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ENCOURAGING ADVANCES IN MINING AND RECLAMATION PRACTICES: AN ANALYSIS OF THE EXPERIMENTAL PRACTICES PROVISION OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

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INTRODUCTION

In the five years since the passage of the Surface Mining Control and Reclamation Act of 1977,¹ courts, legislatures, and state and federal agencies have subjected the Act's enforceability to intensive discussions and analyses. In the numerous matters discussed, the most important legal questions considered have been the constitutionality of the Act's basic provisions,² the extent and appropriateness of its applicability,³ and the overall reasonableness of its technical requirements.⁴ However, even the Act's less important provisions have undergone some form of dissection as environmentalists and industry have done battle. In the main, conflict has centered over the final administrative rules and procedures. State regulators, because they are the

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¹ Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified at 30 U.S.C §§ 1201-1328 (Supp. IV 1980)).

² See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264 (1981) (the Act's land restoration provisions are constitutional under the Commerce Clause, the guarantees of due process and equal protection, and the tenth amendment); *United States v. Hill*, 533 F. Supp. 810 (E.D. Tenn. 1982) (the Act is nonviolative of equal protection under the fifth amendment); *Blackhawk Mining Co. v. Watt*, No. 79-136, slip op. (E.D. Ky. Feb. 11, 1982) (the Act's provision for penalty assessments, § 518, 30 U.S.C. § 1268 (Supp. IV 1980), does not violate the Due Process Clause).

³ See, e.g., *Peabody v. Watt*, 553 F. Supp. 1201 (D.D.C. 1982) (the termination date promulgated by the Department of the Interior pursuant to the prime farmland grandfather clause exemption, § 510(d)(2), 30 U.S.C. § 1260(d)(2), was arbitrary and capricious); *Otter Creek Coal Co. v. United States*, No. 83-79L (Ct. Cl. filed June 24, 1982) (a determination of valid existing rights under § 522(e), 30 U.S.C. 1272(e) (Supp. IV, 1980), was required to be sought before a company could seek compensation for deprivation of its use of property); *Ohio ex rel. Brown v. Home Pro Enterprises*, 1 Ohio St. 3d 255, 438 N.E.2d 1175 (1982) (one who removed coal "while preparing a site for commercial development is subject to the permit requirements of statutes governing reclamation of strip-mined land"); *Save Our Cumberland Mountains v. Watt*, 550 F. Supp. 979 (D.D.C. 1982) (the Secretary of the Interior has a mandatory, not discretionary, duty to impose cessation orders under § 521(a)(3), 30 U.S.C. § 1271(a)(3) (Supp. IV 1980).

⁴ *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980); see *infra* notes 38-74 and accompanying text.

ultimate enforcers of the Act through their assumption of primacy,⁵ have been compelled to participate in the debates and to take a stand on each of the issues presented.⁶

However, within the legal menagerie of questions debated, one particular provision within the Act has so far managed to avoid serious scrutiny by courts, legislatures, or regulatory agencies. It is section 711 entitled "Experimental Practices."⁷ This Article will examine the use of section 711 in the pursuit of particular mining methods which depart from the Act's performance standards. It seeks to examine the potential utilization of section 711 departures by focusing on an analysis of congressional intent in adopting section 711, and whether the departures were contemplated during the drafting of the Act.

I. EXPERIMENTAL PRACTICES— SECTION 711 AND THE LANGUAGE OF THE ACT

Unlike most of the Act's provisions, section 711 has been adopted by regulating states in a form identical or quite similar to the Act's original language.⁸ In deceptively simple language found in one short paragraph, section 711 provides:

In order to encourage advances in mining and reclamation practices or to allow post-mining land use for industrial, commercial, residential, or public use (including recreational facilities), the regulatory authority with approval by the Secretary may *authorize departures in individual cases on an experimental basis from the environmental protection performance standards promulgated under sections [515] of this [Act]*. Such departures may be authorized

⁵ State primacy was granted pursuant to § 503, 30 U.S.C. § 1253 (Supp. IV 1980), which required that each state wishing "to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" submit to the Secretary of Interior, within an eighteen month period following the Act's enactment, a state program demonstrating its capabilities for enforcing the Act. If the Secretary approved the state program, the state achieved primacy, or exclusive jurisdiction over surface mining operations within its boundaries.

⁶ State programs are required to be no less stringent than the federal law and they must meet other criteria set out in § 503(a), 30 U.S.C. § 1253(a) (Supp. IV 1980).

⁷ 30 U.S.C. § 1301 (Supp. IV 1980). The section was mistakenly entitled "Environmental practices" when codified, however, the proper title "Experimental Practices" appears in the original bill. See 91 Stat. 523, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS. (v. 1). The section has not been the focus of any extended court action to date. Moreover, apparently none of the states achieving primacy ever disputed the language of the section, since most adopted similar or identical language in their programs. See, e.g., COLO. REV. STAT. § 34-33-134 (Supp. 1982); TENN. CODE ANN. § 59-8-329 (Supp. 1983); VA. CODE 45.1-242-43 (1980); W. VA. CODE § 20-6-33 (1980). The only challenge to any aspect of the provision has been to the final regulation which was published on Mar. 4, 1983. 48 Fed. Reg. 9,478 (1983) (to be codified at 30 C.F.R. 785.13). An action challenging the promulgation of this regulation is currently pending in district court. See *infra* text accompanying notes 95-99.

⁸ See *supra* note 7 for a partial list of states which have adopted § 711 as written.

if (i) the experimental practices are potentially more or at least as environmentally protective, during and after⁹ mining operations, as those required by promulgated standards; (ii) the mining operations approved for particular land-use or other purposes are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practices; and (iii) the experimental practices do not reduce the protection afforded public health and safety below that provided by promulgated standards.⁹

The authorized departures language provides coal operators with a certain leverage which can readily be converted to their advantage. Moreover, the potential results of such a use of this section may not serve the public interest or reflect the basic purposes of the Act. In the end, the authorized departures language may be enormously attractive to the coal operators who have resisted compliance with the Act's required performance standards.

Given the above, why is it that section 711 has received such limited scrutiny by the courts, legislatures, and regulatory agencies, when it has been widely adopted by the states which have assumed primacy? In addition, why has it been all but totally disregarded by environmentalists and industry?

Aside from a narrow regulation challenge, the impact of section 711's simple language has gone unnoticed. But the potential reach of the experimental practices provision is limited only by one's imagination. In order to determine what the section is supposed to reach, one must look beyond the simple language and beneath the surface of section 711.

According to the legislative history of the Act, section 711 was initially drafted as a single small concession to the coal industry for the purpose of supporting growth and development. This seemed like a fair trade-off, since the industry had to assume onerous responsibilities under other provisions of the Act. The stated purposes of section 711 were "to encourage advances in mining and reclamation practice or to allow post-mining land use for industrial, commercial, residential, or public use."¹⁰ But this narrow exception was apparently to be subordinate to the strongly stated grand purpose of the Act itself: "[T]o protect society and the environment from the adverse impacts of surface coal mining operations."¹¹ The pro-environment essence appeared especially strong in light of the very few exceptions allowed under the Act,¹² and the Carter Administration's pronounced commitment to the Act's strict enforcement.¹³

⁹ 30 U.S.C. § 1301 (emphasis added).

¹⁰ *Id.*

¹¹ § 102(a), 30 U.S.C. § 1202(a). Of the thirteen stated purposes of the Act, the environmental purpose is listed first.

¹² Experimental practices is one of two types of variances allowed under the Act. See *infra* notes 44-47 and accompanying text.

¹³ President Carter made it clear when he signed the Act that his policies regarding environmental protection were reflected in the Act's stringent requirements.

The integral significance of the Act's dominant purpose was reflected more than once throughout 1978-83. Many states adopted implementing statutes and regulations to demonstrate that they had the capability of "carrying out the provisions of [the Act] and meeting its purposes. . . ."¹⁴ Moreover, during this same time frame, a number of courts relied heavily on the language of the Act's dominant purpose in addressing challenges to its constitutionality, enforceability, and overall fairness.¹⁵

The advent of the Reagan Administration in January of 1981¹⁶ brought with it, however, a shift away from the strong environmental protection posture of the Carter Administration. As early as January 1981, the new administration began to encourage federal agencies to adopt more streamlined approaches in their regulations and procedures for the purpose of preventing unnecessary burdens on industry.¹⁷ Courts began to reflect this change in attitude and gravitated toward a relaxed interpretation of the Act's provisions.¹⁸

However, the strong language of the Act regarding its dominant purpose, and the specificity of its various provisional requirements, has made it difficult to accept any interpretation except the rigorous environmental protection approach. Further, the very core of the Act's "purpose" language is inconsistent with any interpretation except one demanding strict enforcement. But given the operational realities of administrative discretion, section 711, with its inherently subjective compliance standard, its minimal history of interpretation, and the provision's articulated purpose of "encourag[ing] advances in mining and reclamation," becomes an ideal tool for circumventing the Act's more environmentally stringent requirements. The present Administration, by its regulatory philosophy,¹⁹ has already focused on section 711 through the Department of Interior as one method of easing the miner's regulatory burden. Under the current Administration's policies, section 711 has the potential of becoming the escape mechanism coal operators have sought since the Act was adopted.

II. LEGISLATIVE INTENT OF SECTION 711

Regulation of strip mining by state and federal agencies has been a fairly recent development.²⁰ The first serious national action was not undertaken un-

¹⁴ § 503(a), 30 U.S.C. § 1253(a).

¹⁵ See *supra* notes 2-4 and accompanying text. The earlier and most all-encompassing of these was *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980).

¹⁶ President Ronald Reagan assumed office on January 20, 1981.

¹⁷ See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

¹⁸ See, e.g., *Peabody v. Watt*, 553 F. Supp. 1201 (D.D.C. 1982).

¹⁹ See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

²⁰ However, since as far back as 1939, states have been engaged in the regulation of various types of mining. See, e.g., W. VA. CODE § 22-2A-2461(2)-(3) (Supp. 1939) (current version in scattered sections of Ch. 20, 22) (the first of such state surface mine regulations laws). For a historical

til 1973, when both houses of Congress passed reclamation bills with performance standards for underground and surface mining.²¹ In 1975, the bills that led to the 1977 Act were introduced. These bills became the Surface Mining Control and Reclamation Act of 1975,²² and the Surface Mining Control and Reclamation Act of 1976.²³ A close examination of the experimental practices provisions of these two bills and their accompanying House, Senate, and Conference reports reveals much in regard to Congress' intent in passing an experimental practice provision as part of the 1977 Act.

The House Report on the experimental practices provision of the 1975 Surface Mining Control and Reclamation Act indicated a concern that exceptions from the environmental standards be granted only on the basis of a "scope . . . no greater than necessary," and "with a level of protection no less than that intended by the standards."²⁴ However, the report stated no specific rationale for the permitted exceptions. The House commentary for the 1976 bill used the same language.²⁵ The Senate report, on the other hand, specified that the purpose of the experimental practices provision was "to encourage advances in mining and reclamation practices,"²⁶ and indicated that departures might be authorized only "if (i) the experimental practices are potentially more or at least as environmentally protective as those required by promulgated standards; and (ii) the mining operation is no longer than necessary to determine the effectiveness and economic feasibility of the experimental practices."²⁷

perspective of surface mining, see *Energy v. Environment: Who Wins in the Race for Coal in Kentucky?* 64 KY. L.J. 641 (1976).

²¹ S. 425, 93d Cong., 2d Sess., 119 CONG. REC. 33,333-45 (1973). The stated intent was "to provide for the cooperation between the Secretary of the Interior and the States with respect to the regulation of Surface Mine Operations and acquisition and reclamation of abandoned mines, and for other purposes." The House Bill was H.R. 11,500, 93d Cong., 2d Sess., reprinted in 120 CONG. REC. 25,259-94 (1973). Proceedings on the House bill were vacated and it was laid on the table as the Senate bill was passed in lieu. However, both bills were pocket-vetoed by President Ford in December 1974. See generally H.R. REP. No. 1072, 93d Cong., 2d Sess. (1974).

²² H.R. 25, 94th Cong., 1st Sess., 121 CONG. REC. 13,368-886 (1975). See also S.7, 94th Cong., 1st Sess. (1975), S. REP. No. 28, 94th Cong., 1st Sess. (1975). H.R. 25 was vetoed by President Ford on May 20, 1975 and the House sustained the Presidential veto on June 10, 1975. See H.R. REP. No. 45, 94th Cong., 1st Sess. (1975).

²³ H.R. 9725, 94th Cong., 2nd Sess., (1976). See also H.R. REP. No. 896, 94th Cong., 2nd Sess. (1976).

²⁴ H.R. REP. No. 45, 94th Cong., 1st Sess. 210 (1975).

²⁵ H.R. REP. No. 1445, 95th Cong., 2d Sess. 125 (1976). The full comment reads:

This section allows the regulatory authority to authorize deviations from the required environmental protection standard of sections 515 and 516 on an experimental basis, so long as the level of protection afforded environment and public is no less than that intended by the standards and so long as the scope of operation is no greater than necessary.

²⁶ S. REP. No. 28, 94th Cong., 1st Sess. 228 (1976). The Report accompanied S.7, 94th Cong., 1st Sess. (1975).

²⁷ *Id.* S.7, 94th Cong., 1st Sess. (1975), but the Senate did pass H.R. 25, 94th Cong., 1st Sess. (1975).

The Surface Mining Control and Reclamation Act of 1977 contained an experimental practices provision combining the House and Senate philosophies of the previous Acts.²⁸ The Senate Report for the 1977 Act states that the experimental practices provision aims at "encourag[ing] advances in mining and reclamation practices."²⁹ In reviewing the report's language on general "variances"³⁰ from the standards of the Act, however, a more environmentally conservative purpose is to be found. Indeed, in describing the proposed approach for the utilization of experimental practices as one form of variance from the Act, the Senate noted:

[T]he Committee was adamant that there should be no broad exceptions to the vital mining and reclamation standards of this bill. To provide for unlimited exceptions would render the bill meaningless since it would then be likely that the exceptions would become the rule. On the other hand, the Committee did recognize that there are some valid and important reasons for allowing limited variances to the prescribed standard of the bill, where such variances provide equal or better protection to the environment, and result in a higher post-mining land use.³¹

The House Report also reflects an intent that section 711 be restricted by the Act's overall purpose.³² Amendments to section 711 were directed at balancing interests; accommodating those who felt in certain cases that the public interest was served by alternatives to reclamation³³ and those who sought to restrict departures from the Act as narrowly as possible.³⁴ The House Conference Report also reflected the position that section 711 be used prudently.³⁵

It is clear, therefore, that congressional intent was to restrict the use of section 711 by requiring approval of variances in line with the other purposes of the Act. Section 711's subordinate position was to allow a limited exception from the rigors of the Act when the public interest would be served. En-

²⁸ § 711, 30 U.S.C. § 1301. It should be noted that the House Report on the 1977 Act adopted the history of the 1974 and 1976 Acts. See H.R. REP. NO. 218, 95th Cong., 1st Sess. 140, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 672 [hereinafter cited as H.R. REP. NO. 218].

²⁹ H.R. REP. NO. 128, 95th Cong., 1st Sess. (1977).

³⁰ "Variance" is not defined within the "Definitions" section of the Act. § 701, 30 U.S.C. § 1291. Its scope has continued to be a matter of much controversy in the development of regulations and in the enforcement of the Act. See *infra* notes 55-75 and accompanying text (for case law development under *In re* Surface Mining Regulation Litigation, 452 F. Supp. 327 (D.D.C. 1978), *modified*, 627 F.2d 1346 (D.C. Cir. 1980).

³¹ S. REP. NO. 128, 95th Cong., 1st Sess. (1977).

³² H.R. REP. NO. 218, *supra* note 28.

³³ *Id.* at 71, 1977 U.S. CODE CONG. & AD. NEWS 609.

³⁴ *Id.* at 180, 1977 U.S. CODE CONG. & AD. NEWS 711.

³⁵ HOUSE CONF. REP. NO. 493, 95th Cong., 1st Sess. 114-15, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 746.

vironmental proponents have contended³⁶ that the intent of the experimental practices variance was to ensure environmental protection *above and beyond* the performance standards of sections 515 and 516.³⁷

III. OSM PHILOSOPHY AND SECTION 711

A. 1978 OSM Interim Program and Permanent Regulations

Whether the environmentalists were correct in asserting that section 711 required a higher level of protection is still open to debate. However, the Office of Surface Mining (OSM) clearly had a different view when it drafted regulations for section 711.

Before discussing the OSM regulatory philosophy, it is necessary to discuss the Act's regulatory background. The Act was designed to be implemented in two stages. The initial phase was the interim program stage,³⁸ whereby the surface mining operators within a state were subject to federally-promulgated standards,³⁹ supplemented in some places by state enforcement mechanisms.⁴⁰ The interim program stage was followed by the permanent program phase,⁴¹ where all operations became subject either to a state regulatory program which demonstrates capability of carrying out the provisions of the Act,⁴² or to a permanent federal program.⁴³

Regulations for the interim program stage were promulgated by OSM on December 13, 1977,⁴⁴ and included standards for, inter alia, spoil and waste

³⁶ See generally OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPT. OF THE INTERIOR, PROPOSED REVISIONS TO THE PERMANENT PROGRAM REGULATIONS IMPLEMENTING SECTION 501(b) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, FINAL ENVIRONMENT STATEMENT, VOL. II COMMENTS, 125, 202-07 (1983). (Comments on Proposed Rules Relating to Experimental Practices: 30 C.F.R. § 785.13) (written for the Citizens Mining Project of the Environmental Policy Institute and the Appalachian Research and Defense Fund of Kentucky, Inc.) [hereinafter cited as FINAL RULES COMMENTS].

³⁷ 30 U.S.C. §§ 1265-66.

³⁸ § 502, 30 U.S.C. § 1252.

³⁹ § 501(a), 30 U.S.C. § 1251(a), required the Secretary of the Interior to promulgate within ninety days of the Act's enactment, interim regulations for surface coal mining and reclamation operations.

⁴⁰ § 502(b), 30 U.S.C. § 1252(b). The states were required to enforce the interim requirements of the Act in a manner satisfactory to the Secretary of the Interior. § 502(b), 30 U.S.C. § 1252(e).

⁴¹ § 503, 30 U.S.C. § 1253.

⁴² The permanent program phase was begun by the Office of Surface Mining's approval of a state, permanent regulatory program. The program had to demonstrate that a state had "the capability of carrying out the provisions of the Act and meeting its purposes." § 503(a), 30 U.S.C. § 1253(a). A time table for establishing the submission and approval or disapproval of the state's proposal was specified. *Id.*

⁴³ § 504, 30 U.S.C. § 1254. The Federal program was to be implemented for any state not achieving primacy no later than thirty-four months after the Act's enactment. *Id.*

⁴⁴ 42 Fed. Reg. 62,639 (1977) (codified as amended at 30 C.F.R. §§ 710.1-725.25 (1982)).

disposal, reclamation operations, the use of explosives and impoundments, topsoil protection, hydrology system protection, and revegetation.⁴⁵ No specific guidelines were provided for experimental practices and no procedures were promulgated to provide for *general* exemptions or variances from the regulations.⁴⁶ The lack of such general exemption and variance provisions became one of numerous weapons industry groups used to attack the interim regulations.⁴⁷

In its first set of proposed permanent program rules, OSM set out two purposes for the use of experimental practices: "One purpose is to encourage advances in mining and reclamation technologies. The other is to allow for a post-mining land use for industrial, commercial, residential, or public use."⁴⁸ OSM stated that because these exemptions may be allowed only in individual cases and on an experimental basis,⁴⁹ acts in deviation should be authorized only under a permit issued in accordance with "sufficient protective requirements."⁵⁰

In March of 1979, OSM published its final rules for the permanent regulatory program.⁵¹ For the first time an Experimental Practices section was included in the final rules.⁵² However, three years after these "final" regulations were promulgated, the Reagan Administration⁵³ decided to alter the experimental practices section to better reflect its philosophy of a more streamlined regulatory process.⁵⁴

⁴⁵ § 502(c), 30 U.S.C. § 1252(c), delineates these as the performance standards that the interim regulatory program had to contain.

⁴⁶ See 43 Fed. Reg. 62,639 (1977).

⁴⁷ The variance case was in fact only one of the twenty-two separate actions brought against the regulations. Substantive challenges to the regulations by industry representatives included: that the regulations improperly extended to preexisting structures and facilities; that prime farmland standards had been improperly extended to nonprime farmland areas; and that waste impoundment had been improperly regulated. Several procedural challenges were also raised. See generally, *In re* Surface Mining Regulation Litigation, 452 F. Supp. 327, 332 (D.D.C. 1978), modified, 627 F.2d 1346 (D.C. Cir. 1980).

Industry groups who challenged the regulations included Atlantic Richfield, Shea and Gardner, Amherst Coal Co., McGee and Ketcham, Texas Utilities Generating Co., Sunoco Energy Dev. Co., National Coal Ass'n., Dow Chemical Co., W. Penn. Surface Coal Mine Operators Ass'n., Consolidation Coal Co., and American Mining Congress. Actions were filed immediately following the issuance of the final regulations in December 1977. All actions were eventually consolidated for the United States District Court, District of Columbia on May 3, 1978.

The environmental groups, acting as plaintiff and defendant/intervenor in the consolidated action, were represented as National Wildlife Fed., et. al. *Id.* at 331.

⁴⁸ 43 Fed. Reg. 41,662, 41,711 (1978) (to be codified at 30 C.F.R. § 785.13) (proposed Sept. 18, 1978).

⁴⁹ *Id.* (quoting § 711).

⁵⁰ 43 Fed. Reg. 41,662, 41,711.

⁵¹ 44 Fed. Reg. 14,902 (1979).

⁵² 30 C.F.R. § 785.13 (1982).

⁵³ Ronald Reagan took office on January 20, 1981.

⁵⁴ See *supra* note 17 and accompanying text, see also *infra* text accompanying notes 76-94.

In response to the promulgation of these regulations, several actions were brought seeking to bar their implementation. A number of such actions were consolidated in *In re Surface Mining Regulation Litigation*.⁵⁵ In that case, the district court for the District of Columbia specifically noted the congressional intent related to section 711 as a limited variance "mechanism."⁵⁶

The industry complainants asserted that the Secretary of Interior's failure to provide for general variance procedures in the Act violated "principles of administrative law and due process."⁵⁷ That claim was rejected by the court of appeals and the district court. The D.C. Circuit found that Congress did not intend that general variances be provided in the interim regulatory program,⁵⁸ citing the Senate Report as indicative of congressional intent.⁵⁹ The Court stated:

Throughout the statute, Congress indicated an intent that there be no general variances or exemptions from the Act's performance standards. In fact, Congress deleted from earlier surface mining legislation a general variance provision that would have excepted mine operators from certain interim regulatory standards upon a showing that necessary equipment could not be readily obtained.⁶⁰

Significantly, the court emphasized that Congress had "explicitly provided for *limited* variances and exemptions in the Act where it deemed them necessary."⁶¹ It noted that specific sections where this had been done: (1) section 502(c)⁶² wherein limited exemptions for small operators are specified; (2) section 515(b)(12),⁶³ where special variances are provided for surface mining through or near underground mines; (3) section 515(b)(16),⁶⁴ where variances are provided for combined surface and underground mines; (4) section 515(b)(20),⁶⁵ where variances are provided for revegetation; (5) section 515(c)(3),⁶⁶ where variances are provided for mountaintop removal of overburden; (6) section 515(e)⁶⁷ which establishes special provisions for steep slope mining; and in particular, (7) section 711,⁶⁸ which establishes variances for experimental practices.

⁵⁵ 452 F. Supp. 327 (D.D.C. 1978), *modified*, 627 F.2d 1346 (D.C. Cir. 1980). The litigation was subdivided into parts I, II, and III for briefing and argument purposes.

⁵⁶ 627 F.2d at 1356 n.11.

⁵⁷ *Id.* at 1355 (citing the joint brief for appellants).

⁵⁸ *Id.* at 1356.

⁵⁹ *Id.* at 1355. See *supra* note 39 and accompanying text.

⁶⁰ *Id.* at 1355-56. See H.R. REP. NO. 101, 94th Cong., 1st Sess. 90 (1975), H.R. REP. NO. 1522, 93d Cong., 2d Sess., 18-201 (1974).

⁶¹ 627 F.2d at 1356 n.11.

⁶² 30 U.S.C. § 1252(c).

⁶³ 30 U.S.C. § 1265(b)(12).

⁶⁴ 30 U.S.C. § 1265(b)(16).

⁶⁵ 30 U.S.C. § 1265(b)(20).

⁶⁶ 30 U.S.C. § 1265(c)(3).

⁶⁷ 30 U.S.C. § 1265(e).

⁶⁸ 30 U.S.C. § 1301.

Manifestation of congressional intent was also found by the court in section 102(c).⁶⁹ That section specifies the purpose "to assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible."⁷⁰ The court also quoted several other provisions of the Act⁷¹ to support this absolute prohibition against nonconforming operations. In a forceful finale, the court concluded that Congress had intended no general variances or exemptions from the Act's performance standards.⁷²

The court of appeals affirmed the district court's determination that the "claim that procedures for the granting of exemptions and variances from all of the regulations are necessary is without merit."⁷³ But in the face of this judicial interpretation of the Act's underlying policies and the court's specific reference to section 711 as a "limited variance" provision,⁷⁴ the Reagan Administration set out to streamline government and to reduce the regulatory burden on industry, including the coal industry. With the change in the Administration's philosophies, a new problem began to surface. The relaxing of the regulatory burden threatened to encourage the use of section 711 as a tool to undermine the protective purposes of the Act.

B. *The 1983 Experimental Practices Regulation*

1. The 1982 Proposal

On March 19, 1982, OSM proposed a new experimental practices regulation.⁷⁵ The purpose of the amendment was, according to OSM, "to delete sections to avoid duplication, revise language to improve clarity, and change the periodic review of experimental practices from once every three years to annually."⁷⁶ But two other aspects of the Administration's proposed changes are especially important. First, OSM proposed to eliminate the requirement that an operator demonstrate that a proposed variance is not "larger than necessary."⁷⁷ The reason given for this change was that the necessity of the size of the variance is not only obvious from the substance of the application, but, "[a]dditionally, it is a determination that is more appropriately made by the regulatory authority and the Director based upon the proposed experimental practice and similar experimental practices that may have been approved or

⁶⁹ 30 U.S.C. § 1202(c).

⁷⁰ § 102(c), 30 U.S.C. § 1202(c).

⁷¹ Citations included § 502(c), 30 U.S.C. § 1252(c); § 510(b)(2), 30 U.S.C. § 1260(b)(2); § 515(a), 30 U.S.C. § 1265(a); and § 522(a)(2), 30 U.S.C. § 1272(a)(2).

⁷² 627 F.2d at 1356.

⁷³ *Id.* (quoting 452 F. Supp. at 339).

⁷⁴ 627 F.2d at 1356 n.11.

⁷⁵ 47 Fed. Reg. 12,082 (1982) (to be codified at 30 C.F.R. § 785) (proposed March 19, 1982).

⁷⁶ 47 Fed. Reg. 12,082.

⁷⁷ 47 Fed. Reg. 12,083.

contemplated."⁷⁸ Further, the proposed amendment would no longer require comparisons of the effects of the operation with other coal mining operations using similar experimental practices. Instead, it would allow a practice to stand on its own merit regardless of the existence of similar experimental practices.⁷⁹

The significance of these changes in position, both of which have been criticized by environmentalists,⁸⁰ is that they signal OSM's leniency in considering experimental practices. This amended policy of leniency is highlighted in the Office's preamble to the proposed changes, whereby it "*encourages* industry and State regulatory authority participation in experimental practices."⁸¹ The preamble goes on to present five distinct advantages of such practices: (1) Industry—OSM cooperation; (2) regulatory change; (3) economics; (4) community development; and (5) improved environmental protection.⁸² The comment on the advantage of "improved environmental protection" states only that a given experimental practice "*may* provide a means of demonstrating improved techniques for environmental protection"⁸³

OSM's proposed regulations reflect a much different philosophy than the Senate commentaries which stated that experimental practices be *required* to have a potential for "improved environmental protection."⁸⁴ Moreover, OSM's encouragement of experimental practices as "a means of demonstrating innovative methods for obtaining economic advantages,"⁸⁵ finds little basis in any of the congressional discussions of section 711. Indeed, this

⁷⁸ *Id.* Furthermore, the proposal stated, "It is an unnecessary burden on operators to require description, maps, and plans to make this showing." *Id.*

⁷⁹ *Id.* This same verbage was later upheld in the final rule despite adverse comments as to its inappropriateness. For a summary of the comments, see 48 Fed. Reg. 9,478, 9,480 (1983). See also FINAL RULES COMMENTS, *supra* note 36 (reprinting of all comments).

⁸⁰ See 48 Fed. Reg. 9,478-83 (1983) (comments on proposed regulations). The proposal also included changing the permit review requirement from every three years to annually. But this seemingly more stringent standard was supplemented by a new proposal that if as a result of the review the regulatory authority required major or minor revisions to the operation, the revision could be implemented by the operator simply by providing written notice. 47 Fed. Reg. 12,085 (1982) (to be codified at 30 C.F.R. § 785.13(g)(2)) (proposed March 19, 1982). However, the final regulation requires review only every 2½ years and requires regulatory authority approval for all permit modifications. See 48 Fed. Reg. 9,484 (1983) (to be codified at 30 C.F.R. § 785.13(g), (h)); see also 48 Fed. Reg. 9,482 (OSM's explanation of the provisions as they appear in final form and discussion of the major/minor distinction).

⁸¹ 47 Fed. Reg. 12,082 (emphasis added).

⁸² *Id.*

⁸³ *Id.* (emphasis added).

⁸⁴ S. REP. NO. 128, 95th Cong., 1st Sess. (1977).

⁸⁵ 47 Fed. Reg. 12,082 (1982) (to be codified at 30 C.F.R. § 785.13) (proposed March 19, 1982).

The economic advantages stated by OSM were: savings in dollars per ton of coal produced; savings in dollars per cubic yard of spoil handled; less dollars per acre for reclaimed land; and, increased dollar value of postmining land. *Id.*

"economics" objective drew particular criticism from environmental representatives in their commentary on the proposed regulation as a "blatant misconstruance of the section 711 provision."⁸⁶

2. The 1983 Final Regulations

In response to comments on the proposed amended regulations, OSM issued final regulations on March 4, 1983.⁸⁷ The regulations in general adopted the rule as proposed, however the new regulation did contain some specific modifications. The modifications indicate that the Administration will "encourage" the use of the section 711 provision to achieve economic objectives. Moreover, OSM's "Discussion of Comments," printed with the final rule, specifically addressed criticisms of the "economic advantage" goal of the revised provision.⁸⁸ But OSM flatly rejected the argument that the provision was included in the Act for the sole purpose of improving environmental protection.⁸⁹ Instead it contended that the policy of the Act was to encourage advances in technology or to allow alternative post-mining land use *in addition* to providing for environmental protection.⁹⁰

The language of the provision clearly states that the variances are to be approved in order to encourage advances in technology or to allow alternative postmining land uses. However, such approvals may not be given unless certain conditions are met. Therefore, while an experimental practice could lead to improvements in environmental protection, it could also result in a technological improvement. In both cases, in order to be approved, the experimental practice must be potentially more or at least as environmentally protective as the environmental protection performance standards. . . .⁹¹

One particularly significant change in the final regulations was that an application for an experimental practice would no longer need show a necessity for obtaining a variance from the performance standards.⁹² OSM addressed the deletion of the application requirement by reiterating the intent of section 711 relating to encouraging advances in technology and alternative post-mining land uses: "Thus, even if an end product could be obtained through the existing regulatory program, improved procedures for attaining that goal could possibly also be developed through the experimental practices program."⁹³ OSM's reasoning is not completely clear. Furthermore, OSM

⁸⁶ FINAL RULES COMMENTS, *supra* note 36 at 203. The comment states, "The provision goes much further than the office is empowered to under Section 711, which allows the Secretary the discretion to waive *his* environmental rules, not to waive the Act's provisions."

⁸⁷ 48 Fed. Reg. 9,478 (1983) (to be codified at 30 C.F.R. § 785.13).

⁸⁸ See *supra*, note 86 and accompanying text.

⁸⁹ 48 Fed. Reg. 9,478 (1983).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 9,479.

⁹³ *Id.* at 9,479-80.

failed to address the commentator's concern that without such a showing, experimental practices could become a way to circumvent the requirements of the performance standards. Nevertheless, OSM was quite clear in stating that a necessity showing would no longer be an application requirement under section 711.⁹⁴

Since the issuance of the final rules for experimental practices, six of the most prominent national environmental groups⁹⁵ have brought suit against the Secretary of the Interior and the Director of the Office of Surface Mining challenging the promulgation of the final regulations. Their complaint alleged that the regulations plainly violated the Act, congressional intent, and the Administrative Procedure Act.⁹⁶ The specific violations alleged by the environmentalists included:

- a) Improperly and illegally allow regulatory authorities and the Directors to grant experimental practice variances from the provisions of the Act itself;
- b) Improperly and illegally omit requirements to show the necessity for obtaining a variance from the performance standards;
- c) Improperly and illegally allow experimental practices to be conducted without requiring that performance standards be met if the experimental practice fails;
- d) Improperly and illegally omit requirements to impose mitigation and affirmative remedial measures if the experimental practice fails;
- e) Improperly and illegally restrict citizens participation in the grant or denial of experimental practices;
- f) Improperly and illegally limit the monitoring of experimental practices;
- g) Improperly and illegally omit requirements to impose enforceable alternative performance standards in experimental practice permits.⁹⁷

Only four of these allegations, (b), (c), (d), and (g) were pursued in litigation. But an OSM Memorandum would seem to concede the basic issues involved and in essence admits that other Act provisions serve as the bottom line in granting experimental practice variances.⁹⁸ Nevertheless, OSM continues to

⁹⁴ *Id.* at 9,480.

⁹⁵ The groups are the National Wildlife Federation, National Audubon Society, Environmental Policy Institute, Western Organization of Research Councils, Illinois South Project, and Virginia Citizens for Better Reclamation, Inc.

⁹⁶ Complaint of Plaintiff National Wildlife Federation, et al. at 8-9, *National Wildlife Fed'n v. Watt*, No. 83-1093 (D.D.C. filed April 14, 1983, consolidated with *In re Perm. Surface Mining Litigation II*, No. 79-1144 (D.D.C. July 11, 1983) (Agreed Order for Consolidation). The suit also attacks the final federal lands regulations promulgated under the Act. The action was consolidated with other surface mining actions then pending.

⁹⁷ *Id.*

⁹⁸ Defendant OSM's Memorandum in Support of Cross-Motion for Summary Judgment and in

oppose a court order to give future binding effect to the concessions in its memorandum.⁹⁹

Even with OSM's cognizance that the Act establishes limits on experimental practice variances, the danger of using section 711 to circumvent the other requirements of the Act remains. Fundamental congressional intent requires that section 711 variances maintain levels of environmental compliance at least equal to other provisions of the Act. However, OSM's new philosophy, as evidenced by the ambiguity and relaxation of standards in the 1983 regulations, is not in harmony with that intent. Moreover, state decision-making under section 711 could present an even greater need for OSM's insistence on strict compliance.

IV. ADMINISTRATION OF SECTION 711

To ascertain the full potential of section 711 as an avenue to noncompliance, an analysis beyond its legislative history and regulatory promulgations is required. Indeed, the inherently subjective nature of the provision itself¹⁰⁰ makes crucial an examination of the types of administrative procedures which the regulatory authorities have created for implementing the provision.

Section 711 of the Act is unusual in its requirement that under both the interim and permanent program an application for an experimental practice be approved by both the Director of the Office of Surface Mining and the state regulatory authority.¹⁰¹ Moreover, the final section 711 regulations were drafted to make it clear that the Director could not concur in an application until after the state regulatory authority has made its specific findings.¹⁰²

During the Carter Administration and since the beginning of the interim

Opposition to Plaintiff's Motion for Summary Judgment at 81-97, *In re Perm. Surface Mining Litigation*, No. 79-1144 (D.D.C. filed Sept. 30, 1983).

⁹⁹ Response in Opposition to Motion of Citizen and Environmental Organizations for Entry of Order Binding Defendants to Positions Taken in Memorandum in Opposition and Dismissing Those Issues From the Case, *In re Perm. Surface Mining Litigation* at 1-3, No. 79-1144 (D.D.C. filed Nov. 4, 1983).

¹⁰⁰ The standard used in section 711 is that the proposed practice be "at least as environmentally protective . . . as those required by promulgated standards." The pure impossibility of determining what constitutes "at least at" makes it subjective by nature, and neither the federal regulations nor any state regulations have provided any more substantive details as to its enforcement. By comparison, the promulgated standards of sections 515 and 516, 30 U.S.C. §§ 1265 and 1266, establish specific levels of performance for each aspect of implementing a proposed operation, with the pertinent federal and state regulations defining specific technical limitations in the mining process. See generally 30 C.F.R. § 715.

¹⁰¹ 30 C.F.R. § 785.13(d) (1982).

¹⁰² 48 Fed. Reg. 9,484 (1983) (to be codified at 30 C.F.R. 785.13(d)). This particular drafting of the provision was due to commenters' concerns over the order of review by the regulatory authority and director.

program, administrative procedures and guidelines for the implementation of the federal laws and regulations were issued by the OSM Regional Offices.¹⁰³ The majority of experimental practices programs were conducted in Region II,¹⁰⁴ which contained the states of Kentucky, Tennessee, Alabama, Mississippi, Georgia, North Carolina, South Carolina, and Florida. In conjunction with the promulgation of interim program regulations, the Region II Office issued "Guidelines for Authorization of Experimental Practices in Region II Prior to Implementation of Permanent Regulatory Programs."¹⁰⁵ However, guidelines were largely a reiteration of the regulations themselves.¹⁰⁶ Additionally, the casual treatment of procedural matters seemed to indicate that there would be no rush to approve large numbers of experimental practices programs.

In the spring of 1980, OSM gave approval to two interim program experimental practice operations. The first was to a Kentucky coal company, Zapata Fuels, Inc.,¹⁰⁷ to conduct an experimental practice on a haul road construction.¹⁰⁸ The proposal involved developing earth chutes (excavated spoil lanes) from an upper to lower bench through which excess spoil would be end-dumped, moved by bulldozer, and reloaded for hauling and use in a conventional head-of-hollow fill. The Kentucky company contended that by reducing the total length of haul road construction, lessening the need for switchbacks, and diminishing sediment load from run-off, the plan would conserve energy and decrease environmental impacts.¹⁰⁹

¹⁰³ For administrative purposes, the Department of the Interior established five regional offices for implementation of the Act. The five Regional Offices are: Region I - Charleston, W. Va.; Region II Knoxville, Tenn.; Region III - Indianapolis, Ind.; Region IV - Kansas City, Mo.; Region V - Denver, Colo.

¹⁰⁴ Region I was also a frontrunner in the review of experimental practice applications. See *infra* note 106 and accompanying text.

¹⁰⁵ The guidelines were issued to the Region's state regulatory authorities implementing Interim Programs.

¹⁰⁶ The guidelines specify:

If, after its review, the Regulatory Authority denies the request for experimental practice, no further consideration of the request is given. If the regulatory authority recommends approval of the request, they forward it to the Regional Director, Region II, OSM, together with the Regulatory Authority's recommendation; all in triplicate copy.

Upon receipt of the experimental practice document and after a preliminary check for completeness, Region II will immediately transmit one copy of the document to the Assistant Director, Technical Services and Research (Washington Headquarters), and also publish the request for experimental practice in the Federal Register with a 30 day public comment period. Region II will evaluate the request to determine that it meets the following criteria: [criteria listed].

¹⁰⁷ Zapata, a Lexington, Kentucky based firm, had proposed to conduct the practice on its Triple Elkhorn Mine Site near Prestonsburg, Kentucky. Nesbitt Engineering completed the design and supervised construction.

¹⁰⁸ Haul road construction is governed by section 515(b)(17), 30 U.S.C. § 1265.

¹⁰⁹ OSM NEWS, OFFICE OF PUBLIC AFFAIRS, OFFICE OF SURFACE MINING, U.S. DEPARTMENT OF THE INTERIOR, May 1980.

At approximately the same time, OSM also approved a reclamation plan variance on topsoil segregation for a full scale operation in Illinois. Southwestern Illinois Coal's¹¹⁰ proposal was to use a 100-acre swatch of their operation as a laboratory to "manufacture" soil to yield an equal or superior crop than the land could produce before mining.¹¹¹ Like the Kentucky experimental practice, the Illinois operation was proposed as creating improved reclamation standards and energy efficiency. OSM's approval of both seemed clearly to be within section 711's intent.

Similarly, the other six experimental practices approved¹¹² by OSM under the interim program between January 1980 and July 1982 were well within the original intent of the Act's purpose. Many other proposals presented during the same time were denied at the state level for nonconformance with the Act's purpose or are still pending at the OSM administrative level or in court.¹¹³

Then in March of 1983, following OSM's amendment to its final section 711 regulations,¹¹⁴ OSM's Eastern Technical Center¹¹⁵ issued final procedures to its Eastern Field Office Directors for the processing of experimental practice applications.¹¹⁶ The language used by OSM indicated that official policy was to encourage mine operators to submit applications for experimental practices. The Office articulated the position that it sought to encourage the employment of such practices as a means of "demonstrating effectiveness and economic feasibility of new mining and reclamation techniques and post-mining land use alternatives."¹¹⁷ Though the objectives of experimental practices were stated to be the same in this memo as originally set forth in the intent portions of the Act, OSM's encouragement of the use of experimental practices was a deviation from the recent administrative norm. Further, in the accompanying guidelines, greater emphasis seemed to be given to the

¹¹⁰ The operation was Captain Mine in Perry County, Illinois.

¹¹¹ The process proposed would eliminate the need to employ high draftlines of shovel to scoop up the topsoil and segregate it until the coal is removed. Instead, one part of the study proposed to mix the top 10-15 feet of soil rather than segregating the strata.

¹¹² In addition to Zapata Fuels and Southwestern Illinois Coal, OSM had approved the following sites between January 1980 and July 1982: Gilbert Fuels of Ohio (a variance on fill construction); Arch Minerals of Illinois (a slurry pond variance); Coal Run of Kentucky (a highwall variance); Colowyo of Colorado (a fill construction variance); Big Horn Coal of Wyoming (a spoil off-site variance); and Peabody of Ohio (a topsoil variance).

¹¹³ See *infra* note 119 and accompanying text.

¹¹⁴ 48 Fed. Reg. 9,478 (1983) (to be codified at 30 C.F.R. § 785.13).

¹¹⁵ The Eastern Technical Center, under the Reagan reorganization of the Office of Surface Mining, administered all technical aspects of the Act and the regulations for the Eastern portion of the United States.

¹¹⁶ Memorandum from Raymond L. Lowry, Administrator of OSM's Eastern Technical Center, to the Eastern Field Office Directors (March 18, 1983) (available at Eastern Technical Center, U.S. Dept. of Interior, OSM, Pittsburgh, PA 15220).

¹¹⁷ *Id.*

“technological advancements” and “economic advantages” which could be provided by such practices rather than the potential for improved environmental protection.¹¹⁸

The attitudinal change reflected in the recent administrative guidelines on section 711 are but one other aspect of the current Administration's urgency in preventing “unnecessary burdens” on the industry. Yet, the use of section 711 is one of the few means by which such policy can be invoked within the confines of the Act itself. Because of the provision's vagueness, absent close scrutiny of administrative decisions by the courts, the provision could easily be used to circumvent the purpose of the Act.

No practices have as yet been approved by OSM under these new section 711 guidelines, and considering all political, technological, and procedural aspects of the entire state and federal permitting programs, it is difficult to prognosticate the extent they will actually be used in any manner adverse to the Act's basic policies. The concern is, however, that the guidelines offer a real possibility for abuse. Their open-endedness places a difficult burden on the courts in checking and balancing in the most scrutinizing manner each experimental practice administratively approved. This need for close judicial analysis in and of itself undermines the original intent of the Act as a basic environmental control mechanism. More importantly, it weighs heavy on the courts.

A case in point concerns an “experimental practice” originally proposed almost five years ago and still being litigated in the federal court system. Buckley Mining Corporation¹¹⁹ first submitted its application to the Kentucky regulatory agency in June 1978,¹²⁰ immediately following the beginning of the interim program.¹²¹ Buckley's application contained a post-mining alternative to the existing use of the land,¹²² by proposing to construct a mobile home park on the mined site.¹²³

As a supplement to this alternative, Buckley requested exemption from the approximate original contour standard¹²⁴ by being allowed to leave an extensive stretch of highwall along the proposed park's access road. After

¹¹⁸ *Id.*

¹¹⁹ Buckley Mining Corporation, Pikeville, Kentucky. The proposal was for its Buckley Creek operation in Pike County.

¹²⁰ Submitted to the Kentucky Department for Natural Resources and Environmental Protection, Frankfort, Ky.

¹²¹ See *supra* text accompanying notes 38-44.

¹²² Section 515(c), 30 U.S.C. § 1265, provides for the granting of permits where an industrial, commercial, agricultural, residential, or public facility use is proposed.

¹²³ Permit No. 398-001, on file at Kentucky Department of Surface Mining, Capitol Plaza Tower, Frankfort, Ky.

¹²⁴ The section allows that if the applicant meets the qualifications for a valid alternative post mining land use, a permit may be issued “without regard to reshare to approximate original con-

several months of extensive review,¹²⁵ Kentucky issued the permit,¹²⁶ purportedly granting the highwall exemption variance.

In November 1979, however, an OSM inspection issued a Notice of Violation to Buckley based on its failure to eliminate the highwall and restore the site to approximate original contour.¹²⁷ In its efforts to have OSM amend the Notice of Violation, Buckley asserted a need to utilize the bench as a haul road during the duration of the operation. OSM recognized the validity of their position and allowed the operation to continue with the understanding that the highwall would be eliminated and the mined area would be restored to approximate original contour. When mining was completed, Buckley filed suit against the Secretary of the Department of the Interior in federal court, seeking to enjoin OSM from enforcing the highwall elimination requirement, and asserting its reliance on the state issued permit.¹²⁸ In an attempt to resolve the suit, OSM agreed to allow Buckley to submit an application for an experimental practice. This was to be processed through the state regulatory authority, and then submitted to OSM for review. On submission, however, Kentucky rejected the experimental practice application, citing thirteen specific deficiencies. Before Buckley could resubmit the application to the state, OSM's Washington headquarters decided that it could not allow for experimental practice when the operation had essentially been completed prior to the filing of an application. At this point in time the case remains unresolved. The status of the original suit for injunctive relief remains under the jurisdiction of the district court.¹²⁹

The resolution of such a case is difficult when one considers the vagueness of the experimental practices provision. Given the explicit language and purposes of the Act, it will be difficult to deal with such cases as experimental practices. But the case highlights the potential abuses to which section 711 can be subjected. The future of the Act's environmental standards could be jeopardized by an uncontrolled use of section 711 to circumvent other requirements of the Act.

CONCLUSION

The Experimental Practices provision was implemented under the guise of one small concession for the coal industry to allow advances in development in the industry that assumed the burden of the Act's core provisions.

tour." For most situations, the Act requires the complete elimination of highwalls resulting from surface operations. See § 515(b)(3), 30 U.S.C. § 1265.

¹²⁵ The application was returned to the operator several times as incomplete for failure to demonstrate compliance with the requirements of section 515(c).

¹²⁶ The permit was issued by Kentucky on September 6, 1978. See *supra* note 118.

¹²⁷ As required by section 515, 30 U.S.C. § 1265. See *supra* note 124 and accompanying text.

¹²⁸ Buckley Mining Co. v. Andrus et al, No. 80-74 (E.D. Ky., filed on May 14, 1980).

¹²⁹ *Id.*

The subjectivity of its requirements, however, has allowed the provision to evolve as a possible loophole in the industry's compliance with the Law's basic performance standards. Although the use of section 711 can never violate the Act's general prohibition against broad categories of variances from the standards since departures can only be allowed in individual cases and on an experimental basis, the regulatory authority's broad discretion in approving such practices could extend well beyond the original intent of the Act.

Only premonitions of extreme uses of the provision have been observed in the last three years. But the full effect of its potential cannot be accurately analyzed until section 711 undergoes several administrative changes. The policies of the next administration and other external variable of the near future, such as the economy and unemployment, will inevitably be strong determinatives in whether section 711 will blend or conflict with the overall purpose of the Act. The final burden of conforming the provision's language to the basic policies of the Act fall on the courts as they are requested to review experimental practice approvals. In time, the outer parameters may be sufficiently established to enable some objective determination of what constitutes valid experimental practices.

4