



12-1-1978

The Surface Mining Control and Reclamation Act of 1977.

Lawrence B. Dale

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Lawrence B. Dale, *The Surface Mining Control and Reclamation Act of 1977.*, 9 ST. MARY'S L.J. (1978).
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol9/iss4/8>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

LAWRENCE B. DALE

When President Carter signed the Surface Mining Control and Reclamation Act of 1977, it marked the end of six years of legislative consideration.¹ The proponents of federal regulation argued that a national uniform policy was necessary in order to assure proper reclamation on a national basis and to provide for equalized competition among the coal industries of the various states.² Non-uniform regulation resulted in a condition of unfair competition for operators within the states implementing responsible coal surface mining standards. Those operators had higher costs, but competed for the same customers as did operators in other, more recalcitrant, states.³ Conceding that the lack of consistent regulation was not due entirely to a lack of good faith among the states, the proponents argued that the scope of regulation required was beyond the financial capabilities of many states where regulation was needed most.⁴

Opposition to federal regulation initially was couched in terms of in-

1. The first hearings were held by the Committee on Interior and Insular Affairs in the 90th Congress. No bills were reported during the 90th and 91st Congresses. During the 92d Congress, the Sub-Committee on Minerals, Materials and Fuels unanimously reported a bill (S. 630) in September, 1972, with the understanding that committee members reserved the option to offer amendments on the Senate floor. The House passed H.R. 6482 in October of 1972. The 92d Congress adjourned before the Senate could consider either bill.

Using information offered by representatives of the coal mining industry, environmental groups, and various federal, state, and local government agencies, Congress drafted compromise legislation in the form of Senate bill 425, which met a pocket veto by President Ford at the close of the 93d Congress. On February 6, 1975, the President transmitted a letter to Congress, which proposed twenty-seven changes on the legislation, eight of which were considered critical by the Administration.

At the beginning of the 94th Congress, the House and Senate took the Administration's suggested changes under advisement and incorporated many of them into the joint Conference bill, H.R. 25. Despite the efforts of Congress to compromise on this matter (Congress accepted six of the eight critical changes and ten of the seventeen important changes suggested by the Administration), President Ford vetoed H.R. 25 on May 20, 1975. The veto was very nearly overridden in the House on June 10, 1975, but failed by a margin of three votes. Later in the 94th Congress, two bills, amended to meet the objectives of the administration, were introduced. Both bills failed. H.R. REP. No. 95-218, 95th Cong., 1st Sess. 140-41, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1622-23; S. REP. No. 95-128, 95th Cong., 1st Sess. 50 (1977).

2. See H.R. REP. No. 95-218, 95th Cong., 1st Sess. 186, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1666.

3. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 1ST SESS., STATE SURFACE MINING LAWS: A SURVEY, A COMPARISON WITH THE PROPOSED FEDERAL LEGISLATION, AND BACKGROUND INFORMATION 20 (Comm. Print 1977) [hereinafter cited as 1977 SURVEY OF STATE SURFACE MINING LAWS].

4. See H.R. REP. No. 94-45, 94th Cong., 1st Sess. 64-66 (1975).

creased costs and decreased production.⁵ A shift in the opponent's argument occurred after President Ford's veto of the Surface Mining and Reclamation Act of 1975.⁶ During that period several mining companies conceded that implementation of the proposed legislation would not have caused the huge loss of production initially forecast.⁷ A survey conducted by the Environmental Protection Agency, the United States Bureau of Mines and the Federal Energy Administration concluded that, at the time of the veto, the Administration did not know what the real costs of the legislation would be.⁸ The results of the survey were widely thought to have damaged the Administration's credibility regarding its assessment of the bill's impact on surface mine operators.⁹

Opponents of the Act currently contend that existing state regulations are sufficient to meet environmental goals espoused by the proponents of federal regulations.¹⁰ Additional federal regulation is viewed as both unnecessary and as creating potential for widespread rule and regulation abuse.¹¹

Whatever the merit of the arguments, federal regulation of coal surface mining is now a reality. The proponents' current concern is only that the Act effectuate its purposes. Diehard opponents will have a long road ahead as they attempt to confine an act that they fear will result in excessive federal usurpation of state authority.¹²

THE ACT IN OVERVIEW

The purpose of the Act is to provide a set of national environmental performance standards to be applied principally to coal surface mining operations, and to be enforced by the states with backup authority in the Department of the Interior.¹³ More specifically, the Act will implement a national system of coal mining regulation by establishing: 1) regulations for all surface coal mining and the surface impacts caused by underground mines and coal processing;¹⁴ 2) a new office of Surface Mining Reclamation and Enforcement (OSM);¹⁵ 3) a federal grant-in-aid program to the

5. *Id.* at 146 (dissenting views of Senator Risenhoover of Oklahoma).

6. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 13.

7. *Id.* at 13; Wall St. J., July 28, 1976, at 1, col. 6.

8. COAL WEEK, May 31, 1976, at 4; see 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 14.

9. See S. REP. NO. 95-128, 95th Cong., 1st Sess. 53 (1977).

10. *Id.* at 126 (minority views of Senators Bartlett, Domenici, and Laxalt).

11. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 191-92, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1669-71. The spectre of another bureaucratic regulatory agency was undoubtedly an anathema to an industry already experienced in pervasive federal regulation.

12. See *id.* at 191-92, [1977] U.S. CODE CONG. & AD. NEWS at 1669-71.

13. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, §§ 102, 201, 91 Stat. 448-49 (1977).

14. *Id.* § 516.

15. *Id.* § 201(a).

states;¹⁶ 4) a program for the reclamation of previously mined and inadequately reclaimed lands;¹⁷ 5) administrative, environmental and enforcement standards for regulatory programs to be administered by the states on non-federal lands;¹⁸ 6) a federal regulatory program to augment state programs if necessary on non-federal lands;¹⁹ 7) procedures for public review of the administrative and enforcement program through access to data, hearings, inspections, and standing to sue for damages for non-compliance with the act;²⁰ and 8) federal standards applicable to operations on Indian lands.²¹

The Act applies initially only to the surface aspects of coal mining.²² There is a provision, however, authorizing Congress to appropriate funds for a study concerning the feasibility of extending the Act to other surface mined minerals.²³

ABANDONED MINE RECLAMATION FUND

It is estimated that throughout the United States, 1½ million acres of land have been disturbed directly by coal mining, while over 11,500 miles of streams have been polluted by sedimentation or acidity from surface or underground coal mines.²⁴ Estimates of the cost of correcting these problems have been set by the Department of the Interior at 25 billion dollars.²⁵ In order to meet the expenses of rehabilitation, the Act establishes an Abandoned Mine Reclamation Fund, to be administered by the Office of Surface Mining Reclamation and Enforcement (OSM).²⁶ The principal sources of revenue for the fund are a reclamation fee of thirty-five cents per ton on coal produced by surface mining; fifteen cents per ton of coal produced by underground mining, or ten percent of the value of the coal in the entire mine, whichever is less.²⁷ The reclamation fee for lignite coal is set at the rate of ten cents per ton, or two percent of the value of the

16. *Id.* § 302(a), (b).

17. *Id.* § 401.

18. *See id.* Title V.

19. *Id.* § 504.

20. *Id.* § 513.

21. *Id.* § 710.

22. *Id.* § 102(a). Other minerals such as clay, gravel, and uranium are not covered in the Act for they involve deep-pit mining which necessarily requires different reclamation standards than surface mining. *But see* TEX. NAT. RES. CODE ANN. § 131.004(1) & (2) (Vernon Pamp. Supp. 1977) (Texas Act applies to surface mining of both coal and uranium).

23. Pub. L. No. 95-87, § 709, 91 Stat. 552 (1977).

24. U.S. DEPT. OF INTERIOR, ANNUAL SURVEY 108 (1977).

25. *Id.* at 110. *See also* S. REP. NO. 95-128, 95th Cong., 1st Sess. 56-57 (1977).

26. Pub. L. No. 95-87, §§ 201(c)(4), 401, 91 Stat. 450, 456 (1977).

27. *Id.* § 402(a). Other sources of revenue include: lease money derived from lands which have been bought and reclaimed by the OSM; *id.* § 402(b)(2); penalties recovered under the Act; *id.* § 401(b)(4); and donations, *id.* § 401(b)(3).

coal, whichever is less.²⁸ The cumulative revenue generated by the fund should approach 6 billion dollars within twenty years, costing consumers approximately four to twelve cents per month on their utility bills.²⁹

The reclamation program is to be carried out by the OSM, the Secretary of Agriculture, or by the states through approved state programs.³⁰ If the OSM determines that a state has the ability to implement such a program, then the state shall be granted exclusive responsibility to reclaim such lands within its borders.³¹ Fifty percent of the funds collected annually within the state shall be available for expenditure by the agency regulating the approved state program.³² These funds, however, are restricted to the reclamation of those lands which have been mined for coal or adversely affected by coal mining operations.³³ This restriction does allow expenditures for construction of specific public facilities in communities impacted by coal development where federal funds are not otherwise available.³⁴ It should also be noted that section 404's restriction of reclamation funds to coal mining damage is modified by section 409(c)'s provision allowing the OSM to spend reclamation money "without regard to provisions of section 404" upon request by a state's governor.³⁵ Funds not expended within three years become available to the OSM for use in the other states.³⁶

Up to one-fifth of the money deposited in the fund during any one year may be made available to the Secretary of Agriculture for the purpose of providing small rural landowners with technical and financial resources to reclaim lands affected by coal surface mining operations.³⁷ Reclamation is to be accomplished according to a mutually agreeable plan through contact with the landowner, including lessees and owners of water rights.³⁸ Each landowner is limited to 120 acres of land eligible for reclamation, and the federal share of reclamation funding is not to exceed eighty percent of the cost unless the Secretary of Agriculture finds that a greater share is justified to enhance offsite water quality, aesthetics, or other benefits.³⁹

28. *Id.* § 402(a). The fee is less on lignite due to the low thermal value and the absence of any known unreclaimed lands associated with lignite mining. *Cf.* S. REP. No. 95-128, 95th Cong., 1st Sess. 65 (1977) (Senate Bill provided no reclamation fee for lignite).

29. S. REP. No. 95-128, 95th Cong., 1st Sess. 65 (1977).

30. Pub. L. No. 95-87, §§ 201(c)(4), 406(a), 405(d), 91 Stat. 450, 460, 459 (1977).

31. *Id.* § 405(d).

32. *Id.* § 402(g)(2).

33. *Id.* § 404.

34. *Id.* § 403(5). *See generally* H.R. REP. No. 95-218, 95th Cong., 1st Sess. 134-36, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1616-18.

35. Pub. L. No. 95-87, § 409(c), 91 Stat. 465 (1977). This exception to the use of reclamation funds may be helpful to states such as Texas which have very little unreclaimed coal lands but substantial amounts of unreclaimed uranium surface mining sites.

36. Pub. L. No. 95-87, § 402(g)(2), 91 Stat. 458 (1977).

37. *Id.* §§ 401(c)(2), 406.

38. *Id.* § 406(b).

39. *Id.* § 406(d).

Where the impact of pre-existing coal surface mining operations is severe enough to justify mandatory reclamation without the owner's consent, the OSM or the state regulatory authority, pursuant to an approved plan, has the right to enter upon the land to reclaim, restore, or abate the adverse effects.⁴⁰ To the extent that reclamation has enhanced market value, the regulatory authority is empowered to establish a lien on the property; except that no lien should be filed against any person who owned the surface prior to May 2, 1977, and neither consented to, participated in, nor exercised control over the mining operations responsible for the degradation.⁴¹

Provision is made in the Act for the acquisition of private lands by the power of condemnation where it is necessary for successful reclamation and where the OSM or approved state regulatory authority determines that the post-mining use of the land will serve a designated public function.⁴² The Act provides that the condemnation award shall reflect the market value of the land as affected by previous coal mining practices.⁴³

ENVIRONMENTAL PROTECTION STANDARDS

Permits issued pursuant to an approved state or federal program must require the operator to meet the applicable performance standards of sections 515 and 516 of the Act.⁴⁴ Section 515(b) sets out the general standards applicable to all coal surface mining operators.⁴⁵ Additional standards and variances are provided in sections 515(c) and 515(d) for mountaintop and steep slope mining respectively.⁴⁶ All standards are merely minimum requirements—state standards not covered by the Act or which are more stringent than those provided are not superseded.⁴⁷

The general standards of the Act pertain to restoring the land to its pre-mining condition or better.⁴⁸ At a minimum, the post-mined land must be capable of supporting uses which it was capable of supporting prior to mining.⁴⁹ Backfilling, compacting, and grading are required to restore the land to its approximate original contour.⁵⁰ More specifically, the reclaimed

40. *Id.* § 407. This provision was obviously added to allow reclamation where needed on industry owned land.

41. *Id.* § 408(a).

42. *Id.* § 407(c). This section contemplates the acquisition of large tracts affected by past surface mining operations which potentially can serve commercial, industrial, residential, or other intensive type land uses. S. REP. NO. 95-128, 95th Cong., 1st Sess. 68 (1977).

43. Pub. L. No. 95-87, § 407(d), 91 Stat. 463 (1977).

44. *Id.* §§ 515, 516.

45. *Id.* § 515(b).

46. *Id.* § 515(c), (d).

47. *See id.* § 505(b).

48. *Id.* § 515(b).

49. *Id.* § 515(b)(2). Higher or better uses may be allowed if they are practical and do not present dangers to public health or to the environment. *Id.* § 515(b)(2).

50. *Id.* § 515(b)(3). Critics of the Act have alleged that the term "approximate original

land must closely resemble the general surface configuration of the pre-mined land and must compliment the natural drainage patterns of the surrounding terrain.⁵¹ Certain variations are allowed, however, where there

contour" imposes an overly rigid and impractical requirement. S. REP. NO. 95-128, 95th Cong., 1st Sess. 127 (1977) (minority views of Senators Bartlett, Domenici, and Laxalt); 31 CONG. Q. ALMANAC 188 (1975). Congress has made it clear, however, that this term is to be a flexible one which contemplates different mining circumstances. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 96, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1583; S. REP. NO. 95-128, 95th Cong., 1st Sess. 83 (1977); H.R. REP. NO. 94-45, 94th Cong., 1st Sess. 92 (1975). Also relevant as an indication that the term "approximate original contour" is a flexible one, is the fact that this same standard applies to three completely different types of strip mining: area strip mining, mountaintop strip mining, and steep-slope strip mining. Pub. L. No. 95-87, §§ 515(b)(3), 515(c), 515(d)(2), 91 Stat. 486-87, 493-94 (1977). Variances are allowed from the "approximate original contour" standard in the case of mountaintop removal and steep-slope contour mining, but only when the operator demonstrates that a higher use is feasible. *Id.* §§ 515(c), 515(e)(2). The fact that the "approximate original contour" standard was formulated to cover all types of mining operations under all circumstances indicates that the term is, of necessity, a flexible one. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 96, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1583. The Texas Surface Mining and Reclamation Act requires that the affected land be returned "to the same or a substantially beneficial" condition. TEX. NAT. RES. CODE ANN. § 131.102(b) (Vernon Pamp. Supp. 1977). The question arises whether the "substantially beneficial" standard comports with the federal standard of "approximate original contour" to a degree necessary to allow it to be retained in the Texas Act as a part of an approved state plan. Some guidance concerning the meaning and effect of "substantially beneficial" is provided by the Rules of the Surface Mining and Reclamation Division of the Texas Railroad Commission which reads in pertinent part as follows:

Except where the land will be inundated by a permanent water impoundment or unless the value and/or usefulness of the land will be reasonably comparable to or enhanced by an alternative procedure, the operator will restore the surface to its *approximate original contour* and where necessary compact its overburden and topsoil to prevent erosion.

Tex. R.R. Comm'n, Rule 051.07.03.251(bb)(2), 1 Tex. Reg. 505 (1976) (emphasis added). The definition of "approximate original contour" as defined in the Texas Act requires the elimination of all highwalls, spoil piles, and depressions, with the additional requirement that the approximate drainage pattern be retained. The post-mining contour is allowed to be higher or lower than the original contour to accommodate volumetric expansions. TEX. NAT. RES. CODE ANN. § 131.004(15) (Vernon Pamp. Supp. 1977). It can be rationally assumed, therefore, that the requirement in the Texas Act that the affected land be returned to "the same or substantially beneficial condition" comports with the requirement in the Federal Act that the land be returned to the "approximate original contour," for the "approximate original contour" standard is incorporated into the Texas "substantially beneficial" standard by the rules adopted by the Railroad Commission's Surface Mining and Reclamation Division. See Tex. R.R. Comm'n, Rule 051.07.03.251(bb)(2), 1 Tex. Reg. 505 (1976). Although the Texas definition of "approximate original contour" differs from the definition of that term as defined in section 701(2) of the Federal Act, it is probably close enough to be accepted in the proposed plan that Texas will present to the OSM. Compare Pub. L. No. 95-87, § 701(2), 91 Stat. 516 (1977) with TEX. NAT. RES. CODE ANN. § 131.004(15) (Vernon Pamp. Supp. 1977). This is especially true in light of the fact that Congress did not intend for the term "approximate original contour" to be strictly construed. See H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 96, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1583.

51. Pub. L. No. 95-87, § 701(2), 91 Stat. 516 (1977).

exists an excess or relative scarcity of overburden necessary for regrading and backfilling.⁵² Topsoil must be segregated, and if not replaced on the backfill area within a reasonably short period, a vegetative cover is required to prevent deterioration and erosion of the soil.⁵³ In the case of prime farm lands, the critical soil zones must be preserved and reconstituted.⁵⁴ Vegetative cover capable of self-regeneration is to be established on the regraded areas, and the operator assumes responsibility for successful revegetation for five years after the last year of augmented seeding.⁵⁵ Disturbances to the hydrological balance at the minesite and associated off-site areas must be minimized by avoiding toxic drainage,⁵⁶ preventing off-site flows of suspended solids,⁵⁷ and by restoring the recharge capabilities of the mined area.⁵⁸ Specific standards regarding operational methods involve: water impoundments,⁵⁹ access roads,⁶⁰ blasting,⁶¹ waste,⁶² and spoil dis-

52. *Id.* § 515(b)(3), 91 Stat. 486. In such cases the operator must achieve an "ecologically sound land use compatible with the surrounding region," with particular attention focused on covering toxic materials, obtaining a stable angle of slide, allowing for proper drainage and preventing water pollution. *Id.* § 515(b)(3), 91 Stat. 486.

53. *Id.* § 515(b)(5). If topsoil is of a poor agrarian quality, another strata shall be used to replace it. *Id.* § 515(b)(5).

54. Pub. L. No. 95-87, § 515(b)(7), 91 Stat. 487 (1977).

55. *Id.* § 515(b)(19), (20). In regions having an annual average rainfall of twenty-six inches or less the period of responsibility is ten years. *Id.* § 515(b)(20); see TEX. NAT. RES. CODE ANN. § 131.102(18) (Vernon Pamp. Supp. 1977) (four years beyond first year that vegetation is established).

56. Pub. L. No. 95-87, § 515(b)(10)(A), 91 Stat. 488-89 (1977).

57. *Id.* § 515(b)(10)(B).

58. *Id.* § 515(b)(10)(D). This requirement in the Federal Act is the only provision which is not contained in the Texas Act or which cannot be reasonably inferred therefrom. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 110. Because of the unconsolidated nature of the soil in Texas, however, this provision in the Federal Act should not pose any significant burdens upon Texas surface mining operators. *Id.* The intent behind section 515(b)(10)(D) is to retain the integrity of aquifers under the affected land. See H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 109, 110, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1593. An aquifer is an underground layer of porous rock or sand containing water. It exists where impermeable strata surrounds the porous rock or sand thereby trapping the water in a confined channel. The operator may be required, therefore, to replace the layers of strata that were removed to reach the coal seam, in their same relative position in order to retain the aquifer. See Pub. L. No. 95-87, § 515(b)(10)(D), 91 Stat. 489 (1977); 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 110. Where the soil is of an unconsolidated nature—sandy—there exists no clearly defined aquifers because there is no impermeable strata to entrap them. Therefore, the strata need not be replaced in its relative original position, and may be mixed. See 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 110.

59. Pub. L. No. 95-87, § 515(b)(8), 91 Stat. 488 (1977). Water impoundments are allowed only if: the safety of the dam construction meets applicable government standards, *id.* § 515(b)(8)(B); discharges will not degrade water quality significantly, *id.* § 515(b)(8)(C); and neither the quality nor quantity of water utilized by surrounding landowners will be diminished, *id.* § 515(b)(8)(F).

60. *Id.* § 515(b)(17). Access roads are to be constructed in a manner that will prevent erosion, siltation pollution and damage to wildlife. *Id.* § 515(b)(17).

61. *Id.* § 515(b)(15). Emphasis here is directed at providing adequate notice to local

posal.⁶³ Reclamation efforts are to proceed as contemporaneously as possible with the surface mining operations.⁶⁴ Variances are allowed, however, for coincident operation of both surface and underground mines in order to maximize resource utilization.⁶⁵

A second set of standards pertains to mountaintop mining.⁶⁶ A wide range of post-mining uses are allowed in section 515(c) as an alternative to returning the land to its approximate original contour.⁶⁷ An application for a permit pursuant to this section requires specific assurances demonstrating the success potential of the proposed use.⁶⁸

An additional set of standards allows for modified variances to the approximate original contour standard in the case of steep-slope contour mining.⁶⁹ Post-mining use alternatives are allowed, but in all instances regrading is required to backfill all highwalls.⁷⁰ This amounts to a variance from the requirement incorporated into the definition of approximate original contour that the reclaimed area "closely resemble the general surface configuration."⁷¹

The surface impacts of underground operations are often intermingled with the environmental impacts of strip mining. Section 516 of the Act provides minimum environmental standards for underground mining.⁷² Specific provisions are designed to prevent surface subsidence and mine

government entities and individuals in the surrounding area. *See id.* § 515(b)(15)(A). Technical records of the methods of blasting used are to be kept for three years subsequent to the blasting. *Id.* § 515(b)(15)(B).

62. *Id.* § 515(b)(14). Waste piles must be compacted in layers for compatibility with the surrounding area. *Id.* § 515(b)(11).

63. *Id.* § 515(b)(22). Spoil is excess overburden. It must be disposed of somewhere in the permit area. *Id.* § 515(b)(22)(B). The design of the spoil disposal area must be certified by a qualified engineer. *Id.* § 515(b)(22)(H). Where the soil is placed on a downslope, a rock buttress must be placed to prevent slides. *Id.* § 515(b)(22)(F).

64. *Id.* § 515(b)(16).

65. *Id.* § 515(b)(1), (16). The permanent regulations will include procedures for granting a short-term variance to the approximate original contour grading standard to permit underground operations prior to reclamation. *Id.* § 515(b)(16)(B).

66. *Id.* § 515(c). Mountaintop mining refers to operations which transect a hill, ridge or mountain, removing all the coal or overburden. *Id.* § 515(c)(2). What remains is a level plateau or gently rolling contour. *Id.* § 515(c)(2).

67. *Id.* § 515(c)(3). Alternative uses include commercial, residential, agricultural or recreational uses. *Id.* § 515(c)(3).

68. *Id.* § 515(c)(3)(B). The use must be compatible with adjacent land uses, of sufficient necessity, and capable of financial support. *Id.* § 515(c)(3)(B).

69. *Id.* § 515(d). Steep-slope mining refers to a surface mining operation on any slope above 20 degrees, or a lesser slope as determined by the regulatory authority. *Id.* § 515(d)(4). The term does not apply, however, to mining operations on flat or gently rolling terrain with an occasional steep slope through which the mining operation is to proceed. *Id.* § 515(d).

70. *Id.* § 515(d)(2).

71. S. REP. No. 95-337, 95th Cong., 1st Sess. 108-09 (1977); *see* Pub. L. No. 95-87, § 701(2), 91 Stat. 516 (1977).

72. Pub. L. No. 95-87, § 516, 91 Stat. 495 (1977).

drainage.⁷³ Underground operations adjacent to urbanized areas, water impoundments, or streams are subject to suspension if found to create an imminent danger to public health.⁷⁴ To the extent of possible incidental surface impacts, underground mining operations are subject to the provisions applicable to surface mines regarding permits, performance bonds, inspections, enforcement, and public review.⁷⁵ Leeway will be recognized, however, to account for the obvious difference between surface and underground coal mining operations.⁷⁶

ACCEPTANCE OR REJECTION OF STATE IMPLEMENTATION PLANS

States desiring exclusive jurisdiction over regulation of non-federal lands within their borders must submit a proposed plan to the OSM.⁷⁷ Section 503 outlines the essential criteria necessary for approval.⁷⁸ Specific requirements include: sanctions and penalties commensurate with those in the Act;⁷⁹ sufficient administrative personnel with proper funding;⁸⁰ a process for designating areas as unsuitable for coal surface mining;⁸¹ and a method for coordinating review of mine permits with other permits required by law.⁸² Basically, the program must offer a state law which is "in accordance with the Act."⁸³ The rules and regulations implementing such law must be

73. *Id.* § 516(b)(1), (9). Mines must be designed to prevent gravity discharge. *Id.* § 516(b)(9).

74. *Id.* § 516(c). See section 701(8) for a definition of imminent danger to health or safety of the public. *Id.* § 701(8).

75. *Id.* § 516(d).

76. *Id.* § 516(d).

77. *Id.* § 503(a). The plan must be submitted by February 4, 1979. *Id.* § 503(a). An additional six months is allowed in cases where state legislation is required. *Id.* § 504(a). The OSM must make a decision of approval or disapproval by August 4, 1979, or by February 4, 1980, in cases where state legislation was required. *Id.* §§ 503(a), 503(b)(4).

78. *Id.* § 503(a).

79. *Id.* § 503(a)(2).

80. *Id.* § 503(a)(3).

81. *Id.* § 503(a)(5).

82. *Id.* § 503(a)(6).

83. *Id.* § 503(a)(1). As section 503 is couched in rather ambiguous terms, the OSM will apparently have a certain amount of discretion in reviewing state plans. One of the purposes of the Act is found in section 101(f) which states that "because of the diversity in terrain, climate, biologic, 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." *Id.* § 101(f). In light of this section, an argument can be made that a state plan which deviates from the federal environmental protection standards in order to deal with the regional characteristics of the particular state, will be both "in accordance with" and "meet the purposes" of the Act. It can be rationally assumed, therefore, that the state environmental protection standards should not be required to comply specifically with the federal environmental protection standards so long as they reasonably fall within the framework of the Act and deviate only where it is necessary to recognize the regional characteristics of that particular state. This is not to say, however, that the Act does not require state laws

consistent with the federal regulations "in a manner that meets the purposes of the Act."⁸⁴ If a state plan is disapproved in whole or in part the state has sixty days in which to submit a revised plan.⁸⁵ Where the state fails to submit a program, or where a proposed program is finally disapproved, the OSM will implement a federal program to regulate coal mining activities within the state.⁸⁶ A state is not precluded, however, from submitting a state program at any time after the implementation of the federal program.⁸⁷

PERMIT PROCEDURES

An application for a mining permit pursuant to a state or federal program must demonstrate a plan consistent with the environmental protection standards.⁸⁸ It must provide geographical and environmental data to expedite the administrative decisions of approval or denial. The information required includes accurate maps showing cultural, physical, and pertinent geological data;⁸⁹ research data concerning the probable hydrological consequences of the proposed operation;⁹⁰ and a detailed reclamation plan.⁹¹ After the application is approved, but before the permit is issued, the operator must obtain a performance bond to assure that reclamation will proceed as planned.⁹²

Specific requirements for permit approval include a demonstration that the applicant's reclamation requirements can be met,⁹³ that the operation is designed to prevent material damage to the hydrological balance of the area,⁹⁴ and that the area is not one designated "unsuitable for surface

to provide uniform regulation as the primary purpose behind the Act is to provide a uniform set of minimum standards throughout the states. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 57-58, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1545; S. REP. NO. 95-128, 95th Cong., 1st Sess. 49 (1977).

84. *Compare* Pub. L. No. 95-87, § 503(a), 91 Stat. 470 (1977) *with id.* § 503(a)(7).

85. *Id.* § 503(c).

86. *Id.* § 504(a). In promulgating a federal program for the state the OSM is to take into consideration the nature of the particular state's terrain and climate. *Id.* § 504(a). Preexisting state permits remain valid but are subject to OSM review. *Id.* § 504(d).

87. *Id.* § 504(e).

88. *Id.* § 507(d).

89. *Id.* § 507(b). Two maps are required: a topographical map conforming to those of the United States Geological Survey, *id.* § 507(b)(13), and a crosssectional map of the land to be affected. *Id.* § 507(b)(14).

90. *Id.* § 507(b)(11). An exception here is provided for operations which will not exceed 100,000 tons total production. *Id.* § 507(c).

91. *Id.* § 507(d). The reclamation plan shall describe in detail the proposed mining and reclamation operation and how the environmental protection standards are going to be achieved. *Id.* § 508.

92. *Id.* § 509(a). The amount of the bond is dependent upon the probable difficulty of the proposed reclamation but in no event will be less than \$10,000. *Id.* § 509(a).

93. *Id.* § 510(b)(2).

94. *Id.* § 510(b)(3).

mining," or under consideration to be so designated.⁹⁵ Additional conditions are imposed if the proposed operation is to be located on alluvial valley floors⁹⁶ or prime farm lands.⁹⁷

ENFORCEMENT

For a number of reasons, including insufficient funding and the tendency for state agencies to be protective of local industry, state enforcement historically has fallen short of the stringency necessary to assure adequate protection of the environment.⁹⁸ In order to prevent these problems in the future, the enforcement provisions in the Act place backup authority in the OSM, although the primary responsibility for enforcement will remain with the states pursuant to approved state plans.⁹⁹ Operators are required to maintain detailed records¹⁰⁰ to facilitate state regulatory inspections which are to average not less than one partial inspection per month and

95. *Id.* § 510(b)(4). Lands may be so designated if: 1) the land cannot be reclaimed under the requirements of the Act, *id.* § 522(a)(2); 2) surface coal mining would be "incompatible" with existing state land use plans, *id.* § 522(a)(3)(A); 3) the area is a fragile or historic land area, *id.* § 522(a)(3)(B); 4) the operations would affect "renewable resource lands"—those lands where uncontrolled or incompatible development could result in loss or reduction of long range productivity, including watershed lands and aquifer recharge areas, *id.* § 522(a)(3)(C); or 5) the area is on "natural hazard lands"—those lands where development could endanger life or property, such as unstable geological areas, *id.* § 522(a)(3)(D).

96. *Id.* § 510(b)(5).

"Alluvial valley floor" means the unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and windblown deposits.

Id. § 701(1). Surface coal mining is prohibited on alluvial valley floors located west of the one hundredth meridian west longitude if such operations would disturb or preclude farming in such areas which are irrigated or naturally subirrigated. *Id.* § 510(b)(5). Exceptions are provided if the land is undeveloped ranch land or if the surface coal mining operation would not significantly affect farming on the alluvial valley floor. *Id.* § 510(b)(5)(A). A savings provision excepts operations already in existence or operations for which substantial financial commitments have been made. *Id.* § 510(b)(5)(B). This provision providing stringent requirements in regard to alluvial valley floors has been attacked for its ambiguity. Opponents of the Act maintain that it is susceptible to an interpretation that would make it applicable to the entire western half of the United States. S. REP. No. 95-128, 95th Cong., 1st Sess. 128 (1977). *Contra*, H.R. REP. No. 95-218, 95th Cong., 1st Sess. 119, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1601-02.

97. Pub. L. No. 95-87, § 510(d)(1), 91 Stat. 482-83 (1977). If the proposed mine site is on prime farm lands the permit will be approved only if the regulatory authority determines (with the concurrence of the Secretary of Agriculture) that the operator has sufficient technological capabilities to return the land to its pre-mined yield potential. *Id.* § 510(d)(1).

98. H.R. Rep. No. 94-45, 94th Cong., 1st Sess. 64 (1975); see 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 25.

99. See Pub. L. No. 95-87, §§ 503(a), 517(a), 91 Stat. 470, 498 (1977).

100. *Id.* § 517(b).

one complete inspection every three months.¹⁰¹ The OSM shall order inspections as are necessary to ensure that the state regulatory agency is properly enforcing its state program.¹⁰² Federal inspectors will issue cessation orders upon the determination that any prohibited condition or practice exists, or that the operator is in violation of the Act or any permit condition required thereunder which creates an imminent danger to the public or the environment.¹⁰³ Where the violation does not cause imminent danger, the federal inspector must issue a notice setting a period of no more than ninety days for abatement of the violation.¹⁰⁴ A pattern of violations caused by the unwarranted failure of the permittee will trigger the issuance of a show cause order.¹⁰⁵ All actions by the OSM in regard to the operator's permit are subject to judicial review in the federal district court in the district where the mine is located.¹⁰⁶

OPPORTUNITIES FOR CITIZEN CHALLENGES

Citizen participation is to play a dual role in the regulatory process established by the Act. Citizen access to administrative appellate procedure is a practical method of assuring compliance by the regulatory authorities with the requirements of the Act. In addition, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authorities are grounded upon complete and full information. With the intent that citizen participation should be a vital factor in the regulatory program established by the Act, Congress provided the opportunities for citizen challenge set out below.¹⁰⁷

101. *Id.* § 517(c).

102. *Id.* § 517(a). Whenever violations occurring under an approved state program appear to result from the failure of the state to enforce its program effectively, the OSM shall hold a public hearing in the state. *Id.* § 521(b). If the state fails to adequately demonstrate its capability and intent to enforce its program the OSM shall assume that responsibility. *Id.* § 521(b).

103. *Id.* § 521(a)(2). The cessation order is to be issued at the time of the inspection and becomes effective immediately. *Id.* § 521(a)(2). In addition to the cessation order, the OSM may order the operator to take affirmative action to abate the imminent danger. *Id.* § 521(a)(2). A public hearing is to be held at the site of the operation within thirty days to determine further action. *Id.* § 521(a)(5). If a hearing is not held within thirty days then the cessation order is revoked. *Id.* § 521(a)(5).

104. *Id.* § 521(a)(3).

105. *Id.* § 521(a)(4). After receiving the order the operator must request a hearing at which he has the burden of showing why the permit should not be suspended or revoked. *Id.* § 521(a)(4). "A pattern of violations occurs whenever the permittee violates the same or a related requirement of the Act or permit several times, or when the permittee violates different requirements of the Act or permit at a rate above the national norm." S. REP. NO. 95-128, 95th Cong., 1st Sess. 89 (1977).

106. Pub. L. No. 95-87, § 526(a)(2), 91 Stat. 512-13 (1977).

107. See H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 88-89, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1575; S. REP. NO. 95-128, 95th Cong., 1st Sess. 59 (1977).

Regulation Promulgation

The OSM is to publish two sets of regulations which will prescribe how the standards in the Act are to be implemented.¹⁰⁸ These regulations will ultimately determine the actual operational effect of the Act.¹⁰⁹ Interim regulations, required to be published within ninety days of the date of enactment, will relate to the initial standards applicable from the date of enactment until eight months after a federal or state program is adopted.¹¹⁰ Six months after enactment, all new mines, and nine months after enactment, all existing mines must comply with the interim regulatory procedures.¹¹¹ The permanent regulations, which will pertain to all of the section 515 environmental protection standards, will also prescribe the methods for state plan approval pursuant to the criteria outlined in section 503.¹¹² These regulations will be particularly important for they will determine the amount of flexibility allowed by both the environmental protection standards and the methods for state plan approval. They represent a potential area for extensive litigation.

Both sets of regulations are to be published in proposed form to allow review by states and citizens.¹¹³ A public hearing will be held to allow citizens and states to interject their views.¹¹⁴ The statute does not specifically prescribe the procedural formalities to be followed in the hearing, but the compelling inference is that it will be one in accordance with section 553 of the Administrative Procedure Act (APA), which applies to agency rulemaking hearings in general.¹¹⁵

Standing alone, section 553 does not require that a formal evidentiary hearing be held as part of the agency's rulemaking proceedings.¹¹⁶ The only

108. Pub. L. No. 95-87, § 501(a), (b), 91 Stat. 467-68 (1977).

109. The standards in the Act provide a framework within which the states may promulgate their own regulations. *See id.* § 503; 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 20. The regulations will determine how closely the state laws and regulations must track the federal standards in the Act. Pub. L. No. 95-87, § 501(b), 91 Stat. 468 (1977) (permanent regulations govern method of state plan approval).

110. Pub. L. No. 95-87, § 502(d), 91 Stat. 468-69 (1977). The initial standards deal primarily with post-mining uses and are set forth in section 502(c).

111. *Id.* § 502(b), (c). A new coal mine is one not in existence on August 3, 1977. *See id.* § 502(b). An existing coal mine is one in operation pursuant to a state permit issued before August 3, 1977. *Id.* § 502(b). Operations which do not exceed 100,000 tons annual production are specifically exempted from the interim standards and regulations until January 1, 1979, except to the extent of steep-slope regulations provided in section 515(d)(1). *Id.* § 502(c)(3). This provision was strongly opposed by environmentalists who claim that it will exempt 93% of the nation's coal mine operators who produce 33% of the coal. CONG. Q. WEEKLY REP., May 28, 1977, at 1031.

112. Pub. L. No. 95-87, § 501(b), 91 Stat. 468 (1977).

113. *Id.* § 501(a).

114. *Id.* § 501(a)(C).

115. 5 U.S.C. § 553 (Supp. V 1975).

116. *South Terminal Corp. v Environmental Protection Agency*, 504 F.2d 646, 660 (1st Cir. 1974); *Moss v. Federal Power Comm'n*, 502 F.2d 461, 465 (D.C. Cir. 1974), *rev'd on other*

requirement is that the agency give interested persons an opportunity to participate in the rulemaking process through the submission of written or oral comments.¹¹⁷ The opportunity for oral presentation may be allowed at the discretion of the agency.¹¹⁸ Conversely, when a hearing is governed by section 556 or 557 of the APA, the agency must provide the same procedural safeguards for participation at the hearing as are provided in adjudicative proceedings.¹¹⁹ These latter sections apply, however, only when the statute specifically prescribes that the hearing be "on the record," by using those identical words or words to the same effect.¹²⁰ The provisions of the Act provide only for a "public hearing."¹²¹ There is, however, no expression or manifestation of intent in the Surface Mining Control and Reclamation Act that the hearing shall be "on the record."¹²² Consequently, the procedural formalities of section 556 and 557 will not be required in rulemaking by the OSM. This determination is important in relation to the scope of judicial review.

Challenges to the regulations or to any action taken by the OSM may be made by any person who participated in the administrative hearing¹²³ and is aggrieved by the regulation or action taken.¹²⁴ The Act states that jurisdiction and venue are in the Federal District Court of the District of Columbia, and requires that the petition be filed within sixty days from the date of the agency action or decision.¹²⁵ The Act specifically provides

grounds, 424 U.S. 494 (1976); *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 50 (9th Cir. 1967).

117. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 240-43 (1973); *Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Auth.*, 476 F.2d 1263, 1268 (3d Cir. 1973), *cert. denied*, 414 U.S. 1067 (1974). *See generally* *Pacific Coast European Conference v. United States*, 350 F.2d 197, 205-06 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965); *Superior Oil Co. v. Federal Power Comm'n*, 322 F.2d 601, 609 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964).

118. *See* *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 658 n.3 (D.C. Cir. 1976) (Tamm, J., concurring), *cert. granted sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 97 S. Ct. 1098, 51 L. Ed. 2d 535 (1977) (No. 76-419); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973); *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 50 n.11 (9th Cir. 1967). *See generally* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

119. 5 U.S.C. §§ 556, 557 (1970). "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *Id.* § 556(d); *see* *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-58 (1972); *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 521-25 (D.C. Cir. 1963).

120. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 237-38 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972).

121. Pub. L. No. 95-87, § 501(a)(C), (b), 91 Stat. 467-68 (1977).

122. *Id.* § 501(b).

123. *Id.* § 526(a)(1). Participation in the agency hearing is a prerequisite to judicial review. *Id.* § 526(a)(1).

124. *Id.* § 526(a)(1).

125. *Id.* § 526(a)(1).

that the scope of review concerning regulations promulgated as a result of the rulemaking hearing shall be limited to a determination that the regulation is "arbitrary, capricious, or otherwise inconsistent with the law."¹²⁶ The test is in accordance with that provided by section 706 of the APA for 553-type hearings.¹²⁷ Only when the hearing is a 556 or 557 formal hearing (required to be on the record) is the reviewing court authorized to use the substantial evidence test.¹²⁸

The "arbitrary and capricious" test is considered the more lenient of the two tests because the decision reached need not be completely supported by the record as there is no requirement of a formal record for 553 agency rulemaking hearings.¹²⁹ There is, however, an informal record consisting of all data, including comments submitted by citizens and states, which was before the agency at the time the decision was reached. The scope of the inquiry on review is to determine whether the decision was reasonably deduced from a consideration of all the relevant factors.¹³⁰ The decision need not be supported completely by the evidence made available to the agency in the rulemaking hearing, for the reviewing court can assume that

126. *Id.* § 526(a)(1).

127. 5 U.S.C. § 706 (1970). Section 706 reads in pertinent part as follows:
The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) *unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or*

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id. § 706 (emphasis added).

From a reading of section 706, it is clear that review under the substantial evidence rule is available only with respect to formal hearings required to meet the criteria imposed by sections 556 and 557 of Title 5 of the APA. *See id.* § 706.

128. *Smith v. Federal Trade Comm'n*, 403 F. Supp. 1000, 1005 (D. Del. 1975); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

129. *See Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 37 n.79 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1977).

130. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-17 (1971); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1977); *Montana Power Co. v. Environmental Protection Agency*, 429 F. Supp. 683, 695 (D. Mont. 1977).

part of the decision was based upon the developed expertise of the agency.¹³¹ If expertise is relied upon, however, it must be included in the record on the agency's own initiative; for in determining whether all relevant factors have been considered, the reviewing court can require the agency to state all the reasons for its decision.¹³²

Pursuant to section 501(a) of the Act, the permanent regulations constitute a major federal action, and therefore, require an environmental impact statement.¹³³ Consequently, the permanent regulations will be subject to judicial review under the legal principles governing review of environmental impact statements in addition to being subject to judicial review on the merits.¹³⁴ This review basically involves the adequacy of the impact statement and the validity of the particular regulation in view of the impact statement.¹³⁵

Citizen Suits

Pursuant to section 520, any person having an interest which is or may be adversely affected is entitled to commence a civil action in the federal district court in the district where the surface mining operation complained of is located.¹³⁶ This action may be brought against: (1) any governmental instrumentality or any person alleged to be in violation of any provision of the Act or regulations, or (2) against the regulatory authority—federal or state—for failure to perform any non-discretionary duty required under the Act.¹³⁷ The district court shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties, and venue is in the district where the surface mine is located.¹³⁸ In most instances, the suit may not be commenced before the expiration of sixty days

131. Compare *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) with *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 36 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1977).

132. *Hawaiian Tel. Co. v. Federal Communications Comm'n*, 498 F.2d 771, 777 n.29 (D.C. Cir. 1974); see *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 646 (D.C. Cir. 1976), cert. granted sub nom. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 97 S. Ct. 1098, 51 L. Ed. 2d 535 (1977) (No. 76-419); *American Iron & Steel Inst. v. Environmental Protection Agency*, 526 F.2d 1027, 1047 (3d Cir. 1975); *Texas Medical Ass'n v. Mathews*, 408 F. Supp. 303, 305 (W.D. Tex. 1976).

133. Pub. L. No. 95-87, § 501(b), 91 Stat. 468 (1977); see *National Environmental Policy Act of 1969*, 42 U.S.C. § 4332(c)(i) (1970).

134. See generally *Striegel, E.I.S.: An Environmental Impact Statement, or an Evolving Institutional Straight Jacket?*, 22 ROCKY MTN. MIN. L. INST. 1 (1976); 57 MINN. L. REV. 404 (1972).

135. See generally 61 MINN. L. REV. 363 (1977).

136. Pub. L. No. 95-87, § 520(a), (c)(1), 91 Stat. 503-04 (1977).

137. *Id.* § 520(a)(1), (2).

138. *Id.* § 520(a), (c)(1). Statutory jurisdiction is also granted any person suffering an injury to person or property caused by an operator in violation of any provision of the Act. *Id.* § 520(f).

from the date the operator is notified of the alleged violation.¹³⁹ Suit is also barred if the OSM or the state regulatory authority is diligently prosecuting a civil or criminal action to require compliance with the Act.¹⁴⁰ In such instances, however, the citizen may intervene as a matter of right.¹⁴¹

The court in issuing a final order may award litigation costs, including reasonable attorney and expert fees, to any party.¹⁴² Congress made it clear that this provision is not meant to deter citizens from bringing good faith actions.¹⁴³ Consequently, the defendant may be awarded litigation costs only where he demonstrates that the action was brought in bad faith.¹⁴⁴ Under appropriate circumstances, the court may issue a temporary restraining order or preliminary injunction,¹⁴⁵ and within the court's discretion may require the plaintiff to post a bond.¹⁴⁶

Section 520 specifically grants standing to "any person with an interest which is or may be adversely affected."¹⁴⁷ Since it is within the discretion of Congress to confer standing in relation to any statute enacted, the determination of the parameters of this standing provision can best be achieved through an examination of congressional intent.¹⁴⁸ Congress here has clearly manifested an intent that the phrase "any person having an inter-

139. *Id.* § 520(b)(1)(A). The waiting period is not applicable if the violation constitutes imminent danger to plaintiff or would immediately affect a legal interest of the plaintiff. *Id.* § 520(b)(2).

140. *Id.* § 520(b)(1)(B).

141. *Id.* § 520(b)(1)(B).

142. *Id.* § 520(d).

143. S. REP. No. 95-128, 95th Cong., 1st Sess. 88 (1977).

144. *Id.* at 88; H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 90, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1576. Congress intended for this provision to be construed consistently with the history of similar federal statutes providing for the award of attorneys' fees in citizen suits. *Id.*; S. REP. No. 414, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3747 (Federal Water Pollution Control Act Amendments of 1972); *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975) (action motivated by malice and vindictiveness); see *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063-64 (8th Cir. 1975) (no costs allowed without bad faith). Therefore, while this provision will not discourage citizens from bringing good faith actions to see that the act is enforced, it will prevent unwarranted harassment.

145. Pub. L. No. 95-87, § 520(d), 91 Stat. 504 (1977).

146. *Id.* § 520(d) specifies that the court may require a bond in accordance with Federal Rules of Civil Procedure. Rule 65(c) of the Federal rules states that a bond is mandatory in the case of a temporary restraining order or preliminary injunction. FED. R. CIV. P. 65(c). It can be inferred from the legislative history surrounding section 520(d) of the Act that Congress intended the bond requirement to be discretionary with the court. See S. REP. No. 95-128, 95th Cong., 1st Sess. 88 (1977). Mandatory bonds could deter citizens from taking good faith action to enforce the Act and prevent irreversible harm to the environment. *Id.* Congress was careful to point out, however, that section 520 was not meant as a substitute for other provisions in the Act which provide for citizen intervention before the operator has expended substantial sums of money. See *id.*

147. Pub. L. No. 95-87, § 520(a), 91 Stat. 503 (1977).

148. See *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940).

est which is or may be adversely affected," comports with the broadest standing requirements enunciated by the United States Supreme Court.¹⁴⁹ In *Association of Data Processing Service Organization, Inc. v. Camp*,¹⁵⁰ which concerned the construction of a statutory standing provision, the Supreme Court noted that although the statute required an injury in fact in order to comply with article III of the Constitution, the injury need not necessarily be an economic one.¹⁵¹ The Court did not, however, discuss what must be alleged by persons who claim an injury of a non-economic nature to interests that are widely shared. That question was directly addressed by the Supreme Court in *Sierra Club v. Morton*,¹⁵² involving a contested agency decision to allow the development of a ski resort in a national park.¹⁵³ The plaintiffs based standing on section 702 of the APA which confers standing to "a person suffering legal wrong because of an agency action, or adversely affected or aggrieved by an agency action."¹⁵⁴ In their petition the plaintiffs alleged that they had a special interest in the conservation and sound maintenance of the national parks in general, and that this interest would be adversely affected within the meaning of section 702 of the APA by the destruction of the park's aesthetics and ecology if the ski resort were allowed.¹⁵⁵ In accordance with the decision rendered in *Data Processing*, the Court noted that injury to an "aesthetic, conservational or recreational" interest could amount to an injury in fact sufficient to confer standing under section 10 of the APA, and the fact that it is an interest widely shared by many did not make it any less of an interest entitled to judicial protection.¹⁵⁶ The Court denied the plaintiffs' standing, however, because they failed to allege that they themselves would be directly injured by the development at the park.¹⁵⁷ The Court reasoned that the adverse impact of the ski development on the environment of the park would not fall indiscriminately upon every citizen; rather, the development's environmental changes would directly affect only those persons actually using the park.¹⁵⁸ *Sierra Club* therefore requires that the noneconomic interest which the plaintiff alleges is or may be adversely affected, must be more than a mere concern for the environment in general. It must be the type of interest, that if adversely affected, would directly diminish the plaintiff's enjoyment of the environment. This limi-

149. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 90, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1576.

150. 397 U.S. 150 (1970).

151. *Id.* at 154.

152. 405 U.S. 727 (1972).

153. *Id.* at 729-30.

154. 5 U.S.C. § 702 (1970).

155. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

156. *Id.* at 734.

157. *Id.* at 734-35.

158. *Id.* at 735.

tation should not, however, place a significant burden upon citizens seeking standing under section 520 of the Surface Mining Control and Reclamation Act, for strip mining can potentially result in adverse impacts that extend beyond the boundaries of the land actually mined. Water pollution and soil erosion are common effects of improperly conducted strip mining, and those impacts extend over a relatively large portion of the surrounding environment.

The Senate bill as reported to the conferees allowed standing for citizen suits to "persons having a *valid legal interest* which is or may be adversely affected."¹⁵⁹ In the legislative history accompanying the bill, Congress explicitly stated that this provision was also to be construed as broadly as the standing requirements enunciated by the United States Supreme Court.¹⁶⁰ The legislators further stated that the provision was meant to confer standing upon any resident injured in any manner by the failure of any operator to comply with the Act.¹⁶¹ Without discussing the subtle distinctions between the Senate standing provision and the provision ultimately adopted, it can be rationally asserted that the conferees recognized the House version to be more lenient in its effect, and therefore, intended to adopt a standing provision susceptible to a liberal construction.

Congress has made it clear that citizen suits are to play an important part in the regulatory process of the Act.¹⁶² Strip mining generally will not take place on public park lands in which a substantial number of persons can demonstrate an interest of a nature sufficient to confer standing under the *Sierra Club* holding, rather it will occur on private property far from the beaten path. In order to recognize the spirit and intent behind the Act, the standing provision of "any person having an interest which is or may be adversely affected" should, and most probably will, be liberally construed.

Designating Lands as Unsuitable for Surface Coal Mining

A decision to permit surface coal mining is a land use decision, and as such may at times conflict with other demands on scarce or valued land resources. For this reason, the Act provides a mechanism for citizens to petition the regulatory authority to have certain areas designated as unsuitable for surface coal mining.¹⁶³

159. S. 7, 95th Cong., 1st Sess. § 420(a) (1977).

160. S. REP. No. 95-128, 95th Cong., 1st Sess. 87 (1977).

161. *Id.* at 87.

162. *Id.* at 88.

163. *Id.* at 93; Pub. L. No. 95-87, § 522, 91 Stat. 507 (1977). It should be noted that the designation process is structured to be applied on an area basis, rather than a site by site determination which presents issues more appropriately addressed in the permit application process. H.R. REP. No. 95-218, 95th Cong., 1st Sess. 95, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1582.

As a prerequisite for state plan approval, each state must establish a program for designating lands as unsuitable for surface coal mining in accordance with section 522 of the Act.¹⁶⁴ If the petition is supported by sufficient evidence tending to support the allegations, the regulatory authority has ten months in which to hold a public hearing.¹⁶⁵ There are two basic criteria upon which a petition may be grounded. The first concerns the feasibility of surface coal mining in the area, while the second focuses primarily on the propriety of such mining operations with the major considerations being general planning and environmental concerns. Upon petition, if the regulatory authority determines that reclamation of an area pursuant to the standards of the Act is physically or economically infeasible, then the land must be designated as unsuitable for surface coal mining.¹⁶⁶ Decisions based on the infeasibility of reclamation are subject to judicial review according to state law.¹⁶⁷ Decisions based on general planning and environmental concerns, on the other hand, are discretionary, and provide no right of judicial review.¹⁶⁸

164. Pub. L. No. 95-87, § 503(a)(5), 91 Stat. 470 (1977); see TEX. NAT. RES. CODE ANN. § 131.035 (Vernon Pamp. Supp. 1977). At the present time, Texas has no lands which have been designated as unsuitable for surface coal mining. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 110. The OSM has jurisdiction over federal lands for designation purposes. Pub. L. No. 95-87, § 601, 91 Stat. 515 (1977).

165. Pub. L. No. 95-87, § 503(a)(3), 91 Stat. 470 (1977). Any person having an interest which is or may be adversely affected is entitled to petition the authority. After a person having an interest which is or may be adversely affected has filed, but before the hearing, any person is entitled to intervene. *Id.* § 522(c). *But see* TEX. NAT. RES. CODE ANN. § 131.039 (Vernon Pamp. Supp. 1977), which gives the right to "any person" to file an original petition to have lands designated as unsuitable, but restricts the right to intervene to "any person affected," which is defined as any resident of the same or adjacent county where the land is located, including persons doing business or owning land in such counties, and is further limited to those who suffer economic damage. *Id.* § 131.004(11).

166. Pub. L. No. 95-87, § 522(a)(2), 91 Stat. 507 (1977).

167. *Id.* § 526(e). Appeal from an action of the state regulatory agency is to be in the state court of competent jurisdiction and held in accordance with state law. *Id.* § 526(e); see TEX. NAT. RES. CODE ANN. § 131.047 (Vernon Pamp. Supp. 1977). Texas provides for judicial review of any action by the commission by any person "whose interest is or may be adversely affected" and who participated in the administrative proceedings. *Id.* § 131.047(a). The test on review is to be the substantial evidence test. *Id.* § 131.047(d). This provision in the Texas Act appears to be sufficient for approval as it is in accordance with section 526(b) of the Federal Act. The standing provision is the same, and the Texas scope of review is more stringent than the provision in the Federal Act which allows a substantial evidence review only on appeal of a hearing on a surface coal mining application or a hearing involving the assessment of a civil penalty. *Compare id.* § 131.047(a), (d) with Pub. L. No. 95-87, § 526(b), 91 Stat. 513 (1977).

168. Pub. L. No. 95-87, § 522(a)(3), 91 Stat. 507-08 (1977). The statute states that the regulatory authority "may" designate lands unsuitable for surface coal mining upon petition alleging that such operations would be inconsistent with existing land use, affect fragile or historic lands, affect aquifer recharge zones, or present a danger to the health or safety of the public. *Id.* § 522(a)(3); H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 94, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1581.

Permit Process

At the time of the submission of an application for a surface coal mining permit, the applicant is to publish notice of his intent in a newspaper of general circulation in the locality of the proposed operation.¹⁶⁹ Any person having an interest which is or may be adversely affected is entitled to file written objections to the proposed application.¹⁷⁰ Upon request by any person with an interest which is or may be adversely affected, the regulatory authority is to hold an informal conference in the locality within a reasonable time after receipt of the objections.¹⁷¹ Written findings must be provided to all parties to the proceedings within sixty days of the informal conference¹⁷² and if the application is granted, the permit shall be issued.¹⁷³ Within thirty days of the final decision of the regulatory authority, the applicant or any person with an interest which is or may be adversely affected may request a formal hearing to contest the reasons for the regulatory authority's decision.¹⁷⁴ The formal hearing must be on the record and

169. Pub. L. No. 95-87, § 513(a), 91 Stat. 484 (1977). The notice of the hearing must run at least once a week for four consecutive weeks. *Id.* § 513(a).

170. *Id.* § 513(b). It is not clear whether the standing requirement for participation in the administrative proceedings is the same as that provided for in citizen suits; that is, "as broad as is allowed by the United States Supreme Court." See note 148 *supra* and accompanying text. There is an indication, however, that the standing provision here should be broadly construed. See discussion of legislative intent note 159-162 *supra* and accompanying text. There is no manifestation of intent as to how the adopted version should be construed as it relates to standing to participate in application hearings under this section. In Texas, the regulatory authority will allow any person to participate in any administrative proceeding and leaves the determination of standing with the court if a party appeals the regulatory authority's decision. Interview with J. Randell Hill, Chief Counsel, Surface Mining and Reclamation Division of the Texas Railroad Commission, in Austin, Texas (Sept. 23, 1977).

171. Pub. L. No. 95-87, § 513(b), 91 Stat. 484 (1977). The Senate bill provided for a hearing upon request only if the regulatory authority determined that the objections were not frivolous. See S. 7, 95th Cong., 1st Sess. § 513(b) (1977). The conferees, however, adopted the House version which apparently allows an informal conference without regard to the sufficiency of the objections. S. REP. NO. 95-337, 95th Cong., 1st Sess. 107 (1977). *Contra*, TEX. NAT. RES. CODE ANN. § 131.163 (Vernon Pamp. Supp. 1977). The Texas Act allows a requested hearing at this stage of the permit process only if "the Commission determines that the application . . . is of a significance sufficient to warrant a public hearing." *Id.* § 131.163(a). The hearing provided here by the Texas statute, however, is governed by the Texas Administrative Procedure Act, and is of a more formal nature than that provided in the Federal Act. TEX. REV. CIV. STAT. ANN. art. 5920-10 § 17 (Vernon 1975) *as amended*, 1977 Tex. Gen. Laws, ch. 524, § 17, at 1320 (amendment was not recodified into the Texas Natural Resources Code because of apparent oversight). The federal statute requires that a record be made of the informal conference unless waived by all the parties. Pub. L. No. 95-87, § 513(b), 91 Stat. 485 (1977). Congress intended, however, that the record for this informal conference need not be as complete and formal as would be required for records of formal hearings. S. REP. NO. 95-337, 95th Cong., 1st Sess. 107 (1977).

172. Pub. L. No. 95-87, § 514(a), 91 Stat. 485 (1977).

173. *Id.* § 514(c).

174. *Id.* § 514(c). This hearing is not limited to those parties who have filed written objections and participated in the formal conference. See *id.* § 514(c). This formal hearing

adjudicatory in nature.¹⁷⁵ Temporary relief may be granted, in circumstances where the movant shows substantial likelihood of success and the relief will not adversely affect the public health or the environment.¹⁷⁶

Any person having an interest which is or may be adversely affected, who participated in the administrative proceedings, and who is aggrieved by the agency's decision is entitled to judicial review.¹⁷⁷ Where the OSM is the regulatory authority, the review shall be in the federal district court in the district where the land is located.¹⁷⁸ If the state is the regulatory authority pursuant to an approved state plan, then review shall be in the appropriate state court and in accordance with state law.¹⁷⁹ Although Congress manifested no intent concerning the construction of the standing provision here, it is clear from a reading of the statute that the same standing provision will apply under this section whether the appeal is to the state or federal court.¹⁸⁰

Release of Performance Bonds

Performance bonds are released according to a phased plan depending upon the amount of reclamation completed.¹⁸¹ "Any person having a valid legal interest which is or may be adversely affected" by the release of a performance bond is entitled to a hearing upon submission of objections.¹⁸²

may be requested within thirty days after the regulatory authority acts on an application, whether or not an informal conference was held. *Id.* § 514(c).

175. *Id.* § 514(c).

176. *Id.* § 514(d).

177. *Id.* § 514(f).

178. *Id.* § 514(f). The scope of review here shall be the substantial evidence test. *Id.* § 526(b).

179. *Id.* § 514(f). The Texas Act provides that judicial review is to be in the district court of Travis County or in the district court of the county where the greater part of the land is located. TEX. NAT. RES. CODE ANN. § 131.047 (Vernon Pamp. Supp. 1977).

180. Pub. L. No. 95-87, § 514(f), 91 Stat. 486 (1977). Section 526 of the Act deals with judicial review in general and provides that appeals from state regulatory decisions pursuant to approved state plans are to be in the state court and in accordance with state law. *Id.* § 526(e). In this instance, the state court is not free to apply its own standing requirement, for it is clear from a reading of section 514(f) that the standing provision therein enunciated is to apply to state as well as federal reviews. *Id.* § 514(f). As a practical matter, the OSM will probably require state laws submitted as a part of a proposed state plan to have standing provisions similar to those allowed in the Act. *See id.* § 503(a)(1) (state program must have a law in accordance with the requirements of the Act).

181. *Id.* § 519(c). This section contemplates three levels of bond release: sixty percent of the bond will be released upon completion of backfilling and regrading. *Id.* § 519(c)(1). After revegetation, an additional amount may be released subject to reservation of the amount necessary to reestablish vegetation for the period of responsibility set by section 515. *Id.* § 519(c)(2). Upon full completion of the remaining portion of the required reclamation, the bond is to be released. *Id.* § 519(c)(3).

182. *Id.* § 519(f). It is significant to note that this standing provision differs from "any person having an interest which is or may be adversely affected," which is the standing provision in all other pertinent sections of the Act. The amount of money involved justifies

An informal conference may, at the discretion of the regulatory authority, be held in lieu of a public hearing.¹⁸³

Enforcement

The Act provides two opportunities for citizen input in the enforcement procedures. The OSM is to notify the state regulatory authority upon the receipt of information furnished by any person which gives rise to a reasonable belief that an operator is in violation of a permit condition or other requirement of the Act.¹⁸⁴ If without good reason, no action results from the complaint within ten days, then the OSM is to order a federal inspection.¹⁸⁵ Any person with an interest which is or may be adversely affected is entitled to an informal review by the OSM for the failure of any federal inspector to issue a citation with respect to any alleged violation.¹⁸⁶

PRACTICAL EFFECTS OF THE ACT

In 1974 the consumption of coal contributed only eighteen percent of the nation's total energy supply.¹⁸⁷ During the economic period prior to the 1973 oil embargo, the relatively low world prices of natural gas and crude oil, coupled with stringent clean air standards, contributed substantially to the low utilization of coal.¹⁸⁸ In light of the Administration's push for greater utilization of coal and the fact that coal now represents over ninety percent of the nation's hydrocarbon energy reserves, it appears inevitable that coal will supply an increasingly significant proportion of this nation's future energy needs.¹⁸⁹

the limited standing provision. *Contra*, TEX. NAT. RES. CODE ANN. § 131.214(a) (Vernon Pamp. Supp. 1977). "Any person" has the right to file objection to the release of a performance bond. *Id.* § 131.214(a).

183. *Id.* § 519(g). The informal conference is to be one in accordance with the informal conference provided in section 513 of the Act. *Id.* § 519(g). A record must be kept unless waived by all the parties. *Id.* § 513(b). The record need not be as complete, however, as the record required for public hearings. S. REP. NO. 95-337, 95th Cong., 1st Sess. 107 (1977).

184. *Id.* § 521(a)(1). "Reasonable belief" could be established by a snapshot of an operation in violation or other simple and effective documentation of a violation. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 129, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1611.

185. Pub. L. No. 95-87, § 521(a)(1), 91 Stat. 504 (1977). The person who provides the OSM with the information is to be notified as to the time of the inspection and may accompany the inspector during the inspection. *Id.* § 521(a)(1).

186. *Id.* § 517(h)(1). The procedures for informal review will be established later in the permanent regulation. *Id.* § 517(h)(1).

187. 13 WEEKLY COMP. OF PRES. DOC. 566, 570 (April 20, 1977) (President Carter's energy address).

188. In fact, during the preceding 10 years utilities and industry spent millions of dollars converting from coal fired systems to oil and gas boilers.

189. 13 WEEKLY COMP. OF PRES. DOC. 566, 570 (April 20, 1977) (President Carter's energy address).

In consideration of coal's future energy importance, the drafters of the Act set out to create legislation responsive to society's dual needs of energy and environmental conservation. The primary purpose of the Act, therefore, is to effect "the internalization of mining and reclamation costs, which are now being borne by society in the form of ravaged land, polluted water, and other adverse effects of coal surface mining."¹⁹⁰

The effect of the Act in terms of decreased production, increased utility costs, and unemployment remains more or less a matter of speculation. When President Ford vetoed this bill's predecessor, H.R. 25, he outlined four of the major defects which made it unacceptable. Those defects included loss of jobs, increased electric utility bills, greater dependence on foreign oil, and the unnecessary decline in coal production.¹⁹¹ The validity of these objections has been questioned since that time, and apparently found to be lacking.¹⁹² In committee hearings following the veto, proponents of federal regulation countered the unemployment projections of the Ford Administration, arguing that the implementation of a federal strip mining act would actually increase the number of jobs within the industry since the amount of lost production from the closed surface mines would necessarily be replaced by the more labor intensive production from underground mining.¹⁹³ Others have maintained that intensive reclamation efforts would in itself result in more jobs.¹⁹⁴

Of primary concern to those fearing production losses are the provisions in the Act restricting mining operations on "alluvial valley floors" and establishing a process for designating lands as unsuitable for surface coal mining.¹⁹⁵ The objections to these provisions are grounded upon the apparent ambiguity in the wording of the provisions which could result in overly

190. S. REP. NO. 95-128, 95th Cong., 1st Sess. 53 (1977).

191. 11 WEEKLY COMP. OF PRES. DOC. 535 (May 20, 1975).

192. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 13-14. A survey conducted by the E.P.A., the Bureau of Mines, and the Federal Energy Administration, concluded that at the time of the veto, the Administration did not know the real costs of the legislation. *Id.*; see S. REP. NO. 95-128, 95th Cong., 1st Sess. 52-53 (1977).

193. In an unusual joint House-Senate Interior Committee hearing on June 3, 1975, the figures that President Ford had cited in his veto message were challenged as "grossly inflated." Hearing on veto of H.R. 25, before the Joint Subcommittees on Mines and Mining and Energy and the Environment, 94th Cong., 1st Sess. (1975), 31 CONG. Q. ALMANAC 189 (1975). At the proceedings, the Administration representatives based their assertions that passage of the Act would result in lost production and unemployment within the industry on a paper published by Dr. William Miernyk, Professor of Economics and Director of the Regional Research Institute at West Virginia University. Later, the author informed the Subcommittees and the press that the information in his study had been misused by the Administration. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 7-8.

194. S. REP. NO. 95-128, 95th Cong., 1st Sess. 107 (1977) (refers to letter from James R. Schlesinger to Senator Henry M. Jackson on February 15, 1977).

195. See S. REP. NO. 95-128, 95th Cong., 1st Sess. 127-28 (1977) (minority views of Senators Bartlett, Domenici, and Laxalt to S. 7). See also H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 191-99, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1669-78.

strict judicial construction.¹⁹⁶ The definition of "alluvial valley floor" in the Act, for example, could potentially be construed to encompass the majority of the proven coal reserves in the western United States.¹⁹⁷ The section in the Act establishing a process for designating lands as unsuitable for surface coal mining provides that land may be so designated if surface coal mining would "affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems."¹⁹⁸ Apart from the objection that such ambiguities will result in extensive litigation expenses, the opponents of the Act fear the potential of adverse judicial determinations severely limiting production.¹⁹⁹ Proponents, on the other hand, maintain that in light of the nation's extensive coal reserves, we can afford to provide strong environmental protection standards even if it means that certain coal deposits will not be mined.²⁰⁰

The proponents' primary argument refutes the contention that the price of utilities will increase significantly due to the abandoned mine reclamation fee and the additional production costs concomitant with stringent reclamation requirements. Estimates of reclamation costs made by the Committee on the Interior and Insular Affairs of the House of Representatives range from thirty cents per ton to eighty-five cents per ton depending upon how efficiently changes in operating procedures are made.²⁰¹ Adding the thirty-five cents per ton (ten cents per ton for lignite) abandoned mine reclamation fee to the eighty-five cents per ton reclamation cost, the total reclamation cost under the Act is only six percent of the 1976 spot price of \$21.49.²⁰² The proponents do not believe, however, that the price of coal will reflect the increased production costs because coal prices are more reflective of the unusual situation in the energy market than small changes in production costs.²⁰³ Over the past few years the increase in the price of coal

196. See S. REP. No. 95-128, 95th Cong., 1st Sess. 127-28 (1977) (minority views of Senators Bartlett, Domenici, and Laxalt to S. 7); H.R. REP. No. 95-218, 95th Cong., 1st Sess. 193-94, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1672-73.

197. Pub. L. No. 95-87, § 701(1), 91 Stat. 516 (1977); S. REP. No. 95-128, 95th Cong., 1st Sess. 128 (1977). *Contra*, H.R. REP. No. 95-218, 95th Cong., 1st Sess. 119, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1601. See also note 96 *supra*.

198. Pub. L. No. 95-87, § 522(a)(3), 91 Stat. 445, 507-08 (1977).

199. See H.R. REP. No. 95-218, 95th Cong., 1st Sess. 191-99, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1669-78. It should be noted, however, that designating lands as unsuitable for surface coal mining under that subsection of section 522 is discretionary with the regulatory authority, and their decision is not subject to judicial review. *Id.* at 94. Section 522 states that upon petition the regulatory authority *may* designate the area as unsuitable. Pub. L. No. 95-87, § 522(a)(3), 91 Stat. 507 (1977).

200. CONG. Q. WEEKLY REP., April 2, 1977, at 608; see H.R. REP. No. 95-218, 95th Cong., 1st Sess. 60, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1548-49.

201. H.R. REP. No. 95-218, 95th Cong., 1st Sess. 148-149, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1630-31.

202. *Id.* at 149. Spot price is a price picked randomly at any one time.

203. See H.R. REP. No. 95-218, 95th Cong., 1st Sess. 148, reprinted in [1977] U.S. CODE

has been substantially due to the rise in the price of petroleum products.²⁰⁴ Proponents contend, therefore, that the variance in the coal prices bears at best an indirect relation to cost and normal profit level.²⁰⁵ In this situation where prices are not directly established by costs, the upward pressure on prices due to tax and reclamation costs is not expected to fully manifest itself in the market price.²⁰⁶

Much of the debate surrounding the Act has centered upon the adequacy of individual state laws and enforcement procedures.²⁰⁷ A study sponsored by the Committee on Energy and Natural Resources concluded that the state laws in existence prior to the Act varied greatly in stringency and enforcement.²⁰⁸ The disappointing record of state regulation was thought to be partially due to the rapid expansion of the surface coal mining industry.²⁰⁹ Regardless of the adequacy of a state's mining and reclamation laws, and assuming good faith on the part of the regulatory agencies, problems of enforcement often arose from a lack of funding and manpower to insure adequate compliance with the state law.²¹⁰ Many state laws were inadequate in that they were tailored to suit ongoing mining practices rather than requiring modification of current industry practices to meet established environmental standards.²¹¹ This problem was especially prevalent in states where the coal mining industry dominated the economy as a major source of jobs and taxes, thereby allowing it to exercise powerful political leverage.²¹²

Uniform federal standards are provided to establish minimum criteria for the regulation of surface coal mining and reclamation activities throughout the country to assure adequate environmental protection in all states.²¹³ This provision's effect has been an elimination of the unfair competitive advantage previously enjoyed by states with lenient surface mine reclamation standards which allowed lower operating costs to create higher

CONG. & AD. NEWS 1543, 1630. See also S. REP. NO. 95-128, 95th Cong., 1st Sess. 52-53 (1977); Wall St. J., Sept. 28, 1977, at 22, col. 4-6 (editorial discussing crude oil prices on world market).

204. See H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 148, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1630; S. REP. NO. 95-128, 95th Cong., 1st Sess. 52-53 (1977).

205. S. REP. NO. 95-128, 95th Cong., 1st Sess. 52-53 (1977).

206. *Id.*

207. Prior to the Act, thirty-eight states had laws regulating surface coal mining. See Imhoff, A GUIDE TO STATE PROGRAMS FOR THE RECLAMATION OF SURFACE MINED AREAS, United States Geological Survey Circular 731 at 1, Resource and Land Investigations Program (1976). Most of these state laws are very recent with thirty-two having been implemented between 1970 and 1975. *Id.* at 1.

208. See 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 25.

209. H.R. REP. NO. 94-45, 94th Cong., 1st Sess. 64 (1976); see 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 26.

210. S. REP. NO. 95-128, 95th Cong., 1st Sess. 51-52 (1977).

211. *Id.*

212. H.R. REP. NO. 94-45, 94th Cong., 1st Sess. 64 (1976).

213. See Pub. L. No. 95-87, § 515(b), 91 Stat. 486 (1977).

profits for the coal industry within the state. The environmental and aesthetic costs not calculated in price per ton were concomitantly paid by the state's citizens. Under the Federal Act, funding is provided to state regulatory agencies to assure proper local administration of the federal requirements.²¹⁴ Additionally, the application procedures in the Act requiring a demonstration of feasible reclamation plans will assure that proper reclamation is taken.²¹⁵ Restrictions placed on the location of mining operations on alluvial valley floors and prime farm lands, together with the process for designating land unsuitable for surface coal mining, will assure that mining will not take place where reclamation is not practical to return the land to its original pre-mined condition.²¹⁶

The effect of the Act on states currently enforcing stringent surface mining regulations will not become entirely clear until the permanent regulations are promulgated specifying the operational effect of the general performance standards and the methods for state plan approval.²¹⁷ Because mining conditions, climate, and terrain vary so greatly among the states, Congress felt that the responsibility for coal surface mining regulation would be more properly handled by the states.²¹⁸ A program geared to insure proper mining and reclamation in the mountains of Appalachia, for example, must understandably be different from one suited to regulate these activities in the arid and semi-arid regions of the west. It is clear that these regional differences must be reflected in the federal regulations—both as they relate to the operational effects of the general performance standards, and as they govern the requirements for state plan approval.²¹⁹ It is not so clear, however, how much discretion the state regulatory authorities will allow in conforming reclamation standards to comport with the geographical and climatical conditions present at the particular mine locations.²²⁰ According to a literal reading of the Federal Act, all coal

214. *Id.* § 712(a).

215. *Id.* § 507(d).

216. *Id.* §§ 510(b)(5), (d)(1), 522.

217. *Id.* § 501(b) provides that the OSM is to publish permanent regulations "covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of title V and establishing procedures and requirements for preparation, submission, and approval of State programs; and development and implementation of federal programs under the title." *Id.* § 501(b).

218. *Id.* § 101(f); S. REP. No. 95-128, 95th Cong., 1st Sess. 51 (1977).

219. See H.R. REP. No. 95-218, 95th Cong., 1st Sess. 85, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1572.

220. It has been the practice in Texas for the regulatory authority to engraft particular reclamation standards into the permit as conditions thereon. Interview with J. Randell Hill, Chief Counsel, Surface Mining and Reclamation Division, the Texas Railroad Commission, in Austin, Texas (September 23, 1977). This arrangement has operated advantageously in Texas for operators and environmentalists alike because the state's wide range of terrains mandates certain flexibility in the application of the state environmental protection standards. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 109. Texas has one of the most stringent and effective surface mine regulation programs in comparison with other

surface mining permits must meet certain minimum uniform standards. Congress felt that arrangements providing for discretionary variances would render the Act meaningless.²²¹ Without a certain amount of uniformity, proper reclamation would again be entrusted almost entirely to the state regulatory agencies.²²² For that reason, Congress was adamant that there should be very few exceptions to the general performance standards.²²³ The limited variance and exceptions provided in the Act pertain primarily to alternative post-mining uses, and apply only when the return to the approximate pre-mining condition is either not feasible or is not the most desirable goal of reclamation.²²⁴ Apart from these general exceptions, all surface coal mining operations must conform to the specific reclamation standards set out in the Act. Certain uniform standards must be met, even if the state regulatory authority, in its discretion, feels that other methods might be more practical because of peculiar geographical and climatic conditions at the particular minesite.²²⁵ Any permit which does not conform with the requirements of the Act and regulations will be susceptible to citizen challenge at the application approval stage,²²⁶ or by way of a

states. *Id.* at 109. This state's ability to produce such a good program stems from the fact that surface mining is a relatively new industry in Texas and the regulatory authority, therefore, has been able to set up the program in an unhampered fashion rather than reacting to an already established industry. *Id.* at 110.

221. S. REP. NO. 95-128, 95th Cong., 1st Sess. 55 (1977); see H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 85, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1571.

222. Cf. 1977 SURVEY OF STATE SURFACE MINING LAWS, *supra* note 3, at 20 (impetus for Act stemmed from non-uniform state programs).

223. See S. REP. NO. 95-128, 95th Cong., 1st Sess. 55 (1977); H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 85, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1571.

224. For example, section 515(b)(3) allows a variance from the approximate original contour standard when the amount of the overburden at the minesite is either too scarce or too large to return the land to its original contour. Pub. L. No. 95-87, § 515(b)(3), 91 Stat. 486-87 (1977). In such cases, the operator is to obtain the lowest practical grade. *Id.* Section 515(c) provides an exception to the approximate original contour standard in the case of mountain top mining, when the operation would transect and remove a mountain top or ridge. *Id.* § 515(c)(2). This variance is an obvious necessity for it would be impractical to rebuild a mountain top or ridge. The variance is granted, however, only when the operator proposes as "industrial, commercial, agricultural, residential or public facility (including recreational facilities) . . . post-mining use." *Id.* § 515(c)(3). Section 515(d) provides a limited variance for steep-slope mining where the operator proposes the same type of post-mining uses necessary to obtain a variance in the case of mountain top mining. *Id.* § 515(e)(2).

225. A certain amount of flexibility will be allowed in regard to the "approximate original contour" standard of section 515(b)(3) however, for Congress intended it to be a flexible standard which "contemplates different mining circumstances." H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 96, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1583.

226. Pub. L. No. 95-87, § 515(a), 91 Stat. 486 (1977) provides that "any permit issued under any approved state or federal program pursuant to this Act to conduct surface coal mining operations shall require that such surface coal mining operations will meet all applicable performance standards of this Act, and such other requirements as the regulatory authority shall promulgate." *Id.* Section 510(b)(1) provides that no permit shall be approved "unless the application affirmatively demonstrates that . . . all the requirements of this Act and the

citizen suit against the regulatory authority.²²⁷ Federal inspections apparently will be conducted in a check-list type manner, where any deviation from the letter of the Act and the regulations will be cited.²²⁸

The Act, therefore, could potentially remove a great deal of discretion from the state regulatory authorities. This matter will be determined to a great extent, however, by the permanent regulations and decisions by the OSM in accepting or rejecting proposed state plans.

CONCLUSION

It becomes readily apparent that the success or failure of the Act will depend to a large extent upon the permanent regulations issued by the OSM. If the regulations pertaining to the environmental protection standards and the methods for state plan approval fail to provide for an appropriate amount of flexibility, there is a possibility that the standards in the Act will be ignored because of the necessity for obtaining the most abundant domestic fossil fuel currently available. The primary reason for federal regulation of surface coal mining is that for various reasons, some states are incapable of properly regulating such operations on non-federal lands within their borders.²²⁹ There is no reason, therefore, for the OSM to require significant changes in the laws and regulations within the states that have demonstrated an ability to adequately control surface coal mining and reclamation procedures prior to the Act. The Texas Act, for example, provides that post-mined land should be returned to "the same or a substantially beneficial condition."²³⁰ While this provision does not meet the specific wording of the Federal Act which provides that the affected land should be returned to the "approximate original contour," it has the same intent and achieves the same results. In addition, the Texas Act provides that the regulatory authority may, after public hearing, approve a method of reclamation other than that provided for in the state environmental protection standards if the regulatory authority determines that reclamation according to those standards is not practical, and that the alternative method will effect the same result.²³¹

While the Federal Act does not provide that such discretion should be placed solely in the state regulatory authorities, it is needed as a practical

State or Federal program have been complied with." *Id.* § 510(b)(1). Citizens may challenge an improper approval pursuant to section 514(c).

227. *Id.* § 520(a)(1) provides for citizen suits against the regulatory authority when "in violation of any of the provisions of this Act." *Id.* § 520(a)(1).

228. *See id.* § 521(a)(2). The OSM is to take appropriate action when the federal inspectors determine that an operator "is in violation of any requirement of this Act, or any permit condition required by this Act." *Id.* § 521(a)(2).

229. *See H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 58-59, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1546-48; S. REP. NO. 95-128, 95th Cong., 1st Sess. 51-52 (1977).*

230. *TEX. NAT. RES. CODE ANN. § 131.102(b)(2) (Vernon Pamp. Supp. 1977).*

231. *Id.* § 131.102(d).

matter in Texas and other large states with multiple, varying terrains within their borders.²³² It is important that the OSM take into consideration the practical aspects of surface coal mining in promulgating regulations and in making decisions regarding the acceptance or rejection of proposed state plans. State plans which substantially meet the purposes of the Act and fall within the framework of the federal environmental protection standards should be accepted, for it would be impractical for the OSM to undertake a federal program in the majority of the states. A certain amount of discretion should be allowed to remain in the local regulatory authorities—especially in those states which have demonstrated an ability to administer such discretion properly. The provisions in the Act providing for federal backup enforcement and citizen participation will assure that such discretion will not result in meaningful deviations from the federal environmental protection standards.

The passage of this comprehensive environmental litigation will affect both the costs and effects of energy production in the post cheap petroleum era. It at least appears that a balance has been struck which will ensure the energy necessary for viable economic growth while preserving irreplaceable geographical assets and preventing the further degradation of the already ravaged landscape of Appalachia and the old surface mining states. One cannot help but applaud the realization by Congress that the environmental costs of "growth at any price" are too great, and that this country's environmental resources are not expendable, but rather an invaluable legacy worthy of preservation.

232. See Pub. L. No. 95-87, § 711, 91 Stat. 523 (1977). Section 711 of the Federal Act does provide for discretionary variances from the requirements of the federal environmental protection standards for experimental purposes, but only with the approval of the OSM, and only when the "experimental practices are potentially more or at least as environmentally protective, during and after mining operations, as those required by promulgated standards"; and only when "the mining operations approved for particular land-use or other purposes are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practices"; and only when the experimental practices "do not reduce the protection afforded public health and safety below that provided by promulgated standards." *Id.* § 711.