



1982

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## Recommended Citation

McGraw, Marcus P. (1982) "Surface Mining Primacy for Kentucky: The Legal Implications," *Kentucky Law Journal*: Vol. 71 : Iss. 1 , Article 4.

Available at: <https://uknowledge.uky.edu/klj/vol71/iss1/4>

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# Surface Mining Primacy for Kentucky: The Legal Implications

BY MARCUS P. MCGRAW\*

## INTRODUCTION

Regulation of the environmental impact of surface coal mining and the surface effects of underground coal mining in Kentucky entered a new stage on May 18, 1982,<sup>1</sup> when the U.S. Secretary of the Interior, pursuant to his authority under the Surface Mining Control and Reclamation Act of 1977 (SMCRA),<sup>2</sup> granted the Commonwealth of Kentucky conditional approval of its surface mining program. Approval not only transferred the primary regulatory responsibility for enforcing environmental laws concerning coal mining operations from the federal to the state level but also created numerous legal issues and practical problems for the state, coal operators, the federal government and the public. This Article addresses the issues and problems that arose as a result of this transfer of responsibility.

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<sup>1</sup> 47 Fed. Reg. 21,404 (1982). On December 30, 1981, the Commonwealth of Kentucky resubmitted to the U.S. Department of the Interior its proposed permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 [hereinafter cited as SMCRA]. This followed an initial approval in part and disapproval in part of the proposed program by then Secretary of the Interior Cecil Andrus, which was published in the *Federal Register* on October 22, 1980. 45 Fed. Reg. 69,940 (1980). For a complete discussion of the general background on the permanent program, the program approval process, and the Kentucky program submission, see *Id.* at 69,940-42. The rules and legislative provisions in Kentucky's initial submission were approved with the exceptions noted under the heading "Secretary's Decision." *Id.* at 69,964-70.

Kentucky's resubmission was published in the *Federal Register* on January 7, 1982. See 47 Fed. Reg. 820 (1982). The formal conditional approval of Kentucky's program by Secretary of the Interior James Watt contains voluminous findings and specifies 12 conditions to be met by Kentucky prior to unconditional approval. See 47 Fed. Reg. 21,404 and 21,433-34 (1982).

<sup>2</sup> 30 U.S.C. §§ 1201-1328 (Supp. 1980). Authority for the Secretary's approval of state programs is found at *id.* § 1211(c)(1).

## I. THE INITIAL REGULATORY PROGRAM

SMCRA was the culmination of numerous congressional hearings, seven bills passed by either the U.S. House of Representatives or the Senate, three Senate-House conference reports and two presidential vetoes.<sup>3</sup> When President Carter signed the final version on August 3, 1977, he ended this tortuous legislative battle as to whether and to what extent Congress could regulate the environmental effects of surface and underground coal mining in this country. One statutory feature which possibly contributed to SMCRA's passage was the provision for a two-stage regulatory process in which the states would ultimately have an opportunity to run their own programs after an initial period of federal involvement. Under SMCRA, the first stage of this two-stage process, the "initial regulatory program,"<sup>4</sup> involves dual regulation whereby the U.S. Office of Surface Mining Reclamation and Enforcement (OSM)<sup>5</sup> and the states independently regulate the environmental impacts of surface and underground coal mining.<sup>6</sup> During this interim period, the Secretary of the Interior not only enforces federal interim performance standards but also reviews the various proposed state programs to determine whether or not they meet the standards set forth in SMCRA and whether the state has the ability to enforce the full range of federal performance standards.<sup>7</sup>

Although the exact legal relationship among OSM, the states and the coal industry during the interim program has been the

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<sup>3</sup> For a comprehensive history of the federal strip mining legislation, see D. THOMPSON & A. AGNEW, *SURFACE MINING: FEDERAL REGULATION*, Issue Brief No. IB74074, Library of Congress Cong. Research Service, Major Issues System, May 1, 1974, updated November 28, 1977.

<sup>4</sup> 30 U.S.C. § 1252 (Supp. 1980).

<sup>5</sup> The Office of Surface Mining, Reclamation and Enforcement [hereinafter cited as OSM] was established in the Department of the Interior by § 201 of the SMCRA. *Id.* § 1211. The acronym "OSM" was coined by the Department of the Interior in 1977.

<sup>6</sup> During this initial regulatory period, both OSM and the states are authorized to exercise enforcement of the new environmental performance standards which are required to be incorporated into operators permits. *See id.* § 1252(b) & (c). OSM's responsibility is to enforce the federal performance standards which are implemented during the interim period and to respond to any reasonable evidence of violations of these standards by using the authority vested in the Secretary of the Interior to bring about compliance. *See id.* §§ 1252(3) & 1271(a).

<sup>7</sup> *See id.* § 1252(3); H.R. REP. NO. 218, 95th Cong., 1st Sess. 132 (1977).

subject of considerable disagreement, decisions of the Interior Board of Surface Mining and Reclamation Appeals<sup>8</sup> and the courts<sup>9</sup> have essentially put this controversy to rest. The states are the permitting authority in the interim program, but the courts and the Board have uniformly agreed that OSM has an independent right and duty to enforce the federal performance standards in the interim program, notwithstanding the frequently overlapping and inconsistent actions of states and notwithstanding the issuance of variances and exceptions to those standards by the states.<sup>10</sup> Despite coal operators' arguments to courts that they were being whipsawed between the duplicative actions of the state and OSM, courts have justified OSM's independent role on the basis of legislative history which reflected a recognition by Congress that some overlapping and inconsistent actions would be unavoidable during the critical interim program.<sup>11</sup> Under SMCRA, this initial regulatory or interim program gives way to the permanent regulatory program when the Secretary of the Interior either approves a state's surface mining program or promulgates and institutes a federal program in that state.<sup>12</sup>

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<sup>8</sup> This Board was established to hear appeals under SMCRA and is authorized to speak finally for the Secretary of the Interior in various formal appeals. 43 C.F.R. § 4.1101(a) (1981).

<sup>9</sup> See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 270-71 (1981); *In re Surface Mining Regulations Litig.*, 627 F.2d 1346, 1351 (D.C. Cir. 1980), *aff'g in part, rev'g in part* 456 F. Supp. 1301 (D.D.C. 1978); *Union Carbide v. Andrus*, No. 79-2142 (S.D. W. Va. July 17, 1979).

<sup>10</sup> See the cases cited in note 9 *supra*. In *Hodel*, for example, the Supreme Court stated:

States may also pursue their own regulatory and inspection programs during the interim phase, and they may assist the Secretary in enforcing the interim standards. The states are not, however, required to enforce the interim regulatory standards and, until the permanent phase of the program, *the Secretary may not cede the Federal Government's independent enforcement role to states that wish to conduct their own regulatory programs.*

452 U.S. at 270-71 (emphasis added).

<sup>11</sup> See the cases cited in note 9 *supra*. In S. REP. NO. 128, 95th Cong., 1st Sess. at 57 (1977), it was stated:

The Committee recognizes that [the Act] may to some extent duplicate State activity; however it is the view of the Committee that this sort of federal presence at the most crucial time of the administration of this Act will result in uniform, equitable enforcement of the interim standards and will assure that the requirements of the Act get off to a good start.

<sup>12</sup> See 30 U.S.C. §§ 1253 & 1254 (Supp. 1980).

Pursuant to his authority to promulgate national regulations to implement SMCRA,<sup>13</sup> the Secretary of the Interior promulgated voluminous and complex regulations relating to the procedures and criteria for approval or disapproval of state program submissions.<sup>14</sup> Essentially, these regulations do not allow the Secretary to approve a state program unless it carries out the provisions and the purposes of SMCRA and the implementing regulations and unless the state demonstrates that it has the authority under state laws and regulations to implement, administer and enforce its laws.<sup>15</sup> Further, the Secretary of the Interior is authorized to approve *conditionally* a state program where it is found to have "minor" deficiencies, provided the state agrees to correct such deficiencies within prescribed time periods and actually initiates and actively proceeds to correct the deficiencies.<sup>16</sup>

Secretary of the Interior James Watt announced his conditional approval of Kentucky's surface mining program on April 13, 1982. Before this decision could become effective by publication in the *Federal Register*,<sup>17</sup> a Kentucky state court entered a restraining order enjoining Kentucky from enforcing the permanent program.<sup>18</sup> The restraining order was eventually lifted, and on May 18, 1982, Secretary Watt's conditional approval of Kentucky's surface mining program became effective.<sup>19</sup>

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<sup>13</sup> *Id.* § 1211(c).

<sup>14</sup> See 30 C.F.R. pt. 732 (1981). These regulations specified the type of review that OSM would make of the states' submission, established notice and public hearing requirements, specified the time periods and manner in which the Secretary of the Interior would approve or disapprove the state program, detailed the procedures for state program amendments to the programs and stated the criteria for approval or disapproval of state programs.

<sup>15</sup> 30 C.F.R. § 732.15 (1981).

<sup>16</sup> 30 C.F.R. § 732.13(i) (1981).

<sup>17</sup> 30 C.F.R. § 732.13(h) (1981).

<sup>18</sup> *Morris v. Kentucky*, No. 82-CI-143 (Johnson Cir. Ct., Ky. Apr. 13, 1982). The order also required Kentucky to continue accepting interim program permit applications, enjoined any action which would result in the imposition of a federal program, enjoined the issuance of regulations without following procedures for non-emergency promulgation of regulations and, finally, enjoined the promulgation of regulations inconsistent with or more stringent than federal permit program regulations. See *id.*

<sup>19</sup> The suit was voluntarily dismissed by plaintiffs after negotiations among plaintiffs, officials of the Kentucky Department of Natural Resources and Environmental Protection and OSM officials.

## II. WHAT IS PRIMACY?

Having obtained conditional approval of its program, Kentucky achieved the much-heralded and long-awaited goal of "primacy."<sup>20</sup> As the primary regulatory entity, the state took on an entirely new role. This new role was described by the District of Columbia Circuit Court of Appeals:

In an approved and properly enforced state program, the state has the primary responsibility for achieving the purposes of the Act. First, the state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. *See* Act §§ 506, 510. It decides whether a permittee's [sic] technique for avoiding environmental degradation are sufficient and whether the proposed reclamation plan is acceptable. Act § 510(b). The state sets the amount of the bond to be posted by the operator, and inspects the mine to determine compliance. §§ 509, 517. When permit conditions are violated, the state is charged with imposing appropriate penalties. Act § 518(i).

Finally, it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply *see* Act § 503(a), 518(i). Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role. Act § 514.<sup>21</sup>

The role of OSM in a state with an approved program is one of oversight. Section 517(a) of SMCRA requires occasional on-site inspections "to evaluate the administration of approved state programs."<sup>22</sup> If a state fails to take "appropriate action" after notification by OSM, the agency is required to inspect and to take

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<sup>20</sup> The term "primacy" is not a statutory or regulatory term but is believed to have been coined by OSM during the state program approval process. It denotes the condition whereby a state becomes the "primary" regulatory entity vis-à-vis OSM as opposed to its former dual role with OSM.

<sup>21</sup> *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 822 (1981) (footnote omitted).

<sup>22</sup> 30 U.S.C. § 1267(a) (Supp. 1980).

appropriate enforcement action.<sup>23</sup> Once a state program is approved, OSM is still obliged to monitor the state's performance and where there is a breakdown in the state enforcement, OSM may take over the state program in whole or in part.<sup>24</sup>

The state's independence in the permit program contrasts with the continuing role of the Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act, after a state has assumed responsibility for pollution discharge permits.<sup>25</sup> Under that statute, the EPA Administrator has veto power over individual permit decisions by states that have primacy under the National Pollutant Discharge Elimination System. Under SMCRA, the Secretary of the Interior retains no veto power or other control over the issuance of a permit by a state with an approved surface mining program. The only authority that the Secretary has in this regard is either to take independent enforcement action against a coal operator pursuant to section 521(a) of SMCRA<sup>26</sup> after affording the state an opportunity to take action

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<sup>23</sup> *Id.* § 1271(a). For a description of the relationship between OSM and the states in the permanent program, see H.R. REP. NO. 218, 95th Cong., 1st Sess. 131-32 (1977).

<sup>24</sup> 30 U.S.C. §§ 1254(b) & 1271(b) (Supp. 1980). See also H.R. REP. NO. 218, 95th Cong., 1st Sess. 132 (1977).

<sup>25</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1976 & Supp. 1980)). Under that statute, the Administrator of the Environmental Protection Agency has veto power over individual decisions by states that have primacy under the National Pollutant Discharge Elimination System. Under the Water Pollution Act, states which have the capacity to administer a permit program may be delegated the authority to issue permits for discharges into the navigable waters within their jurisdiction. However, no permit may be issued from a state agency if the Administrator of the Environmental Protection Agency objects. 33 U.S.C. § 1342(a)(5) (Supp. 1980).

Each state with a permit program is required to forward to the agency a copy of each permit application and to give notice of all actions which the state takes related to the permit application. *Id.* § 1342(d)(1) (1976). If the Administrator objects to the issuance of the permit within 90 days, either because the proposed permit violates the Act or because its issuance by the state may affect water quality in another state, no permit may issue. *Id.* § 1342(d)(2) (Supp. 1980). However, the Administrator may waive the agency's right to object to the issuance of a permit in a number of situations. *Id.* § 1342(d)(3).

When the Administrator objects to the issuance of a permit, a public hearing is required to be held regarding such objections if the state requests the same. The Administrator may issue the permit if the state fails to request a hearing within 90 days of the date of objections or if the state fails to submit a revised permit meeting such objections within 30 days following completion of the hearing. *Id.* § 1342(d)(4).

<sup>26</sup> 30 U.S.C. § 1271(a) (Supp. 1980).

or to take control of all or a part of the state's permanent program pursuant to sections 504(b)<sup>27</sup> and 521(b).<sup>28</sup>

While SMCRA authorizes a limited oversight role for OSM in a state which has attained primacy, the exact relationship among OSM, the state and the operators in that state has not thus far been precisely delineated by either judicial decision or regulation. Existing OSM permanent program regulations set forth general enforcement rules for OSM in state-approved programs,<sup>29</sup> but the details of how this will work in practice have not yet emerged. OSM is currently developing procedures for OSM inspectors who perform oversight functions in the permanent program.<sup>30</sup> For its oversight role, OSM statistically samples mining operations to evaluate the performance of the state regulatory authority. OSM currently is statistically sampling in all states with primacy.<sup>31</sup> The number of coal operators selected for sampling depends upon the total number of operators in that state and, thus far, the information gathered during the inspections is merely sent to OSM headquarters in Washington and is "analyzed" there for possible use.<sup>32</sup> No evidence is yet available as to how OSM will utilize any statistical information it obtains in Kentucky.

Generally, when OSM conducts an oversight inspection in Kentucky, it does so jointly with the Kentucky inspector, unless the state declines the invitation to join OSM.<sup>33</sup> When a violation

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<sup>27</sup> *Id.* § 1254(b).

<sup>28</sup> *Id.* § 1271(b). The procedure for such a takeover of all or part of a state's program is contained in 30 C.F.R. pt. 843 (1981).

<sup>29</sup> 30 C.F.R. pt. 843 (1981).

<sup>30</sup> OSM has developed a document entitled *Plans and Procedures For the Evaluation of the States' Permanent Programs*. This document, finalized on March 5, 1982, contains both general oversight information as well as a description of the systems review of approved state programs. While this document is still in draft form, it discloses the type of "oversight" OSM intends to perform. OSM intends to statistically sample randomly selected mines to review each state function at that mine from permit issuance through total bond release. OSM will then make inferences about the state's regulatory performance and take action accordingly. OSM will also monitor state program data including permits, state inspection reports, notices of bond release and the results of citizen complaint investigation.

<sup>31</sup> Telephone interview with Carl Pavetto, Chief, Branch of Inspection, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. (June 2, 1982).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



is observed during an oversight inspection, OSM will give the state the ten-day notice pursuant to section 521(a)(1) of SM-CRA.<sup>34</sup> However, OSM's ability to follow up this ten-day notice in the event the state fails to take "appropriate action" may be seriously hampered by its proposed reinterpretation of its oversight enforcement authority following the change of administrations in Washington.<sup>35</sup>

### III. PHASE-IN OF NEW STATE LAW

Several states which have attained primacy have been confronted with the issue of *when* the various parts of the new state laws go into effect after the Secretary of the Interior approves them, but have yet to fully implement their permanent program provisions for inspections, enforcement or performance standards.<sup>36</sup>

Although Kentucky began using its new enforcement authority immediately upon attaining primacy, it has taken the position that the permanent program performance standards do not apply to operators in Kentucky until the state has issued individ-

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<sup>34</sup> 30 U.S.C. 1271(a)(1) (Supp. 1980).

<sup>35</sup> During the Carter administration, OSM interpreted §§ 521(a)(1) and 521(a)(3) of SMCRA as authorizing it to issue notices of violation against operators if a state with primacy failed to take "appropriate action" after notification by OSM. 30 C.F.R. § 843.12 (1981). See also 44 Fed. Reg. 15,302 (1979) (preamble to the regulation). However, the Reagan administration issued proposed regulations which reflected a new interpretation in which no notice of violation could be issued by OSM during oversight inspections, even if the state failed to take appropriate action after notification. 47 Fed. Reg. 17,269 (1982). The author is advised by OSM that although OSM has recently suspended this proposed regulation, the office continues to refrain from issuing any notices of violation during oversight because of this new interpretation. Telephone interview with Carl Pavetto, Chief, Branch of Inspections, Office of Surface Mining, Washington, D.C. (June 2, 1982).

<sup>36</sup> MINE REG. & PRODUCTIVITY REP., July 16, 1982, at 1. For example, Virginia has apparently taken the position that its new permanent program enforcement provisions do not apply until all of the state's coal operators obtain permanent program permits. *Id.* Currently, only a handful of Virginia's operators have obtained program permits and officials there say it could take at least a year before the task is completed. *Id.* Consequently, Virginia has fallen back on its pre-primacy law with regard to inspection and enforcement which means that it cannot issue notices of violation or cessation orders against operators, but rather must issue "special orders" which carry no monetary penalties and create no particular deterrent effect. *Id.* As a result, OSM has dispatched additional inspectors to the Virginia coal fields to begin direct enforcement action on the theory the state is misinterpreting its own plan. *Id.*

ual operators permanent program permits.<sup>37</sup> For some coal operators this could mean that the permanent program standards do not begin to apply for many months after primacy. Kentucky will thus continue to enforce its interim program performance standards until that time. OSM, in its oversight capacity, must likewise enforce Kentucky's interim program law since the federal interim and permanent program regulations no longer apply after Kentucky achieved primacy.<sup>38</sup> Federal regulations provide, however, that the performance standards shall be effective and shall apply to each operation "on the earliest date upon which the Act and this Chapter require a permit to be obtained."<sup>39</sup> Federal law requires that the permanent program permits be acquired within eight months after primacy goes into effect before one can operate, except for those persons who operate pursuant to an interim program permit *and* have made timely and complete application for a permanent program permit.<sup>40</sup> Therefore, at least as far as federal law is concerned, some operators in states with primacy must comply with the new performance standards whether or not they have their new state permanent program permits.

Another legal wrinkle regarding the phase-in of the new state programs is that some states' interim program statutes and regulations, including Kentucky's, automatically expire when the state obtains primacy.<sup>41</sup> Since Kentucky's interim program law automatically expired when Kentucky attained primacy on May 18, 1982, if the new primacy laws cannot be made binding on operators until incorporated into their permits, there would seem to be a serious question as to Kentucky's ability to enforce *any* performance standards against operators in Kentucky until that operator had been issued a permanent program permit. A similar situation would exist where primacy has occurred but where the state has been enjoined from implementing primacy. This situa-

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<sup>37</sup> Telephone interview with Charles Gault, Office of Field Solicitor, Division of Surface Mining, Region II, Knoxville, Tennessee (June 2, 1982).

<sup>38</sup> See KY. REV. STAT. § 350.010 compiler's notes (Bobbs-Merrill Interim Supp. 1982) [hereinafter cited as KRS].

<sup>39</sup> 30 C.F.R. § 701.11(c) (1981).

<sup>40</sup> *Id.* §§ 771.11 & 771.13(b) (1981).

<sup>41</sup> See KRS § 350.010 compiler's notes (Interim Supp. 1982).

tion was averted in Kentucky when the plaintiffs withdrew a suit against the state which had resulted in the issuance of a restraining order by the Johnson Circuit Court.<sup>42</sup>

#### IV. OSM REGULATION CHANGES AND INTERPRETATIONS AND THEIR EFFECT UPON KENTUCKY'S PROGRAM

Since the change of administration in Washington, OSM has been engaged in a massive overhaul of its permanent program regulations. This regulation rewrite was ordered by Secretary of the Interior James Watt and is now approaching its conclusion as more and more surface mining regulations become final. While this regulation rewrite process has been hampered somewhat by OSM staffing problems and litigation,<sup>43</sup> OSM regulations of major importance continue to change and, in many cases, are being made less stringent.<sup>44</sup> This regulation re-write, and resulting change in stringency, will become increasingly significant in states such as Kentucky where the legislature has prohibited state rules and regulations from being any more stringent than federal law.<sup>45</sup> Thus, when a new OSM regulation becomes final, operators and others in states such as Kentucky must analyze it to ascertain whether it is less stringent than its state counterpart and to what extent. Even if a new federal regulation is deemed to be less stringent than its state counterpart, Kentucky cannot automatically conform its law to the less-stringent federal provisions.

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<sup>42</sup> For a discussion of the restraining order issued by the Johnson Circuit Court, see notes 18-19 *supra* and accompanying text.

<sup>43</sup> A suit was filed by several environmental groups in the U.S. District Court for the District of Columbia alleging that OSM's massive re-write of the permanent program regulations was invalid due to a failure by OSM to comply with the National Environmental Policy Act. See *National Wildlife Fed'n v. Watt*, No. 82-0320 (D.D.C. 1980). This suit has now been settled. Under the terms of this settlement, OSM is to prepare a cumulative environmental impact statement (EIS) for approximately 80% of the regulations being revised. The remainder of the regulations OSM intends to revise may be promulgated without the preparation of an EIS. The rules to be covered in the EIS will include permitting, subsidence, roads, excess spoil, re-mining, alluvial valley floors, hydrology, impoundments, experimental practices, prime farmlands, revegetation, backfilling and grading, auger mining, coal processing plants, exploration, OSM oversight, lands unsuitable for mining, sedimentation ponds and explosives. These rules will be held up approximately 90 days while the EIS process goes forward. Thirteen other proposed regulations will go forward without an EIS provided an environmental assessment is done.

<sup>44</sup> See, e.g., 47 Fed. Reg. 12,088; 12,596; 12,760; 13,466; 13,535 and 16,152 (1982).

<sup>45</sup> See generally KRS § 350.028 (Interim Supp. 1982).

Kentucky statutes and regulations do not prescribe what will occur when federal law changes. Presumably, once it becomes apparent that a federal standard is less stringent than its Kentucky counterpart, state rulemaking will have to take place. In the interim, Kentucky coal operators may be asked to comply with a state regulation more stringent than its federal counterpart notwithstanding the state law prohibiting such action. It is unclear as to what extent Kentucky could enforce the more stringent state regulations in such a case. Also, coal operators and the Kentucky Natural Resources and Environmental Protection Cabinet<sup>46</sup> may very well disagree on the extent to which the OSM rule change is more stringent than its state counterpart, if at all.

In addition to OSM rule changes, coal operators and others also should keep apprised of regulation changes by the Environmental Protection Agency because SMCRA may not supersede, amend, modify or repeal a Federal Water Pollution Control Act<sup>47</sup> provision and Kentucky regulations may not be more stringent than SMCRA. For example, OSM and the Environmental Protection Agency are looking to ease effluent standards for operators desiring to re-work previously-mined lands.<sup>48</sup> Additionally, the Environmental Protection Agency is in the process of changing its rules relating to credits for pollutants in intake water.<sup>49</sup> As in the case of relaxation of OSM regulations, coal operators may wish to assert the no-more-stringent argument after any relaxation of Environmental Protection Agency regulations relating to coal operations.

In addition to the relaxation of OSM and Environmental Protection Agency regulations relating to coal operators, new decisions by courts and by the Interior Board of Surface Mining and Reclamation Appeals (IBSMA)<sup>50</sup> interpreting SMCRA or OSM

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<sup>46</sup> The cabinet was formerly known as the Kentucky Department for Natural Resources and Environmental Protection.

<sup>47</sup> 30 U.S.C. § 1292(a)(3) (Supp. 1980).

<sup>48</sup> MINE REG. & PRODUCTIVITY REP., July 16, 1982.

<sup>49</sup> See generally 40 C.F.R. § 122.63(g) (1981).

<sup>50</sup> The Interior Board of Surface Mining and Reclamation Appeals has jurisdiction to exercise the final decision making power of the Secretary under SMCRA pertaining to, *inter alia*, applications for review of notices of violation and cessation orders, proceedings for the suspension or revocation of permits and appeals from orders or decisions of Depart-

regulations may have a bearing on new state programs. Federal courts and the IBSMA have issued significant decisions relating to OSM jurisdiction over loading facilities and processing plants.<sup>51</sup> Since the IBSMA is authorized to exercise final decision-making authority for the Secretary of the Interior in administrative adjudicatory appeals relating to surface mining,<sup>52</sup> these decisions interpreting such issues as OSM's jurisdiction over processing plants and similar facilities accordingly represent the Secretary's interpretation of OSM regulations. Thus, IBSMA's decisions may provide an argument that a contrasting and more stringent interpretation by Kentucky violates the no-more-stringent provision of the Kentucky Surface Mining Act.<sup>53</sup>

#### V. CHANGES IN STATE LAW AFTER PRIMACY

Many states which have received primacy from the Department of the Interior have begun revising their primacy laws or are considering revisions. At least one state began this process after its program had been submitted to the Department of the Interior but *before* its program had been approved.<sup>54</sup> Revisions are motivated partly by experience gained after primacy, partly as a reaction to OSM changes in its own regulations and partly by the new OSM "state window" provision which arguably facilitates revisions as long as states can show their new provision is "as effective as" the parallel federal provision.<sup>55</sup> Generally speak-

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ment of the Interior administrative law judges who hear surface mining cases. 43 C.F.R. § 4.1101 (1981).

<sup>51</sup> See *Drummond Coal Co. v. Watt*, No. 80-M-0829 (N.D. Ala. April 20, 1981); *Dinco Coal Sales, Inc.*, 4 IBSMA 35 (1982) *reversed*, No. 82-99 (E.D. Ky. Sept. 23, 1982); *Reitz Coal Co.*, 3 IBSMA 260 (1981). These decisions are at variance with a previous opinion by the U.S. District Court for the District of Columbia in *In re Permanent Surface Mining Regulation Litig.*, No. 79-1144 (D.D.C. 1980), *appeals docketed*, Nos. 80-1810, 80-1811, 80-1812 and 80-1813 (D.C. Cir. July 16, 1980) and No. 80-1823 (D.C. Cir. July 18, 1980).

<sup>52</sup> For a description of the authority and functions of the board, see note 50 *supra*.

<sup>53</sup> See KRS § 350.028 (Interim Supp. 1982).

<sup>54</sup> Pennsylvania started revising its permanent program surface mining regulations before they had been approved by Secretary of the Interior Watt. Telephone interview with John Woodrum, Field Solicitor, O.S.M. Region I, U.S. Department of the Interior (June 2, 1982).

<sup>55</sup> 46 Fed. Reg. 16,592 (1982) (to be codified at 30 C.F.R. § 732.14).

ing, however, all states may perceive a need to "fine tune" their programs once they gain some on-the-ground experience with their new statutes and regulations. In West Virginia, for example, the state rewrote its coal refuse regulations shortly after approval of its primacy program. Accordingly, it revised those regulations and submitted them to OSM for approval.<sup>56</sup>

Revisions may create major confusion for coal operators, state regulators, mining consultants and the public. Assuming that states formally revise their regulations, OSM must still conduct a *second* rulemaking of its own with the requisite notice and public comment before it can approve the change.<sup>57</sup> The procedures, time schedules and criteria used by OSM in considering a revision are the same as those used by the state and found in 30 C.F.R. sections 732.12, 732.13 and 732.15.<sup>58</sup> This slow and tedious process could leave states, the industry and the public in limbo for long periods of time because changes in laws or regulations are not effective in that state until approved by OSM as a formal program amendment, unless state regulation changes are made contingent upon approval by OSM.<sup>59</sup>

The situation may be analogous to revisions of state implementation plans (SIPs) under the Clean Air Act.<sup>60</sup> The Environmental Protection Agency has been notoriously slow in approving SIP revisions under the Clean Air Act because it must conduct its own rulemaking on such revisions. In an attempt to deal with this problem, the Environmental Protection Agency devised "interim final rulemaking" and "parallel processing."<sup>61</sup> "Interim final rulemaking" allows a SIP change to become effective immediately after the Environmental Protection Agency has finished its rulemaking process. "Parallel processing" enables state and federal rulemaking to occur simultaneously in order to expedite the SIP revision process.<sup>62</sup> However, while these regulatory de-

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<sup>56</sup> Telephone interview with John Woodrum, Field Solicitor, O.S.M. Region I, U.S. Department of the Interior (June 2, 1982).

<sup>57</sup> 30 C.F.R. § 732.17 (1981).

<sup>58</sup> *Id.* § 732.17(a)(2).

<sup>59</sup> *Id.* § 732.17(g).

<sup>60</sup> 42 U.S.C. §§ 7401-626 (Supp. 1980).

<sup>61</sup> See 12 ENV'T REP. (BNA) 212, 376 and 579 (1981-82). See also 46 Fed. Reg. 44,476 (1981).

<sup>62</sup> See 46 Fed. Reg. 44,476 (1981).

vices may speed the SIP revision process, the process is still cumbersome since it has been held that the only procedural routes available to modify a federally-approved SIP are revision pursuant to 42 U.S.C. section 7410(a)(3)<sup>63</sup> or postponement pursuant to 42 U.S.C. section 7410(f),<sup>64</sup> both of which require approval of the Environmental Protection Agency.<sup>65</sup>

Other cases relating to SIP revisions under the Clean Air Act have made it clear that the original state regulation as adopted in its SIP and approved by the Environmental Protection Agency continues to be enforceable until such time as a revision of that regulation is submitted and approved by that agency.<sup>66</sup> In analogizing the Clean Air Act to the Surface Mining Act, states with surface mining primacy might face long and frustrating delays in obtaining OSM approval of state regulation or statutory changes before they can implement and enforce these changes. This delay between adoption of a revision of state law and federal approval of the revision promises to create major confusion and friction.

States with surface mining primacy can avoid this time-consuming approval process by OSM and their own state rulemaking agency by using policy memoranda in lieu of statute or regulation changes. Law interpretation or change by policy memoranda apparently has proliferated without any strong OSM objection. The Kentucky Natural Resources and Environmental Protection Cabinet has used policy memoranda since achieving primacy over its surface mining program by periodically publishing a "Reclamation Advisory Memorandum."<sup>67</sup> These memoranda range in topic from status reports on various efforts being undertaken by the Natural Resources Cabinet to substantive changes in departmental surface mining interpretations. As an example of the latter, Reclamation Advisory Memorandum No.

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<sup>63</sup> 42 U.S.C. § 7410(a3) (1980).

<sup>64</sup> 42 U.S.C. § 7410(f) (1980).

<sup>65</sup> *Illinois v. Commonwealth Edison Co.*, 490 F. Supp. 1145, 1154 (D. Ill. 1980).

<sup>66</sup> *Friends of the Earth v. Potomac Elec. Power Co.*, 419 F. Supp. 528, 533 (D.D.C. 1976). See also 490 F. Supp. at 1153; *Metropolitan Washington Coalition for Clean Air v. Department of Economic Dev.*, 373 F. Supp. 1096, 1100 (D.D.C. 1973).

<sup>67</sup> These memoranda provide advice, interpretations and instructions to coal operators, coal operator associations, consulting engineers and division personnel. They are not formal regulations and have not gone through the state rulemaking process.

33<sup>68</sup> redefines coal processing operations and loading facilities and specifies which facilities fall under the jurisdiction of the Kentucky surface mining law. On the basis of the discussion and interpretation contained in this advisory memorandum, operators of such facilities are presumably required either to obtain a permit, to remain permitted or to apply for cancellation of an existing permit. However, such a matter more properly should be the subject of a formal departmental regulation after notice and an opportunity for public comment is provided.<sup>69</sup>

Kentucky's use of reclamation policy memoranda has several legal implications. First, it will be difficult for operators to know precisely which law to follow. While the state may be enforcing its reclamation advisory memoranda, OSM in its oversight capacity may be enforcing merely the state regulation and statute. A more serious problem is that state notices of noncompliance and cessation orders written on the basis of interpretations in the advisory memoranda may be unenforceable because the memoranda were not promulgated in accordance with state rulemaking requirements<sup>70</sup> and have not received OSM's approval as a program amendment.<sup>71</sup>

## VI. LEGAL CHALLENGE TO THE SECRETARY OF THE INTERIOR'S APPROVAL OF THE KENTUCKY PROGRAM

Section 526(a)(1) of SMCRA<sup>72</sup> authorizes judicial review of

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<sup>68</sup> Kentucky Department of Natural Resources and Environmental Protection (now known as Natural Resources and Environmental Protection Cabinet), Reclamation Advisory Memorandum No. 33 (April 27, 1982).

<sup>69</sup> A "regulation" is defined in KRS § 13.080(3) (Cum. Supp. 1982) as including substantive procedural and interpretive rules as well as the amendment or repeal of a prior regulation. A "regulation" does not include statements concerning only the internal management of an administrative body and not affecting private rights or procedures available to the public. *See id.*

<sup>70</sup> State agency regulations are considered effective and binding only if they have been promulgated in accordance with all the required rulemaking procedures set forth in KRS ch. 13. *See Ziegler, A Primer on Administrative Rules and Rule-Making in Kentucky*, 67 Ky. L.J. 103, 109 (1978-79). *See also* Christian Appalachian Project, Inc. v. Berry, 487 S.W.2d 951, 953 (Ky. 1972) (Court refused to take judicial notice of regulation due to its incorrect citation of the authority pursuant to which it was adopted); Kentucky State Bd. of Business Schools v. Electronic Computer Programming Inst., 453 S.W.2d 534, 536 (Ky. 1970) (Court stated in dictum that for a rule to be valid it must be issued pursuant to proper procedure).

<sup>71</sup> *See* 30 C.F.R. § 732.17 (1981).

<sup>72</sup> 30 U.S.C. § 1276(a)(1) (Supp. 1980).



any decision by the Secretary of the Interior to approve or disapprove a state program. On July 16, 1982, several environmental and citizens groups filed a major suit against the Secretary of the Interior and state officials in a federal district court in Kentucky.<sup>73</sup> The groups seek a declaration that Secretary Watt's approval of the Kentucky program is invalid because it fails to meet SMCRA requirements. The suit also seeks an order requiring: (1) the state to correct alleged deficiencies; (2) the Interior Department to institute a federal program within sixty days if the state fails to correct these deficiencies, and (3) the Secretary of the Kentucky Natural Resources and Environmental Protection Cabinet to stay any administrative hearing which entails issuing a permit containing any of the alleged deficiencies.<sup>74</sup>

The suit should not have any present impact upon the state's implementation of the permanent program since it does not appear to request any immediate injunctive relief against either the state or the Interior Department. Thus, the permanent program should continue unaffected by this litigation until the court renders a final decision or until the parties work out a settlement.

The long-term significance of the case is that, at least with regard to several of the issues, a settlement by the parties or a decision that the Secretary improperly approved part of the Kentucky program would set in motion a new series of legislative changes or rulemaking revisions. The changes or revisions would then be followed by a submission to OSM, federal rulemaking<sup>75</sup> and ultimately a new decision by the Secretary regarding Kentucky's program. Federal and state laws are silent as to the legal status of those portions of Kentucky's program which are held to be improperly approved by the Secretary of the Interior. The re-

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<sup>73</sup> *Sierra Club, Cumberland Chapter v. Watt*, No. 82-30 (E.D. Ky. July 16, 1982).

<sup>74</sup> *Id.* The alleged defects in the Kentucky program identified in the suit include the following: Kentucky will have insufficient personnel for the inspection and enforcement of its law, the program fails to provide for immediate issuance of cessation orders by inspectors, the Kentucky program's provision for regulation of coal preparation and crushing facilities is inconsistent with federal law, and the program fails to require that existing structures which fail to meet permanent program performance standards be modified or reconstructed with six months to meet both performance and design standards. *Id.*, slip op. at 9-10.

<sup>75</sup> See generally 30 C.F.R. § 732.17 (1981).

sulting confusion as to the enforceability of those provisions during this interim period would provide further instability to Kentucky's program at a critical juncture in its development.

## VII. INJUNCTIONS AGAINST STATES AFTER PRIMACY

Officials in a number of states were enjoined by their own courts from submitting or resubmitting their surface mining programs to OSM during the interim program. While these injunctions were pending, OSM took the position that it was unable to institute a federal program in those states because of the language of section 1253(d) of SMCRA.<sup>76</sup> After the expiration or dissolution of the injunctions these states joined others which had submitted or resubmitted programs to OSM. However, in at least two instances, injunctions were obtained against states *after* the Secretary of the Interior approved their programs.<sup>77</sup> The anomalous result in West Virginia, where the injunction was issued against part of the state's program, was that the state continued to enforce its *interim* program while OSM treated the state as being a *permanent* program. This put OSM in an oversight rather than an independent regulatory position.

In Kentucky, a preliminary injunction was entered against the state enjoining it from enforcing the permanent program, promulgating any permanent program regulations without first going through normal rulemaking procedures or promulgating regulations inconsistent with or more stringent than federal regulations.<sup>78</sup> The plaintiffs have now withdrawn this suit. Had the injunction continued, however, or in the event future injunctions are issued against the state, questions concerning the status of Kentucky's program become important. Since Kentucky's in-

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<sup>76</sup> 30 U.S.C. § 1253(d) (Supp. 1980). This section provides, in part:  
[T]he inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in . . . the imposition of a Federal program.

*Id.* See also 30 C.F.R. § 730.12 (1981) (implementing 30 U.S.C. § 1253(d) (Supp. 1980)).

<sup>77</sup> These states were Kentucky and West Virginia.

<sup>78</sup> For a more complete discussion of this suit, see notes 18-19 *supra* and accompanying text.

terim program regulations automatically expired upon primacy,<sup>79</sup> the state would seem to have no enforceable law if its current surface mining law were struck down or if the state were barred from implementing it. Additionally, if Kentucky had been required to replace its emergency regulations with regulations which had gone through regular rulemaking,<sup>80</sup> this process would have taken months to complete. Moreover, if the non-emergency regulations had come out differently than those originally submitted to OSM, the agency would have had to treat these new regulations as a program amendment under 30 C.F.R. section 732.17, which would cause many more months of delay.

As the new primacy states begin implementing and enforcing their new laws, additional legal challenges may be brought to those laws in state courts on constitutional, procedural or other grounds. If a state's new regulations are enjoined in state court, the question arises as to whether OSM may enforce the state regulations or the state may enforce the state program as part of *federal* law. In *People v. Celotex Corporation*,<sup>81</sup> a federal district court addressed such an issue under the Clean Air Act.<sup>82</sup> After the Illinois state court had invalidated the state regulations because of procedural deficiencies, Illinois and the Environmental Protection Agency sought to enforce portions of the Illinois state implementation plan as part of *federal* law. They argued that although the regulations were unenforceable in state court, they were enforceable in a federal court since the state court action was a "modification" of the state implementation plan. Furthermore, they argued that the regulations remained in place until approved by the Environmental Protection Agency. However, the district court held that the invalidated regulations were unenforceable in federal courts as part of the federal Clean Air Act.<sup>83</sup>

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<sup>79</sup> See KRS § 350.010 compiler's notes (Interim Supp. 1982).

<sup>80</sup> The state had used its emergency rulemaking authority to implement its interim program regulations and had never replaced these emergency regulations with regulations which had been promulgated by the regular notice and public comment procedure.

<sup>81</sup> 516 F. Supp. 716 (D. Ill. 1981).

<sup>82</sup> 42 U.S.C. §§ 7401-7642 (Supp. 1980).

<sup>83</sup> 516 F. Supp. at 718-19.

If a parallel ruling were made with respect to enjoined state surface mining programs, OSM's only recourse would seem to be the implementation of a federal program in order to take over that portion of the state's program which had been enjoined or invalidated.<sup>84</sup> Such an action by OSM would cause confusion, if not chaos, in a state such as Kentucky because it would take months, even years, for OSM to gear up for inspections of the large number of Kentucky mines. Furthermore, the drafting and promulgation of a federal program in Kentucky would be lengthy and complicated, creating a great deal of confusion for coal operators who need stable regulation to plan and operate efficiently.

#### CONCLUSION

As might be expected with any federal-state regulatory program, the transition to state primacy invariably causes great disruption and confusion and raises innumerable legal and practical questions and problems. The transition from the interim to the permanent program in Kentucky is certainly no exception. Whether all of these legal questions and problems can be resolved remains to be seen.

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<sup>84</sup> See generally 30 U.S.C. §§ 1254(b) & 1271(b) (Supp. 1980).

