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THE REGULATION OF COAL SURFACE MINING IN A FEDERAL SYSTEM*

TERRY D. EDGMON** and DONALD C. MENZEL***

INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA)¹ represents a federal legislative effort to balance the need to increase coal production to meet the nation's energy requirements with the safeguarding of the environment for future generations. In the past, surface mining of coal has led to significant disruptions in traditional land uses and environmental damage on a large scale.² Prior to this act, regulation of surface mining and reclamation practices was the responsibility of state governments, resulting in a mosaic of diverse standards and, oftentimes, timidity in enforcement.³ With the enactment of SMCRA, however, a uniform regulatory framework has been established for controlling the adverse effects of surface mining while enabling coal mine operators to pass on the costs of environmental protection to those who consume the coal without the fear of being undercut in the marketplace by others who are less willing to undertake costly reclamation practices, or who operate in states with minimal reclamation standards. The SMCRA is designed to surmount a fundamental problem in a federal system of government, namely, controlling the negative impacts of unconstrained economic competition among firms operating in states having varying regulatory standards and patterns of enforcement.⁴ As with other federal environmental policies, however, the application of surface mining and

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1. 30 U.S.C. § 1201-1308 (Supp. III 1979).

2. The literature is extensive. See *generally* COAL AND THE SOCIAL SCIENCES: A BIOGRAPHICAL GUIDE TO THE LITERATURE (A. Yanarella ed. 1979).

3. See E. IMHOFF, T. FRIZ & J. LAFEVERS, A GUIDE TO STATE PROGRAMS FOR THE RECLAMATION OF SURFACE MINED AREA (1976); M. LANDY, THE POLITICS OF ENVIRONMENTAL REFORM: CONTROLLING KENTUCKY STRIP MINING (1976); R. NEHRING & B. ZYCHER, COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS: A PRELIMINARY REPORT (1976); W. ROSENBAUM, COAL AND THE CRISIS: THE POLITICAL DILEMMAS OF ENERGY MANAGEMENT (1978).

4. Battle, *Transportation Controls under the Clean Air Act—An Experience in (un) Co-operative Federalism*, 15 LAND & WATER L. REV. 1 (1980).

reclamation standards to insure equity in the distribution of costs and benefits in resource extraction is a difficult task at best. The wide diversity in environmental conditions under which surface mining takes place and the variability in public attitudes reflected by state governmental policies make implementation difficult.

Critical to the implementation of a set of national surface mining and reclamation standards is the development of a federal regulatory strategy. Such a strategy will, on one hand, insure equity in the application of national standards and, on the other, allow some measure of flexibility in the determination of management practices which are best suited for site-specific problems encountered within an ecologically and geologically diverse environment. Congress, in its experience with the development of national standards for air and water pollution, devised a mechanism it hoped would be able to achieve equity in the application of national standards. The provisions of SMCRA are based upon the now familiar principle of cooperative federalism, whereby states are offered both positive and negative inducements to assume important roles in the design and implementation of regulatory programs that are consistent with the goals of the act. However, with the creation of the Office of Surface Mining (OSM)⁵ in the Department of the Interior, an ever-widening controversy over state-federal roles and relationships has caught this newly created federal agency in a political-bureaucratic struggle over who shall determine the appropriate balance between diverse subnational interests and the necessity for uniform standards for surface mining and reclamation. The eventual outcome of this struggle is critical, because it will largely determine the ultimate effectiveness of the act to serve as a policy tool for sustaining needed coal production while protecting the environment. In a larger sense, the implementation of the act itself is a test of the principle of cooperative federalism as a mechanism for insuring equity in the administration of national standards and, simultaneously, allowing for a measure of state diversity.

The purpose of this article is to examine the dynamics of intergovernmental politics associated with the implementation of the federal program for regulating the surface mining of coal in the United States. This is accomplished by defining SMCRA in relation to other federal environmental legislation and developing a conceptual framework for the analysis of state-federal relationships which have been established by the regulatory mechanism embodied in the act. This analysis reaches the conclusion that the effectiveness of the principle of cooperative federalism as a policy management tool is conditioned

5. 30 U.S.C. § 1211 (Supp. III 1979).

by the particular implementation strategy adopted by the agency (OSM) authorized to develop and enforce the provisions of the legislation, and the relationships developed between it and state agency counterparts. The manner in which the agency defines key provisions of the act and the style used to provide incentives and invoke sanctions are critical to the evolution of a genuine partnership between state and federal units of government.

THE COAL ACT OF 1977

The Surface Mining Control and Reclamation Act of 1977 emerged at a period in the environmental movement of the 1970s when public concern for environmental quality had begun to give way to the malaise of an enduring energy crisis and increasing disenchantment with federal regulatory policies. However, during this decade, the ramifications of the rapid growth of coal surface mining caused misgivings. In 1970, surface mining accounted for only 44 percent of all coal produced in this country. By 1974, however, the level had risen to 54 percent.⁶ In the western U.S., surface coal production grew rapidly in mid-1970, and it is estimated to increase from 73 million tons in 1974 to 574 million tons by the year 2000.⁷ This growth represents nearly an eightfold increase in coal production and requires substantial areas of land. With this real and projected expansion in the mid-western and Rocky Mountain states, sufficient support was generated for the passage of two bills by Congress in 1974⁸ and 1975.⁹ They were vetoed by President Gerald R. Ford on the grounds that such legislation would be inflationary. Finally, in 1977, a bill was passed with the blessing of the new President, Jimmy Carter, who urged the Congress to adopt "the strictest reclamation standards possible."¹⁰

The act itself is an omnibus piece of legislation similar in structure to the Clean Air Act¹¹ and the Federal Water Pollution Control Act Amendments¹² passed in the late 1960s and early 1970s. Its organizing principle is that of cooperative federalism, whereby a state-federal partnership is established in the implementation process through the application of a mix of carrots and sticks to induce states to imple-

6. GENERAL ACCOUNTING OFFICE, U.S. COAL DEVELOPMENT—PROMISES AND UNCERTAINTIES, REPORT BY THE COMPTROLLER GENERAL 4-15 (1977).

7. *Id.*

8. S. 425, 93rd Cong., 2d Sess., 120 CONG. REC. 40054 (1974).

9. H.R. 25, 94th Cong., 1st Sess., 121 CONG. REC. 13385-86 (1975).

10. 8 ENVIR. REP. (BNA) 275 (1977).

11. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

12. Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 861-902 (amending 33 U.S.C. §§ 1251-1376 (1970)).

ment federal objectives. The significant goals of SMCRA as established in Section 102 are

- (i) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
- (ii) promote the reclamation of mined areas left without adequate reclamation prior to [1977] . . . which continue, in their unreclaimed condition, to substantially degrade the quality of the environment . . . or endanger the health or safety of the public; and (iii) strike a balance between the protection of the environment . . . and the Nation's need for coal as an essential source of energy.¹³

As in the case of national air and water legislation, the above stated goals are to be attained through an elaborate system of incentives and regulatory sanctions. A major inducement for the states to develop regulatory programs is the establishment of a multi-million dollar trust fund in the Department of the Treasury.¹⁴ These monies will be expended for the reclamation and restoration of land and water resources adversely affected by past coal mining. Revenues for the trust fund are derived from a reclamation fee of 35¢ per ton of coal produced by surface mining and 15¢ per ton of coal that is deep mined.¹⁵ Fifty percent of all funds generated in a particular state must be expended in that state.¹⁶ In addition, OSM is authorized to provide grants to states to enable them to establish regulatory programs and develop university based mining and engineering research and training programs.¹⁷

The regulatory components of the act, on its face, assign primary responsibility for regulating the adverse impacts of surface disturbances to the states. Section 101(f) says, "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States."¹⁸ Reinforcing this section is the "state window" provision that OSM established in the permanent regulations.¹⁹ It provides for the development of mining and reclamation standards that meet particular climatic, geographic, or biological conditions peculiar to specific coal regions found among the states. As explained by the director of OSM, the various states "can set forth alternatives

13. 30 U.S.C. § 1202 (Supp. III 1979).

14. *Id.* § 1231.

15. *Id.* § 1232.

16. *Id.* § 1232(g)(2).

17. *Id.* §§ 1221-1229.

18. *Id.* § 1201(f).

19. 30 C.F.R. § 731.13 (1979).

that are necessary in their view to identify the peculiarities of their regions and design their programs accordingly."²⁰

The states, however, do not have to implement a federal regulatory program; but if they do not establish satisfactory programs OSM must do so.²¹ In principle, OSM is to work with and through the states to the fullest extent possible in developing state programs that, collectively, constitute a national regulatory program.

The act also calls for the establishment of regulatory programs on federal lands.²² Prior to the passage of the act, surface mining regulation was achieved through formal cooperative agreements established between the respective states and the Department of Interior. Six states—Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming—had such agreements prior to 1977. These agreements created regulations and standards for state enforcement on both state and federal lands. States with cooperative agreements in existence at the time of passage of the act, and whose programs are approved by OSM, can continue to regulate coal operations on federal lands, provided the existing cooperative agreement is brought into compliance with the act.²³ Section 523 stipulates however, that the Secretary of Interior *may not* delegate to the states his duty to approve mining plans on federal lands.

Regardless of whether OSM or the states implement a regulatory program, compliance with national performance standards is based upon the comparison of the plan with a set of performance and design criteria to mine and reclaim the land. If the plan satisfies the criteria, then the operator is granted a permit to operate. If the operator, upon inspection of an operation, is found to be in violation of the plan (hence, the standards), then a range of civil and criminal sanctions can be invoked.²⁴ In addition, as with other national environmental legislation, the act provides for citizens with standing to bring suit as a means to insure federal enforcement of the regulations.²⁵

20. SENATE SUBCOMM. ON PUBLIC LANDS & RESOURCES, COMM. ON ENERGY & NATURAL RESOURCES, 95th Cong., 2d Sess., OVERSIGHT HEARINGS ON IMPLEMENTATION OF SURFACE MINING CONTROL AND RECLAMATION ACT 4 (Comm. Print 1978) [hereinafter cited as 1978 OVERSIGHT HEARINGS].

21. 30 U.S.C. § 1254 (Supp. III 1979).

22. *Id.* § 1273.

23. 30 C.F.R. § 745 (1979).

24. 30 U.S.C. § 1268 (Supp. III 1979). The OSM devised a complex point system for awarding civil penalties that has, in some instances, made it more attractive for operators to go out of business rather than reclaim land. This paradoxical situation has caused the OSM to revise its civil penalty scheme, thereby making it less onerous to operators. For specific details, see 44 Fed. Reg. 58,780-86 (1980).

25. 30 U.S.C. § 1270 (Supp. III 1979).

Comparisons With Air and Water Pollution Policies

While the legal framework of the coal act is similar to other federal environmental legislation, the conditions under which it has been implemented differ significantly. First, the Clean Air Act²⁶ and the Water Pollution Control Act Amendments of 1972²⁷ (and later the Clean Water Act of 1977)²⁸ were manifestations of a gradual shift of regulatory authority from the states to the federal government, whereas the SMCRA does the reverse. The Water Pollution Control Act of 1948,²⁹ while granting the federal government authority to investigate, research, and survey, left primary responsibilities for pollution control with the states. Although amendments of 1956 introduced a complex procedure for federal enforcement actions, they served primarily as a vehicle for providing water treatment plant construction grants.³⁰ A national permit system (NPDES) was not authorized until 1972³¹ and is still not fully implemented in all 50 states. The first legislation which authorized federal activity in air pollution control was passed in 1955,³² and the history of federal involvement over the 15-year period to the passage of the Clean Air Act follows a similar evolutionary path. The SMCRA, however, had no such legislative history. Created full blown in 1977, the act created comprehensive authority for federal activity in an area traditionally dominated by the states.

Second, over the years some coal producing states had developed administrative machinery for, and expertise in, regulating surfacing mining and reclamation practices. Although the record for strict enforcement in the states has been mixed, many states nevertheless have had ongoing programs administered by personnel who have come to terms with the realities of state politics and the necessity for surface mining regulation.³³

In sum, SMCRA can be seen as a federal action to establish national

26. 42 U.S.C. § § 7401-7642 (Supp. II 1978).

27. Pub. L. No. 92-500, 86 Stat. 816 (amending 33 U.S.C. § § 1251-1376 (1970)).

28. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (amending 33 U.S.C. § § 1251-1281 (1976)).

29. Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (codified at 33 U.S.C. § § 1251-1376 (1976)).

30. See Water Pollution Control Act Amendments of 1956, ch. 518, 70 Stat. 498.

31. Pub. L. No. 92-500, 86 Stat. 880 (codified at 33 U.S.C. § 1342 (1976)) (amended 1977).

32. Act of July 14, 1955, ch. 360, 69 Stat. 322.

33. See M. LANDY, *supra* note 3. See also SENATE COMM. ON ENERGY & NATURAL RESOURCES, 95th Cong., 1st Sess., STATE SURFACE MINING LAWS: A SURVEY, A COMPARISON WITH PROPOSED FEDERAL LEGISLATION, AND BACKGROUND INFORMATION (Comm. Print 1977).

standards for environmental protection on the basis of a federal-state partnership. As such, the act contains positive and negative inducements for states to develop and implement regulatory programs to meet national goals. The conditions under which the act has been implemented, however, differ from previous experiences with this form of cooperative federalism in that the federal government did not have the opportunity gradually to develop expertise in surface mining regulation, and has had to confront experienced state agencies which have been accustomed to a dominant regulatory role, on federal as well as on state lands.

IMPLEMENTATION STRATEGIES

To assess the implementation strategy of the Office of Surface Mining, one can draw upon a set of concepts to structure the analysis. While the process of policy implementation has only recently caught the attention of scholars, and much is still to be learned, several important factors have been determined to be significant in shaping implementation outcomes.³⁴ First, it is widely accepted that an agency may choose a specific implementation *strategy* from a range of alternatives. The choice of which strategy to adopt is largely determined by the resources available to the agency, past experience with similar policies, the level of knowledge concerning the problems to be solved or managed, and the perceived political feasibility of selected alternatives. Second, there exist several *imperatives* which, if satisfied, enhance the probabilities of effective implementation.³⁵ Third, every agency is faced with specific *constraints* to effective implementation, either in statutory requirements or the bureaucratic milieu in which it operates. Constraints are defined as those factors which influence the agency's behavior, but over which the agency has little control or cannot avoid.

Strategies

Perhaps the most critical decision to be made by an agency is the selection of an implementation strategy. In the area of regulatory policy, at least three basic strategies can be identified. They are *ad-*

34. See R. MAKARAMA & F. SMALLWOOD, THE POLITICS OF POLICY IMPLEMENTATION (1980); Berman, *Thinking About Programmed and Adaptive Implementation*, in WHY POLICIES SUCCEED OR FAIL 205 (H. Ingram & D. Mann eds. 1980); Sabatier & Mazmanian, *The Conditions of Effective Implementation*, 5 POLICY ANALYSIS 481 (1979).

35. Effective implementation is defined as the extent to which a policy's goals and objectives are met in practice.

*ministrative, organizational environmental, and learning system strategies.*³⁶ These strategies are distinguished from each other by the type of regulatory mechanisms created by the statute and agency interpretation through its rule making function, the mix of incentives and sanctions employed to induce a change in the behavior of the groups to be regulated, and the tactics the agency employs to achieve acceptance of new programs by the states. For example, an administrative strategy is usually employed in situations where a high consensus on regulatory goals exists and the specific behaviors and technologies to attain them are known. Enforcement and compliance become technical matters and, to a large extent, formal regulatory procedures are utilized to preserve widely accepted social and political values. For situations where the desired behaviors are not well known and appropriate behaviors may vary from situation to situation, an organizational environmental strategy is deemed appropriate. This strategy allows for negotiation, bargaining, and compromise between the implementing agency and those who must adopt new behaviors. This strategy is characterized as a mix of positive inducements and negative sanctions which modify the decision environment of the regulated group.

The third strategy, a learning system approach, is the most decentralized and least coercive of the three strategies. It is employed in situations where desirable behaviors of the organizations to be regulated are not well known, and moreover, may vary from situation to situation. In this case, no negative sanctions are employed. Rather, the implementing agency merely plays a facilitating role and provides encouragement.

Implementation Imperatives

Given the specific implementation strategy selected by the agency and its legislative sponsors, certain imperatives must be satisfied if the regulatory program is to be effective in meeting the goals embodied in the legislation. The first imperative is the *statutory requirement* of the act itself. Sabatier and Mazmanian³⁷ contend that this imperative is perhaps the most important factor which influences the implementation process. The statute "structures" the implementation process by

36. Kirlin, Structuring the Intergovernmental System: An Appraisal of Conceptual Models and Public Policies (paper presented to the annual meeting of the American Political Science Association, New York, N.Y., September 1-4, 1978).

37. Sabatier & Mazmanian, Toward a More Adequate Conceptualization of the Implementation Process—With Special Reference to Regulatory Policy (1978) (report by the Institute of Governmental Affairs, University of California at Davis).

its selection of the implementing institutions through providing legal and financial resources . . . ; through biasing the probable policy orientations of energy officials; and through regulation the opportunities for participation³⁸

More importantly, the statute determines the agency's mission, that is, its program objectives, and provides a guide for the achievement of those objectives. Another important element is the legislated timetable for implementation milestones.

The second imperative is the establishment by the agency of *reputational authority* in enforcing its regulations. As Ball noted in the implementation of water pollution control programs,³⁹ regulatory compliance will be achieved only if the regulated groups perceive that the agency possesses the will, technical capability, and political support to make enforcement sanctions stick. In a word, a successful regulatory policy operates on the basis of deterrence. The irony is that voluntary compliance will be achieved only if the regulating agency is perceived to possess the capability to force compliance.

The third imperative is political support. This is particularly crucial for regulatory programs which are intergovernmental in nature. As Thomas⁴⁰ has pointed out, even if a federal agency has the authority to implement a program in a state which refuses to develop one itself, it is loathe to do so. To a certain extent, the federal agency is dependent upon state agencies to implement significant portions of the statute. State agency support for the policy's objectives, therefore, is deemed essential if implementation is to be effective.

Constraints

Given the above identified imperatives, several constraints can be identified. First, regulatory policies which define implementation roles for state agencies imply that a built in conflict situation may exist. If the statute contains objectives not deemed relevant to state agencies and defines procedures with which they are unfamiliar, then resistance to these necessary changes can be anticipated. At the same time, however, the federal agency may need to establish its reputational authority in respect to its policy. The agency, therefore, is caught in a dilemma. In order to establish reputational authority, it must take a coercive approach to enforcing regulations. At the same

38. *Id.* at 11.

39. Ball, *Water Pollution and Compliance Decision Making*, in PUBLIC POLICY MAKING IN A FEDERAL SYSTEM 169 (C. Jones & R. Thomas eds. 1976) [hereinafter cited as PUBLIC POLICY MAKING].

40. Thomas, *Intergovernmental Coordination in the Implementation of National Air and Water Pollution Control Policies*, in PUBLIC POLICY MAKING, *supra* note 39, at 129.

time, it may need to be flexible in its dealings with state agencies. The paradox is that, in intergovernmental regulatory policies, the federal agency must first influence the behavior of state or local agencies before it can be assured that state enforcement programs will be effective in modifying the behavior of target groups. As Bardach⁴¹ has observed, massive resistance to legislated changes in the procedures of subordinate agencies may seriously impede implementation. Thus, the federal agency must somehow maintain state agency support for the policy's goals, while at the same time induce them to alter established regulatory practices and organizational routines.

The second major constraint to implementing an intergovernmental regulatory policy is related to difficulties inherent in the performance standards-enforcement approach itself. This approach has been criticized by economists as being cumbersome and inefficient.⁴² With respect to surface mining regulation the problem concerns which administrators will be allowed the greatest amount of discretion in enforcement, state or federal? In order to reduce the level of uncertainty related to implementing the policy, the federal agency will act to minimize the discretion delegated to field and state agencies. However, state agencies will press to maximize the amount of discretion available to them within the context of the statute. This competition for maximizing decisional discretion is at the heart of intergovernmental conflicts in the implementation of intergovernmental regulatory programs, since the outcomes will largely determine to whom the target groups will have to appeal in respect to enforcement decisions.

Taking these constraints together, it comes as no surprise to conclude that an administrative strategy has limited application, and that implementation outcomes are largely negotiated among the participants. Therefore, it is usually on the basis of negotiation and compromise that an implementing agency finally comes to terms with its subordinate agencies.

OSM'S IMPLEMENTATION STRATEGY

Given the concepts defined above, the Office of Surface Mining, under the direction of Walter Hein, had to accomplish a number of difficult objectives during the congressionally mandated interim phase of federal program development. This phase, which has lasted roughly three years from the time the act was passed, has been im-

41. E. BARDACH, *THE IMPLEMENTATION GAME* (1977).

42. See, e.g., A. KNEESE & C. SCHULTZE, *POLLUTION, PRICES, AND PUBLIC POLICY* (1975); Majone, *Choice Among Policy Instruments for Pollution Control*, 2 *POLICY ANALYSIS* 589 (1976).

portant for OSM, because within it⁴³ permanent regulations have been promulgated, state program grants have been issued, and federal presence has been felt in coal fields.⁴⁴ With respect to state-federal relations, activity in this period has been especially critical because it will greatly influence the administration of the permanent regulatory program by the states and OSM.

OSM's actions and states' responses have deviated from earlier environmental policy implementation efforts in a number of ways. First, strict enforcement actions occurred almost immediately upon the organization of the agency, often without the benefit of state agency support for such actions. (In water pollution regulation the federal EPA has generally followed a policy of selective enforcement and, to a large extent, has acted in concert with state agencies desiring an enforcement action but feeling a lack of sufficient political support on the state level.⁴⁵) Second, OSM developed what many state officials perceived to be a narrow interpretation of the act, especially of those portions which defined key state-federal responsibilities. Third, OSM has been accused of producing long and detailed regulations for permit applications and approvals. Fourth, it attempted to utilize its grant program to "coerce" the states into accepting its interpretation of the act in the formulation of state programs.

These assertions, if valid, indicate that OSM's implementation strategy was based on the assumption that not only did a consensus exist among OSM, the states, and coal firms on the goals of the act, but also that all parties were in agreement on the specific administrative procedures to be utilized. That is, OSM chose to implement a predominantly administrative regulatory strategy rather than a more flexible organizational environmental strategy more common to other federal environmental management programs.

Strict Enforcement

If the perception of agency willingness and capability to enforce regulations was an important factor in OSM's strategy to insure regulatory compliance, then OSM did not want to leave any doubt about this fact in the minds of coal operators. While some environmental-

43. The initial timetable called for the OSM to approve or disapprove a state's program by August 3, 1979. However, due to court actions and legal opinions within the Department of Interior, this date was changed to January 3, 1981.

44. Federal inspectors did not get into the coal fields until April 1978.

45. For a thorough discussion of EPA's initial strategy, see J. QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* (1976).

ists⁴⁶ have voiced criticism that OSM has been timid in enforcing provisions of the act, the record indicates that in 1979 the agency levied \$7.8 million in fines, conducted 20,306 inspections, wrote 4,461 notices of violations, and shut down 998 operations.⁴⁷ (See Table 1 for federal enforcement activities in specific states.) These enforcement actions have led some to voice the opinion that "federal enforcement policy . . . has resulted in a contest between federal regions to see which region can write the most violations and assess the largest amounts of fines."⁴⁸ Agency officials have countered that "inspectors do not write tickets unless there are significant violations."⁴⁹

This strategy of strict enforcement, while necessary to develop reputational authority for the regulating agency, has contributed to the erosion of state support of SMCRA and OSM. Part of this loss of support lies in the penalty point system utilized by OSM with which many state administrators were unfamiliar, and part lies in the differences in enforcement philosophies between OSM and the states. In some states, reclamation officials have played a facilitative role in the enforcement of surface mining regulations. In other states, uses of negative sanctions, such as civil penalties and shutdown, have been reserved as "big sticks" to be applied only when other actions have failed.⁵⁰ OSM, on the other hand, has elected to "go by the book" and "take enforcement action whenever a violation is found."⁵¹ This attitude has in effect resulted in a dual enforcement system during the interim period, a situation which some state officials feel has undermined state actions.

Narrow Interpretation

The second component of OSM's implementation strategy has been to interpret SMCRA conservatively in defining federal-state

46. Similar criticism has been offered by former OSM inspectors. See N.Y. Times, Sept. 2, 1980, § A, at 22, col. 3.

47. U.S. DEPARTMENT OF INTERIOR, OFFICE OF SURFACE MINING, undated mimeograph.

48. SENATE COMM. ON ENERGY & NATURAL RESOURCES, 96th Cong., 1st Sess., OVERSIGHT HEARINGS—THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, at 78 (Comm. Print 1979) [hereinafter cited as 1979 OVERSIGHT HEARINGS].

49. Donald Crane, as quoted in The Steamboat Pilot, Oct. 18, 1979 (Steamboat Springs, Colorado).

50. Menzel, Implementation of the Federal Surface Mining Control and Reclamation Act of 1977 (paper presented to the annual meeting of the Southern Political Science Association, Gatlinburg, Tenn., Nov. 1-4, 1979).

51. Barry, State-Federal Agreements, Programs, and Issues under the Surface Mining Control and Reclamation Act 23 (Nov. 8, 1979) (paper prepared for the Rocky Mountain Mineral Law Institute).

TABLE 1
FEDERAL ENFORCEMENT ACTIVITIES IN THE STATES
(1979)

<i>State</i>	<i>Inspections</i>	<i>Violation Notices</i>	<i>Cessation Orders</i>
Alabama	926	248	71
Arizona	0	0	0
Arkansas	92	16	9
Colorado	95	39	5
Georgia	19	5	0
Illinois	590	92	4
Indiana	786	157	42
Iowa	31	5	0
Kansas	93	12	0
Kentucky	5,329	1,400	277
Louisiana	3	0	0
Maryland	248	31	0
Missouri	102	13	8
Montana	19	7	0
New Mexico	17	3	0
North Dakota	18	5	0
Ohio	1,367	367	35
Oklahoma	337	57	12
Oregon	1	0	0
Pennsylvania	3,346	645	234
Tennessee	1,320	327	205
Texas	28	3	0
Utah	57	10	0
Virginia	951	238	25
Washington	4	0	0
West Virginia	4,484	760	71
Wyoming	43	21	0
TOTALS	20,306	4,461	998
Average for All States	752	165	37
Average for Eastern States ^a	2,257	419	82
Average for Western States ^b	28	9	.5

Source: U.S. Department of the Interior, Office of Surface Mining.

^aMaryland, Pennsylvania, Virginia, and West Virginia.

^bArizona, Colorado, Montana, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming.

relations. Perhaps the most controversial interpretation was OSM's definition of the state window concept in its final regulations.⁵² Congress, realizing that a uniform set of federal performance standards might not be well suited for all states, allowed for the development of state programs as long as they were "consistent with" SMCRA. OSM chose to interpret "consistent with" the act to mean "consistent with" all rules and regulations issued by OSM.⁵³ Several critical reviews of proposed state regulations led many state officials to believe that nothing short of mirroring OSM's regulations would produce a state program that would satisfy the agency, especially in light of the fact that OSM developed regulations for design criteria rather than performance standards. These concerns, according to a staff analyst in the Library of Congress, "suggest that there is some legitimacy in this criticism. The States do appear to be left with few options but to accept all of the Federal regulations as their own in order to assume regulation of surface mining."⁵⁴

These perceptions by state officials that OSM has been intent on converting state reclamation agencies into federal clones, led to the passage in September 1979 of the so-called Rockefeller Amendment in the U.S. Senate.⁵⁵ This amendment, which is discussed in detail later in the article, was aimed at nullifying the rule making authority of OSM.

Another major concern, especially to western coal states, has been OSM's interpretation of Section 523(c).⁵⁶ This section partially defines the Secretary of Interior's responsibilities to approve mining plans on federal lands. OSM has taken this section to mean that all plans for mines on federal lands must be subject to a federal review process which essentially duplicates state procedures. For the six states with prior cooperative agreements with Interior to regulate surface mining on federal lands within their jurisdiction, OSM's interpretation effectively voids such agreements. Another bone of contention for western reclamation officials is OSM's apparent broad definition of federal lands jurisdiction. Presumably, under current OSM policy, if a surface mine on private land has an access road which crosses federal land, then all mine activities fall under direct OSM regulations.⁵⁷

52. 43 Fed. Reg. 41,662 (1978).

53. U.S. Library of Congress, Congressional Research Service, Memo to Senate Committee on Energy and Natural Resources, Section 503(a)(7) of P.L. 95-87, SMCRA (July 24, 1979).

54. *Id.*

55. S. 1403, 96th Cong., 1st Sess., 125 CONG. REC. S12387 (daily ed. Sept. 11, 1979).

56. 30 U.S.C. § 1273(c) (Supp. III 1979).

57. *Supra* note 51, at 23-24.

Lengthy Regulations

Perhaps the most significant factor in galvanizing state and industry counterattacks on OSM's implementation strategy was its generation of lengthy regulations and detailed permit application and review procedures. The permanent regulations, published in the Federal Register on September 18, 1978, were also criticized as inflationary by the President's Council on Wage and Price Stability.⁵⁸ A cost impact analysis of the permanent regulations conducted by Consolidation Coal Company estimated that the "unnecessary costs of complying with unreasonable, unjustified, and restrictive OSM regulations would amount to over \$1.7 billion to [the company] in the next 11 years." This same study estimated an 11-year cost to the industry and public of over \$34 billion.⁵⁹

Various state officials and mine operators have referred to the regulations as "horrendous," "time consuming," and "unnecessary."⁶⁰ While both the states and the coal industry ostensibly support the environmental goals of the act, they have been vociferous in their attacks upon the procedures OSM has adopted to implement them. A significant point of the debate is that the regulations are a mix of performance standards *and* design criteria. That is, for some reclamation and mine operations, the companies must follow specific engineering criteria set forth in the regulations, rather than selecting from a range of engineering options to meet a performance standard. This limitation on operator (and, to an extent, state program) discretion in choosing among a range of options is at the heart of the debate over the permanent regulations.

Coercive Use of Grants

The final component of OSM's implementation strategy has been to utilize grants to the states as a tool for influencing the development of regulatory programs deemed acceptable to the agency. The agency's initial position regarding grant allocation was, as one OSM official put it, to be "blatantly coercive about state use of grants."⁶¹ This posture is not uncommon for federal agencies that wish to influ-

58. PRESIDENT'S COUNCIL ON WAGE AND PRICE STABILITY, U.S. DEPARTMENT OF INTERIOR, OFFICE OF SURFACE MINING, PROPOSED SURFACE COAL MINING AND REGULATION, PERMANENT REGULATORY PROGRAM (1978).

59. 1979 OVERSIGHT HEARINGS, *supra* note 48, at 150.

60. Interviews with representatives of several Rocky Mountain coal companies, October 29-31, 1979. (At the author's request, representatives' names have been withheld.)

61. Several OSM officials interviewed for this research were given assurances that their names would not be used.

ence state or local governmental units. Recently, for example, the U.S. Environmental Protection Agency publicly threatened to withhold more than \$850 million a year from California if the legislature failed to enact a law mandating inspections of auto emission control systems.⁶²

This intergovernmental grantsmanship style, according to the Advisory Commission on Intergovernmental Relations, is simply a reflection of a "fanciful" form of federalism, one in which

basic policies in most program areas appear to be made in Washington either by the Court or the Congress and their implementation is achieved through decisions, orders, mandates, conditions, regulations and the lure of federal loot by 12 million state and local civil servants. And, in the end, the fancy becomes caprice because the sub-national governments, their elected officials, and bureaucracies are capable of highly differentiated responses to all this—in terms of compliance, cooperation, participation, and conflict.⁶³

OSM awarded more than \$27 million to the states for fiscal year 1978-79 under Section 502(e)(4) of the act. As indicated in Table 2, there is considerable variation in the distribution of grant funds among the states; for example, the state of Kentucky has received sizable sums while other states have received little or nothing. The mixed success of OSM to utilize grants as a management tool is indicated in a statement by Edward Grandis and L. Thomas Galloway of the Environmental Law Institute who charge that OSM "capitulated to Kentucky" on several issues related to the implementation of the interim regulatory program, that OSM's insistence that Kentucky meet minimum federal requirements as a condition for a program met with failure, and consequently, the perception by Kentucky coal operators that the state had achieved a victory over OSM.⁶⁴ Yet, as Table 1 illustrates, the state of Kentucky was the scene of the greatest number of inspections, violation notices, and cessation orders in 1979.

STATE STRATEGIES TO LIMIT OSM

The states lost little time reacting to OSM's implementation of the coal act. The most intense pressures upon OSM came through state

62. N.Y. Times, Aug. 30, 1980, § A, at 10, col. 3.

63. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE FEDERAL ROLE IN THE FEDERAL SYSTEM (May 1980 Draft).

64. HOUSE SUBCOMM. ON ENERGY & THE ENVIRONMENT OF THE COMM. ON INTERIOR & INSULAR AFFAIRS, IMPLEMENTATION OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, H.R. DOC. 96-4, 96th Cong., 1st Sess. 328 (1979).

TABLE 2
OSM GRANTS TO THE STATES^a

State	Program Development Grants ^b		Interim Program Grants ^b	
	FY78	FY79	FY78	FY79
Alabama	\$ 0	\$ 0	\$ 230	\$ 487
Arkansas	0	73	65	152
Colorado	71	264	42	254
Illinois	0	0	398	1,000
Iowa	20	9	45	83
Kansas	0	42	48	95
Kentucky	1,566	864	2,133	5,708
Louisiana	0	103	0	0
Maryland	0	396	159	122
Mississippi	0	116	0	0
Missouri	126	0	46	164
Montana	0	151	58	88
New Mexico	0	150	68	140
North Dakota	463	589	248	199
Ohio	0	0	371	1,500
Oklahoma	205	0	121	468
Pennsylvania	0	0	233	1,053
Tennessee	0	0	26	534
Texas	0	186	196	209
Utah	0	141	62	147
Virginia	286	71	626	786
West Virginia	0	0	882	1,222
Wyoming	289	0	38	483
TOTALS	\$3,026	\$3,155	\$6,095	\$14,894

^aGrants are also made for Small Operators Assistance Programs.

^bThousands of dollars.

Source: Office of Surface Mining, U.S. Department of the Interior.

influence in Congress. In congressional oversight hearings, governors and officials of coal states sharply criticized OSM's apparent over-extension of its authority to promulgate regulations and implement them.⁶⁵ A primary concern of congressional representatives of coal states was that OSM paid lip service to the state window concept while moving toward national uniformity in regulations among states. This issue was again expressed in a report by the Government Accounting Office, which stated that "many state agencies are convinced that a near verbatim copy of the federal rules as they apply to

65. See 1978 OVERSIGHT HEARINGS, *supra* note 20.

performance standards . . . will be required to gain Interior's approval. . . ."⁶⁶

In the U.S. Senate, West Virginia's Senators Jennings M. Randolph and Robert C. Byrd marshalled support for an amendment to nullify OSM's rulemaking authority.⁶⁷ The Rockefeller Amendment, named after its chief lobbyist, West Virginia's Governor Jay Rockefeller, passed the Senate on September 11, 1979, by the lopsided vote of 68-26.⁶⁸ The amendment changes the language of the act to require that state rules and regulations be consistent with the act and not the regulation issued by OSM.⁶⁹

Proponents of the amendment argued that OSM had been overzealous in writing more than 150 pages of rules and regulations.⁷⁰ Furthermore, it was argued that OSM's rules and regulations were adversely affecting existing state programs and causing energy production delays. Some state regulatory authorities further contended that if the federal program were implemented, it might actually lower environmental quality in some states because the federal program would be less stringent than existing state programs. Opponents of the Rockefeller Amendment, such as Senator Henry M. Jackson of Washington, argued that the amendment would "create such confusion that enforcement of a national surface mining control program is likely to be set back for several years as the courts are forced to substitute their judgment for that of the Congress—on a state-by-state basis."⁷¹

Senator John Melcher of Montana maintained that the Rockefeller Amendment might impact adversely on energy production by causing strip mining operations to be delayed by judicial argumentation.⁷² Representative Morris K. Udall of Arizona, whose Committee on Interior and Insular Affairs has retained the bill, expressed the view that the Rockefeller Amendment "has been sold as a tonic for states' rights, an antidote to federal regulators, and an elixir for our beleaguered coal industry . . . [and it is] none of these things."⁷³

66. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING THE SURFACE MINING CONTROL AND RECLAMATION ACT: REPORT BY THE COMPTROLLER GENERAL 13 (1979).

67. S. 1403, 96th Cong., 1st Sess., 125 CONG. REC. S 12350-89 (daily ed. Sept. 11, 1979).

68. *Id.* at S 12387.

69. *Id.* at S 12365-83.

70. Koch, *Senate Exempts Strip Mining Plans from Rules*, 37 CONG. Q. WEEKLY RPT. 1981 (1979).

71. *Id.* at 1982.

72. 125 CONG. REC. S12365 (daily ed. Sept. 11, 1979).

73. Koch, *supra* note 70.

Several efforts have been made by West Virginia members of Congress to dislodge the Rockefeller Amendment from the Udall Committee.⁷⁴ However, they have met with very little success. Congressman Udall played an instrumental role in the design of P.L. 95-87, and he is not likely to bow easily to those congressional forces attempting to weaken the federal government's responsibility in this area. In August, 1980, however, coal state senators led by Senator Byrd initiated a new effort to circumvent Congressman Udall's powerful committee by attaching a new version of S. 1403 to H.R. 1197, a vessel tonnage bill.⁷⁵ This maneuver was designed to place the re-fashioned Rockefeller Amendment before a more sympathetic house committee. Whether or not this parliamentary tactic will succeed remains to be determined, especially in light of the strong opposition of Congressman Udall, who maintains that the elimination of the federal regulations would cause massive confusion and unwarranted delay in implementing the act.⁷⁶

The states have also directed their counterattacks through the federal courts and have won victories in the judicial arena. In January, 1980, for example, U.S. District Court Judge Glen M. Williams ruled that P.L. 95-87 is in part unconstitutional and economically burdensome on the State of Virginia.⁷⁷ Judge Williams permanently enjoined from enforcement those sections of the act that deal with the issuance of cessation orders and civil penalties which, as he interpreted the facts of the case, deprived mine operators of procedural due process of the law as guaranteed by the fifth amendment. In Indiana, U.S. District Court James E. Noland ruled on June 10, 1980, that "various portions of [the Act] exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment."⁷⁸ Judge Noland enjoined the Secretary of the Interior from enforcing numerous provisions of the act, including such requirements that operators make a convincing commitment toward certain postmining land use, (for example, contracts on financial agreements to erect a housing development on a stripped mountain top) as a condition for receiving a per-

74. Koch, *Senate Votes to Weaken Strip Mining Law*, 38 CONG. Q. WEEKLY RPT. 2453 (1980).

75. 126 CONG. REC. S 10505 (daily ed. Aug. 1, 1980).

76. Letter from Cecil Andrus to Senator John W. Warner, Virginia (August 18, 1980).

77. *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus*, 483 F. Supp. 425 (W. D. Va.), *prob. juris. noted*, 101 S. Ct. 67 (1980) (No. 79-1538).

78. *Indiana v. Andrus*, 501 F. Supp. 452, 456-57 (S.D. Ind.), *prob. juris. noted*, 101 S. Ct. 67 (1980) (No. 80-231).

mit to mine and return the land to its approximate original contour. These actions, however, have been stayed by the U.S. District Court for the District of Columbia, pending a full review.⁷⁹

Despite these assaults on OSM's efforts to implement the coal act, 24 states had submitted regulatory programs for OSM's approval by the summer of 1980, with approval given to two states—Montana and Texas. While pressing hard on legal and political fronts, the states have continued writing their program proposals, rules, and laws wondering how much success, if any, they will have in getting OSM to approve their programs in 1981.

CONCLUSION

The interim regulatory period in the implementation of the coal act can be characterized as the initial phase of a process whereby new relationships are being forged between states and the federal government in respect to the control of surface mining and reclamation. At the heart of these new relationships is the issue of who will define the balance between coal production and environmental quality values. Many states have, over the years, achieved what their officials consider to be an equilibrium in this balance. The newly formed Office of Surface Mining, through its effort to establish a set of nationwide standards, has disturbed this equilibrium and has moved aggressively into an area where, prior to OSM's existence, the states were the dominant governmental actors.

As OSM made its presence felt in coal fields and through the promulgation of its regulations, the conflict between the role that federal personnel were attempting to establish and the expectations of state officials became apparent. Based upon the state primacy clause, state officials anticipated a federal implementation strategy which, much like the learning system strategy defined by Kirlin, would be characterized by the provision of financial resources, technical support, and an enforcement back-up for recalcitrant coal mine operators. However, OSM officials appear to have been concerned with the establishment of a dominant federal role from the outset. The initial strategy, embodying strict enforcement, narrow interpretation of the act, attention to procedure, and coercive utilization of grants indicates that OSM has attempted to implement an administrative strategy which stresses procedural compliance with established rules. This strategy has led to the surfacing of conflicts inherent within any federal-state regulatory mechanism. These conflicts have

79. The list of suspended and remanded regulations can be found in 45 Fed. Reg. 45,605 (1980).

centered around the imposition of tight deadlines for the development of state programs, OSM hiring of state agency personnel, differences in regulatory philosophies and procedures, and, most of all, differences in goal or value orientations of state and federal officials.

While the initial implementation strategy of OSM may have contributed in the short run to achieving coal operator compliance through deterrence, it has detracted from insuring program compliance and cooperation among the states through consensus building in the long run. Thus, some states desiring OSM approved programs have submitted plans that to a large extent mirror OSM regulations. Still, little has been done to resolve the underlying conflicts inherent in the uniform application of a set of federal standards on a nationwide basis. In a procedural sense, OSM has achieved a kind of dominance over the states; but, unless accommodations are made during the next implementation phase, either the states will find they have adopted regulations that are hard to live with, or OSM will be faced with the necessity of maintaining a coercive posture in its oversight of state regulatory actions at the risk of diminished congressional support.

The struggle for determining regulatory balance is likely to continue under the newly installed Reagan administration. Ronald Reagan has publicly committed his new administration to providing relief for over-regulated industries, particularly energy related ones. Moreover, his Secretary of Interior, James G. Watt, while serving as director of Mountain States Legal Foundation, championed the cause of federal deregulation of energy production. As a spokesman for the Sagebrush Rebellion, it is expected that Mr. Watt will, at the very least, not push for aggressive OSM enforcement. In testimony before the Senate Committee on Energy and Natural Resources, Watt stated that while he had "no specific plans" for overhauling SMCRA, federal surface mining regulation needs improved management which emphasizes state primacy. Thus, it is expected that Interior will not implement aggressive OSM action against state interests, and might even relax its regulations for the utilization of the state window provision.⁸⁰

80. NATIONAL WILDLIFE FEDERATION, CONSERVATION REPORT, No. 1, 97th Cong., 1st Sess. 2 (1977).