COMPETITION IN THE COAL FIELDS AND THE ENFORCEMENT OF SMCRA[1]

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Last August marked the tenth anniversary of the enactment of the Surface Mining Control and Reclamation Act (SMCRA), hailed as a comprehensive approach to establish national minimum standards for the mining of coal and the reclamation of land. The law has not accomplished what Congress or the citizens of the coalfields had envisioned. Mining abuses still flourish, standards vary from state to state, and thousands of acres of abandoned mined lands remain as scars on the landscape.

SMCRA is one of the most comprehensive land-use laws ever promulgated. It mandates planning from outset to conclusion. A mineral developer must analyze conditions before mining, must submit a proposal on how mining activities will be conducted, and must have a plan for achieving post-mining restoration of the affected land to a condition capable of supporting the uses which it was capable of supporting before mining.

The goals of SMCRA are laudable. The past history of mining in our country resulted in thousands of miles of streams clogged and polluted with sediment and acid mine drainage and tens of thousands of acres of mined land unreclaimed from surface mining, in addition to the legacies of unregulated national underground mining, which include continuing subsidence of mined-out areas, huge culm piles, and untold numbers of serious, long-term acid mine discharges.

Citizens across Appalachia began organizing protest groups in the late 50's and 60's. When state government failed to meet their citizens' concerns by establishing stronger state programs, the battle was carried to Congress. Using the Pennsylvania mining regulatory program as a discussion model, Congress debated the issue of a national regulatory program for nearly 10 years. Twice legislation was passed, which was vetoed by two different Republican presidents.

In 1977, under a Democratic administration, SMCRA was passed and signed into law. In the Act's Statement of Findings, Congress said, ". . . surface mining and reclamation are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic and environmental effects of such mining operations. . ." Furthermore, it found, ". . . surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders. . ." (U.S. Code of Federal Regulations 1977).

Throughout the legislative debate over SMCRA, Congress repeatedly registered concerns over the propensity of states to underregulate and underenforce environmental constraints on mining. The House bill provision, which prevailed at Conference and which contained language which became part of Section 521 (a) (i) as finally adopted in SMCRA, summarized their conviction that states, if allowed to fashion and administer their own state programs, would not enforce the Act as intended:

> For a number of predictable reasons - including ... the tendency of State agencies to be protective of local industry - State enforcement has, in the past, often fallen short of the vigor necessary to assure adequate protection of the environment ...
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> While it is confident that the delegation of primary regulatory authority to the States will result in fully adequate state enforcement, the Committee is also of the belief that a limited Federal enforcement role as well as increased opportunity for citizens to participate

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in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated. (U.S. House of Representatives, 1977).

The compromise arrived at in SMCRA was that states could apply for primary enforcement authority for the Act but that the Federal government would reserve for itself an oversight authority to ensure that the Act was enforced and that reclamation was achieved. The problem has become the changing philosophy of the Federal administration. Under the Carter presidency, the philosophy of the Federal Office of Surface Mining (OSM) was that the Act would be interpreted strictly and that Federal oversight would be zealous. Under the Reagan administration's 'New Federalism' approach, the Act has not been interpreted to preserve the Federal and has, in fact, been eroded of much of the driving force to achieve "national minimum standards." OSM has exaggerated the emphasis on the role of states under approved programs to the point of distorting the enforcement structure of the Act and the proper overlay of Federal enforcement over state program enforcement.

The widely divergent philosophies of Federal administrators from one of cooperative state-federal enforcement with a substantial role for the state to one of an overriding role for the state and an ineffective oversight role for the Federal government has produced a climate of uncertainty and disarray for the industry, for regulatory agencies, and for the general citizenry.

James Lyon of the Environmental Policy Institute in Washington, D.C., a citizen organization that often takes the lead on mining issues, says that OSM has allowed the states' effort to "slide to the lowest common denominator. When you allow a state like Kentucky to go off the edge, there is tremendous pressure in the other states for a falloff there, too, because of the cutthroat competitiveness of the market." (Courier-Journal 1987)

The climate of uncertainty is focused on the Federal quidelines upon which state programs are based under the law. In 1981, former Interior Department Secretary, James Watt, in the name of 'Regulatory Reform,' ordered the OSM to rewrite 90 percent of its regulations. National and grassroots environmental and citizen groups, claiming the changes violated the intent of the Act, challenged Watt's final rules in federal court. The groups received an overwhelming victory when in 1984-85 the court ruled to remand virtually every major change sought by the administration. Over the past year, after almost two years of delay, the OSM is beginning to make final a few of its rewritten regulations. The environmental groups involved in the litigation claim the new regulations blatantly ignore the Federal court's ruling on these issues and, for the most part, take the exact same line as the initial changes. The third revision of national regulations is now being litigated.

The Watt-directed changes in regulation - those changes challenged in court by the environmental coalition - in general relaxed specific (or, as charged by industry critics, 'cook-book') standards established in the 1979 regulation package to more general ones which allow state interpretation. Allowing states such broad interpretation encourages widely divergent state programs. The Act contemplated minimum standards for coal mining and reclamation that would put coal producers on a more or less equal footing; however, competition is rife in the coalfields again.

The administration's eagerness to turn the program over to states as part of the New Federalism approach may have been a critical mistake. At the end of the Carter administration, states had lead enforcement duties at only 11 percent of the nation's strip mines. Within 20 months after the Reagan administration took office, more than 80 percent were state regulated. In a recent comprehensive series in the Louisville, KY, Courier-Journal, state leaders were asked their opinion on why state programs were in trouble:

> 'For those states that had very little regulation - Virginia, Kentucky, Alabama - it was a very, very traumatic change and they simply weren't ready to do it themselves,' said coal-industry consultant Alan K. Staff. 'The industry in those states very seriously resisted the Act and compliance with it. And there are those who say they still are, that Kentucky especially is still fighting it.'
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> 'The states were in no shape to take it (mining regulation) over,' said James Fleming, energy adviser to Kentucky Democratic Sen. Wendell Ford, a staunch industry ally.
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> Longtime coal operator William B. Sturgill, whose name is synonymous with strip mining in Eastern Kentucky, said the 1977 law 'hasn't been administered in such a way as to make a contribution to the production of coal or to the environmental constraints we all wanted to achieve.' (Courier-Journal 1987)

Twenty-four states now have primacy responsibility for enforcement. According to General Accounting Office reports, state program operations have not been effective (U.S. General Accounting Office, 1986, 1987). The GAO surveys found that states were citing less than half the violations in their coalfields - many of which were of serious potential to harm the environment. Nationwide, more than $180 million in civil strip-mine fines remain uncollected. Kentucky alone has $60 million in uncollected fines and also can boast of having more than 2,000 unabated cessation orders which have not been enforced. Kentucky is also singled out as the state harboring the largest number of the scofflaws called 'wildcat' miners, those who don't bother with permits, backfilling, or severance fees at all. Border counties in Southwestern Virginia and in Tennessee also have their share of wildcatters. OSM Director Jed Christiensen announced last August the formation of a 12-person Federal strike force to combat wildcat mining.

One loophole in SMCRA, the two-acre exemption operation which was free from severance taxes and reclamation requirements, was quickly seized upon by unscrupulous operators in Western Virginia and Eastern Kentucky. Small, independent operators weren't the only ones to reap profits from two-acre

operations. Large companies, including one of the largest corporations in the nation, created through sub-contractors "strings of pearls" operations which connected numerous two-acre mines. Legitimate coal producers in those areas were put at a distinct competitive disadvantage. Last spring, with support of both industry and environmentalists, Congress closed the loophole, abolishing the two-acre exemption.

One area which can be particularly pointed to as one which encourages competitive disadvantages for coal producers is the reclamation bond. The divergence in bonding rates is a significant factor in comparing state programs and looking at the costs to industry in each state as well as comparing costs to the environment in terms of potential threat of increased abandoned acreage.

SMCRA requires mine operators to post a bond to assure that mined lands will be adequately reclaimed if the operator is unwilling or unable to do so. How much should that bond be? In my own state, Pennsylvania, it is estimated that at least $6,000 per acre is necessary to cover public reclamation costs. Other states have different estimates. Ohio reclamation officials say it costs their state at least $5,500 per acre. And, it should be borne in mind, such last ditch reclamation is rarely the return to pre-mining conditions that is the preferred form of reclamation under the Act.

Although the mining industry was the foremost advocate of allowing state-by-state divergence from the Federal guidelines, it now rails against the difference in the cost of doing business from one state to another. Pennsylvania industry spokesmen maintain it is two to three times as expensive to mine coal in Pennsylvania as it is in West Virginia or Kentucky, for example. Much of that cost is found in the differing bonding rates.

Over the past summer, I conducted an informal survey of the bonding practices and bonding levels in eight Eastern mining states: Indiana, Kentucky, Pennsylvania, Virginia, Illinois, Ohio, Tennessee and West Virginia. When I summed up the results of the survey, the overwhelming impression was that bonding is, on the whole, inadequate and there is little similarity in the way programs are bonding surface mine operations.

Bonding the mining area is one of the big cost items in mining. That cost, especially in the Eastern region of the country, should be comparable from one state to another. Right now it isn't. The required bond can be as high as $10,000 an acre to bond in Pennsylvania or Illinois. In Ohio, it cannot cost more than $2,575 an acre, less than half of what the state says it costs per acre to reclaim the site if the state has to assume reclamation responsibility. In West Virginia and Tennessee, an operator can obtain a bond for $1,000-$2,000 an acre even if he is removing a mountain top and creating a valley fill.

My informal survey also brought out one particularly disturbing fact: you can't rely on the Federal government to establish adequate bonding rates. The Office of Surface Mining is now administering the Tennessee program, the only state program under Federal administration. Their bonding procedure, however, is setting bonds among the lowest in the Eastern states. Two examples of recently permitted operations reveal the following bond amounts:

1) An area mine with an average of 20 feet of overburden - 270 acres bonded at $177,000 ($655 an acre).

2) Another area mine where a variance was granted to accommodate a drag-line operation, extending the allowable pit opening from 1800 feet to 4200 feet and allowing three spoil piles - 682 acres bonded at $1,425,000 ($2,089 an acre).

The initial Tennessee primacy program, taken over by OSM, bonded at $1500 an acre - clearly inadequate. The Federal program - based on the examples above - appears to be no improvement.

Both state primacy programs and OSM calculations on bond requirements for permitting assume prompt inspection and enforcement activity - in other words, strict adherence to contemporaneous reclamation requirements. What happens to bond adequacy when strict enforcement is absent? The public has neither assurance that adequate bonds are being set nor that there is a national standard in operation.

Most states claim that they have had so few cases of forfeiture on permanent program operations that it is impossible to accurately assess adequacy of bond levels. OSM recently conducted a review of four of the first five permanent program bond forfeitures in Kentucky. Of the four sites, OSM calculated the necessary amount to reclaim to be two to three times more than the state bond amount for the sites. In all four cases, the sites will not be reclaimed to permanent program standards. The OSM noted other program failures in connection with the sites: a total of $244,735 in civil penalties had been assessed against the operations and all penalties remained outstanding. (Tipton 1987)

Another area of concern to citizens in the coal fields is what happens to the acreage abandoned in the interim period between enactment of SMCRA and the approval of state primacy programs? Those operations were mostly the fall-out of the end of the 'energy crisis.' Operators hoping to cash in on a new demand for coal went bust, they could not re-permit under primacy program requirements, and their mines were left unreclaimed. The abandonments neither qualify for Abandoned Mined Lands severance funds nor for permanent program bond forfeiture funds. For want of a better term, I call those abandonments "Notch Babies." There are more than 31,000 acres of Notch Babies in the Eastern coal fields, over 20,000 acres in my own state of Pennsylvania.

All those mines were bonded at much less than the cost of public reclamation. Yet, except in a few cases, not even that limited bond has been recoverable. In many cases, the bonding companies have also declared bankruptcy. As the insurance companies also suffer financial problems, the market in general has become even tighter. Even reputable, well capitalized mining companies are having problems securing surety bonds. Clearly, further Federal legislation is needed to cope with

the problem. States do not seem able to either control surety companies nor to initiate adequate alternative bonding systems.

Arguments continue to be heard here in Pennsylvania that our relatively strong regulatory program should be weakened so that our industry can compete more effectively with that in neighboring states. The industry is supporting several initiatives that would reduce the Pennsylvania program to its least common federally required minimum. It has convinced the State Senate Environmental Committee to approve a resolution calling for a review of state mining industry regulations to allow more competitive coal marketing. Complying, the Department of Environmental Resources in Pennsylvania recently reviewed recommendations of an industry task force and consented to numerous changes in administrative procedures. The Department has been less willing to reduce environmental regulations.

Conservation groups in Pennsylvania, as well as across the nation, decry the drive to weaken state programs as being shortsighted and neither in the states' or nation's best interests. Other states which have failed to regulate their industry under the guidelines of SMCRA now are paying the price with Federal sanctions, controversy in state legislatures, and citizen agitation and litigation. Their environments are paying the price in new degradations of land and water resources and a new generation of abandoned mines.

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