

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977:
REGULATORY CONTROVERSIES AND CONSTITUTIONAL
CHALLENGES

Development of coal resources in the United States will unquestionably play a major role in the nation's energy future. To ameliorate the severe environmental consequences of the expected substantial increase in surface mining, Congress enacted the Surface Mining Control and Reclamation Act of 1977.¹ Through the Act, Congress intended to strike a balance between environmental protection and agricultural productivity and the nation's need for coal as an essential energy source.² While recognizing the need for nationwide standards, Congress left the primary regulatory and enforcement authority to the states so that the regulatory scheme would properly reflect the diversity of the states' terrain, climate, and other physical conditions.³

To achieve these dual purposes—nationwide standards and primacy of state regulatory programs—the Act gives states the option to create a regulatory program that must meet federal minimum standards. To become effective the program must be approved by the Secretary of the Interior.⁴ If a state fails to submit a program, or if a submitted program is not approved, the Act requires the Office of Surface Mining (OSM) to create a federal scheme to regulate surface mining practices within that state.⁵

The Surface Mining Control and Reclamation Act, passed after years of heated debate, has been the subject of much litigation.⁶ The controversy has intensified with the Secretary's issuance of the permanent regulations under which the Act is to be implemented.⁷ The purpose of this Development is to describe the issues surrounding the

1. Pub. L. No. 95-87, 91 Stat. 448 (codified at 30 U.S.C. §§ 1201-1328 (Supp. I 1977)).

2. *Id.* § 1202.

3. *Id.* § 1201(f).

4. *Id.* § 1253. The Secretary must approve or disapprove the proposed state program within six months of its submission. *Id.* § 1253(b). The state program must carry out "the purposes of the Act," and alternative approaches to the federal requirements must be "in accordance" with the Act and "consistent with" the permanent regulations. 44 Fed. Reg. 15,327 (1979) (to be codified in 30 C.F.R. § 732.15(a)). In addition to these general standards, the regulations list 16 specific criteria for the Secretary to consider in deciding whether to approve a state program. 44 Fed. Reg. 15,327-28 (1979) (to be codified in 30 C.F.R. § 732.15(b)(1)-(16)).

5. 30 U.S.C. § 1254(a) (Supp. I 1977).

6. *See, e.g.,* Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, 604 F.2d 312 (4th Cir. 1979); Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, 12 ERC 1795 (W.D. Va. 1979); *In re* Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978); *In re* Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978).

7. 44 Fed. Reg. 15,312-463 (1979) (to be codified in 30 C.F.R. pts. 700-845).

promulgation of these permanent regulations and to explain the most recent constitutional challenges to the Act. The issues concerning the regulations may roughly be characterized as "hardship" issues—claims of harm to the states caused by OSM delay in promulgating the permanent regulations—and "specificity" issues, controversies over the degree of regulatory specificity allowable under the Act. These controversies have prompted Congress to consider new legislation extending deadlines and providing for greater state autonomy. The constitutional challenges to the Act and the regulations are based on the tenth amendment and the takings clause of the fifth amendment.

I

REGULATORY CONTROVERSIES

A. Hardship Issues—The Delay in Promulgation

The permanent federal regulations, issued by the Secretary of the Interior through OSM, are guidelines for the development of state plans.⁸ The Act requires states promulgating their own regulatory programs to follow the requirements of the Act and the regulations.⁹ Failure to submit or obtain approval of a state plan prior to the statutory deadlines allows OSM to implement its own federal regulatory program for that state.¹⁰ The statutory deadline for issuance of the federal regulations was August 3, 1978.¹¹

The permanent regulations, however, were not issued until March 13, 1979,¹² more than seven months after the statutory deadline. This delay had the potential of working great hardship on the states, since they were required by statute to submit their proposed programs no

8. 30 U.S.C. §§ 1251(b), 1253(a)(7), 1291(25) (Supp. I 1977).

9. The Act provides: "'State Program' means a program established by a State pursuant to section 1253 of this title to regulate surface coal mining and regulation operations, on lands within such state in accord with the requirements of this chapter and regulations issued by the Secretary pursuant to this chapter." *Id.* § 1291(25).

10. A federal regulatory program for a coal mining state may be implemented only after the state's failure to submit any program before the statutory deadline, after final disapproval of the state's proposed program, or after the state's failure to enforce its program. 30 U.S.C. § 1254(a) (Supp. I 1977); UNITED STATES COMPTROLLER GENERAL, ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT 7 (1979) (hereinafter cited as COMPTROLLER GENERAL). Implementation of a federal program may well frustrate the state's desire to create its own program tailored to suit local conditions, even though the Act requires the Secretary, in implementing a federal regulatory program, to consider the state's unique "terrain, climate, biological, chemical and other relevant physical conditions." 30 U.S.C. § 1254(a) (Supp. I 1977). The basic issue is whether the federal Office of Surface Mining or individual states are better motivated and informed to formulate programs both adapted to local conditions and still effectuating the purposes of the Act.

11. 30 U.S.C. § 1251(b) (Supp. I 1977).

12. 44 Fed. Reg. 15,311 (1979).

later than August 3, 1979.¹³ The delay in receiving the needed guidance from the federal regulations made it virtually impossible for the states to comply with this deadline.¹⁴

Because of the potential hardship, several states sought an injunction against enforcement of the statutory deadline; the District of Columbia District Court ordered an extension of the submission date to March 3, 1980.¹⁵ OSM followed this lead by amending its regulations to extend the submission deadline for state programs to March 3, 1980.¹⁶

Neither OSM nor the court, however, has extended the statutory deadline of June 3, 1980¹⁷ for final approval of state programs.¹⁸ Strict enforcement of this deadline for final approval will probably not allow sufficient time for OSM review and state revision of the submitted plans,¹⁹ again exposing the states to the disfavored consequence of implementation of a federal program. Congress is now considering legislation to extend the deadline for submission and approval of state programs.²⁰

B. *The Controversy Over the Regulations' Specificity*

The second controversy generated by the issuance of the permanent regulations centers around their extensive detail and specificity concerning mining procedures. The resolution of this controversy may have far-reaching effects on the Act's implementation. The regulations are comprehensive in scope and explanation, consisting of approximately 150 pages of regulations²¹ and over 400 pages of explanatory comment.²² They have not only provided general guidelines for the states to follow in developing their own programs, but have also specified the precise procedures and techniques to be used in mining and reclamation operations.²³ The regulations contain, for example, six

13. 30 U.S.C. § 1254(a) (Supp. I 1977).

14. COMPTROLLER GENERAL, *supra* note 10, at 5.

15. *In re* Permanent Surface Mining Regulation Litigation, 13 ERC 1586 (D.D.C. Aug. 21, 1979). The court held that the extension must be granted because: 1) the original deadline was only "directory" and not mandatory; 2) enforcement of the original deadline would be expensive to the states and would prevent development of alternative programs; and 3) the public interest would suffer from inadequate "reasoned consideration" in formulation of the state plans. *Id.*

16. 44 Fed. Reg. 60,969 (1979) (to be codified in 30 C.F.R. § 731.12).

17. 30 U.S.C. § 1254(a) (Supp. I 1977).

18. *In re* Permanent Surface Mining Regulation Litigation, 13 ERC 1586, 1590 (D.D.C. Aug. 21, 1979).

19. COMPTROLLER GENERAL, *supra* note 10, at 5. See 30 U.S.C. § 1254(a) (Supp. I 1977).

20. See text accompanying notes 60-67 *infra*.

21. 44 Fed. Reg. 15,312-463 (1979) (to be codified in 30 C.F.R. pts. 700-845).

22. *Id.* at 14,902-15,309 (1979).

23. See *id.* at 15,395-422 (to be codified in 30 C.F.R. §§ 816.1-.181).

pages of requirements controlling the location and construction of roads on mine sites.²⁴

OSM justifies the specificity of its regulations by citing the need for uniform performance standards and design criteria in order to establish a minimum level of environmental protection.²⁵ A high degree of specificity is also in accord with the congressional intent of preventing unfair competition among coal producers that could result from widely differing state procedures.²⁶ Furthermore, detailed regulations are needed because the Act is worded too broadly to be self-implementing.²⁷ For example, such terms as "best available subsoil," "environmentally sound reclamation efforts," and "reasonably stable water levels," which are used throughout the statute,²⁸ require further clarification.

In addition, OSM claims that a procedural mechanism by which the states can retain the flexibility to regulate surface mining according to local conditions is built into the regulations, thus complying with the congressional intent of giving states primacy in the regulatory process. This so-called "state window" feature allows the states to propose alternatives to the requirements of the federal program on the condition that the alternative provision is "no less stringent" than the requirements of the Act and the federal regulations.²⁹ The state must also demonstrate that the proposed alternative is necessary because of local requirements or local environmental or agricultural conditions.³⁰ OSM contends that the "state window" feature strikes the proper balance between the need for national uniformity and the states' desire for flexibility in resolving local problems.³¹

Because the permanent regulations afford significant environmental protection, environmental groups favor strict compliance with the regulations' provisions.³² Some groups, however, have expressed a concern that the states and industry will use the "state window" provision as a loophole for approval of state programs that do not meet the minimum standards of the Act and regulations.³³ This fear seems unfounded since the states bear the burden of justifying significant depart-

24. *Id.* at 15,416-21 (to be codified in 30 C.F.R. §§ 816.150-176). These regulations are intended to implement only two subsections of the Act. 30 U.S.C. § 1265(b)(17), (18) (Supp. I 1977).

25. COMPTROLLER GENERAL, *supra* note 10, at 19. 44 Fed. Reg. 14,952 (1979).

26. 30 U.S.C. § 1201(g) (Supp. I 1977).

27. 125 CONG. REC. S12,384 (daily ed. Sept. 11, 1979) (remarks of Sen. Melcher).

28. 30 U.S.C. § 1265(b)(6), (8)(D), (16) (Supp. I 1977).

29. 44 Fed. Reg. 15,324 (1979) (to be codified in 30 C.F.R. §§ 730.5, 731.13(c)(1)).

30. *Id.* (to be codified in 30 C.F.R. § 731.13(c)(2)).

31. *Id.* at 14,951-52; COMPTROLLER GENERAL, *supra* note 10, at 19.

32. [1978] 9 ENVIR. REP. (BNA) 1286.

33. COMPTROLLER GENERAL, *supra* note 10, at 14.

tures from the specific requirements of the federal regulations,³⁴ and since the alternative must be at least "as stringent" as the federal standard.³⁵

State and industry officials claim that the "state window" concept is an illusion since the detailed OSM regulations leave virtually no discretion to the states.³⁶ Many state officials are convinced that in order to gain OSM approval, state program performance standards must be almost verbatim copies of the federal regulations.³⁷ Montana, North Dakota, and Wyoming, for example, are required to promulgate prime farmland and alluvial floor regulations identical to the federal regulations despite considerable differences in state terrain.³⁸ The states believe that such extensive regulation is contrary to the congressional intent of state primacy and is an overextension of OSM's regulatory authority.³⁹

This specificity issue has been adjudicated recently in three cases. The decisions indicate that judicial relief from strict compliance with the provisions of the federal regulations on the grounds that they are impermissibly specific is not likely to be forthcoming.

In *In re Permanent Surface Mining Regulation Litigation*,⁴⁰ several state and industry plaintiffs sought to enjoin implementation of the federal regulations concerning permit applications. In part, the plaintiffs alleged that OSM's highly specific regulations violated the legislative intent of the Act⁴¹ by usurping the discretion of state regulatory agencies.⁴² In denying the injunction, the court held that the plaintiffs had made an insufficient showing that they were likely to prevail on their claim that the "regulations, taken as a whole, provide insufficient discretion to the states."⁴³ In a prior case, coal mine operators argued that the Secretary's broad authority under the Act to protect the hydrologic balance and water quality⁴⁴ did not empower the Secretary to issue highly detailed interim effluent regulations.⁴⁵ The court rejected this

34. 44 Fed. Reg. 15,324 (1979) (to be codified in 30 C.F.R. § 731.13(c)).

35. *Id.* (to be codified in 30 C.F.R. § 730.5).

36. COMPTROLLER GENERAL, *supra* note 10, at 12; [1978] 9 ENVIR. REP. (BNA) 1286.

37. COMPTROLLER GENERAL, *supra* note 10, at 13.

38. *Id.*

39. *Id.* at 12.

40. 13 ERC 1586 (D.D.C. Aug. 21, 1979).

41. See 30 U.S.C. § 1201(f) (Supp. I 1977).

42. *In re Permanent Surface Mining Regulation Litigation*, 13 ERC 1586, 1600 (D.D.C. Aug. 21, 1979).

43. *Id.* Strictly speaking, this holding only addresses the sufficiency of these plaintiffs' arguments and evidentiary showing. In rejecting these arguments, however, the court relied on the broad statutory powers granted the Secretary: "To the extent [the usurpation of State authority argument] is based on the language of the Act, it is without merit." *Id.*

44. 30 U.S.C. § 1265(b)(10) (Supp. I 1977).

45. *In re Permanent Surface Mining Regulation Litigation*, 452 F. Supp. 327, 343-44 (D.D.C. 1978).

contention, holding the Secretary's action to be a "reasonable exercise of his powers . . . despite the lack of explicit authorizing language."⁴⁶ Finally, in the most recent decision on this issue the District of Columbia District Court held that the Act authorizes the Department of the Interior to require state programs to be consistent with the federal regulations as well as the statutory requirements.⁴⁷ Although it apparently did not explicitly deal with the specificity challenge, the court's ruling that the Act bestows "unequivocal grants of rulemaking authority"⁴⁸ to Interior renders doubtful any future challenges to the regulations on specificity grounds.

Industry argues that the high degree of specificity inherent in the regulations is inflationary.⁴⁹ According to a survey conducted by the Mining and Reclamation Council of America (MARC), major coal companies have estimated that the regulations will increase their operating costs by 100 to 300 percent.⁵⁰ The survey also noted that these potential cost increases may result in some delay in expanding industry production.⁵¹ OSM contends, however, that the fully implemented regulations will cause little economic disruption.⁵²

The federal regulations may also have a disproportionately adverse impact on small mine operators. The MARC survey indicated that approximately sixty percent of the small operators plan to leave the coal business due to increasing costs.⁵³ Although this exodus would not necessarily reduce national coal production, since small operations would probably be absorbed by the larger companies,⁵⁴ it may lessen competition in the coal industry, leading to higher energy prices.⁵⁵

In response to these allegations, OSM has stated that factors other than its regulations, such as adverse market conditions and high transportation costs, are more likely to be the cause of small operator shut-down.⁵⁶ OSM has, however, agreed to revise its bonding rules,⁵⁷ some portions of which may have been working a severe hardship on small

46. *Id.* at 344.

47. *In re Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. Feb. 26, 1980) (summarized in [1980] 10 ENVIR. REP. (BNA) 2088-89).

48. *Id.*

49. COMPTROLLER GENERAL, *supra* note 10, at 28.

50. [1979] 9 ENVIR. REP. (BNA) 2070.

51. *Id.*

52. COMPTROLLER GENERAL, *supra* note 10, at 28. At this point, it is too early to ascertain the inflationary impact of the regulations. *Id.* at 29.

53. *Id.* at 27; [1979] 9 ENVIR. REP. (BNA) 2070. Small mine operators are those whose total annual production is less than 100,000 tons. COMPTROLLER GENERAL, *supra* note 10, at 27.

54. COMPTROLLER GENERAL, *supra* note 10, at 27.

55. [1979] 9 ENVIR. REP. (BNA) 2070.

56. COMPTROLLER GENERAL, *supra* note 10, at 27.

57. 44 Fed. Reg. 52,098 (1979) (to amend 30 C.F.R. Chapter 7, Subchapter J).

operators.⁵⁸ In response to state requests that small operators be permitted to adhere to somewhat more lenient standards, OSM has refused to alter the regulations, pointing out that the damage to the environment caused by coal production is the same for both large and small operators.⁵⁹

C. The Legislative Response—Senate Bill 1403

The issues of alleged OSM overregulation and the potential inequities caused by delay in the promulgation of the federal regulations have prompted action by Congress.⁶⁰ As originally proposed, Senate Bill 1403 provided for a seven month extension of the statutory deadlines for submission and approval of state plans.⁶¹

A number of environmental groups opposed extension of the deadlines⁶² because it would continue to let the interim standards govern mining practices.⁶³ The interim standards provide considerably less environmental protection than do the requirements for permanent programs.⁶⁴ For example, specific requirements to protect the delicate soil balance in prime farmland areas, mandated by the Act under the permanent programs,⁶⁵ are not included in the interim standards.⁶⁶ In fact, only eight of the twenty-five protective subsections of the Act's permanent environmental protection performance standards are required by the interim program.⁶⁷ Any delay in shifting to permanent plans, therefore, could significantly adversely affect the environment.

Nonetheless, the bill was amended in committee to call for a twelve month extension of the deadline.⁶⁸ The Senate passed the amended bill on September 11, 1979,⁶⁹ and the bill now awaits House action.

The final version of S. 1403 also contains a provision, commonly known as the Rockefeller amendment, deleting the phrase in section 1253(a)(7) of the Act requiring state plans to conform to the regulations promulgated by OSM.⁷⁰ To qualify for approval, states would have to

58. [1979] 9 ENVIR. REP. (BNA) 2076.

59. COMPTROLLER GENERAL, *supra* note 10, at 27.

60. S. 1403, 96th Cong., 1st Sess. (1979).

61. 125 CONG. REC. S12,350 (daily ed. Sept. 11, 1979).

62. COMPTROLLER GENERAL, *supra* note 10, at 8; [1979] 10 ENVIR. REP. (BNA) 781.

63. 30 C.F.R. pts. 700, 710, 715-718, 720-723, 725, 740, 795, 830 (1978).

64. *Compare* 30 U.S.C. § 1252 (Supp. I 1977) and 30 C.F.R. pts. 700, 710, 715-718, 720-723, 725, 740, 795, 830 (1978) with 30 U.S.C. § 1265 (Supp. I 1977) and 44 Fed. Reg. 15,312-463 (1979) (to be codified in 30 C.F.R. pts. 700-745).

65. 30 U.S.C. § 1265(b)(7) (Supp. I 1977).

66. *See id.* § 1252(c).

67. *Id.*

68. S. 1403, 96th Cong., 1st Sess. (1979).

69. 125 CONG. REC. S12,387 (daily ed. Sept. 11, 1979).

70. Section 1253(a)(7) of the Act presently provides that states wishing to assume exclu-

comply only with the requirements of the Act itself, rendering the permanent regulations applicable only when a state fails to secure approval of its alternative program.

The Rockefeller amendment is unacceptable to the Carter Administration and to Congressman Udall, who spearheaded the original Act through the House of Representatives,⁷¹ and is strongly opposed by environmentalists.⁷² Opponents of the proposed amendment believe it would severely weaken the Act's environmental protection provisions by allowing the promulgation of inadequate state programs.⁷³ Although the Secretary of the Interior would still retain the power to accept or reject a state plan,⁷⁴ federal regulations would no longer be a standard with which to evaluate state programs. Secretary of the Interior Cecil Andrus has stated that without these guidelines his decisions could appear "arbitrary and capricious," increasing the probability of litigation over state programs.⁷⁵

Because numerous provisions of the Act require definition and clarification,⁷⁶ the courts will be required effectively to redraft the regulations via a series of decisions.⁷⁷ Ad hoc judicial creation of a replacement regulatory scheme, besides usurping a congressional function, risks approval and implementation of state plans that inadequately protect the environment.⁷⁸ It could also result in extended reliance on the less protective interim regulations by causing substantial delays in the implementation of permanent plans.⁷⁹

Opponents of S. 1403 feel that the "state window" provision in the federal regulations provides the states with sufficient flexibility.⁸⁰ According to Secretary Andrus, OSM regulations give state regulatory authorities over 100 opportunities to select techniques or procedures different from those in the federal regulations and still qualify for approval.⁸¹ Opponents also argue that ceasing to rely on the federal regulations would create uncertainty for the coal industry at this critical

sive jurisdiction over the regulation of surface coal mining must submit a state program that demonstrates the state's capability of carrying out the provisions of the Act and meeting its purposes through "(7) rules and regulations consistent with *regulations issued by the Secretary pursuant to this chapter.*" The Rockefeller amendment deletes the italicized language. S. 1403, 96th Cong., 1st Sess. § 3 (1979).

71. [1979] 10 ENVIR. REP. (BNA) 897, 1152.

72. *Id.* at 1345.

73. *Id.*

74. 30 U.S.C. § 1253(b) (Supp. I 1977).

75. [1979] 10 ENVIR. REP. (BNA) 897 (summarizing a letter from Secretary of the Interior Andrus to Sen. Henry Jackson).

76. See text accompanying notes 26-27 *supra*.

77. 125 CONG. REC. S12,350 (daily ed. Sept. 11, 1979) (remarks of Sen. Jackson).

78. *Id.*

79. *Id.* at S12,385 (remarks of Sen. Wallop).

80. [1979] 10 ENVIR. REP. (BNA) 1346, 1456.

81. *Id.* at 1456.

time when stability is needed to foster expansion.⁸²

Although S. 1403 was passed in the Senate by a substantial margin,⁸³ it will encounter more difficulty as it faces evaluation by the House and the Administration. Congressman Udall, chairman of the House committee with jurisdiction over the Act, is attempting to block consideration of the bill by the House.⁸⁴ Secretary of the Interior Andrus has stated that he will recommend a veto if Congress sends the current version of S. 1403 to President Carter.⁸⁵ Given these competing interests, the fate of the Rockefeller amendment is uncertain at best.

II

CONSTITUTIONAL CHALLENGES TO THE ACT

The continued viability of several major provisions of the Act is now in doubt because of constitutional challenges made by the mining industry. In February 1979, a federal district court in Virginia issued a preliminary injunction against enforcement of virtually all the major provisions of the Act on the grounds that plaintiffs had shown that enforcement of the Act during the period when substantive challenges were being considered would force them to bear an impermissibly unilateral hardship.⁸⁶ *In dicta*, the court observed that the mining industry had made a strong showing that the Act, by making mining of steep slopes economically impracticable, violated the takings clause prohibition of the fifth amendment.⁸⁷ Furthermore, the court felt that the Act's provisions empowering federal inspectors to order cessation of mining operations without a prior hearing constituted a denial of procedural due process.⁸⁸

On appeal the Fourth Circuit dissolved the injunction, finding improper the lower court's use of the "balance of hardship" test in deciding whether to issue the injunction.⁸⁹ The court held that the plaintiffs had failed to fulfill the statutory prerequisites to enjoin the Secretary's actions, which include a showing of a substantial likelihood that the

82. *Id.* at 1345-46; 125 CONG. REC. S12,350 (daily ed. Sept. 11, 1979) (remarks of Sen. Jackson).

83. The vote was 68-26. 125 CONG. REC. S12,387 (daily ed. Sept. 11, 1979).

84. [1979] 10 ENVIR. REP. (BNA) 1345.

85. *Id.* at 897.

86. Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, 12 ERC 1795, 1798, 1800 (W.D. Va. 1979). The court employed the *Blackwelder* test, which permits the court to issue preliminary injunctions without a finding that plaintiffs are likely to succeed on the merits when the plaintiffs show that the likelihood of irreparable harm in the absence of the injunction outweighs the likelihood of harm to the defendant.

87. *Id.* at 1798-99. The opinion dealt primarily with the Act's requirement of restoration of original contours of mined slopes.

88. *Id.* at 1799-1800.

89. Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus, 604 F.2d 312, 314-15 (4th Cir. 1979).

complainant will prevail on the merits and that the relief would not "adversely affect public health or safety or cause significant environmental harm."⁹⁰ The appellate court did not comment on the lower court's discussion of the constitutional issues.

In January of this year, however, the district court held unconstitutional and enjoined the enforcement of several major provisions of the Act. As foreshadowed in the court's earlier opinion, sections 515(d), (e) and 522,⁹¹ respectively requiring operators to restore mined land to approximately the original contours and permitting designation of an area as "unsuitable for surface coal mining," were found to be constitutionally infirm because they deprived a landowner of any use of his land, thereby causing a taking in violation of the fifth amendment.⁹² The restoration provisions were also held to violate the tenth amendment by displacing the states' freedom to structure integral operations in areas of traditional governmental functions.⁹³

The court also enjoined enforcement of sections 518, 521(a)(1)-(3) and 525,⁹⁴ which provide for summary issuance of cessation orders and civil penalties by OSM inspectors and permit adversely affected parties to petition the Secretary for termination of a designation that a site is suitable for surface mining. These sections, the court held, deprive mine operators of procedural due process.⁹⁵ Disagreeing with a prior decision by the District of Columbia District Court which upheld these provisions against a due process challenge,⁹⁶ the Virginia court held that the Act provides insufficient procedural safeguards for mine operators insofar as it leaves the ultimate decision on whether an operation is to be shut down to the individual inspector.⁹⁷ The court pointed out that under the Act a cessation order could be given in the field without a hearing, leading to a mandatory assessment of a civil penalty and if the mining continued, a criminal sanction.⁹⁸ Thus, "[t]he entire basis of a conviction under the act could be refusal to comply with a cessation order that has been entered without any hearing."⁹⁹

Environmentalists see the most visible consequence of the decision

90. *Id.*

91. 30 U.S.C. §§ 1265(d)-(e), 1272 (Supp. I 1977).

92. *Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus*, No. 78-0224-B, (W.D. Va. Jan. 3, 1980). The court found that restoration of the original contour of the property "diminished its value to practically nothing." *Id.* at 17.

93. *Id.* at 11-13.

94. 30 U.S.C. §§ 1268, 1271(a)(1)-(3), 1275 (Supp. I 1977).

95. *Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus*, No. 78-0224-B, at 26-38 (W.D. Va. Jan. 3, 1980).

96. *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978).

97. *Virginia Surface Mining and Reclamation Ass'n, Inc. v. Andrus*, No. 78-0224-B, at 32 (W.D. Va. Jan. 3, 1980).

98. *Id.* at 33-34.

99. *Id.* at 34.

to be the invalidation of the restoration of original contour requirements. Since ninety-five percent of Virginia's coal reserves are located on slopes of twenty degrees or greater,¹⁰⁰ elimination of the original contour restoration requirement will permit mine operators to alter drastically the topography of these areas.¹⁰¹ If upheld on appeal, the court's use of the tenth amendment analysis may, however, have a more significant overall impact. Since arguably all of the substantive, environmental protection requirements of the Act to some extent intrude on areas of traditional state control, it is conceivable that many of them may be subject to tenth amendment attack.

Since the *Virginia Surface Mining* decision, however, the federal district court for the Southern District of Iowa has rejected nearly identical challenges to the Act.¹⁰² The tenth amendment, fifth amendment, due process and commerce clause arguments were all found untenable, although the court did find section 518(c),¹⁰³ which requires prepayment of a civil penalty to gain a hearing on alleged violations, violative of due process guarantees.¹⁰⁴

Chief Justice Burger cast further doubt on the strength of the constitutional challenges when in February of this year he stayed the *Virginia Surface Mining* decision at the request of the Department of the Interior.¹⁰⁵ The action enables OSM to continue to enforce the Act until the Supreme Court as a whole can hear the arguments regarding the stay.¹⁰⁶

CONCLUSION

The promulgation of the permanent regulations and the constitutional challenges to the Act itself have created a great deal of upheaval in the coal mining industry. It is, however, imperative to find an environmentally acceptable solution of these problems as rapidly as possible. Developing adequate supplies of domestic energy resources in an environmentally sound manner is an important national objective, and surface coal mining can play a major role in achieving this goal. It is

100. *Id.* at 10.

101. Not everyone sees this result as deleterious since level land is a scarce and valuable commodity in many of Virginia's coal mining regions. *Id.* at 11. Some legislators point to the variance provisions contained in § 515(e) of the Act, which recognize the beneficial consequences of leveling hilly areas and which provide for exemptions from the restoration of contour requirements in certain specific circumstances. 125 CONG. REC. S12,382 (daily ed. Sept. 11, 1979) (remarks of Sen. Ford). See 30 U.S.C. § 1265(e) (Supp. I 1977).

102. *Star Coal Co. v. Andrus*, No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (summarized in [1980] 10 ENVIR. REP. (BNA) 2122).

103. 30 U.S.C. § 1268(c) (Supp. I 1977).

104. *Star Coal Co. v. Andrus*, No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (summarized in [1980] 10 ENVIR. REP. (BNA) 2122).

105. [1980] 10 ENVIR. REP. (BNA) 2107.

106. *Id.*

estimated that sufficient national coal reserves exist to meet this country's needs for hundreds of years.¹⁰⁷ These factors led President Carter to call for a two-thirds increase in coal production by 1985.¹⁰⁸ It is unrealistic, though, to expect significant expansion in the coal industry if regulatory turmoil continues. Only with stability and certainty can the sophisticated task of environmentally acceptable surface coal mining be achieved.

Steve Wadsworth

107. S. REP. NO. 402, 93rd Cong., 1st Sess. 35 (1973).

108. COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 1ST SESS., THE PRESIDENT'S ENERGY PROGRAM 8 (Comm. Print 1977).