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Carl E. Bagge
National Coal Association

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SETTING NATIONAL COAL POLICY: INTERACTION BETWEEN CONGRESS, REGULATORY AGENCIES AND THE COURTS

CARL E. BAGGE*

INTRODUCTION

Increasing use of coal to meet America's energy needs depends, in large measure, on the ability of coal to compete with other fuels in the marketplace. But coal's position also hinges on successful interaction between Congress, various regulatory agencies, and the courts.

It is commonly assumed that regulations affecting coal are clearly embodied in specific pieces of legislation. The fact is, however, that as a general rule regulatory agencies have extraordinary discretion in the writing of regulations which are meant to carry out the intent of the legislation passed by Congress. Furthermore, the process of promulgating regulations can often go awry.

The reasons for the frequent failure of the regulatory process are many and varied. Congress is too frequently vague about both its intended objectives and the means of achieving those objectives. Sometimes ambiguity is needed to ensure passage of the bill. At other times the blurring of goals and means merely reflects the lawmakers' opposing and divergent points of view.

In addition, regulatory agencies have been known to misinterpret or even disregard congressional intent. Accordingly, rules and regulations are sometimes written that do not address the underlying legislation's goals or ignore the structure set forth in the particular act. When regulations are contested, the courts become the final arbiter. Jurists must decide if the rules and regulations promulgated are consistent with congressional intent and the underlying statute. If so, they are sanctioned. If not, they are remanded for rewrite.

This essay will discuss the interaction between Congress, the regulatory agencies, and the courts in four areas crucial to the coal industry—federal coal leasing, clean air, surface mining, and transportation. These areas have been chosen because they illustrate the kinds of problems that arise within the institutional framework which serves as a catalyst to transform policy goals into responsible regulation.

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* B.A., Augustana College (1949); J.D., Northwestern University (1952). President of the National Coal Association. Mr. Bagge was a member of the Federal Power Commission from 1965-70 and served as its Vice-Chairman twice. The author wishes to acknowledge John A. Wasowicz, B.A., Windham College (1974); M.A., Marquette University (1976); J.D., Catholic University of America (1984 Candidate); National Coal Association Media Affairs Representative, and Peter A. Gabauer, Jr., B.A. (1967); J.D. (1970), Syracuse University; National Coal Assocation, Deputy General Counsel, for their assistance in the preparation of this essay.

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I. FEDERAL COAL LEASING

A. *A Short History of the Last 13 Years in Leasing*

Federal coal leasing has been subjected to extensive legislative, regulatory, and judicial review following the imposition of an informal moratorium in 1971 by former Department of the Interior (DOI) Secretary Rogers C.B. Morton. The informal moratorium was replaced in February 1973 with a new coal leasing policy which embodied both short-term and long-term actions. The short-term actions included a complete moratorium on the issuance of new prospecting permits and a near-total moratorium on the issuance of new federal coal leases. Between 1974 and 1977 only ten leases covering 30,246 acres were issued.

As part of its long-term leasing policy, DOI issued a draft programmatic impact statement in May 1974. The focus of the draft statement was on implementation of a new coal leasing system entitled the Energy Minerals Allocation Recommendation Systems (EMARS I). A critical feature of EMARS I was that the federal government would make all front-end decisions on where, when, and how much coal should be leased.

DOI's final programmatic Environmental Impact Statement (EIS) was released in September 1975 and EMARS I was modified and retitled the Energy Minerals Activity Recommendation System (EMARS II). A critical difference in EMARS II was that leasing activity was to be triggered by "nominations" for (by industry) or against (by environmentalists, for example) leasing of specific areas. However, on September 27, 1977, the District Court for the District of columiba in *NRDC v. Hughes*,[1] enjoined the implementation of EMARS II and found the final 1975 EIS inadequate.

Rather than revise its EIS, DOI abandoned the EMARS II concept and opted to create an entirely new program, the Federal Coal Management Plan (FCMP), which was set forth in regulation in July 1979. The new program amounted to the functional equivalent of EMARS I. Under the Reagan Administration, the FCMP was reviewed to eliminate excessive and burdensome regulations, and final revised regulations were issued in July 1982. A more detailed discussion of these regulations will follow.

Congressional review of the leasing program extended to passage of both the Federal Coal Leasing Amendments Act (FCLAA) and the Federal Land Policy and Management Act (FLPMA) in July of 1976, the latter of which required comprehensive land use planning at leasing sites. FCLAA provides that leases "not producing in commercial quantities at the end of ten years shall be terminated." This is commonly known as the "ten-year diligent development" requirement.

[1] 437 F. Supp. 981 (D.D.C. 1977), *modified*, 454 F. Supp. 148 (D.D.C. 1978).

Federal coal leasing was reinitiated in 1981. However, Congress reimposed a temporary moratorium last year and created a special commmission to review the coal leasing program and make specific recommendations to Congress.

B. *NRDC v. Burford*

Following the issuance of final leasing regulations by DOI in 1982, the Natural Resources Defense Council, Inc. (NRDC) and several other environmental groups challenged the regulations on a variety of grounds. The National Coal Association (NCA) and the American Mining Congress (AMC) have intervened as defendents in the lawsuit, *NRDC v. Burford*,[2] because the court challenge strikes at the heart of regulatory changes that would make federal coal available for leasing.

As promulgated by DOI, the new regulations would, among other things, allow for significant industry input in the early stages of land use planning. Furthermore, regulatory unsuitability criteria used in the land use planning process to screen leasable lands would be retained, but the criteria would not be applied during the land use planning process to leases issued prior to the implementation of the Surface Mining Control and Reclamation Act of 1977. Also, the concept of "leasing targets" would be modified to establish leasing levels to facilitate ample lease holdings in order to assure competition in the supply of Western coal.

Respecting pre-FCLAA leases, under the new regulations the "ten-year diligent development" requirement would become applicable and the ten-year period would begin to run from the date of the first lease readjustment after August 4, 1976. Additionally, the new regulations reduced the amount of coal required to be produced to meet "commercial quantities" production under the "ten-year diligent development" requirement from 2.5% to 1% of the recoverable reserves or Logical Mining Unit recoverable reserves. However, the right to apply for a five-year extension beyond the ten-year period under certain circumstances was eliminated.

NCA is concerned that success by the plaintiffs in *NRDC v. Burford* would: (1) reintroduce many of the regulatory obstacles that previously existed and incorrectly apply FCLAA's stringent "diligent development" requirements to pre-1976 leases; (2) delay promulgation of new regulations; and (3) substantially delay the overall leasing process in many areas of the country while unnecessarily repetitive land use planning is done. Finally, the coal industry could end up with a program that offers less valuable tracts for lease than are currently available.

[2] NRDC v. Burford, No. 82-2763 (D.D.C. filed Sept. 28, 1982).

C. *NCA and MARC v. Watt*[3]

NCA, along with the Mining and Reclamation Council of America (MARC) is also involved in litigation over whether a railroad subsidiary can receive federally-owned coal lands.[4] Since 1920, the Mineral Lands Leasing Act has provided that, with certain exceptions, federal coal lands should only be conveyed to private parties through competitive leasing. Moreover, section 2(c) of the Act further prohibits issuance of federal coal leases or permits to any company or corporations operating a common-carrier railroad, except for its own use for railroad purposes.

Yet, former DOI Secretary James Watt approved a mineral and land exchange under section 206(a) of FLPMA in 1983 that gave Rocky Mountain Energy Company, an affiliate of the Union Pacific Railroad Company, both mineral and surface rights in the "Corral Canyon" coal tract in Carbon County, Wyoming. Subsequently, the federal government also approved a similar exchange with Meridian Land and Mineral Company, an affiliate of Burlington Northern Railroad Company, for the mineral rights to a large amount of coal in McCone County, Montana.

NCA and MARC have filed a complaint requesting declaratory, mandatory and injunctive relief against the issuance of the fee deeds to the railroad company affiliates. Among other things, NCA and MARC argue that: (1) the exchange violates section 2(c) of the 1920 Act and is not authorized by section 206(a) of FLPMA; and (2) in not considering competitive factors in approving the exchange, Defendant Watt and DOI failed to comply with the section 206(a) requirement that the "public interest . . . be well served" in evaluating the exchange.

Plaintiffs have alleged that numerous anticompetitive effects will accrue if section 2(c) is allowed to be circumvented by these unprecedented railroad land exchanges. The three dominant coal-carrying railroads in the West, the Union Pacific, the Burlington Northern and the Santa Fe, would be able to carry coal mined from their own (formerly) "checkerboarded" lands in competition with coal mined by nonrailroad producers. Competing nonrailroad producers would still be captive to their new competitor's railroad lines in order to move coal to market. The exchanges would undermine the goal of section 2(c) and the Commodities Clause of the Interstate Commerce Act—the separation of the production and transportation of coal.

D. *Congressional Action Related to Leasing*

Congressional activity concerning leasing has occurred in two basic areas: the reimposition of a temporary moratorium on the federal coal leasing

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[3] National Coal Ass'n v. Watt, No. 83-2985 (D.D.C. filed Oct. 7, 1983).
[4] *Id.*

program and the consideration in committee of legislation to amend the FCLAA.

1. Coal leasing moratorium

Last September, the Senate voted 63-32 to approve an amendment offered by Senator Dale Bumpers (D-Ark.) to the 1983 Department of the Interior Supplemental Appropriations Bill. The amendment imposed a temporary moratorium on the leasing program until ninety days after issuance of a report on leasing.[5] The House had previously voted in favor of a moratorium, and Senator Bumpers' amendment was adopted by the Senate-House Conferees. The report is being prepared by the Commission on Fair Market Value Policy for Federal Coal Leasing and was to be given to Congress in early 1984.

The coal industry opposed imposition of a moratorium as constituting a shortsighted approach to the need to develop domestic energy resources in a logical and cost-effective manner. As Senator Frank Murkowski (R-Alaska), chairman of the Senate Energy and Natural Resources Subcommittee on Energy Regulation, stated on the Senate floor prior to the vote: "The federal coal leasing program, like the mineral royalty management program, is a complex, difficult program to administer. Improvements can be made which will 'fine tune' the program, but these improvements can be made without shutting it down."[6] The need to continue with a coal leasing strategy is imperative if the United States is to assume energy self-sufficiency, meet future demand scenarios, and assure unexpected changes in the world energy situation.

2. Reform of the FCLAA

The coal industry believes that the basic framework for the current federal program established under the FCLAA needs to better assure coal development in an orderly manner. In particular, the industry supports repeal of section 2(a)(2)(A) of the Mineral Lands Leasing Act, a provision inserted by section 3 of the FCLAA, and commonly referred to as the "section 3" provision. Essentially, the "section 3" provision bars the Secretary of DOI from issuing a lease or leases "under the terms of this Act" (including coal, oil, gas, phosphate, etc.) to any corporation which holds a federal coal lease or leases and has held such lease or leases for ten-years when that company is not producing minerals in commercial quantities, unless covered by a certain exception. The ten-year period began running for leases held as of the date of enactment of the FCLAA, August 4, 1976.

However, no other leaseable mineral under the Mineral Lands Leasing

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[5] 129 CONG. REC. S12,486-94 (daily ed. Sept. 20, 1983).

[6] *Id.* at 12,489 (statement by Sen. Murkowski).

Act is subject to such an unnecessarily harsh provision. This penalty could drive many coal companies out of the leasing markets for coal and other minerals, thereby reducing the level of competition. Production of these minerals is essential to meet the growing needs of our nation's economy.

The coal industry has testified before congressional committees on the need to repeal the "section 3" provision, and will continue its efforts to reform the FCLAA. But no action to repeal the "section 3" provision occurred during the first session of the 98th Congress.

E. *Summary*

Sufficient amounts of federal coal must be leased to assure availability of supply to meet present and future demand. Both the Carter and Reagan Administrations have attempted to initiate a new leasing program, with President Reagan attempting to make substantive improvements in the regulatory framework. However, the success of the program has become uncertain, particulary as a result of the ongoing litigation in *NRDC v. Burford* and congressional action that reimposes a temporary moratorium on coal leasing.

II. THE CLEAN AIR ACT

While the nation's coal industry unequivocally supports efforts to provide cleaner air, the industry is opposed to the imposition of regulations without adequate scientific evidence. The industry further believes clean air standards must avoid placing unnecessary costs upon utility consumers. Furthermore, regulators should not lose sight of the need to reduce our nation's dependence upon imported oil in promulgating clean air regulations.

Congress established a new regulatory framework to achieve the national goals of protecting public health and welfare in the Clean Air Act of 1970.[7] The framework provided that the Federal Environmental Protection Agency (EPA) develop a list of air pollutants and promulgate National Primary (to promote public health) and National Secondary (to promote public welfare) Ambient Air Quality Standards based on the latest scientific criteria. Definitions for "public health" and "welfare" were provided in that Act. Individual states would then enforce these standards through State Implementation Plans (SIPS).

However, new energy sources or existing sources, the modification of which renders it effectively a "new source", were required to comply with more stringent regulations under New Source Performance Standards (NSPS). In the case of coal-fired powerplants, utilities were offered the choice

[7] 42 U.S.C. §§ 7401-7642 (Supp. V 1981).

of using low sulfur coal or installing scrubbers to achieve those stringent NSPS regulations.

But in 1977 Congress substantially amended the Act requiring, among other things, that: (1) all new coal-fired utilities install scrubbers; (2) SIPS incorporate additional more stringent requirements for areas *not* attaining the National Primary Ambient Air Quality Standard; (3) specific visibility regulations be established; and (4) new restrictive Prevention of Significant Deterioration (PSD) requirements be established in areas attaining the National Ambient Air Quality Standards (NAAQS). As might be imagined, the Act has served as a focal point for legal battles between industry and environmental groups concerning the congressional intent of standards to protect public health and to promote public welfare and the various regulatory programs to achieve those ends.

A. *Clean Air Act Challenges*

In many respects, the amended Clean Air Act has become a complex, confusing and unbalanced piece of legislation. In an effort to reach compromise positions, build coalitons, and get the 1970 and 1977 Acts through Congress, legislators created ambiguities and uncertainties in explaining precisely how the Clean Air Act was to accomplish its goals. Regulations promulgated by EPA have often been inconsistent with industry's interpretation of congressional intentions, and the issues have been presented to the courts for resolution. The major issues which have become the subject of legal battles are discussed below.

1. NAAQS

The National Coal Association supports a thorough review of air quality standards, as required by section 109 of the Act, to assure the criteria documents, upon which national ambient air quality standards are based, utilize the best scientific data. Medical evidence now suggests that the Primary NAAQS for sulphur dioxide (SO_2) and particulates can be relaxed without jeopardizing public health. NCA endorses further review and revision in accordance with such scientific data.

In *Consolidation Coal Co. v. EPA*,[8] the plaintiffs sought to have the federal agency revise the present standards for both SO_2 and to have a court-ordered injunction imposed until the review and revision occurred. The federal district court in Columbus, Ohio denied the injunction, but deferred further consideration pending an ongoing EPA review of the criteria documents.

[8] 483 F. Supp. 1003 (S.D. Ohio 1979).

The ongoing debate over what constitutes a proper ambient level for SO_2 and other pollutants under the Act demonstrates the problem of implementing the congressional directive that the Primary NAAQS be set at levels to protect the public health while maintaining an adequate margin of safety. The level is to be based on the latest scientific knowledge useful in indicating the kind and extent of identifiable effects on public health. To date, however, EPA is operating without a definition of what is "an effect on health," as opposed to "a reaction to an irritant." Moreover, the scientific community is unable to agree on the proper interpretation of relevant studies. Parties impacted by the legislation, therefore, have no recourse but to turn to the courts to ensure that standards are based upon the correct scientific information.

2. NSPS

EPA issued final regulations for powerplants in 1979 which included an SO_2 emission limitations of 1.2 lbs. per million Btu (30 day rolling average). Additionally, the regulations mandate a reduction in potential SO_2 emissions. Prior to issuance of the final rules, NCA submitted information to EPA regarding the sulfur content of coal and emissions, and the time over which sulfur content and emissions could be averaged. NCA opposes any emission standard below the one issued in the final EPA rule.

In *Sierra Club v. Costle*,[9] the Court of Appeals for the District of Columbia upheld the EPA promulgated New Source Performance Standard (NSPS) against all challenges two months after EPA had denied environmental groups and utilities reconsideration of the standard. The court ruled in favor of NCA, which had filed a motion to intervene on the side of the EPA, by upholding the 1.2 lb. emission standard.

3. PSD

Following the 1978 promulgation of regulations to comply with PSD-related aspects of the amendments, NCA and others petitioned the D.C. Circuit Court of Appeals for review. The petitions were consolidated under *Alabama Power Co. v. Costle*,[10] which dealt primarily with Part C of the Clean Air Act. EPA issued regulations in 1980 consistent with the court's ruling in that action.

The new regulations were challenged in *CMA v. EPA*,[11] and the settlement agreement in that case concluded surface mines are not subject to PSD review unless they have potential nonfugitive emissions greater than 250

[9] 657 F.2d 298 (D.C.Cir. 1981).

[10] 606 F.2d 1068 (D.C. Cir. 1979), *superceded*, 636 F.2d 323 (D.C. Cir. 1980).

[11] Chemical Manufacturing Ass'n v. EPA, No. 79-1112 (and consolidated cases) (D.C. Cir. Feb. 22, 1982) (settlement agreement).

tons annually. EPA also agreed under the settlement to change the manner in which it treated fugitive emissions under the PSD program.

Most of the industry-contested requirements have either been removed by subsequent rulemaking or are currently under study. But further changes to the PSD program are likely to be part of Clean Air Act revisions in Congress.

4. Visibility

EPA has fashioned regulations under the 1977 Amendments to protect visibility, which the coal industry believes could adversely affect coal use in utilities and even limit coal mining activities. The EPA regulations have the effect of expanding visibility protection in Class I areas to those areas that can be seen from Class I areas, (integral vistas) thereby possibly prohibiting mining activity.

The visibility regulations are being challenged in court by industry groups and utilities, and NCA has joined in seeking statutory amendments to relieve portions of the current visibility program. Environmentalists have sued EPA seeking to impose federal visibility limits on states which have not cacted to include similar limits in their SIPS.

B. *New Clean Air Legislation*

During the first term of the 98th Congress, legislation was introduced in the Senate to further amend the Clean Air Act.[12] The legislation, similar to a proposal approved by the Senate Environment and Public Works Committee during the second session of the 97th Congress,[13] contains several provisions that will probably end up in federal courtrooms if passed. The critical issues in the proposed legislation are as follows.

Acid Rain. Sulfur dioxide emissions would be required to be cut an additional eight million tons from 1980 levels by 1995 in a thirty-one state region encompassing the nation's industrial heartland. The Acid Precipitation Task Force would be required to report to Congress before the end of both 1985 and 1987, and the Task Force's funding would be increased ten million dollars per year for five years to help undertake a comprehensive review of the problem.

Interstate Pollution. SIPS would be required to prohibit air pollutant emissions that interfere with attainment and maintenance of NAAQS in any other state or which might cause or contribute adversely to public health or welfare or the environment of another state or foreign country.

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[12] S. 768, 98th Cong., 1st Sess. (1983).
[13] S. REP. No. 9766, 97th Cong., 2d Sess. (1982).

PSD. States would be required to classify PSD areas within eighteen months. Protection of so-called Class II areas would be reformed by eliminating a three-hour increment on SO_2 emissions. States would also be able to remove the Class II designation from nonfederal lands areas if a comprehensive assessments of air quality covering a twenty-year period is prepared and projections of emissions growth are compatible with clean air goals.

Visibility. Class I area regulations would be amended to assure protection of visibility not only within the Class I area but also in the areas surrounding a Class I area, so-called "integral vistas." Retrofitting of existing sources could be required to prevent significant impairment of visibility within an "integral vista" unless the state's governor determines it is not in the public interest to do so.

These and other amendments, if adopted, would provide another layer of federally-imposed regulations onto the existing air program. This would complicate existing efforts, create uncertainty, and result in more confusion both in the regulatory process and in the courts.

C. *Summary*

The 1970 Clean Air Act has been substantively changed once already, and proposals are awaiting action in Congress to further confound the issue. Congressional changes, often inexact in their direction, have led to lengthy and expensive litigation as EPA has proposed regulations to meet the objectives it believes Congress intended. Ongoing litigation and regulatory rewrite only add to the uncertainty and confusion.

Now acid rain is proposed to be added to the list of contested issues involved in the clean air debate. If Congress passes an acid rain control plan as part of new amendments to the Clean Air Act, the chances of further litigation are almost certain.

It is easy for everyone to agree that air must be clean enough to assure public health is not endangered. However, there are serious questions not only as to how that goal can best be achieved, but also as to the degree to which a clean air program should be expanded to encompass issues related to public welfare. The painstaking task of transforming congressional intent into a workable and rational regulation has increasingly become a task ultimately left to the courts.

III. SURFACE MINING

Since its passage in 1977, the Surface Mining Control and Reclamation Act (SMCRA),[14] also commonly known as the "Surface Mining Act," has been

[14] 30 U.S.C. §§ 1201-1328 (Supp. V 1981).

heavily litigated in suits filed by both environmental groups and industry. The National Coal Association (NCA) has been a party to all of the major litigation in the past seven years, as the association and its producer members attempt to have workable and equitable regulations implemented for surface mining and reclamation operations.

A. *Surface Mine Act Developments*

The Surface Mining Act called for implementation on a two-stage basis. Initially, an "interim" program imposed key requirements of the Act upon coal operators. The second stage required final approval of the "permanent" program consisting of either a state-approved plan or a federally-imposed plan.

NCA, joined by the American Mining Congress, filed suit on a number of regulations under both the "interim" and "permanent" programs. Much of the litigation has focused on whether the Department of the Interior's Office of Surface Mining (OSM) properly exercised its authority in drawing-up regulations to implement the Act. Important victories were registered in decisions before both the District Court for the District of Columbia and the Court of Appeals for the D.C. Circuit. Other decisions remanded for reconsideration regulations related to such issues as bonding, durable rock fills, alluvial valley floors, EPA's water regulations, prime farmlands and the "State Window" concept.

Regarding prime farmlands, Judge Thomas Flannery of the District Court for the District of Columbia ruled in late 1982 that an April 3, 1983, agency-imposed cut-off date for protection under the prime farmlands' grandfather clause was illegal. In explaining the ruling, Judge Flannery said there was no support in the language or legislative history of the Act permitting a construction of the statute that authorized a regulation terminating the grandfather protection under section 510(d)(2) of the Act.

Another industry victory occurred on September 17, 1982, when Judge John Pratt of the District Court for the District of Columbia upheld the "State Window" regulation, whereby state programs with regulations "no less effective" than those approved by the Secretary of DOI in meeting the requirements of the 1977 Act are to be in compliance with the law.

NCA/AMC also intervened in *National Wildlife Federation v. Watt,*[15] which ended in a settlement agreement under which OSM was required to compile a cumulative Environmental Impact Statement (EIS) for about eighty percent of the regulations being revised. The remaining twenty percent were allowed to be promulgated without completion of the EIS.

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[15] National Wildlife Fed'n v. Watt, No. 82-0320 (D.D.C. Feb. 8, 1983) (settlement agreement).

B. *Permanent Program Litigation*

Since the Reagan Administration came into office, OSM has been involved in a major regulatory rewrite of the surface mining program. In view of that rewrite, the D.C. Circuit Court of Appeals remanded to the district court the outstanding issues currently on appeal under the initial "permanent" program at the time the regulatory revision began. However, many of the proposed changes have also become the subject of litigation.

NCA/AMC, coal companies, individual states, and others are participating in lawsuits on a number of issues and definitions which, they believe, must be reformed to assure the intent of Congress is met, constitutional guarantees are not violated, and an effective program is put in place that assures environmental protection without undue hardship to the coal mining industry.

Among the issues in which NCA/AMC are participating are the following:

Air Quality Regulations. The National Wildlife Federation challenged OSM's revised regulations on air quality as being arbitrary and capricious. NCA and AMC have intervened in support of the government's position. In the permanent program litigation, Judge Flannery struck down OSM's original rule as being excessive and unauthorized by law. The original rule required operators to take appropriate control measures to limit fugitive dust emissions at surface coal mines. However, the revised rule eliminates these control measures and requires instead that operators take steps to effectively control only air pollution attendant to erosion.

Federal Lands Program Regulations. The National Audubon Society and other environmental groups challenged OSM's federal lands program regulations. These rules set forth the requirements for surface coal mining and reclamation operations on federal lands. They also provide for the development of cooperative agreements between the federal government and the states for the regulation of surface mining on federal lands by the states of lands within their borders.

The new rules are intended to provide the states with greater responsibility for administering the requirements of the Surface Mining Act on federal lands. However, the industry has identified several serious concerns with OSM's regulatory approach taken in the regulations. NCA/AMC has intervened in this challenge in order that the views of the coal industry would be considered by the court in any resolution of the issues involved in the federal lands program regulations.

Definitions. NCA/AMC, Peabody Coal Co., and the State of Illinois have challenged OSM's revised definitions on permit area, affected area, and adjacent area. The regulations are being challenged on the grounds that they excessively expand the geographic scope of authority to solicit and require in-

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formation for the purpose of permit applications and reclamation plans, increasing the time and cost burdens of the Act's permit and reclamation plan process, and attempt to expand the regulatory authority beyond the limits provided in the Act. The definitions also fail to take adequate account of the distinct differences between surface and underground mining as required by the Act and exceed the Act's restrictions in the regulation of underground mining.

Subsidence. The subsidence regulations are being challenged on the grounds that they adopt control measures that fail to take account of the statutory exemption for full extraction mining. Moreover, they require that material damage to land be remedied and the land be restored irrespective of state land and contractual or property rights to the contrary. The regulations also prohibit and otherwise restrict underground mining beneath or adjacent to certain facilities or topographic features in excess of statutory authority and require unnecessary and unwarranted notification of surface owners and occupants concerning future underground mining, even where no subsidence will take place.

Alluvial Valley Floors. These regulations have been challenged on the grounds that they define the terms "agricultural activities" and "farming" as synonomous, adopting a single definition that is overbroad when measured against statutory authority and the administrative record. Additionally, the rules define the term "subirrigation" so as to expand unlawfully the amount of acreage that may properly be classified as constituting alluvial valley floors. The rules also fail to take appropriate account of the statutory exclusions (i.e. for undeveloped range lands not significant to farming and for small acreage), particularly by requiring studies and/or submission of information with respect to lands that are subject to one or more of those exclusions and by imposing performance standards relating to the preservation and/or reestablishment of the essential hydrologic functions of AVF on lands that are subject to one or more of those exclusions.

Areas Unsuitable for Mining. NCA and AMC have challenged these regulations on several grounds. First they limit the exemption from discretionary unsuitability designations by defining "substantial legal and financial commitments" in an unlawfully restrictive way. Next, the rules broaden the grounds for unsuitability designations by an unlawfully expansive definition of the terms "historic lands," "fragile lands," "natural hazard lands," and "renewable resource lands." Third, they permit cross-examination only of experts and otherwise fail to require the use of appropriate adjudicatory procedures at hearings on petitions to designate areas unsuitable for mining. Finally, the regulations provide for an impermissible petition process for the designation of federal lands as unsuitable for mining.

This list does not pretend to include all of the issues being litigated by NCA and AMC. Additional suits have been filed on other issues, such as sup-

port facilities, prime farmlands, stream buffer zones, roads and excess spoil disposal. However, NCA and AMC believe the list does point to a regulatory agency's failure to implement a plan in accordance with its congressional mandate.

C. *Summary*

Since passage of the Surface Mining Act, the industry has been faced with an "interim" program, a "permanent" program, and a regulatory rewrite of the "permanent" program. All have been the subject of extensive litigation, with many of the lower court decisions appealed. Questions about the constitutionality of the Act led to a Supreme Court review, which ruled the law is not violative of the Commerce Clause.

With the level of surface mined coal increasing from 292 million tons in 1973 to 505 million tons in 1982, the need to assure environmental protection has never been greater. The coal industry is doing its part to reclaim mined lands. The Bureau of Mines reports that the coal industry has the best record of any U.S. mining industry for reclamation over the past fifty years with 75.4% of all mined lands being reclaimed. While the industry is committed to a sound reclamation policy, it is opposed to promulgated regulations that place unnecessary, burdensome, overly expensive and illogical constraints upon surface mining.

IV. TRANSPORTATION

Rail industry deregulation has been promoted by Congress through passage of both the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act)[16] and the Staggers Rail Act of 1980 (Staggers).[17] In passing Staggers, Congress attempted to balance the needs of rail carriers for pricing flexibility with those of shippers lacking effective transportation competition for moving goods to market and seeking protection from rate and service abuses at the hands of railroads holding market dominance over freight movements. NCA believes that in implementing Staggers, the Interstate Commerce Commission (ICC) has failed to act in a balanced manner. The ICC has ignored captive shipper protection and focused on ways to enhance railroad revenues without attempting to hold down rail rates charged shippers to reasonable levels when shippers are subject to market control in the hands of the railroads. NCA is endeavoring to restore equity and fairness to railroad regulation by petitioning the ICC for redress, pursuing judicial recourse, and seeking congressional passage of corrective legislation.

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[16] Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified in scattered sections of titles 15, 31, 45 & 49 U.S.C.).

[17] Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of titles 11, 45 & 49 U.S.C.).

A. *Coal Rate Guidelines*

Even before the passage of Staggers, the ICC had attempted to establish rail rate guidelines for shipping coal from mine to market. As C. Michael Loftus said in a paper presented before the 1983 Coal Lawyers' Conference:

> The basic issue at the heart of this matter has not been whether or not the railroads should be permitted to earn a reasonable profit on coal transportation, but rather how much over and above a 'fair profit' level should be permitted to the railroads under the differential pricing theory, given the statutory goals of assisting the carriers to achieve revenue adequacy and of maintaining rail rates on captive traffic at reasonable levels.[18]

In attempting to implement regulations under Staggers, NCA believes the ICC has been totally delinquent in protecting "captive" shippers, thereby neglecting to follow the congressional intent of the Act.

NCA has taken issue with the ICC regarding the Commission's proposals under *Ex Parte No. 347 (Sub-No. 1)*, concerning coal rate guidelines. NCA strongly believes the ICC's proposals to utilize a "stand alone" test for determining maximum coal rate reasonableness and to allow railroad coal rate increases of fiteen percent annually above inflation are arbitrary and in serious conflict with Staggers. Moreover, NCA believes the ICC's inequitable proposals clearly subject captive coal shippers to rate abuses leading toward serious harm to coal producers, coal users, coal exporters, and electric utility rate payers.

Regarding railroad coal rates, the ICC proposes that a rate is not excessive if it is no higher than what the shipper would pay to move the coal by building, furnishing, and operating railroad equipment and facilities for its traffic. NCA believes that no reasonable body could truly conclude this is fair and equitable to shippers and consumers who must pay extraordinarily unjust rates under such arrangements due to dominance of the railroads.

B. *Coal Export Exemption*

The ICC has also struck a serious blow to the U.S. coal export market by exempting from transportation regulation movements of coal destined for export. The ICC exempted from regulation, that is completely deregulated in a de facto manner, railroad movements of export coal; a classic example of traffic over which the railroads have possessed broad monopoly powers for many years. Thus, the ICC is deregulating movements over which the railroads hold market dominance in several ways: defining market dominance in terms which rarely would be met; determining rate reasonableness in a manner

[18] Railroad Deregulation and Coal Transportation: An Update on Major Administrative, Judicial and Legislative Developments (October 14, 1983) (unpublished manuscript).

which endorses charging traffic over which railroads hold monopoly powers whatever the traffic will bear regardless of the cost of providing the service; and exempting certain captive traffic from railroad regulation and associated captive shipper protection.

NCA and the Coal Exporters Association (CEA) were unsuccessful in an attempt to stop the September 12, 1983, effective date of the ICC decision. NCA and CEA argued that the exemption would result in irreparable harm to coal producers and shippers engaged in export trade.

Coal Exporters Association v. ICC,[19] seeks a total reversal of the ICC's action on the grounds that it violates the Interstate Commerce Act. In its brief, CEA and NCA argue that the ICC acted unjustly in its decision to exempt export coal movements from railroad regulation. The lawsuit

> presents the question whether the Commission has unlawfully circumvented the determination in the Staggers Rail Act of 1980 to protect captive coal shippers—both export and domestic—against unreasonable rail rates . . . never before has the Commission removed maximum rate regulation . . . where the railroads have monopoly power over captive shippers.[20]

Unless the ICC determination is reversed by the courts, U.S. coal exports—which were only 75 million tons in 1983, as opposed to 105 million tons in 1982 and a record 110 million tons in 1981—could face further competitive obstacles in the world market.

C. *Barge Acquisition by Railroad*

On November 14, 1983, CSX Corporation, a holding company which now owns and controls seven railroads, submitted an application for ICC approval of CSX control of American Commercial Barge Line Company (ACBL), a wholly owned subsidiary of American Commercial Lines, Inc. (ACBL) and the nation's largest inland water carrier.

On December 6, 1983, the coal industry, through NCA, decided to oppose the transaction before the ICC. NCA believes that the transaction would be inconsistent with 49 U.S.C. § 11,321, which prohibits rail carriers from owning or controlling water carriers when this would reduce competition. In NCA's view, if CSX were to add ACBL to the group of railroads it controls (C&O, B&O, L&N, SCL, RF&P, Clinchfield, and Western Maryland), CSX would expand market control over coal transport to the entire area east of the Mississippi River.

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[19] Coal Exporters Ass'n v. ICC, No. 83-1629 (and consolidated cases) No. 83-1633 (D.C. Cir. filed Sept. 19, 1983).

[20] Complaint of Coal Exporters Ass'n and National Coal Ass'n at xxviii, Coal Exporters Ass'n v. ICC, No. 83-1633 (D.C. Cir. filed Sept. 19, 1983).

D. *Reform Legislation Offered*

To correct the ICC's unbalanced approach toward implementing Staggers, legislation has been offered in both the Senate and the House to give the Commission specific guidelines regarding railroad market dominance, revenue adequacy, and rate-setting. The legislation, offered by Rep. Nick Rahall[21] (D-W.Va.) and Sen. Wendell Ford[22] (D-Ky.), establishes tests to determine railroad market dominance. Moreover, they forbid the ICC from exempting or deregulating captive traffic. The bills also provide the ICC with guidance in determining revenue adequacy by requiring the use of standard depreciation accounting and ratios indicative of financial health such as cash flow, return on investment, and bond ratings. The bills further provide standards for determining rate reasonableness. These include the relationship of the rate to the railroad's cost of providing the service and whether the traffic involved is being required to pay an unreasonable share of the carriers' fixed costs.

The coal industry believes that the need for the legislation has been heightened by the recent decision by the Fifth Circuit Court of Appeals. That court held the ICC did not act inconsistently with the intent of Staggers in fashioning a test by which the agency could determine whether a railroad was market dominant. The ICC changed the way in which it determines whether a movement is subject to railroad market dominance, and therefore has access to protection from rate abuse. In the ICC's view, the issue is not whether effective transportation competition exists. Rather, the ICC says the movement is not captive if the commodity involved in the rate dispute could be obtained somewhere else or if a substitute commodity could be used. The coal industry believes that such an approach is without merit and evades protection in the law.

E. *Summary*

The interaction between Congress, courts and agencies is clearly evident when one examines transportation policy affecting the nation's coal industry. Congress passed legislation in 1980 deregulating the rail industry, but also requiring that the interests of the railroads be balanced with those of "captive" shippers to assure equitable rates. The ICC, the agency assigned to implement the Act, has neglected to follow congressional intent and balance those competing interests. Consequently, the coal industry is forced to seek redress through the coutrs and Congress.

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[21] H.R. 2584, 98th Cong., 1st Sess. (1983).

[22] S. 1082, 98th Cong., 1st Sess. (1983).

CONCLUSION

As stated at the beginning, United States energy policy is not shaped simply by the passage of legislation by Congress. A great deal depends upon how the agencies assigned to implement congressional intent interpret the laws, and how the courts determine the legality or inapplicability of legislative action and administrative rule-making. It is only after a policy proposal that has been approved by both houses of Congress is molded into a regulatory framework by administrative agencies and sanctioned by the courts, that it becomes a part of our policy landscape.

The surface mining regulatory program has been challenged by the environmental community, embroiling the industry in a series of court battles. In the area of transportation, decisions by the ICC have failed to adequately implement the congressional intent of the Staggers Rail Act and have forced the coal industry to seek proper redress in the courts and in Congress. With respect to leasing, the coal industry believes the Interior Department has performed admirably in reforming the regulatory framework for future federal coal lease sales, but has had to join with DOI in opposing litigation efforts by environmental groups to undermine or destroy these reforms. And acid rain promises to become the center of court review if control legislation is passed by Congress that assigns EPA the responsibility to further limit the level of SO_2 emissions.

Only by consistent and very close attention to what is taking place at every step of the legislative, regulatory and judicial processes can we assure sound objectives will be met. This is often a time-consuming and expensive process, as the coal industry has learned in attempting to assure that realistic regulatory approaches are taken in the areas of leasing, surface mining, clean air, and transportation.