.C. § 1267.

85. See H.R. 2372, 104th Cong. § 4 (1995).

the face of imminent danger or significant harm should proceed regardless of the source of the law being violated,⁸⁶ so that such a change to SMCRA would constitute a fundamental change in approach. But for this problem, the proposed amendment merely makes explicit the current scheme of SMCRA, that enforcement of SMCRA by the state during state primacy is of the state program.⁸⁷ It is the Secretary, and not the state, who can enforce beyond the scope of the state program if there is imminent danger or significant harm. Because it is unclear what reason would motivate this change; it may be simply an unintentional lack of clarity.

Finally, the bill proposes to amend section 506, which deals with permits, to treat compliance with a permit as compliance with the environmental performance standards of SMCRA with the only exception being that the regulatory authority can revise the permit.⁸⁸ Permits do not and should not be required to restate SMCRA⁸⁹ although a catch-all permit provision requiring compliance with SMCRA and the regulations promulgated pursuant thereto should satisfy the proposed amendment. Here again, as with the proposed amendment to section 503(e), the proposed amendment does not appear to give exception to the imminent danger or significant harm situation.

The exception for revising a permit, however, appears limited in that the proposed amendment refers to revising the permit pursuant to section 511(c) of SMCRA.⁹⁰ This section of SMCRA suggests the necessity of a pre-established schedule for reviewing outstanding permits and, if enforced in that manner, would have limited applicability.

86. Section 521(a)(2) of SMCRA applies whenever “[a]ny condition or practice exist, *or* . . . any permittee is in violation of . . . this Chapter which condition, practice, *or violation* also creates an imminent danger . . .” (emphasis added). 30 U.S.C. § 1271(a)(2). Thus, a violation of the Act is only one of several bases for exercise of authority under this provision.

87. Similarly federal enforcement under section 521(b) of SMCRA after formal assumption is of the state program until the Secretary substitutes a federal program for the state program. *See* 30 U.S.C. § 1254, on federal programs.

88. H.R. 2372, 104th Cong. § 6 (1995).

89. *See infra* note 109.

90. 30 U.S.C. § 1261(c).

Unless rewritten, the proposed amendments to sections 201(c), 503(e), and 506 of SMCRA would have to be interpreted more narrowly than their language suggests in order to make them consistent with the paragraph (2) exception provided for in the proposed amendment to section 521(a) and with other extant provisions of SMCRA for which no express amendments are proposed.

B. *Enforcement of the Clean Water Act
as Applied to Mining Operations*

House Bill 2372 also appears to propose amending the Clean Water Act of 1977 (CWA)⁹¹ by limiting enforcement of that Act at any surface mine or reclamation operation to action taken by "the regulatory authority approved by" the Environmental Protection Agency (EPA) under the CWA.⁹² The term "regulatory authority" is not used in the CWA,⁹³ so the bill appears to be using that term here in reference to the state delegee of enforcement power for a given CWA program such as the NPDES program.⁹⁴ However, the EPA clearly has concurrent enforcement power under the CWA.⁹⁵ The enforcement scheme provided for in the CWA simply should not be amended through a provision in a bill otherwise unrelated to the CWA and which provision would not have any kind of universal applicability in the CWA regulatory scheme.

91. 33 U.S.C. §§ 1251-1387 (1994).

92. If adopted, House Bill 2372, section 7(c), would amend SMCRA and create section 521(a)(6)(B) of SMCRA to this end.

93. *See, e.g.*, section 402 of the CWA, establishing the National Pollutant Discharge Elimination System (NPDES) program. 33 U.S.C. § 1342.

94. *See id.* There are several other programs within the CWA that states may assume administration of, all independently of one another: 33 U.S.C. § 1316(c) (new source performance standards); § 1344(g) (wetlands dredge & fill discharge permit program); and § 1345(c) (sewage sludge disposal permit program).

95. 33 U.S.C. §§ 1319, 1342(i) (1994). It is appropriate to refer to the federal government as having primacy at all times. *See* Robert E. Beck, *Introduction, History, and Overview*, 5 *WATERS AND WATER RIGHTS* § 52.06(b)(2) (Beck ed., 1991).

C. *Judicial Review*

House Bill 2372 would amend the judicial review provisions of SMCRA⁹⁶ in three respects. The first proposed amendment on judicial review would make an order of an administrative law judge (ALJ) "in a proceeding conducted pursuant to section 554 of title 5, United States Code"⁹⁷ a final decision of the Secretary which is subject to judicial review under the SMCRA judicial review section.⁹⁸ Section 554 deals with adjudications.⁹⁹ In a recent article¹⁰⁰ describing in detail litigation before the Department of the Interior, Michael C. Hickey notes the following procedure:

When, however, OSM issues to a coal operator a notice of violation under the Surface Mining Control and Reclamation Act, . . . the operator files with the Hearings Division an application for review of the notice. . . . There follows a trial-type proceeding conducted by an ALJ at which both OSM and the operator may be represented by counsel. Upon issuance by the ALJ of a decision or order, each party may appeal to IBLA by filing a notice of appeal with IBLA on or before thirty days from date of receipt of the ALJ opinion. . . .¹⁰¹

So apparently the purpose of this proposed amendment is to cut off within the Department of the Interior the appeals described in this excerpt and in other adjudications involving SMCRA. While the appeal process within the Department of the Interior may need reform,¹⁰² this sort of piecemeal approach is not best suited to achieving overall reform.

The second proposed amendment would remove a provision regarding citizen suits. Currently section 526(e) of SMCRA provides:

96. SMCRA § 526, 30 U.S.C. § 1276 (1994).

97. The Administrative Procedure Act, 5 U.S.C. § 554 (1994), deals with adjudications in administrative procedure.

98. H.R. 2372, 104th Cong. § 8(a) (1995).

99. 5 U.S.C. § 554; *see also* §§ 556 (hearings, etc.), 557 (initial decisions, etc.).

100. Michael C. Hickey, *Litigation Before the Department of the Interior*, NAT. RESOURCES & ENV'T, Summer 1996, at 20.

101. *Id.* at 21.

102. This point was made by Tom Galloway at a roundtable discussion at a recent colloquium on SMCRA. *See Roundtable, Colloquium on SMCRA: A Twenty Year Review*, 21 S. ILL. U. L.J. 575, 576 (1997).

Action of the state regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 520 [the citizen suit provision] except as provided therein.¹⁰³

The proposed amendment would strike the second half of this subsection and place the period after "State law."¹⁰⁴ It appears that this amendment is intended to remove the protection accorded citizen suits¹⁰⁵ when the action of a state regulatory authority is subject to review by a state court of competent jurisdiction. While the federal courts had split over the propriety of citizen suits for enforcement of SMCRA in federal court after a state obtained primacy,¹⁰⁶ SMCRA clearly authorizes such oversight actions by the public:

any person . . . may commence a civil action . . . to compel compliance with this chapter . . . (2) against . . . the appropriate State regulatory authority to the extent permitted by the eleventh amendment . . . where there is alleged a failure of the appropriate State regulatory authority to perform any act or duty under this Chapter which is not discretionary with . . . the appropriate State regulatory authority."¹⁰⁷

This quoted language has no meaning unless Congress contemplates citizen suits in federal court after state primacy. There is, however, no provision in House Bill 2372 to amend this language in SMCRA section 520(a).

It is doubtful that the mere removal of the protective language in section 526(e) would be sufficient to accomplish overturning the public's oversight role otherwise so clearly established in SMCRA. It is obviously important to retain full citizen oversight¹⁰⁸

103. 30 U.S.C. § 1276(e) (1994).

104. See H.R. 2372, 104th Cong. § 8(b) (1995) (proposing removing the protective language of SMCRA § 526(e)).

105. See 30 U.S.C. § 1270 (1994).

106. Compare *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494 (3d Cir. 1987) (disallowing citizen suit) with *Molinary v. Powell Mountain Coal Co.*, 779 F. Supp. 839 (W.D. W. Va. 1991), *aff'd* 125 F.3d 231 (4th Cir. 1997) (allowing citizen suit).

107. 30 U.S.C. § 1270(a)(2).

108. See H.R. REP. NO. 95-218, at 88-91 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 625-27, for the comprehensive and important role contemplated for citizen participation in the regulatory and enforce-

particularly as federal budgets shrink requiring that the federal government shrink its oversight role.¹⁰⁹ States do not appear to be in an expansive budgeting mode either. Thus it is more important than ever that citizen suit provisions remain comprehensive.

Finally, the third proposed amendment would provide that the Secretary's formal action to resume administration of all or part of a state program¹¹⁰ be subject to judicial review in the district that includes the capital of the state whose program is at issue.¹¹¹ SMCRA already designates this district as one in which any action of the Secretary to approve or disapprove a state program or to promulgate a federal program for a state is subject to review.¹¹² House Bill 2372 makes no effort to correct the current lack of clarity in the SMCRA judicial review provisions and continues with that lack of clarity in the proposed amendment.

When action that is judicially reviewable is made subject to review in a particular venue, does that mean it is not subject to judicial review anywhere else? If that is what Congress intends, adding the word "only" would clarify that, as Congress did in one of the judicial review provisions where it said that review could be "only by the United States District Court for the District in which the surface coal mining operation is located."¹¹³ Congress made a similar use of "only" in one part of the citizen suit provision where it said the suit could be brought "only in the judicial district in which the surface coal mining operation complained of is located."¹¹⁴ In other provisions, however, such as the proposed amendment under discussion here, where "only" is not

ment processes under SMCRA.

109. See *infra* note 124 as to the federal budget for OSM. Even at enactment of SMCRA in 1977, the House noted: "The State or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing." H.R. REP. NO. 95-218, reprinted in 1977 U.S.C.C.A.N. 593, 625.

110. See *supra* discussion at text accompanying note 36.

111. H.R. 2372, 104th Cong. § 8(b) would add section 526(f) to SMCRA, 30 U.S.C. § 1276(f).

112. See section 526(a)(1) of SMCRA, 30 U.S.C. § 1276(a)(1). See cases cited *supra* note 32.

113. 30 U.S.C. § 1276(a)(1) (emphasis added).

114. 30 U.S.C. § 1270(f) (emphasis added).

used, courts have split on the issue of exclusivity.¹¹⁵

D. *The Statute of Limitations*

Although related to enforcement during state primacy, but of more general applicability, House Bill 2372 would enact a statute of limitations on enforcement,¹¹⁶ including collection of penalties, within "three years from the date on which the violation first occurs."¹¹⁷ As applied to the collection of a penalty an alternative might have been, for example, three years from the date on which the penalty is assessed, or is it intended that "violation" comprehends failing to pay an assessed penalty?¹¹⁸ Failure to pay an assessed penalty certainly is itself a violation of SMCRA. When does the violation of failing to pay an assessed penalty occur; on the day it is due but not paid? Section 518(c) of SMCRA gives a party thirty days to pay a proposed penalty in full.¹¹⁹ Or is the proposed amendment intended to mean that any suits for collecting fines or penalties already imposed have to be brought within three years of the date the underlying violation that led to the fine or penalty occurred? The proposed amendment does not say "underlying violation"; it says "first occurs." Does that mean the same thing? In *3M Co. v. Browner*,¹²⁰ the court said of "first accrued" as used in the federal general statute of limitations:¹²¹

Since then [1871], the term accrued in § 2462 has been taken to mean the running of the limitations period in penalty actions is measured from the date of violation.¹²²

115. Compare *Commonwealth v. Watt*, 741 F.2d 37 (4th Cir. 1984), with *Holmes Limestone Co. v. Andrus*, 655 F.2d 732 (6th Cir. 1981).

116. "[F]or the enforcement of any violation, fine, penalty, or forfeiture, pecuniary or otherwise" H.R. 2372, 104th Cong. § 9 (1995).

117. *Id.*

118. See, e.g., *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1427 (D.C. Cir. 1984) (interpreting the use of "violation" in SMCRA broadly to encompass the Secretary's failure to perform a mandatory duty).

119. 30 U.S.C. § 1268(c).

120. 17 F.3d 1453 (D.C. Cir. 1994).

121. 28 U.S.C. § 2462 (1994).

122. 17 F.3d at 1462. A quotation from another case makes it clear

It is not clear where the three year period comes from; such a limitation does not exist in either the Clean Air Act or the Clean Water Act. On the other hand, the general federal statute of limitations that the court said applied to "civil penalty cases brought before agencies" provides for a period of five years.¹²³

CONCLUSION

Even if House Bill 2372 is not passed and, therefore, does not result in a cutback of federal supervisory and enforcement efforts under SMCRA, federal budget cuts may well have that effect.¹²⁴ Furthermore, it may be incumbent on OSM to undertake some new regulatory efforts which, if undertaken, would at minimum involve administrative expenses. Therefore, it is useful to consider where OSM should cut back and where it should continue its efforts.

This author believes that rather than scaling back OSM enforcement activity in the manner proposed in House Bill 2372, an alternative focus needs to be considered. Clearly OSM, as explained in *In re Permanent Surface Mining Regulation Litigation*,¹²⁵ has an interest in accurate and complete data collection and other administrative details to facilitate OSM's oversight role. However, it should be secondary to enforcement of environmental standards on the ground. Furthermore, to seek to enforce the data collection interest through the section 521(a) TDN concept seems cumbersome and unnecessary. SMCRA section 521 en-

that the court is contemplating " 'the date of the underlying violation'." *Id.* (quoting *United States v. Core Lab.*, 759 F.2d 480, 482 (5th Cir. 1985)).

123. *Id.* at 1455-57.

124. Thus appropriations for OSM went down approximately 14½%, from \$110,006,000 (plus bond forfeitures and civil penalties) in the Department of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2509 (codified as amended in scattered sections of 25 U.S.C.; 43 U.S.C.; and 48 U.S.C.), to \$94,172,000 (plus bond forfeitures and civil penalties) in the Omnibus Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-625 (1996).

125. 653 F.2d 514, 522 (D.C. Cir. 1981) (en banc), *cert. denied*, 454 U.S. 822 (1981). See discussion in Beck, *Setting the Course*, *supra* note 8, at 28.

forcement procedures should be limited to enforcement of environmental performance standards on site at the mining operation. Section 521 seems indeed to be directed toward this. Thus one way for OSM to limit its role is to separate enforcement of environmental performance standards at the mining operation from other SMCRA requirements and give priority to the former.

In its June 20, 1996 directive on Oversight of State Regulatory Programs¹²⁶ OSM states:

Oversight will not be process driven. Instead, OSM oversight will focus on the on-the-ground/end-result success of the State program in achieving the purposes of the Act. Also, it will focus on identifying the need for and providing financial, technical and other program assistance to States to strengthen their programs.¹²⁷

Clearly this statement represents the appropriate focus for federal oversight. But it should be clear to the states that the ability of OSM to provide financial assistance will become increasingly more difficult. Furthermore, some of the major on-the-ground problems still extant, both in terms of damage caused and remedial costs, stem from pre-SMCRA mining, particularly acid mine drainage.¹²⁸ OSM needs to turn its attention more seriously to this problem.

While theoretically these pre-SMCRA problems fall within the scope of the Abandoned Mine Lands Program¹²⁹ under SMCRA, the money is not there to deal with them.¹³⁰ In the meantime

126. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT DIRECTIVE SYSTEM, U.S. DEP'T INTERIOR, REG-8 TRANSMITTAL (June 20, 1996) (implementing OSM/State Title V Oversight Team Report (July 1995)).

127. *Id.*

128. For an idea of the magnitude of the problem, see *Commonwealth v. Barnes & Tucker Co.*, 472 Pa. 115, 371 A.2d 461 (Pa. 1977), *appeal dismissed*, 434 U.S. 807 (1977).

129. 30 U.S.C. §§ 1231-1243.

130. See § 1232. Abandoned mine reclamation is supported by a reclamation fee imposed on current mine operations. OSM has estimated cleanup costs related to the acid mine drainage problem at \$65 million. See Don Hopey, *Money Needed to Clean Streams Polluted by Mine Drainage*, PITTSBURGH POST-GAZETTE, Sept. 12, 1997, at B-1, available in LEXIS, News Library, Papers File. Professor McGunley has noted a low figure of \$1.4 billion. See Roundtable, *supra* note 102, at 587.

some states are struggling to deal with the problems.¹³¹ Problems with ongoing mining operations could be handled through the imposition of adequate bonding requirements.¹³² The failure here is not from lack of oversight, but from lack of putting together a sufficient bonding program from the beginning. Thus OSM should expend resources in reviewing what is necessary to address pre-SMCRA needs and in correcting the deficiencies in the bonding program.

Despite OSM's Directive on Oversight statement emphasizing ground/end results,¹³³ a December 1996 OSM draft of a directive on TDNs did not limit its use of the TDN process to violations on the ground. Instead TDNs are to be issued in three categories of violations: performance standards, reporting, and permit deficiencies.¹³⁴

In the provision on violations of performance standards the draft directive refers to "performance standards or other obligations imposed on the operator under the approved permit or the approved program" that are observed during the inspection process.¹³⁵ What are these other obligations? The segment on reporting requires TDNs when "the permittee has *failed to submit reports or other information* required under the approved permit."¹³⁶ In the segment on permit deficiencies TDNs would be issued when "the permit allows a design or practice that is unauthorized under the approved program" or when the permit "completely omits required administrative or technical information" or if there is a failure "to follow a procedure required by the approved program as a prerequisite for permit approval."¹³⁷ Thus it is clear that OSM uses the TDN process beyond dealing with on-the-ground violations. Further consideration needs to be given to cutting back on the usages that do not deal directly with on-the-ground enforcement issues.

131. See Barlow Burke, *Reclaiming the Law of Suretyship*, 21 S. ILL. U. L.J. 449, 460-99 (1997); Roundtable, *supra* note 102, at 582-84 (remarks of Tom Galloway).

132. See Burke, *supra* note 131, at 487-99.

133. See *supra* text accompanying note 121.

134. Draft INE-35, § 3(b)(1)(a)-(c) (Dec. 1996). A fourth part (d) deals with inspections based on citizen complaints. Clearly the inspection provision in SMCRA requires a TDN in this latter instance.

135. *Id.* § 3(b)(1)(a).

136. *Id.* § 3(b)(1)(b), with one specified exception.

137. *Id.* § 3(b)(1)(c).

