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The Federal Role under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) on Nonfederal Lands after State Primacy

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**THE FEDERAL ROLE UNDER THE SURFACE
MINING CONTROL AND RECLAMATION
ACT OF 1977 (SMCRA) ON
NONFEDERAL LANDS AFTER
STATE PRIMACY**

Robert E. Beck†

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I. INTRODUCTION

Congress enacted the federal Surface Mining Control and Reclamation Act of 1977¹ (hereinafter "SMCRA") to provide protection against environmental degradation from coal mining.² Congress did so because it perceived that too many states either did not have stringent enough laws to protect the environment or failed to fully enforce those that they had. Further, prior to 1977 there was a lack of uniformity among the laws that did exist.³ However, Congress did not give the federal government complete pre-emption of the field of environmental regulation of coal mining. For example, since October of 1972, when a surface mining regulatory bill passed one of the branches of Congress for the first time,⁴ all of the significant surface mining regulatory bills provided for state administration and enforcement.⁵ Under all bills, the federal government monitored the states' actions. But, these bills also provided for federal enforcement during periods when a state did not have approval for administration and enforcement.⁶

1. Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

2. The demand for energy was growing rapidly and Congress feared the environmental consequences of a lack of control and saw an "urgent need to balance our growing demand for energy resources with the increasing stress we place on the environment in satisfying that demand." 119 CONG. REC. 33,184 (1973) (debates on S. 425). Thus, Congress viewed the growing demand as the unbalancing factor.

Although the initial investigative focus was on surface mining, from the first bill to pass a house of Congress, the major bills have covered surface effects of underground mining as well as surface mining. See Coal Mine Surface Area Protection Act of 1972, § 2(c), 118 CONG. REC. 35,031 (1972).

3. 119 CONG. REC. 33,182, 33,183 (1973) (debates on S. 425); 120 CONG. REC. 23,685 (1974) (debates on H.R. 11,500); 120 CONG. REC. 39,591 (1974) (debates on S. 425); S. REP. NO. 128, 95th Cong., 1st Sess. 51-52 (1977).

Congress wanted maximum uniformity to avoid what it referred to as "industrial blackmail." 119 CONG. REC. 33,186 (1973); 120 CONG. REC. 23,685 (1974). Indeed, in Congressman Udall's view, this concern came first. See The Honorable Morris K. Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553, 553-54 (1979).

4. 118 CONG. REC. 35,056 (1972) (debates on H.R. 6482).

5. From the beginning, Congress wanted state administration "[b]ecause mining conditions, climate, and terrain vary so greatly among the different coalfields." 119 CONG. REC. 33,184 (1973). "The committee recognizes in its report—page 34—that a mining and reclamation program for the mountains of Appalachia must necessarily differ from one for the Western areas of our country." 119 CONG. REC. 33,332 (1973). The language that finally appears in SMCRA is set forth *infra* in the text accompanying note 19.

6. As to enforcement of H.R. 6482, § 34(c), see 118 CONG. REC. 35,037 (1972); as to S. 425, § 215, see 119 CONG. REC. 33,338 (1973); as to H.R. 11,500, § 220, see 120 CONG. REC. 24,127 (1974); as to S. 7, § 521, see 121 CONG. REC. 6,215-16 (1975). As to monitoring of H.R. 6482, § 34(c), see 118 CONG. REC. 35,037 (1972); as to S. 425, § 214, see 119 CONG. REC. 33,338 (1973); as to H.R. 11,500, § 219, see 120 CONG. REC. 24,126 (1974); as to S. 7, § 517, see 121 CONG. REC. 6,214 (1975). See also the legislative history described *infra* part IV(B).

In SMCRA, Congress provided for (1) minimum standards to be applied nationwide which allowed a state to enact more stringent regulations;⁷ (2) a state to take over administration and enforcement of the federal law if the state demonstrated that it was capable of carrying out the Act and meeting its purposes;⁸ and (3) federal oversight once a state obtained federal approval to administer and enforce a state program.⁹ Once a State program is approved, the state becomes the “regulatory authority”¹⁰ and its jurisdiction “over the regulation of surface coal mining and reclamation operations”¹¹ is exclusive, “except as provided in sections 521¹² and 523¹³ of this title and subchapter IV”¹⁴ of SMCRA.¹⁵ Exclusive jurisdiction gives a state primacy which is limited by § 521.¹⁶ Section 521 gives the Department of the Interior an oversight role which it exercises through the Office of Surface Mining Reclamation and Enforcement (OSM).¹⁷

7. When considering Senator Tower’s amendment to allow states to opt out of S. 7, Senator Metcalf observed:

Too long have we permitted States to permit destruction of their mineral resources by strip mining, surface mining, dredging, and so forth So we have to have minimal standards We have had to tailor this bill to the various geographic and economic problems all over the United States Now if a State wants to have higher standards the State can go ahead and have higher standards

121 CONG. REC. 6,186 (1975).

8. SMCRA §503(a), 30 U.S.C. § 1253(a) (1994). State law must be “in accordance with the requirements of [SMCRA]” and state regulations must be “consistent with [federal] regulations.” SMCRA §§ 503(a)(1), (7), 30 U.S.C. §§ 1253(a)(1), (7) (1994).

The federal regulations implementing this requirement focus on whether the state has an equally, or more, stringent law and the money and personnel to enforce the law. 30 C.F.R. §§ 730-732 (1994).

9. SMCRA §§ 517, 521, 30 U.S.C. §§ 1267, 1271 (1994).

10. SMCRA § 701(22), 30 U.S.C. § 1291(22) (1994).

11. SMCRA § 503(a), 30 U.S.C. § 1253(a) (1994).

12. 30 U.S.C. § 1271 (1994).

13. 30 U.S.C. § 1273 (1994). Section 523 relates to federal lands and will not be discussed further.

14. SMCRA §§ 401-443, 30 U.S.C. §§ 1231-1243 (1994). Subchapter IV deals with abandoned mine reclamation and will not be discussed further. *But see*, 30 U.S.C. § 1235(d), (i) - (j) (1994).

15. SMCRA § 503(a), 30 U.S.C. § 1253(a) (1994):

Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteenth-month period beginning on [the date of enactment of this Act], a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and meeting its purposes

Id.

16. 30 U.S.C. § 1271 (1994).

17. SMCRA created the Office of Surface Mining and Reclamation Enforcement (OSM) in the Department of the Interior to administer and enforce the Act. 30 U.S.C. § 1211 (1994). From the beginning, several Congressmen expressed skepticism about having the Department of the Interior responsible for the program. *See, e.g.*, 118 CONG. REC. 35,048, 35,050 (1972) (Rep.

While SMCRA does not define “exclusive,”¹⁸ it does explain why states are to have “primary responsibility.” “[B]ecause of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Chapter should rest with the States”¹⁹ Thus, if there is ambiguity between where state primacy ends and federal oversight begins, this reason can provide a basis for administrative and judicial interpretation.

This article will analyze one of the exceptions to state exclusivity, § 521, which gives the Department of the Interior an oversight role.²⁰ It is fairly long and complex. Obviously, oversight includes inspections, but it could go beyond inspections; it could include, for example: issuing notices of violation; issuing cessation orders; suspending or revoking permits; initiating court proceedings; and issuing permits. The important question is to what extent it does.

Hechler); 118 CONG. REC. 35,052-53 (1972) (Rep. Vanik); 120 CONG. REC. 24,110, 38,601-02 (1974) (Rep. Hechler). When an amendment was offered in 1974 to substitute the Environmental Protection Agency for the Department of Interior, Congressman Udall objected on the basis that the Committee had chosen to create a new office and place it within Interior as a compromise between EPA, being proposed by environmental supporters, and the Bureau of Mines, being proposed by the mining industry. 120 CONG. REC. 24,110 (1974) (Rep. Udall).

18. Under S. 425, passed by the Senate in 1973, § 204(a) provided: “A State, to be eligible to assume exclusive jurisdiction, except as provided by section 215 [federal enforcement] and title III [abandoned and nonreclaimed mined areas] of this Act, over surface mining and reclamation operations on lands within such State, shall” 119 CONG. REC. 33,334 (1973). The Senate report did not contain a specific discussion of this language. See S. REP. NO. 402, 93d Cong., 1st Sess. 50-51 (1973).

The bill that passed the House in 1974, H.R. 11,500, did not contain a provision for “exclusive jurisdiction,” referring instead simply to the situation when a state “wishes to assume State regulatory authority under this Act.” H.R. 11,500 § 203(a); 120 CONG. REC. 25,275 (1974). The section provided: “Each State in which there is or many [sic] be conducted surface coal mining operations, and which wishes to assume State regulatory authority under this Act, shall” The House report did not comment on this difference with the Senate version. H.R. REP. NO. 1072, 93d Cong., 2d Sess. 130 (1974). With the House language it was unnecessary to state any exceptions. The conference adopted the Senate’s exclusive jurisdiction language but with the House’s introductory language. Section 503(a); H.R. REP. NO. 1522, 93d Cong., 2d Sess. 20 (1974). The 1974 conference language carried forward into SMCRA. The only change that occurred between the 1974 conference and the 1977 enactment of SMCRA clarified that the exclusive jurisdiction provision does not extend to federal lands. The following 1974 conference language shows the language added to it subsequently within brackets: “[e]ach State in which there is or may be conducted surface coal mining operations [on non-Federal lands], and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in section[s] 521 [and 523] and title IV of this Act, shall” *Id.*

19. SMCRA § 101(f), 30 U.S.C. § 1201(f) (1994).

20. See *supra* text accompanying notes 13 and 14.

Furthermore, § 517,²¹ regarding federal inspections, makes it clear that §§ 503²² and 521²³ are not the only relevant primacy oversight sections of SMCRA. Neither § 503 nor § 521 mention § 517, yet the applicability of § 517 to oversight is clear. Section 517 states, “[t]he Secretary shall cause to be made such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs”²⁴ Thus, the state-federal primacy-oversight picture is even more complex than §§ 503 and 521 suggest.

Moreover, although Congress already provided for dual federal-state roles in the Clean Air Amendments of 1970²⁵ and the Federal Water Pollution Control Act Amendments of 1972,²⁶ Congress did not copy either of the duality schemes that it had developed in those Acts.²⁷ Therefore, one cannot simply look to precedents from these Acts.

Because most coal mining states have achieved primacy,²⁸ and because important questions continue to be raised about the proper scope of federal oversight,²⁹ as indicated by divergent court opinions,³⁰ this article is an effort to sort out the SMCRA provisions, evaluate the regulations, and consider the soundness of the court decisions.³¹

21. 30 U.S.C. § 1267, discussed *infra* part II(A).

22. See *supra* note 15.

23. 30 U.S.C. § 1271 (1994).

24. SMCRA § 517(a), 30 U.S.C. § 1267(a) (1994).

25. Pub. L. No. 91-604, §§ 107-116, 84 Stat. 1676, 1678-1689.

26. Pub. L. No. 92-500, §§ 301-309, 86 Stat. 816, 844-860 (now known as the Clean Water Act [hereinafter CWA]).

27. For example, under the CWA, the EPA can veto individual state-issued permits. 33 U.S.C. § 1342(d)(2) (1994). Similarities, between these acts and SMCRA, however, did not escape Congress. For example: “[T]his legislation will be a floor under State activity and . . . the several States may make such special deviations from these standards as are needed. Here we have followed the legislative technique adopted in the Federal Water Pollution Control Act and the Clean Air Act.” 119 CONG. REC. 33,189 (1973) (Sen. Metcalf).

28. See 30 C.F.R. §§ 901 - 950 (1994) (24 states have primacy; 11 states have federal programs). Perhaps the federal government’s full administration in eleven states carries over into its oversight role in the other twenty-four. If the federal government did not enforce the law directly in any state, it would not necessarily be geared up for doing so.

29. See, e.g., *OSM Seeks Comments on Modifications to Ten-Day Rule*, COAL WK., Sept. 18, 1995, at 8; ENV’T REP. (BNA) [CURRENT DEV.] 526 (1995); *AMC/NCA Seek State Primacy Clarification*, THE MINING RECORD, Nov. 3, 1993, at 2; *The State of Primacy: Fact or Fiction Under Federal Oversight? A Panel Presentation*, E. MIN. LAW FOUND. SPECIAL INST.: DEV. UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT, Dec. 5-6, 1991.

30. See *infra* part IV(D).

31. This article does not discuss judicial action as a federal enforcement tool as the judicial actions provided for are generally secondary, in aid of the primary enforcement tools that will be discussed in this article. SMCRA § 521(c), 30 U.S.C. § 1271(c) (1994). See, e.g., *United States v. Hubler*, 117 B.R. 160, 163 (W.D. Pa. 1990), *aff’d* 928 F.2d 1131 (3d Cir. 1991).

First, this article will discuss federal inspections when a state has primacy as set forth in sections 517 and 521 of SMCRA. These sections deal with federal inspections to evaluate a state's administration of its program and investigate a state's possible lack of enforcement of its program respectively. Second, this article evaluates the federal government's ability to intervene pursuant to § 521 in a coal mining operation. Third, this article discusses the federal enforcement of a state program and federal substitution of a federal program for the state program as provided in three sections: §§ 504(a)(3), 504(b), and 521(b). In order to determine the scope of these sections as well as their interpretation, it is necessary to analyze their legislative and regulatory history as well as their interpretations by the courts. Finally, this article briefly illustrates the impact of a finding of a pattern of violations on federal regulation of coal mining operations.

II. FEDERAL INSPECTIONS DURING STATE PRIMACY

Sections 517³² and 521³³ of SMCRA clearly provide for federal inspections during state primacy.³⁴ Section 517 grants the Secretary of the Interior authority to require inspections in order to evaluate the administration of a state's program. Next, § 521 gives the federal government the power of inspection upon learning of a state's possible lack of enforcement.³⁵

A. Section 517

Section 517 provides that the Secretary "shall cause to be made such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs."³⁶ SMCRA does not define necessary. Further, the

Further, this article does not discuss the status of the applicant violator system (AVS) or of the citizen suit after approval of a state program. The AVS is based on SMCRA § 510(c), 30 U.S.C. § 1260(c) (1994). See *Save Our Cumberland Mountains v. Watt*, 22 Env't Rep. Cas. (BNA) 1217 (D.D.C. 1985). As to citizen suits, see *Molinary v. Powell Mountain Coal Co.*, 779 F. Supp. 839 (W.D. Va. 1991), and compare the cases cited therein. See also *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494 (3d Cir. 1987) (holding that the federal courts had no jurisdiction to hear a damage suit brought by private plaintiffs alleging violation of a permit condition during State primacy).

32. 30 U.S.C. § 1267 (1994).

33. 30 U.S.C. § 1271 (1994).

34. SMCRA §§ 517, 521, 30 U.S.C. §§ 1267, 1271 (1994). Other oversight federal inspections exist in SMCRA, particularly for follow-up inspections, but will be discussed, if necessary, in the context of relevant enforcement provisions.

35. See *infra* part II(B).

36. SMCRA § 517(a), 30 U.S.C. § 1267(a) (1994). Although dating from 1974, the 1973 and 1974 Senate and House reports say nothing about the provision. See § 517(a), H.R. CONF. REP.

regulations do not adequately clarify the scope of this provision except to provide that these inspections “shall be conducted jointly with the State regulatory authority where practical and where the State so requests”³⁷ This means simply that the Federal government can decide that joint inspections are not practical, and the state can decide that it does not want the Federal government to inspect when the state inspects.

Because § 517 inspections are authorized to “evaluate the administration of approved State programs,”³⁸ the assumption would be that these inspections would not lead to direct federal enforcement during state primacy. However, at the very least, the federal government may proceed to direct enforcement of SMCRA based on “any inspection” when a condition, practice, or violation results in an “imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources”³⁹

Finally, § 517 makes it clear that although the objective is to evaluate state administration, the inspections are to be of “surface coal mining and reclamation operations.”⁴⁰ The definition in SMCRA of these operations focuses on specified activities and specified areas where the activities occur or that are affected by the activities.⁴¹

B. Section 521

Under § 521,⁴² when the Secretary of the Interior learns of a possible lack of enforcement,⁴³ the Secretary must notify the state and, if the state fails to act or to explain its inaction within ten days,⁴⁴ the

No. 1522, 93d Cong., 2d Sess. 43 (1974). The 1975 House Report does state that “Federal inspections should take place in sufficient number to carry out properly these back-up and monitoring functions.” H.R. REP. NO. 45, 94th Cong., 1st Sess. 119 (1975). The 1975 Senate report essentially repeats this language. SEN. REP. NO. 28, 94th Cong., 1st Sess. 180-81 (1975). However, neither the House nor the Senate report for 1977 includes the language. See H.R. REP. NO. 218, 95th Cong., 1st Sess. 129 (1977); SEN. REP. NO. 128, 95th Cong., 1st Sess. 85-86 (1977).

37. 30 C.F.R. § 842.11(a)(1) (1994).

38. SMCRA § 517(a), U.S.C. § 1267(a) (1994).

39. SMCRA § 521(a)(2), 30 U.S.C. § 1271(a)(2) (1994). See discussion *infra* notes 51-4.

40. SMCRA § 517(a), U.S.C. § 1267(a) (1994).

41. SMCRA § 701(28), 30 U.S.C. § 1291(28) (1994).

42. SMCRA § 521, 30 U.S.C. § 1271 (1994).

43. “[O]n the basis of any information available to him, including receipt of information from any person” SMCRA § 521(a)(1), 30 U.S.C. § 1271(a)(1) (1994). Information from § 517 inspections would seem to be “available to [the Secretary].” *Id.*

44. The state may waive this notification requirement. For an example of advance waiver by a state, see *Patrick Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 661 F. Supp. 380, 383-84 (W.D. Va. 1987).

Secretary must conduct a federal inspection, unless the Secretary determines that the State had "good cause."⁴⁵ SMCRA does not define good cause. However, in 1988 the Secretary provided a regulatory definition;⁴⁶ and, of course, good cause is a term that has been much used throughout the law.⁴⁷

Section 521 waives notification to the State when an informant "provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action."⁴⁸ The assumption appears to be that under these circumstances, the Secretary must proceed directly with inspection.⁴⁹

45. SMCRA § 521, 30 U.S.C. § 1271(a)(1) (1994). The notification provision originates in S. 425, passed by the Senate in 1973. 119 CONG. REC. 33,333 (1973). Section 215(a) therein provides that when the Secretary, based on any available information, "has reason to believe that any person may be" in violation of any requirement of the Act or any permit condition required by the Act, the Secretary "shall notify the State regulatory authority." Section 215(a), 119 CONG. REC. 33,338 (1973). The Senate report states that this provision "carries out the Act's basic concept that the States should be responsible for regulation." S. REP. NO. 402, 93d Cong., 1st Sess. 66 (1973). The notification provision in H.R. 11,500 added that if the State "fails within ten days after notification to take appropriate action to cause said violations to be corrected or to show good cause for such failure" the Secretary was to immediately order federal inspection. Section 220(a)(1), 120 CONG. REC. 25,283 (1974). The House bill included two additional modifications: (1) a specific reference to information received by the Secretary from "any person" and (2) changed "may be" in violation to "is" in violation. All House bill changes were adopted by the Conference, H.R. CONG. REP. NO. 1522, 93d Cong., 2d Sess. 49 (1974), and the language moves forward into SMCRA § 521(a)(1) with only the addition of the sentence discussed *infra* notes 48-50, providing for waiver of the notification in some cases of threats of environmental harm. This waiver language was added in the 1977 Senate bill, 123 CONG. REC. 15,794 (1977), as it was not contained in the 1977 House bill, 123 CONG. REC. 12,672 (1977). The Senate report states only that "the 10-day notification does not apply if the State has failed to act to avoid imminent harm or environmental damage." S. REP. NO. 128, 95th Cong., 1st Sess. 89 (1977).

46. The Secretary's definition states:

Good cause includes: (i) Under the State program, the possible violation does not exist; (ii) the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist; (iii) the State regulatory authority lacks jurisdiction under the State program over the possible violation or operation; (iv) the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) [sic] of the Act have been met; or (v) with regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.

30 C.F.R. § 842.11(b)(ii)(B)(4) (1994). The second reference to 525(c) should be 526(c). This definition was upheld in *National Coal Ass'n v. Interior Dep't*, 39 Env't Rep. Cas. (BNA) 1624, 1635-39 (D.D.C. 1994).

47. See BLACK'S LAW DICTIONARY 692 (6th ed. 1990).

48. 30 U.S.C. § 1271(a)(1) (1994). The meaning of this language is discussed *infra* part III.

49. The section is not explicit. But because the Secretary must inspect when the state fails to act within the 10-day notification period, it seems safe to assume that the Secretary must inspect immediately when notification is waived. The waiver language was not in the bills that passed in 1973 and 1975. It first appeared in the 1977 Senate bill. 123 CONG. REC. 15,794 (1977).

The regulations, although not well written, do provide for direct inspection in these circumstances.⁵⁰

III. DIRECT FEDERAL INTERVENTION DUE TO IMMINENT DANGER OR SIGNIFICANT HARM

Under SMCRA § 521, the Secretary must issue a cessation order⁵¹ to intervene directly against the mine operator if, after

any [f]ederal inspection, . . . [] the Secretary . . . determines that any condition or [practice] exist[s], or that [a] permittee is in violation⁵². . . which condition, practice, or violation [results in] an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.⁵³

Presumably “any federal inspection” includes § 517 inspections.⁵⁴

The bill that passed the Senate in 1973 provided that if, during a federal inspection, a violation of the Act or a permit condition required by the Act is discovered and the violation “creates a danger to life, health, or property, or would cause significant harm to the environment, the Secretary or his inspectors may immediately order a cessation of surface mining and reclamation operations.”⁵⁵ The 1974 House bill changed the provision in three respects.⁵⁶ First, it expands the scope beyond violations of the Act or permit conditions required by the Act to include the existence of “any condition[s] or practice[s].”⁵⁷ Second, the provision uses different language to describe the covered effects by requiring “an imminent danger to the health or

50. See 30 C.F.R. § 842.11(b)(1)(i), (ii)(C) (1995).

51. Section 521(a)(2) provides that the Secretary “shall immediately order a cessation.” 30 U.S.C. § 1271 (a)(2) (1994). Earlier versions of the Act had only provided that the Secretary “may immediately order a cessation.” See language quoted in text accompanying *infra* note 114 (emphasis added).

52. “[O]f any requirement of this chapter or any permit condition required by this chapter.” 30 U.S.C. § 1271(a)(2) (1994).

53. SMCRA § 521(a)(2), 30 U.S.C. § 1271(a)(2) (1994).

54. The 1975 House report provided:

During any Federal inspection the Federal Inspector is required to act . . . even if the inspection is being made for the purposes of monitoring a State regulatory authority’s performance. To provide otherwise would be to perpetuate the possibility of tragedies such as the Buffalo Creek Flood, which can be at least partially attributed to the sad fact that government regulation of the collapsed [sic] mine waste banks fell between the cracks of the not quite meshed functions of various State and Federal agencies.

H.R. REP. NO. 45, 94th Cong., 1st Sess. 119 (1975). This language is basically reiterated in the 1975 and 1977 Senate reports. S. REP. NO. 28, 94th Cong., 1st Sess. 181 (1975); S. REP. NO. 128, 95th Cong., 1st Sess. 90-91 (1977). Section 517 is discussed further *supra* part II(A).

55. S. 425, 93rd Cong., 1st Sess. § 215(b) (1973).

56. H.R. 11500, 93rd Cong., 2d Sess. § 220(a)(2) (1974).

57. The 1977 Senate report comments on this aspect:

safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources."⁵⁸ Third, the House bill requires the Secretary to issue a cessation order.⁵⁹ The Conference adopted the 1974 changes, and they were incorporated into SMCRA § 521(a)(2) without further change,⁶⁰ except for a new sentence added in 1977.⁶¹ This new sentence requires the Secretary to go beyond the cessation order in some circumstances and "impose affirmative obligations . . . necessary to abate"⁶² the danger or harm.

Whereas the language regarding waiver of the notification discussed above⁶³ was limited to imminent danger of significant environmental harm, the cessation order language adds public health and safety. Although SMCRA contains a definition of "imminent danger to public health and safety,"⁶⁴ it does not contain a definition of significant, imminent environmental harm.⁶⁵ However, the Secretary defined "significant, imminent environmental harm" in the regulations:

Since neither the Congress nor any regulatory authority can totally predict the public and environmental hazards arising from such a complex endeavor as surface coal mining, the bill does not restrict the closure authority of section 421(a)(2) to violations of the Act or permit. Instead any condition or practice giving rise to imminent danger or environmental harm is sufficient to invoke the authority.

S. REP. NO. 128, 95th Cong., 1st Sess. 91 (1977).

58. H.R. REP. NO. 45, 94th Cong., 1st Sess. 119 (1975).

59. The Conference report specifically comments on this change. H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess. 78 (1974).

60. In the 1975 House bill, the House had inserted the word irreparable so that the language would read "significant, imminent, irreparable environmental harm." 121 CONG. REC. 6828 (1975). The House commented on irreparable at H.R. REP. NO. 45, 94th Cong., 1st Sess. 119-120 (1975). The Conference adopted the Senate version, 121 CONG. REC. 6,216 (1975), which left out irreparable. H.R. CONF. REP. NO. 189, 94th Cong., 1st Sess. 52 (1975).

61. H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess. 49-50 (1974).

62. The sentence first appeared in both the 1977 House, 123 CONG. REC. 12,672 (1977), and Senate, 123 CONG. REC. 15,794 (1977), bills but with a slight variation in language. The Senate language was adopted.

63. See *supra* text accompanying notes 48-50.

64. SMCRA § 701(8), 30 U.S.C. § 1291(8):

[I]mminent danger to the health and safety of the public means the existence of any condition or practice, or any violation of a permit or other requirement of this [Act] in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

Id.

65. Cf. *supra* notes 57 & 60. In *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425, 428 (W.D. Va. 1980) (mem.), the court held that the cessation order provision violated due process of law in failing to provide sufficient objective criteria for its exercise. The Supreme Court reversed, quoting the definition of imminent danger to the health and safety of the public set forth in *supra* note 64 and the Secretary's definition of "significant, imminent

- (a) An environmental harm is an adverse impact on land, air, or water resources which resources include, but are not limited to, plant and animal life.
- (b) An environmental harm is imminent, if a condition, practice, or violation exists which—
- (1) Is causing such harm; or,
 - (2) May reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under section 521(a)(3) of the Act.
- (c) An environmental harm is significant if that harm is appreciable and not immediately repairable.⁶⁶

Further, the Secretary has provided that conducting “surface . . . mining operations . . . without a . . . permit [is a situation that] causes or can reasonably be expected to cause significant, imminent environmental harm.”⁶⁷ Apparently, the Secretary added this latter regulation to provide relief for Congress’ failure to include a specific provision in SMCRA allowing the Secretary to issue a cessation order for operating without a permit under SMCRA.⁶⁸

The statutory definition of imminent danger to public health and safety might have been used to find a meaning for imminent in the environmental harm context, that is, a condition, practice or violation that could reasonably be expected to cause the prohibited consequence before the condition, practice or violation can be abated.⁶⁹ However, the Senate report accompanying S. 7 suggests something less imminent is intended. The report states, “[i]mminent is to be construed for the purposes of environmental harm to mean a harm that could occur if the condition is not abated within a reasonable time.”⁷⁰ The language in the Senate report appears to be the source of the Secretary’s regulatory definition. As to defining “significant environmental harm,” the Senate report states: “[t]he term ‘significant’ should be construed to include factors other than whether environmental damage to land, air or water resources can be repaired. A ‘significant’ effect could be the product of one or more such factors as the geographic scope, intensity, or long lasting effects of the damage.”⁷¹ A

environmental harm” in 30 C.F.R. § 701.5 (1980). *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 298-303 (1981).

66. 30 C.F.R. § 701.5 (1995).

67. 30 C.F.R. § 843.11(a)(2) (1995) (with two stated exceptions).

68. *See United States v. Threet*, 684 F. Supp. 169, 172 (M.D. Tenn. 1987) (mem.) (action for injunctive relief under SMCRA, § 521(c)).

69. *See supra* note 64.

70. S. REP. NO. 128, 95th Cong., 1st Sess. 91 (1977).

71. S. REP. NO. 128, 95th Cong., 1st Sess. 91 (1977). *Cf. supra* note 60, concerning the House’s unsuccessful effort to add the word “irreparable” to the phrase.

1973 colloquy between Senators Baker and Jackson illustrates what should be considered a significant environmental harm:

Mr. BAKER. If the storage at any location of the spoil from mountaintop mining does get away and we wake up one morning and find a heavily silted river, that is pretty good evidence that it was not handled in a satisfactory manner. What happens then?

Mr. JACKSON. The operation could be shut down. And they would have to correct it. The point is that there must be compliance, and the standards here, I think, are reasonable ones. We are trying to achieve a certain goal. The siltation of a river is a pretty good illustration of the problems that we have to deal with. In this kind of illustration . . . , the sediment can be taken as good evidence, and the operation can be shut down if it is not making a reasonable effort to comply with the standards laid down in the permit.

Mr. BAKER. Then the Department of the Interior can shut down such an operation if there is excessive siltation?

Mr. JACKSON. The Senator is correct. The bill contemplates, of course, that the State undertake this. For example, if the State will not see that the matter is enforced, the Secretary of the Interior then, with the State having failed to act, can intervene. That is found on page 99 of the bill, section 215(b), which reads as follows: [setting forth the "danger to life, health, or property, or would cause significant harm to the environment" language].⁷²

Furthermore, the National Environmental Policy Act of 1969⁷³ uses the term significant in the context of environmental effects and hundreds of cases deal with its meaning in that context.⁷⁴ However, because SMCRA emphasizes the different physical features of the various coal mining areas,⁷⁵ it may be reasonable to view what constitutes significant environmental harm in an area to be proportional to the value of the resource that is being threatened. Congress itself, for example, provided very stringent controls on mining alluvial valley floors.⁷⁶

In *M & J Coal Co. v. United States*,⁷⁷ subsidence gave rise to cracks in the ground, collapsing structures, and breaks in gas and water lines as well as taut electric lines.⁷⁸ After state refusal to take

72. 119 CONG. REC. 33,313 (1973).

73. 42 U.S.C. §§ 4321-4370(d) (1994). See particularly 42 U.S.C. § 4332(C) (1994) ("major Federal actions significantly affecting the quality of the human environment").

74. D. MANDELKER, NEPA LAW AND LITIGATION §§ 8.06-8.08 (2d ed. 1992).

75. See *supra* text accompanying note 19.

76. SMCRA § 510(b)(5), 30 U.S.C. § 1260(b)(5) (1988). See also, *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1560 (Fed. Cir. 1985), 926 F.2d 1169, 1177 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991).

77. 47 F.3d 1148, 1150-51 (Fed. Cir. 1995).

78. *Id.* at 1151-52.

action, OSM issued a cessation order in 1986 pursuant to SMCRA § 521(a)(2).⁷⁹ The order required the permittee to protect the public from surface cracks in the ground, restore the pre-mining capacity of the surface to support structures and other uses, and mine pursuant to a revised subsidence control plan.⁸⁰ After mining was over, the permittee sued in the Court of Federal Claims,⁸¹ claiming that the revised subsidence control plan required leaving 99,700 additional tons of coal unmined resulting in \$580,000 of lost profits. Recovery was sought on the basis of a taking.⁸² The Court of Federal Claims granted defendant's motion for summary judgment.⁸³ On appeal, the Federal Circuit affirmed,⁸⁴ applying the nuisance analysis from *Lucas v. South Carolina Coastal Council*.⁸⁵ The Circuit held that the mine permittee had no right to conduct activities that threatened public health and safety, a classic aspect of public nuisance doctrine.⁸⁶ Furthermore, even if surface owners had deeded the right to subside the surface, private parties could not contract away public rights.

IV. FEDERAL ENFORCEMENT OF A STATE PROGRAM AND SUBSTITUTION OF A FEDERAL PROGRAM

A. Introduction

SMCRA clearly provides for federal enforcement of a State program. Three SMCRA subsections, § 504(a)(3),⁸⁷ § 504(b),⁸⁸ and § 521(b),⁸⁹ are important provisions which must be considered when analyzing federal enforcement. Both subsections 504(b) and 521(b) refer to federal enforcement of a State program. Section 504(a)(3) provides for the substitution of a Federal program for a State program.

Essentially, substitution of a federal program would occur when a State decides not to carry on with its State program; the situation would be essentially the same as if the State never prepared a State

79. *Id.* at 1151.

80. *Id.*

81. *M & J Coal Co. v. United States*, 30 Cl. Ct. 360, 371 (1994).

82. *Id.* at 366.

83. *Id.* at 371.

84. *M & J Coal Co.*, 47 F.3d at 1155.

85. 505 U.S. 1003 (1992).

86. *M & J Coal Co.*, 47 F.3d at 1154.

87. SMCRA § 504(a)(3), 30 U.S.C. § 1254(a)(3) (1988).

88. SMCRA § 504(b), 30 U.S.C. § 1254(b) (1988).

89. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1988).

program.⁹⁰ When the federal government replaces the State program with its federal program, the federal government becomes the regulatory authority in the State⁹¹ and has “exclusive” jurisdiction or primacy.⁹² It was necessary to point out the existence of § 504(a)(3) and explain its role⁹³ as the only point at which the federal government resumes exclusivity and thus primacy, with the state losing its primacy. However, because this article deals with the federal role during state primacy, it is not necessary to discuss the provision further.

Due to the controversy surrounding the scope of the Secretary’s oversight role, it is necessary to deal with the precise language of §§ 504(b) and 521(b). Subsection 504(b) provides:

In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section [521] 1271 of this title, of that part of the State program not being enforced by such State.⁹⁴

Subsection 521(b) provides:

Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such

90. “The assumption of regulatory authority over surface mining operations in any State by the Secretary through promulgation of a Federal program for that State is regarded as a ‘last resort’ measure.” S. REP. NO. 402, 93d Cong., 1st Sess. 52 (1974); S. REP. NO. 28, 94th Cong., 1st Sess. 205 (1975); S. REP. NO. 128, 95th Cong., 1st Sess. 73 (1977).

91. SMCRA § 701(22), 30 U.S.C. § 1291(22) (1988).

92. The 1974 Senate Report notes that “[p]romulgation of a Federal program gives the Secretary *exclusive jurisdiction* for regulation of surface mining operations in the State. Surface mine operators need to know which regulations—Federal or State—they must follow at any given point in time.” S. REP. NO. 402, 93d Cong., 1st Sess. 52 (1974). This language is repeated in the 1975 and 1977 Senate reports. S. REP. NO. 28, 94th Cong., 1st Sess. 204 (1975); S. REP. NO. 128, 95th Cong., 1st Sess. 72 (1977). Thus Congress’ primary concern is that operators know which regulations to follow and not so much who is enforcing the regulations. *See also infra* note 118 and the text accompanying *infra* note 119.

93. *See also* the contextual discussion of § 504(a)(3) in the historical development presented *infra* part IV(B) and text accompanying notes 135-36.

94. SMCRA § 504(b), 30 U.S.C. § 1254(b) (1988).

State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith⁹⁵

Two questions arise immediately. First, why are there two subsections, 504(b) and 521(b), that appear to deal with the same thing? Second, how do they interrelate? Ultimately, the two questions can be answered only through an examination of the historical development of the two subsections to which this article now turns. The historical review will be followed by a discussion of the treatment of the sections by the Secretary, a review of the court decisions interpreting the sections, a synopsis of current initiatives in the agency and Congress, and a concluding discussion.

B. *Legislative History of SMCRA §§ 504⁹⁶ and 521⁹⁷*

Although SMCRA has a legislative history dating back to the late 1960's,⁹⁸ the first passage of a predecessor bill occurred in the House of Representatives on October 11, 1972.⁹⁹ Under the House version of the Coal Mine Surface Area Protection Act of 1972,¹⁰⁰ the states operated the program¹⁰¹ with only federal monitoring¹⁰² and this version specifically provided for the power to withdraw approval from a State.¹⁰³ The specific monitoring provisions called for: (1) "periodic spot inspections;"¹⁰⁴ (2) "at least annually, reports from such States;"¹⁰⁵ and (3) "each second year . . . a public hearing."¹⁰⁶ While apparently some Congressmen assumed that a federal inspector would

95. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1988).

96. See *supra* text accompanying notes 87-94.

97. See *supra* parts II(B) and III and text accompanying *supra* note 95.

98. See NATIONAL RESEARCH COUNCIL, SURFACE COAL MINING EFFECTS ON GROUND WATER RECHARGE 118-120 (1990); Robert A. Waters, Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979); Louise C. Dunlap, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975*, 21 ROCKY MTN. MIN. L. INST. 11 (1975).

99. H.R. 6482, 92nd Cong., 2d Sess., 118 CONG. REC. 35,056 (1972) (enacted).

100. *Id.* at 35,031-38.

101. *Id.* at 35,037. State participation was needed because of the "magnitude and diversity" involved. *Id.* at 35,038 (statement of Rep. Edmonson).

102. *Id.* at 35,037.

103. *Id.*

104. *Id.*

105. *Id.* These reports would probably be based on the annual reports from operators. *Id.* at 35,036.

106. *Id.* at 35,037. According to Congressman Burton:

enforce the Act upon finding a violation during an episodic inspection,¹⁰⁷ the language of the Act seemed to suggest that the only federal oversight functions were to inspect and to report to Congress unless the federal government withdrew approval of a State program. Clearly the bill provided for no partial withdrawal of approval. However, the bill did provide for mandamus actions by citizens against public officers and employees¹⁰⁸ and for damage suits against operators by anyone harmed by noncompliance.¹⁰⁹ The Senate, however, did not pass this bill in 1972.¹¹⁰

On October 9, 1973, the Senate passed S. 425,¹¹¹ the Surface Mining Reclamation Act of 1973. Under S. 425, States were eligible to assume exclusive jurisdiction as discussed earlier.¹¹² Section 215 stated specifically what the Secretary was to do, or could do, when the Secretary learned about a violation or possible violation, after a State had exclusive jurisdiction.

First, when the Secretary, based on any available information, "has reason to believe that any person may be in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority . . ." ¹¹³ Second, if during a federal inspection a violation of the Act or a permit condition required by the Act is discovered and the violation "creates

[T]he Federal Government would not then be required or expected to make regular twice-a-month inspections of reclamation. Thus the Federal role, performed by the Secretary of the Interior, would be confined to episodic checks on individual operations and on the quality of the enforcement of the State plan. During those irregular check-ups, whether self-initiated or following complaints of nonenforcement, we expect the Secretary . . . to compile full and sufficient data to inform the Congress, in the next annual report to the Congress, of any and all deficiencies in enforcement. Such information should include names, dates, penalties assessed by Federal inspectors, and other similar data.

Id. at 35,044 (statement of Rep. Burton). However, the reference to "penalties assessed by Federal inspectors" suggests that at least Congressman Burton expected a federal inspector on an episodic inspection to follow-up and have corrected and penalized any violations that were discovered. Because there were no specific provisions in the Act for such action, apparently the inspector would simply follow the same procedures as if the inspection had occurred during federal primacy.

107. See *supra* note 106.

108. H.R. 6482, 92nd Cong., 2d Sess. § 30, 118 CONG. REC. 35,036 (1972).

109. H.R. 6482, 92nd Cong., 2d Sess. § 31, 118 CONG. REC. 35,037 (1972).

110. On September 18, 1972, the Senate Committee on Interior and Insular Affairs had reported out S. 630 with a recommendation that it pass. S. REP. No. 1162, 92 Cong., 2d Sess. 1 (1972).

111. 93rd Cong., 1st Sess., 119 CONG. REC. 33,333 (1973). It passed with 82 yeas, 8 nays, and 10 not voting. *Id.*

112. See *supra* text accompanying notes 7-17.

113. S. 425, 93rd Cong., 1st Sess. § 215(a), 119 CONG. REC. 33,338 (1973). See discussion *supra* part II(B).

a danger to life, health, or property, or would cause significant harm to the environment, the Secretary or his inspectors may immediately order a cessation of surface mining and reclamation operations. . . .”¹¹⁴ Third, if the “Secretary finds that violations . . . appear to result from a failure of the State to enforce such State Program effectively, the Secretary is to notify the State.”¹¹⁵ If the “failure extends beyond the thirtieth day after . . . notice” to the State, the Secretary is to “give public notice” and begin enforcing “any permit condition required under this Act”¹¹⁶ This enforcement would continue until the Secretary is satisfied that the State would enforce its State program.¹¹⁷ Thus § 215(c) is the counterpart of SMCRA § 521(b). There was no counterpart to SMCRA § 504(b). However, S. 425 did provide in § 205(a)(3) that “the Secretary shall . . . implement a Federal Program . . . if [the] State . . . fails to enforce its approved State Program as provided for in this Act.”¹¹⁸ The Senate report explained the relationship between §§ 215(c) and 205(a)(3) this way:

Subsection (c) [of § 215] provides for Federal enforcement when the Secretary determines violations of an approved State program are so widespread as to indicate a failure of the State to enforce its program. . . . Under Federal enforcement, the Secretary must enforce all permit conditions required under the Act either by issuing an order for compliance or bringing civil or criminal action. Of course, if the State’s unwillingness to enforce its program continues for any

114. S. 425, 93rd Cong., 1st Sess. § 215(b), 119 CONG. REC. 33,338 (1973). See discussion *supra* part III.

115. S. 425, 93rd Cong., 1st Sess. § 215(c), 119 CONG. REC. 33,338 (1973).

116. *Id.*

117. *Id.*

118. S. 425, 93rd Cong., 1st Sess. § 205(a)(3), 119 CONG. REC. 33,335 (1973). This section carried forward into SMCRA except for the addition of some language from the 1974 House version and the addition of a proviso in 1975 that turned the structure into nonsense. See S.7, 94th Cong., 1st Sess., 121 CONG. REC. 6,208 (1975); H.R. CONF. REP. No. 189, 94th Cong., 1st Sess. 23 (1975) (§ 504(a)). The final language is set forth below with the 1974 House additions, H.R. REP. No. 1072, 93d Cong., 2d Sess. 9 (1974) § 204(a), included in a single bracket, 1975 additions in a double bracket, and the one subsequent addition in a triple bracket:

The Secretary shall prepare, and subject to the provisions of this section, promulgate and implement a Federal program for a State [[no later than thirty[[[-four]]] months after the date of enactment of this Act]] if such State —

. . .

(3) fails to [implement,] enforce [, or maintain] its approved State program as provided for in this Act.

Id. The language added in 1975 by the Senate and Conference may make sense when read in connection with subdivision (1) (omitted in the quote), but makes no sense when read in connection with subdivision (3) here under consideration.

length of time, the Secretary is expected to promulgate and implement a Federal program pursuant to section 205 rather than to enforce those aspects of the State program and those requirements of permits issued under the State program which are required by the Act.¹¹⁹

Thus, SMCRA of 1973 spelled out the federal/state relationship after a State received approval of a State program in more detail than the House bill passed in 1972.

The 1973 SMCRA provided for an expanded federal role although the 1972 provisions requiring annual reports from the states and mandatory every other year public hearings were gone. These refinements in SMCRA of 1973 provided a sound basis for the statement in the 1973 Senate Report about the clarity of the federal versus state roles:

[T]he Committee has provided the Secretary of the Interior with the authority to monitor State enforcement by inspection, and to enforce the requirements of the Act in the event of failure of a State to administer or enforce an approved State program, or any part thereof.¹²⁰ Should Federal enforcement of a State program occur, the bill prevents any confusion arising from overlapping or dual Federal-State jurisdictions, by carefully defining the extent of the regulatory power of both the Federal and the State authorities.¹²¹

Only the factual determination of whether the imminent danger or significant harm conditions existed or whether violations were arising because the state was not enforcing the state program effectively had to be made; it was clear what the Secretary had to, or could, do once those factual determinations were made.

The bill that passed the House, H.R. 11,500,¹²² contained provisions for the same federal interventions that were in the Senate's SMCRA of 1973 (S. 425),¹²³ although in different and generally more

119. S. REP. NO. 402, 93d Cong., 1st Sess. 67 (1973).

120. However, there is no reference in S. 425 to "part" or "parts."

121. S. REP. NO. 402, 93d Cong., 1st Sess. 41 (1973) (quoted by Sen. Jackson at 93rd Cong., 1st Sess., 119 CONG. REC. 33,186 (1973)). See also, *id.* at 33,182-83 (comments of Sen. Jackson), and *id.* at 33,313 (discussion between Senator Baker and Senator Jackson as to § 215(b), allowing Secretary to intervene directly with cessation order if there is danger to life, health, or property or potential significant harm to the environment).

122. The House passed H.R. 11,500, on July 25, 1974, with 291 yeas, 81 nays, and 62 not voting. 93rd Cong., 2d Sess., 120 CONG. REC. 25,272 (1974).

123. See *supra* text accompanying notes 113-19.

expansive language and in a more convoluted format.¹²⁴ The notification to the State provision and the imminent danger or significant harm enforcement provision appear in the same order as in the Senate's SMCRA of 1973,¹²⁵ but the provision regarding a State's failure to enforce its program is placed in a separated subsection.¹²⁶ Furthermore, the House bill adds to the provision on a State's failure to enforce its program that the Secretary "shall issue new or revised permits in accordance with requirements of this Act, and may issue such notices and orders as are necessary for compliance therewith."¹²⁷ Where this provision on a State's failure to enforce its program was located in the Senate's SMCRA of 1973, the House bill provides for two additional federal interventions. The first one provides for federal notices of violation directly to permittees,¹²⁸ and the second one provides for federal suspension or revocation of mine permits.¹²⁹ The first one requires that "the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement"¹³⁰ of a violation of either the Act or a permit condition required by the Act discovered during a listed federal inspection.¹³¹ The inspection must

124. See *supra* note 45, as to H.R. 11,500, § 220(a)(1), comparable to S. 425, 93rd Cong., 1st Sess. § 215(a); see text accompanying *supra* notes 56-60, as to H.R. 11,500, § 220(a)(2), comparable to S. 425, 93rd Cong., 1st Sess. § 215(b).

125. Compare H.R. 11,500, § 220(a)(1) & (2) with S. 425, § 215(a) & (b).

126. H.R. 11,500, 93rd Cong., 2d Sess. § 220(b), 120 CONG. REC. 25,284 (1974).

127. *Id.* The Conference adopts the House version verbatim, H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess. 51 (1974), so that it reads as follows:

Whenever the Secretary finds that violations of an approved State program appear to result from a failure of the State to enforce such State program effectively, he shall so notify the State. If the Secretary finds that such failure extends beyond thirty days after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act, the Secretary shall enforce any permit condition required under this Act, shall issue new or revised permits in accordance with requirements of this Act, and may issue such notices and orders as are necessary for compliance therewith.

Id. The identical language appears in the 1975 Conference bill, H.R. REP. NO. 189, 94th Cong., 1st Sess. 53 (1975), but the language does not carry forward into SMCRA unchanged. See *infra* text accompanying notes 164-66.

128. H.R. 11,500, 93rd Cong., 2d Sess. § 220(a)(3), 120 CONG. REC. 25,283 (1974).

129. H.R. 11,500, 93rd Cong., 2d Sess. § 220(a)(4), 120 CONG. REC. 25,284 (1974). This remedy was limited, however, to situations where the Secretary found a "pattern of violations" by a permittee caused by the permittee's "unwarranted failure" to comply with the Act. *Id.*

The Conference adopted this provision as well and as noted above the reference back to § 204(b) inspections is contained in the section. H.R. REP. NO. 1522, 93d Cong., 2d Sess. 50 (1974). The only importance of § 220(a)(4) at this point is its reference back to § 204(b) which carries forward into SMCRA § 521(a)(4) with the (b) deleted. Therefore, the balance of the provision's legislative history is developed when the section is discussed independently later in this article in part V.

130. H.R. 11,500, 93rd Cong., 2d Sess. § 220(a)(3), 120 CONG. REC. 25,283 (1974).

131. *Id.*

occur while the federal government is (1) enforcing a federal program, (2) enforcing a federal lands program, (3) carrying out the initial program,¹³² or (4) enforcing a state program under subsection (b).¹³³ Because subsection (b) seemed fully empowering on its own,¹³⁴ it does not appear that placing subsection (b) in the above list in the new § 220(a)(3) accomplished anything. Regardless, the provision at this point is still clear as to its scope; the only implication for an approved State program is the reference to subsection (b) and that in and of itself is clear enough. The basic structural change made by the House is important, however, because it carries forward into SMCRA.

The House bill, like the Senate's SMCRA of 1973,¹³⁵ provided for promulgation of a federal program when the State failed to carry out its program as a separate remedy apart from the federal enforcement of the State program remedy.¹³⁶ But the House bill contained a new provision, § 204(b),¹³⁷ comparable to SMCRA § 504(b).¹³⁸ While § 204(b) provided that it was enforceable under § 220, comparable to SMCRA § 521, there was no reference to § 204(b) in § 220.

The first question that arises is why the House added § 204(b) when it also had §§ 204(a)(3) and 220(b). Does § 204(b) add something? One possible difference is that §§ 204(a)(3) and 220(b) of the House bill, like their counterparts in the Senate's SMCRA of 1973, require a conclusion that the State is not enforcing its program at

132. *Id.* The initial program provision, § 201, is comparable to SMCRA § 502. This provision would have been removed if a motion by Representative Hosmer of California to substitute § 220(a)(3) of his bill had prevailed. It would have allowed a federal notice of violation only [1] when an inspection was based on enforcement of a Federal program or Federal Lands program or [2] when enforcement under subsection (b) uncovered the violation. The motion failed. H.R. 11,500, 93rd Cong., 2nd Sess., 120 CONG. REC. 25,228 (1974).

133. The Conference adopted § 220(a)(3) with modification. *See* H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess 50 (1974) (§ 521(a)(3)). For further discussion, *see infra* text accompanying notes 141-44.

134. *See supra* note 127 and accompanying text.

135. *See supra* text accompanying notes 118-19.

136. H.R. 11,500, 93rd Cong., 2d Sess. § 204(a), 120 Cong. Rec. 25,276 (1974). The section provides: "The Secretary shall prepare and implement a Federal program for the regulation of surface coal mining in any State which fails to — . . . (2) adequately implement, enforce, or maintain a State program once approved pursuant to section 204." *Id.* As to what carries forward into SMCRA § 504(a), *see supra* note 118.

137. H.R. 11,500, 93rd Cong., 2d Sess. § 204(b), 120 CONG. REC. 25,276 (1974). It provided:

In the event that a State has a regulatory program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 220, of that part of the State program not being enforced by such State.

Id. The Conference changed "regulatory" to "State" H.R. CONF. REP. NO. 1522, 93rd Cong., 2d Sess. 22 (1974) (§ 505(b)); otherwise this language moved forward into SMCRA § 504(b) as written by the House in 1974.

138. *See supra* text accompanying note 94.

all,¹³⁹ whereas § 204(b) of the House bill allows the Secretary to intervene upon finding that the State is not enforcing a part of its program. This conclusion is consistent with the House adding the language to § 220(b) discussed above,¹⁴⁰ which requires the Secretary to issue permits when enforcing the State program. That would be necessary during enforcement of the entire State program. However, with the reference in § 204(b) to § 220 generally and the failure of § 220 to refer anywhere to § 204(b), a second question arises. Which part of § 220 applies to § 204(b). If one adopts this part versus entirety duality interpretation of the House bill, the question just noted is answered by the Conference bill which adopts the House approach but adds a reference in § 220(a)(3) (the notice of violation provision)¹⁴¹ and in § 220(a)(4) (the permit suspension or revocation provision)¹⁴²

139. See text accompanying note 119.

140. See *supra* text accompanying note 127.

141. H.R. CONF. REP. NO. 1522, 93rd Cong., 2d Sess. 50 (1974) (§ 521(a)(3)). The Conference language carries forward into SMCRA as noted below with later additions to the language noted within brackets and language apparently inadvertently omitted noted within parentheses:

When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, but such violation does not create an imminent danger to the health or safety of the public, or cause or can[not] be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation [and providing opportunity for public hearing].

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his (authorized representative determines that the violation has been) abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. [In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.]

Id. The 1974 Conference report comments that: "The conferees elected to adopt the House amendment [regarding federal enforcement pending approval of State program] and to combine all enforcement in one section." H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess. 78 (1974). It is reasonable to assume that the latter comment refers particularly placing (a)(3) in § 220 (now § 521) rather than placing it in § 204(b) (now § 504(b)). The language in the 1975 Conference bill is identical to that in the 1974 Conference bill. H.R. REP. NO. 189, 94th Cong., 1st Sess. 52 (1975). The fact that "not" was omitted in the 1974 and 1975 SMCRA's, even though obviously intended all along, simply speaks to the overcomplexity of the language in SMCRA.

142. H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess. 50 (1974) (§ 521(a)(4)). See *supra* note 129 and *infra* part V.

to inspections conducted under § 204(b).¹⁴³ The reference to § 204(b) in § 220(a)(3) and § 220(a)(4) but not in § 220(b) is consistent with the part versus entirety theory of the difference. The Conference bill did not change § 220(b), and federal enforcement of a State program under § 220(b) and the promulgation of a federal program to replace the State program remain separated and distinct.¹⁴⁴

The 1975 House Report emphasizes the difference between SMCRA § 521(a)(2) on imminent danger or significant harm and SMCRA § 521(a)(3) on the notice of violation. The report stated that the cessation order under § 521(a)(2) can issue

During *any* federal inspection . . . even if the inspection is being made for the purposes of monitoring a State regulatory authority's performance. To provide otherwise would be to perpetuate the possibility of tragedies such as the Buffalo Creek Flood, which can be at least partially attributed to the sad fact that government regulation of the collapsed (sic) mine waste banks fell between the cracks of the not quite meshed functions of various State and Federal agencies.¹⁴⁵

Therefore, unlike § 521(a)(2), the § 521(a)(3) notice of violation applies only to information from specified federal inspections. The comments in the 1974 House Report also seem to make it clear that the authors of the Report believed all bases for federal enforcement were covered. At least there is no qualification to the statement: "In the case of a violation which does not cause such imminent danger, the Secretary must issue a notice setting a period of no more than 90 days for abatement of the violation."¹⁴⁶ A statement about the suspension or revocation of permits provision follows. There is then an intervening paragraph in the Report before subsection (b) is discussed. The Report, therefore, makes no necessary connection between what are now SMCRA § 521(a)(3) and § 521(a)(4) on the one hand and § 521(b) on the other. Furthermore, the 1977 Senate Report contains

143. H.R. CONF. REP. NO. 1522, 93d Cong., 2d Sess. 22 (1974) (§ 504(b)).

144. Although the statutory text on this point seems clear enough, the House report commented that "Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program." H.R. REP. NO. 1072, 93d Cong., 2d Sess. 142 (1974); H.R. REP. NO. 45, 94th Cong., 1st Sess. 204 (1975). The 1975 and 1977 Senate reports put it the same way. S. REP. NO. 28, 94th Cong., 1st Sess. 218 (1975); S. REP. NO. 128, 95th Cong., 1st Sess. 88 (1977).

145. H.R. REP. NO. 45, 94th Cong., 1st Sess. 119 (1975). This language is basically reiterated in the 1975 and 1977 Senate reports. S. REP. NO. 28, 94th Cong., 1st Sess. 181 (1975); S. REP. NO. 128, 95th Cong., 1st Sess. 90 (1977).

146. H.R. REP. NO. 1072, 93d Cong., 2d Sess. 142 (1974). *See also* H.R. REP. NO. 45, 94th Cong., 1st Sess. 205 (1975); S. REP. NO. 128, 95th Cong., 1st Sess. 91 (1977).

very direct language: "The Committee fully intends that under subsection 404(b) [SMCRA § 504(b)] the Secretary will use the enforcement authority granted him under subsections 421(a) [SMCRA § 521(a)] (1) through (4), if a State with an approved State program fails to enforce against an operator who is violating the Act."¹⁴⁷

The language used in the 1977 Senate Report points out a possible second difference between § 204(b) and § 220(b) of the 1974 House bill. Under § 204(b) the focal point to engage the Secretary's action would be failure "to enforce against an operator who is violating the Act." But, under § 220(b) the focal point to engage the Secretary's action would be a determination that violations of an approved State program "result from a failure of the State to enforce such State program effectively."¹⁴⁸ That the failure to enforce against "an operator" who is violating the Act and the general failure "to enforce such State program effectively" leading in turn to further violations of a State program are different is evident. Furthermore, this difference helps explain the assumption in the Congressional reports that there would be federal enforcement if the State failed to enforce even in a single instance.

The 1974 Conference Bill, therefore, contains an apparent comprehensive system for federal enforcement during State primacy. The system would be summarized as follows. If the Secretary learned from any source other than a federal inspection that there might be a violation, the Secretary was to inform the State and take follow up action if necessary. If during a federal inspection, a federal inspector found the requisite imminent danger or threat of substantial harm, a cessation order would issue. If the federal inspector found a violation without the requisite imminent danger or threat of substantial harm, the inspector would either notify the state of the violation or issue a notice of violation to the permittee depending on whether or not this was a § 517 inspection or a listed inspection. In the notification situation, if the State failed to act on the notification it received, the federal government would do a § 204(b) inspection and, upon finding a violation, issue a notice of violation to the permittee. If the federal government found a general lack of enforcement by the State, the Secretary would take over enforcement of the whole State program. If the State

147. S. REP. NO. 128, 95th Cong., 1st Sess. 72 (1977).

148. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1994).

had given up on making any attempt at enforcement, the federal government would substitute its own program for the State program. Finally, if a particular permittee was found to be engaging in a pattern of violations, that permittee's permit would be suspended or revoked. The foregoing analysis explains and harmonizes all of the provisions of the Bill. The result is that under the 1974 scheme there simply was no necessary connection between § 204(b) and § 220(b).

Before turning to consider to what extent subsequent changes in the language of the Bill varied this scheme, one must first consider the scope of § 204(b). Does the use of "part" in § 204(b) lends itself to the interpretation that one instance of failure by a State to enforce a State program provision qualifies as "not enforcing a part of such program?"¹⁴⁹ That a distinction can exist between § 204(b) and § 220(b) has already been demonstrated.¹⁵⁰ Immediately obvious is the contrast with § 220(b) which states: "violations of an approved State program result from a failure of the State to enforce such State program effectively." Under § 204(b) no causal connection need be found between the existence of the violation and a past failure to enforce the program. Furthermore, effectiveness is not an element in § 204(b). Thus, there is no need in the language of § 204(b) to have more than one violation to qualify as "not enforcing a part of such program,"¹⁵¹ while there clearly is such a need in the language of § 220(b).

Congress passed the 1974 Conference bill in late December.¹⁵² However, it was pocket vetoed by President Ford.¹⁵³ The Surface Mining Control and Reclamation Act of 1975 as introduced in the Senate¹⁵⁴ and House¹⁵⁵ contained the same basic provisions as were in the vetoed 1974 Conference bill.¹⁵⁶ After the Conference Report came out on May 2, 1975,¹⁵⁷ the Conference bill passed both houses of

149. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1994).

150. See *supra* text accompanying notes 139 & 148.

151. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1994).

152. On December 13, 1974, the House agreed to the Conference Report on S. 425. 120 CONG. REC. 39,596 (1974). The Senate concurred on December 16, 1974. 120 CONG. REC. 40,054 (1974).

153. Waters, *supra* note 98, at 777.

154. S. 7 passed the Senate on March 12, 1975, 121 CONG. REC. 6,202 (1975), with 84 yeas, 13 nays, and 2 not voting.

155. H.R. 25 passed the House on a vote of 333 yeas, 86 nays, and 13 not voting, 121 CONG. REC. 7,069 (1975).

156. See 121 CONG. REC. 6,208 (1975) (§ 504); *id.* at 6,215-16 (§ 521). *But see*, the exception of the Senate's structurally unsound addition in 1975 to § 205(a), discussed *supra* note 118; § 504, 121 CONG. REC. 12,939 (1975); § 521, 121 CONG. REC. 12,947 (1975).

157. H.R. REP. NO. 189, 94th Cong., 1st Sess. (1975).

Congress in short order.¹⁵⁸ President Ford vetoed the 1975 version of SMCRA on May 20, 1975,¹⁵⁹ and a veto override effort failed.¹⁶⁰ In 1976 two bills were reported out of committee in the House.¹⁶¹ However, no votes were taken during the year. With the election of President Carter in 1976, activity began in January of 1977 with H.R. 2¹⁶² and S. 7.¹⁶³

The Senate bill, S. 7, did not change what became SMCRA § 504 in any way relevant to the discussion here.¹⁶⁴ But, S. 7 changed what became SMCRA § 521(b) in three major ways. First, the section now referred to a state's failure to enforce a part of its program. Second, a hearing was required within 30 days of the notice of a State's alleged failure to enforce all or part of its State program. Finally, only if specified findings were made and notice of those findings was given, could the Secretary begin to enforce the State program.¹⁶⁵

No other changes were made in 1977 to language under discussion in this Part. The Conference adopted the Senate approach to § 521(b).¹⁶⁶ The legislation was passed as of July 21, 1977,¹⁶⁷ and it received President Carter's signature on August 3, 1977,¹⁶⁸ as the Surface Mining Control and Reclamation Act of 1977.

Of the three changes to §521(b) incorporated in the 1977 bill, only the addition of "part" significantly altered the structure of federal government enforcement as stated in the 1974 conference bill. If the intent is to require compliance with § 521(b) in order to proceed under § 504(b), a fundamental change would have occurred. Several factors stand in the way of this conclusion. First, § 504(b) continues to

158. The bill passed in the Senate on May 5, 1975. See 121 CONG. REC. 12,965 (1975). The House passed it on May 7, 1975. See 121 CONG. REC. 13,385-86 (1975).

159. 11 WEEKLY COMP. PRES. DOC. 535 (1975).

160. The House sustained the veto on June 10, 1975. See 121 CONG. REC. 18,008 (1975).

161. See H.R. REP. NO. 896, 94th Cong., 2d Sess. (1976) (to accompany H.R. 9725 reported March 12, 1976 but tabled by the Rules Committee on March 23, 1976); H.R. REP. NO. 1445, 94th Cong., 2d Sess. (1976) (to accompany H.R. 13950 reported August 31, 1976).

162. H.R. 2 passed the House on April 29, 1977. See 123 CONG. REC. 12,887 (1977).

163. S. 7 passed the Senate on May 20, 1977. 123 CONG. REC. 15,778 (1977). Actually the Senate had stricken all of the text of H.R. 2 and substituted the text from S. 7, 123 CONG. REC. 15,777 (1977).

164. See *supra* note 118 as to predecessor § 204(a)(3) and *supra* note 137 as to predecessor § 204(b).

165. 123 CONG. REC. 15,794 (1977). The hearing and findings requirement obviously led to a change in the 1974 Conference bill language, *supra* note 127, "violations . . . appear to result from" with the elimination of "appear to."

166. H.R. REP. NO. 493, Cong. Sess. 110 (1977) (Conf. Rep.). For the final language of § 521(b), see *supra* text accompanying note 95.

167. Senate, July 20, 1977. 123 CONG. REC. 23,988 (1977); House, July 21, 1977. 123 CONG. REC. 24,428-29 (1977).

168. 13 WEEKLY COMP. PRES. DOC. 1,161-62 (1977).

refer to § 521 rather than § 521(b).¹⁶⁹ Second, no reference to § 504(b) was added to § 521(b). Third, § 521(a)(3)¹⁷⁰ still provides that the Secretary must proceed directly against a permittee even if there is no imminent danger or significant harm, when a federal inspection pursuant to “a Federal program or a Federal lands program, *Federal inspection pursuant to* [1] section 502, or [2] section 504(b) or [3] during Federal enforcement of a State program in accordance with subsection (b) of this section (521)”¹⁷¹ uncovers a violation of any requirement of SMCRA or any permit condition required by SMCRA. Under § 521(a)(3), the Secretary is to give notice to the permittee fixing a reasonable time for the permittee to abate the violation and providing the permittee with an opportunity for a public hearing. If § 504(b) could be implemented only through § 521(b) enforcement, the foregoing excerpt from SMCRA showing enforcement via § 504(b) and enforcement via § 521(b) to be alternatives would not seem to make any sense. The House Reports in 1975 and 1977 seem clear that the House viewed § 220(a)(3) [SMCRA § 521(a)(3)] as it carried forward into the 1975 and 1977 House bills as providing that §§ 504(b) and 521(b) were alternatives:

*Where the Secretary is the regulatory authority or Federal inspection is being conducted pursuant to sections 502, 504(b) or subsection (b) of section 521, and a Federal inspector determines that a permittee is violating the Act or his permit but that the violation is not causing imminent danger to the health or safety of the public or significant, imminent environmental harm, then the inspector must issue a notice to the permittee setting a time within which to correct the violation.*¹⁷²

The statement in SMCRA itself that § 504(b) and § 521(b) are alternatives seems, at the very least, to make it plausible, if not mandatory, for the Secretary to conclude that the Secretary has authority to issue a notice of violation when a state fails to do so even absent imminent danger or significant harm or § 521(b) enforcement. Issuing a notice of violation to one permittee under § 521(a)(3) is a much more limited enforcement objective than taking over regular enforcement (against all permittees) of a part of the State program under § 521(b). It seems likely therefore that the reference to § 521 in § 504(b) originally in the

169. 104 H.R. 2372 (1995) currently under consideration in the House of Representatives and discussed in part IV(E) would change the reference to § 521 to read § 521(b).

170. SMCRA § 521(a)(3), 30 U.S.C. § 1271(a)(3) (1994).

171. *Id.* (emphasis added).

172. H.R. REP. No. 218, 95th Cong., 1st Sess. 130 (1977) (emphasis added); H.R. REP. No. 45, 94th Cong., 1st Sess. 120 (1975).

1974 Act¹⁷³ was not intended to assume a new meaning in 1977 and to refer thereafter only to § 521(b). Fourth and finally, the 1977 Senate report contains the language¹⁷⁴ which suggests that there should be enforcement against an individual operator by the federal government in any instance where the State fails to enforce.

Anyone arguing that the subsequent addition of “or any part thereof” to § 521(b) carried with it an intent to change the meaning of the reference to § 521 in § 504(b) will have a difficult burden to meet. However, language in the 1977 Conference Report would appear to support that conclusion:

Another issue presented in the Enforcement section of the legislation is the differing procedures by which the Secretary can enforce part of a State program. The House receded from its position that the Secretary could exercise this authority upon the finding of a State's effective failure to enforce, and the conference adopted the Senate amendment's requirement for a public hearing prior to such action by the Secretary.¹⁷⁵

However, § 504(b) has nothing to do with “effective” failure to enforce. The foregoing Report language, therefore, is properly understood as explaining the imposition of a hearing requirement and says nothing else about the structure of federal enforcement during state primacy.

Additional support for an intent to change the reference in § 504(b) has been found in the language in the 1977 Senate Report accompanying S. 7 that stated:

In order to prevent federal-state overlap, the federal inspector is only to use his authority under section 421(a)(3) where the Secretary is the regulatory authority. However in other circumstances the Secretary must insure, in accordance with the provisions of section 421(a)(1), that the State is notified of the compliance problem so that it may act under the terms of the approved state program.¹⁷⁶

The problem with placing much reliance on this language is that it also appeared in the Senate's 1975 Report,¹⁷⁷ without any such limitation

173. This was true also of SMCRA of 1975, H.R. 25, which also was passed and vetoed. Section 504(b) referred to “any part.” 121 CONG. REC. 12,939 (1975). Section 521(b) referred to “to enforce such State program.” *Id.* at 12,948.

174. *See supra* text accompanying note 147.

175. H.R. CONF. REP. NO. 493, 95th Cong., 1st Sess. 110 (1977).

176. S. REP. NO. 128, 95th Cong., 1st Sess. 92 (1977).

177. S. REP. NO. 28, 94th Cong., 1st Sess. 182 (1975).

appearing in the section by section summary.¹⁷⁸ Moreover, the Senate's 1975 Report itself basically repeats the House Report language which suggests a contrary result.¹⁷⁹ And in the context of SMCRA of 1975, the language did not make any sense at all.

One clear problem with this language is that the Secretary is the regulatory authority only where the State has never become one or the Secretary has promulgated a federal program to substitute for a State program under § 504(a)(3).¹⁸⁰ Unquestionably, the Secretary would be issuing notices of violation when enforcing the State program under § 521(b) even though it was not the regulatory authority. The 1975 Senate Report language probably reflects the earlier Senate versions of SMCRA and a failure to finally comprehend the House changes initiated in 1974 and as modified and adopted in the Conference bill of 1974.

Assuming, however, that § 504(b) enforcement would now have to be accomplished via § 521(b), what would be the impact on the structure of federal enforcement? It would mean that rather than issuing a notice of violation to a permittee after the state fails to act upon receipt of notification or satisfactorily explain its inaction, the federal government would have to issue a notice of failure to enforce a part of the program, wait thirty days, hold a hearing, make favorable findings, issue another notice and then issue the notice of violation to the permittee. It is doubtful that one instance of a failure of a State to enforce would or should implicate this procedure.¹⁸¹ The result would be a gap in enforcement where surely none was intended before 1977. The language in SMCRA of 1977 itself does not compel this result. The legislative history does not do so either.

C. *Regulatory History of SMCRA §§ 504 and 521*

Current federal regulations provide:

[w]hen, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section,¹⁸² an authorized representative of the Secretary determines that there exists a violation of

178. *Id.* at 218.

179. *Id.* at 218-19. See *supra* text accompanying note 172.

180. SMCRA § 701(22), 30 U.S.C. § 1291(22) (1988). See also text accompanying *supra* notes 91-2.

181. However, neither does the language go to the extreme of requiring a "pattern of violations" or anything analogous. Cf. text accompanying *supra* note 129 and *infra* part V.

182. Paragraph (a)(1) of the regulation covers periods of direct general federal enforcement including those mandated pursuant to § 504(b). See 30 C.F.R. § 843.12(a)(1) (1995).

the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, subject to the procedures of § 842.11(b)(1)(iii) of this chapter, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate¹⁸³

Under paragraph (a)(1) of the regulation, the Secretary is to issue a notice of violation if “during federal enforcement of a State program *under section 504(b) or 521(b)* of the Act and part 733 of this chapter[]”¹⁸⁴ the Secretary finds a violation that does not create imminent danger or threat of significant harm requiring a cessation order under § 843.11.¹⁸⁵ Part 733 is the part where the Secretary treats enforcement under § 504(b) the same as enforcement under § 521(b). This treatment requires the Secretary to create the provision quoted above out of whole cloth to fill a gap. This article proposes that instead the Secretary should have treated the quoted provision as implementing § 504(b). Obviously once the Secretary has assumed enforcement of a State program or part thereof under § 521(b) procedures, the Secretary would proceed directly against an alleged violator immediately.

The regulation quoted above has its origin in the permanent program regulations promulgated in 1979.¹⁸⁶ When the Secretary proposed permanent program regulations in 1978,¹⁸⁷ the Secretary essentially repeated SMCRA § 521(a)(3) dealing with federal notices of violation during State primacy in the first part of the proposed regulation and then dealt with two federal inspections not covered by § 521(a)(3) in the second part of the proposed regulation. The two latter inspections were § 517 inspections¹⁸⁸ and § 521(a)(1) inspections after State inaction.¹⁸⁹ But this second part of the proposed regulation only provided that the federal representative “may” give

183. 30 C.F.R. § 843.12(a)(2) (1995).

184. 30 C.F.R. § 843.12(a)(1) (1995) (emphasis added).

185. 30 C.F.R. § 843.11 (1995).

186. 30 C.F.R. § 843.12(a)(2) (1979) (current version at 30 C.F.R. § 843.12(a)(2) (1995)).

187. Proposed Rules, 43 Fed. Reg. 41,930 (1978) (current version at 30 C.F.R. § 843.12(a)(2) (1995)).

188. See *supra* part II(A).

189. See *supra* part II(B).

notice to the State and made no provision for what would happen if the State ignored that additional notice. When the final regulation was promulgated, the first part of the regulation remained essentially unchanged from the proposed one, but the second part of the regulation had been changed substantially. It now provided that after State inaction, the federal government representative may reinspect and "if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate."¹⁹⁰ The Secretary justified the regulation on the basis that "issuance of notices of violation fills a void or gap in the federal enforcement scheme."¹⁹¹ Apparently the Secretary interpreted enforcement under SMCRA § 504(b) to require following § 521(b) procedures.¹⁹²

The regulation quoted above provided initially that the Secretary "may" report a violation to the state and "may" reinspect where the State fails to act or satisfactorily explain its inaction.¹⁹³ In 1982, the Secretary changed "may" to "shall" so that the duties to report a violation to the State and to reinspect after State inaction became clear.¹⁹⁴

The 1979 permanent program regulations were promulgated during the Carter Administration. In revisions proposed in 1981 by the

190. 30 C.F.R. § 843.12(a)(2) (1995).

191. 44 Fed. Reg. 15,302 (1979). The Secretary cited to Judge Flannery's statement that the Secretary has authority to fill gaps in the statutory scheme with regulations that are consistent with the scheme. *Id.*

In *In Re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514 (D.C. Cir. 1981) (en banc), *cert. denied*, 454 U.S. 822 (1981), the D.C. Circuit upheld the general regulatory authority of the Secretary pursuant to SMCRA against arguments that it was particularly circumscribed in SMCRA. *Id.* at 527. Subsequent to the Secretary's promulgation in 1979, the United States Supreme Court discussed gaps in legislation in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the landmark decision on the role of the federal administrator:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. [citation omitted]. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44.

192. See 30 C.F.R. pt. 733 (1995). For a discussion of these procedures, see text accompanying *infra* notes 164-81.

193. See 30 C.F.R. § 843.12(a)(2) (1980) (current version at 30 C.F.R. § 843.12(a)(2) (1995)).

194. Final Rules, 47 Fed. Reg. 35,630 (1982) (current version at 30 C.F.R. §843.12(a)(2) (1995)).

newly elected Reagan Administration,¹⁹⁵ which led to amendment of the regulations in 1982, the Secretary proposed to change the language of the regulation thus questioning to what extent federal notices of violation issued directly to a permittee was permissible.¹⁹⁶ The Secretary explained:

This proposed change is intended to raise the question whether, in a case where a State has failed to take appropriate action to ensure abatement of any violation, OSM's recourse may be with the State rather than the permittee. The Office believes that, where and [sic] approved State program is in force, OSM may lack authority to issue citations directly to permittees except in those limited circumstances where public health and safety, or significant, imminent environmental harm would justify issuance of a cessation order under section 521(a)(2) of the Act. The reinspection provided for in 30 CFR 843.12(a)(2) may simply be for the purpose of evaluating a State's performance under its approved program, rather than enforcing the Act directly against permittees.

Alternatively, OSM is considering retention of the language presently contained in 30 CFR 843.12(a)(2) which mandates issuance of a notice of violation where a State fails to take appropriate action within ten days of notification that a violation exists.¹⁹⁷

The Secretary then solicited public comment on the change versus retention issue.¹⁹⁸ Later, the Secretary postponed decision on this issue until it was examined in the Supplemental Environmental Impact Statement (EIS) that OSM was preparing on the environmental impacts of OSM's regulatory reform effort more generally.¹⁹⁹ But, when

195. Proposed Rules, 46 Fed. Reg. 58,464 (1981).

196. The proposed change provided:

(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1), an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under 30 CFR 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall take appropriate action.

46 Fed. Reg. 58,473 (1981).

197. *Id.* at 58,467-68.

198. *Id.*

199. Notice of Intent, 47 Fed. Reg. 17,269 (Dep't Interior 1982). *See also* Notice of Extension or Reopening of Public Comment Periods, 47 Fed. Reg. 20,631 (Dep't Interior 1982).

the rules were promulgated in 1982, the Secretary still had not concluded work on that issue, so the earlier regulation was retained.²⁰⁰

In 1988 the Secretary made several important changes to § 843.12(a)(2)²⁰¹ resulting from a package of changes proposed by the Mining Reclamation Council of America on May 30, 1986, in a petition for rulemaking. First, the word "enforcement" was dropped from before action in the phrase "that appropriate [enforcement] action can be taken by the State."²⁰² Second, OSM's evaluation of a State's action or alleged good cause for inaction is to be on the basis of whether the "arbitrary, capricious, or an abuse of discretion"²⁰³ standard was violated.²⁰⁴ This change represented OSM's response to a request for "a uniform standard for reviewing state responses to federal ten-day notices."²⁰⁵ Third, both appropriate action²⁰⁶ and good cause²⁰⁷ are defined broadly. Finally, OSM must notify the State of a determination that the State has failed either to take appropriate action or show good cause for its failure. The State then has the option to request, within 5 days, an informal review by the Deputy Director of that determination.²⁰⁸

The Mining Reclamation Council petition also contained a request that the Secretary repeal the regulation authorizing federal notices of violations in primacy states. This request was denied June 8, 1987.²⁰⁹ In 1988, the Secretary reported that the denial was "being litigated."²¹⁰ However, no court opinion was forthcoming until 1994.²¹¹

200. "Pending a final decision on the matter, OSM is adopting Section 843.12 with all changes as proposed except the change in OSM's authority to issue notices of violation." 47 Fed. Reg. 35,630 (1982).

201. The court decision sustaining these changes, *National Coal Ass'n v. Interior Dep't*, 39 Env't Rep. Cas. (BNA) 1624 (D.D.C. 1994), is discussed *infra* part IV(D).

202. 30 C.F.R. § 843.12(a)(2) (1995).

203. 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) (1995).

204. *Id.*

205. *See* 53 Fed. Reg. 26,730 (1988).

206. 30 C.F.R. § 842.11((b)(1)(ii)(B)(3) (1995).

207. *See* definition quoted in *supra* note 46 and text accompanying *supra* notes 42-7 and *infra* notes 276-85.

208. 30 C.F.R. § 842.11(b)(1)(iii)(A) which was added in the 1988 revisions, Final Rule, 53 Fed. Reg. 26,744 (1988).

209. Notice of Decision on Petition for Rulemaking, 52 Fed. Reg. 21,598 (Dep't Interior 1987).

210. Final Rule, 53 Fed. Reg. 26,730 (1988) ("[I]n the case of *N.C.A. v. Gentile*, No. 87-2076 (D.D.C.).").

211. *See* *National Coal Ass'n v. Interior Dep't*, 39 Env't Rep. Cas. (BNA) 1624 (D.D.C. 1994) (discussed *infra* part IV(D)).

Under SMCRA § 521(b),²¹² the Secretary of the Interior must begin the process to undertake federal enforcement of a State program if violations exist that result from the State's failure to enforce all or part of its program effectively. SMCRA does not define what qualifies as a "part;" nor do the regulations. As explained earlier,²¹³ the "part" language was not added to § 521(b) until SMCRA of 1977, although such language was included in the SMCRA of 1974 and 1975 sections comparable to § 504(b).²¹⁴ Similarly, neither SMCRA nor the regulations define effective enforcement. While the Secretary has provided a section entitled "Factors to be considered in deciding whether to substitute Federal enforcement for State programs or to withdraw approval of State programs,"²¹⁵ no substantive factors are listed. Instead, the regulation merely provides that the Secretary is to consider in making the decision (1) the State's record in fulfilling any conditions attached to the original approval or in "adjusting to new circumstances;" (2) hearing transcripts; and (3) written presentations and comments.²¹⁶

Lumping together federal enforcement of parts or even all of a State program with preparing and promulgating a Federal program to substitute for the State program as the Secretary has done is improper under SMCRA. The two are fundamentally different. While Federal enforcement of a State program, as interpreted by the Secretary, requires a formal process, including notice²¹⁷ and a public hearing,²¹⁸ it does not result in the federal government having exclusivity.²¹⁹ Exclusivity can result only from promulgation of a Federal program to replace the State program.²²⁰ Furthermore, enforcement by the federal government of a part of the State program is fundamentally different as well from enforcement of the full State program. The latter would necessarily include issuing mining permits. The former does not necessarily include that function. Certainly none of the other federal interventions provided for in SMCRA encompass issuance of permits. Until the word part was added in 1977 to § 521(b), there was no argument that § 504(b) authorized federal issuance of permits.

212. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1988).

213. See *supra* text accompanying notes 164-65.

214. See *supra* text accompanying notes 137-44.

215. 30 C.F.R. § 733.13 (1995).

216. *Id.*

217. SMCRA § 521(b), 30 U.S.C. § 1271(b) (1988).

218. *Id.* To be held within 30 days of the notice. *Id.*

219. See text accompanying *supra* notes 91-2, 180.

220. See text accompanying *supra* notes 91-2, 180.

D. *Court Decisions Interpreting SMCRA §§ 504 & 521*

Three federal district courts ruled in the mid-1980s, in the context of enforcement actions, on the issue of authority to issue federal notices of violation in primacy states. In *Clinchfield Coal Co. v. Hodel*²²¹ and *United States v. Camp Coal Co.*,²²² the federal district courts concluded that no authority beyond what is expressly stated in § 521(a)(3) exists. On the other hand, in *Annaco, Inc. v. Hodel*,²²³ the District Court concluded that such authority does exist.²²⁴ In 1994, the District Court for the District of Columbia, in *National Coal Ass'n v. Interior Department*,²²⁵ upheld the Secretary's 1988 decisions to modify federal enforcement procedure during primacy and to deny a petition request that the notice of violation provision be rescinded, thus upholding the Secretary's authority to promulgate the provision.²²⁶

The problem with the conclusions that the Secretary lacks authority in *Clinchfield Coal Co.* and *Camp Coal Co.* is simply that the Secretary's regulations provide otherwise in §843.12(a)(2),²²⁷ and the provision has been left intact by the Secretary after extensive review, although that review was continuing at the time of the court decisions.²²⁸ If the Secretary's reading is a permissible one, it should stand. That is the lesson of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²²⁹ which was decided before either of these

221. 640 F. Supp. 334 (W.D. Va. 1985). On appeal in the *Clinchfield Coal* case, the Fourth Circuit reversed the district court's decision, *Clinchfield Coal Co. v. DOI*, 802 F.2d 102 (4th Cir. 1986). The Fourth Circuit determined that the district court did not have jurisdiction to rule on the validity of a regulation. According to the Fourth Circuit, the validity of a regulation may be challenged only in the federal courts in the District of Columbia. *Id.* at 103. However, the courts have split over this issue. See B. BURKE ET AL., *MINERAL LAW CASES AND MATERIALS* 650 (1994). Compare *Virginia ex rel. Virginia Dep't of Conservation and Economic Dev. v. Watt*, 741 F.2d 37 (4th Cir. 1984), *cert. denied*, 469 U.S. 1198 (1985), with *Holmes Limestone Co. v. Andrus*, 655 F.2d 732 (6th Cir. 1981), *cert. denied*, 456 U.S. 995 (1982).

222. 637 F. Supp. 336 (N.D. Ala. 1986).

223. 675 F. Supp. 1052 (E.D. Ky. 1987).

224. *Id.* at 1056.

225. 39 Env't Rep. Cas. (BNA) 1624 (D.D.C. 1994).

226. *Id.* at 1641.

227. 30 C.F.R. § 843.12(a)(2) (1995), quoted in the text accompanying *supra* note 183.

228. See 47 Fed. Reg. 35,637 (1982); 53 Fed. Reg. 26,744 (1988).

229. 467 U.S. 837, 843-44 (1984). See *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 517 (D.C. Cir. 1981) (en banc). There now are numerous opinions involving SMCRA in which the Secretary's regulations are upheld on this basis. See, e.g., *National Wildlife Fed'n v. Lujan*, 950 F.2d 765, 767 (D.C. Cir. 1991).

cases.²³⁰ Furthermore, the time for appealing the validity of the regulation had passed,²³¹ although a lack of authority may be jurisdictional.²³²

The federal district court decisions in *Clinchfield Coal Co.* and *Camp Coal Co.* could have been explained satisfactorily without involving the issue of whether the Secretary has general authority to issue notices of violation directly against an operator during State primacy. They can be explained on the basis that Virginia and Alabama properly relied on their Secretary-approved State programs to conclude that there were no violations.

In *Clinchfield Coal Co.*, Virginia had determined that a drainage ditch placed at the interface between fill material and natural ground was permissible under the Virginia program, whereas the Secretary of the Interior argued that the ditch had to be completely off the fill.²³³ The Virginia permanent program regulation provided: "The diversions shall be placed in natural ground unless an alternate plan or design is approved by the Division."²³⁴ Virginia had approved the change requested by the Clinchfield Coal Company.²³⁵

In *Camp Coal Co.*, Alabama had determined that the time for a mine operator to fill rills and gullies had not expired under the Alabama program and that, therefore, no violation existed under the Alabama program.²³⁶ These determinations by Virginia and Alabama would constitute "good cause" for their failure to act.²³⁷ Indeed the court's statement in *Camp Coal Co.* that "the predominant issue . . . is the extent to which OSM has the right to force its view of reclamation requirements over a conflicting view by the state regulatory agency, particularly where the state agency's view makes good sense"²³⁸ seems

230. Although the D.C. Circuit Court of Appeals had questioned seriously the scope of the *Chevron, U.S.A.*, doctrine recently in an Endangered Species Act case, *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), the U.S. Supreme Court reversed, 115 S. Ct. 2407 (1995) (6-3 decision).

231. 30 U.S.C. § 1276(a)(1) (1994) (within sixty days of the action unless "based solely on grounds arising after the sixtieth day").

232. "Because SMCRA § 526(a)(1) is directive, not permissive, courts have said the provision sets 'subject matter jurisdiction.'" *Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1550 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 911 (1993).

233. *Clinchfield Coal Co. v. Hodel*, 640 F. Supp. 334, 336 (W.D. Va. 1985), *rev'd* 802 F.2d 102 (4th Cir. 1986).

234. *Id.* at 336 n.1.

235. *Id.* at 336.

236. *United States v. Camp Coal Co.*, 637 F. Supp. 336, 338 (N.D. Ala. 1986).

237. SMCRA § 521(a)(1), 30 U.S.C. § 1271(a)(1) (1988).

238. *Camp. Coal Co.*, 637 F. Supp. at 341.

to be the most appropriate language possible for a good cause decision.

To the extent that the OSM was ignoring or misconstruing the good cause exception States and permittees had cause to criticize. Both SMCRA and the regulations accept good cause as a justification for state inaction,²³⁹ although at the time the *Clinchfield Coal Co.* and *Camp Coal Co.* opinions were issued the regulations neither defined good cause nor provided for the arbitrary, capricious, or abuse of discretion standard for reviewing a state's response.²⁴⁰ Now, with the presence of both in the regulations,²⁴¹ a decision to support the State's conclusion may be easier.²⁴² There is no particular reason not to apply the arbitrary, capricious, or abuse of discretion standard formally adopted in 1988²⁴³ to interpreting program requirements as well as to scientific and other factual determinations.

In contrast to *Clinchfield Coal Co.* and *Camp Coal Co.*, in *Annaco, Inc.*²⁴⁴ clear violations had occurred that everybody appeared to recognize. Annaco, Inc. had failed to reclaim several parcels of land.²⁴⁵ The subsequent settlement between Kentucky and Annaco, Inc. did not provide for reclamation of all of the parcels.²⁴⁶ The mere existence of the settlement did not constitute "good cause" for the State's failure to enforce and, today, under the arbitrary, capricious, or abuse of discretion standard probably would be viewed as an abuse of discretion.

In *Clinchfield Coal Co.*, the District Judge concludes that: "The Secretary's regulation at 30 C.F.R. § 843.12(a)(2) significantly expands the authority of the OSM beyond that set forth in the Act"²⁴⁷ and that "it does not appear that the OSM inspections of Sycamore No. 5 on November 15 [sic], 1984, fell within any of the specific types of inspections listed under 30 U.S.C. § 1271(a)(3) [SMCRA,

239. 30 U.S.C. § 1271(a)(1) (1994). However, 30 C.F.R. § 842.11(b)(ii)(B)(4)(i) (1995) defining good cause was not on the books when the opinions in these cases were issued. See *supra* text accompanying notes 42-6.

240. They were added in 1988. See *supra* text accompanying notes 203-07.

241. 30 C.F.R. § 842.11(b)(ii)(B)(2), (B)(4) (1995).

242. See the regulatory initiative discussed *supra* part IV(E).

243. See *supra* text accompanying notes 203-05. The regulation provides that the standard is for reviewing the State's "action or response." 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) (1995).

244. *Annaco, Inc. v. Hodel*, 637 F. Supp. 1052 (E.D. Ky. 1987).

245. *Id.* at 1054.

246. *Id.*

247. 640 F. Supp. at 342.

§ 521(a)(3)] which would allow the Secretary to issue a notice of violation to the permittee.²⁴⁸ By implication, the judge is rejecting the Secretary's basis for the regulation which is to fill a gap in the enforcement scheme²⁴⁹ without even considering its plausibility. Under this author's approach, the federal statistical sampling inspection on September 17, 1984, at which the alleged violation was discovered, would qualify as providing "any information" under § 1271(a) [SMCRA § 521(a)] so that OSM properly gave notification to the State. The additional inspection on November 9, 1984, would then be an enforcement inspection under § 504(b) using the § 1271(a)(3) [SMCRA § 521(a)(3)] reference to § 504(b).

In *Camp Coal Co.* and *Annaco, Inc.* there well may be problems with the Secretary's action that apparently were not pursued. In *Camp Coal Co.*, there is no indication under what authority the first federal inspection, on May 20, 1983, took place that led to the 10-day notification to the State or whether there was a second federal inspection before the notice of violation was issued to Camp Coal on July 8, 1983. It is, therefore, entirely possible that no re-inspection under the regulation took place. If so, the result would have been correct.

In *Annaco, Inc.*, the Secretary appears to have had information about the alleged violations sufficient to issue the 10-day notification to the State.²⁵⁰ The Judge clearly notes a federal inspection occurring after the State response,²⁵¹ but with cessation orders issuing from the federal government rather than notices of violation. There is thus some question in the case about the regularity of the procedure as under (a)(3) a cessation order is supposed to issue only after a permittee has failed to abate in the time allotted in the federal notice of violation.

In *National Coal Ass'n v. Interior Department*,²⁵² the District Court reviewed challenges to (1) the federal notice of violation regulation; (2) the arbitrary and capricious standard for reviewing State action; (3) the definition of "appropriate action" from the State; (4) the definition of "good cause" for inaction by the State; and (5) the informal review process of a finding of inadequate response by a

248. *Id.* at 341.

249. *See supra* text accompanying notes 191-92.

250. *See Annaco*, 675 F. Supp. at 1053-54.

251. *Id.* at 1054.

252. 39 Env't Rep. Cas. (BNA) 1624 (D.D.C. 1994), *aff'd*, 70 F.3d 1345 (D.C. Cir. 1995).

State.²⁵³ The Court, basing its decision on *Chevron U.S.A., Inc.*,²⁵⁴ sustained the Secretary's decisions against all challenges.²⁵⁵ The failure to delete the notice of violation regulation was challenged by the National Coal Association (NCA) and the promulgation of the other regulations was challenged by the National Wildlife Federation (NWF).

In reviewing a decision not to undertake rulemaking, the Court noted the review standard is to overturn a decision only "for compelling cause, such as plain error of law or fundamental change in the factual premises previously considered by the agency."²⁵⁶ The Court also points out that the NCA participated in the 1979 and 1982 rulemakings and did not challenge the rule at that time suggesting perhaps that they may be estopped from claiming any less deferential standard.

While the Court reaches the correct result under *Chevron U.S.A., Inc.*, it relies on some inappropriate authority to justify the result. For example, the Court quotes and emphasizes from the 1977 Senate report: "Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program."²⁵⁷ This language says no more than that the government can enforce a State program without the necessity of promulgating a Federal program.²⁵⁸ For example, the language says nothing about how the federal government would accomplish enforcement of a State program, with or without a hearing. It therefore has no bearing on the issue. The Court also says that "no other court has passed on the validity of . . . [the section];"²⁵⁹ however, the three other cases discussed in this section are certainly as relevant as *Southern Ohio Coal Co. v. Office of Surface Mining*,²⁶⁰ which the Court does cite and discuss. The Court says of *Southern Ohio Coal Co.* that the Court there upheld the federal government's authority to

253. *Id.* at 1641.

254. *Chevron U.S.A.*, 467 U.S. at 842-43.

255. *National Coal Ass'n v. Interior Dep't*, 39 Env't Rep. Cas. (BNA) at 1641.

256. *Id.* at 1629.

257. *Id.* at 1632 (quoting S. REP. NO. 128, 95th Cong., 1st Sess. 88 (1977)).

258. *See supra* text accompanying notes 87-93 & 119.

259. 39 Env't Rep. Cas. (BNA) at 1632.

260. 20 F.3d 1418 (6th Cir. 1994). In *Southern Ohio Coal Co.*, OSM either issued a cessation order or was prepared to issue one prohibiting the pumping of highly acidic water from a flooded mine into waters of the United States without treatment. This seems to be appropriate subject matter for SMCRA § 521(a)(2), 30 U.S.C. § 1271(a)(2) (1994), under which OSM would have acted. *See supra* part III.

intervene despite a state finding that the Company's proposed action did not threaten imminent danger or significant harm. However, the Secretary clearly is entitled to make an independent judgment on the imminent danger or significant harm issue under SMCRA. There is no colorable argument that the Secretary can delegate that decision to the State. But the result is different when there is no imminent danger or significant harm involved, and that is the burden of the Secretary's new regulations at issue in the case.

"The Court finds . . . section 504(b) helpful"²⁶¹ because it "cross-references all of section 521."²⁶² Therefore the federal government can enforce any part of a State program "pursuant to either the procedures in section 521(a) (issuing NOV's) or the more time-consuming and drastic procedures of a federal take-over of the state program in section 521(b)."²⁶³ As amplified by the discussion in this article,²⁶⁴ this author agrees, but unfortunately under the SMCRA scheme as interpreted by the Secretary, the argument is inappropriate. Finally, according to the Court, SMCRA § 201(c) authorizes promulgation of rules "necessary to carry out the purposes and provisions of the Act,"²⁶⁵ here oversight.

Once the federal government gives a State notification of an alleged violation, the State is to take "appropriate action to cause said violation to be corrected"²⁶⁶ or "show good cause for such failure."²⁶⁷ The 1988 regulations define for the first time both appropriate action²⁶⁸ and good cause.²⁶⁹ In addition, the 1988 regulations provide that the federal government is to judge the State response by the "arbitrary, capricious, or an abuse of discretion" standard,²⁷⁰ and that if the federal government finds against the State on this basis, it must notify the State in writing, and the State has five days from receipt of the notice to request an informal review by the Deputy Director of OSM.²⁷¹ If the State does nothing within those five days, the federal government is free to proceed. However, if the State requests the review, that must be played out to its conclusion.

261. *National Coal Ass'n*, 39 Env't Rep. Cas. (BNA) 1624, 1631 (D.D.C. 1994)

262. *Id.*

263. *Id.*

264. *See supra* text accompanying notes 137-51.

265. 39 Env't Rep. Cas. (BNA) at 1631.

266. SMCRA § 521(a)(1), 30 U.S.C. § 1271(a)(1) (1994).

267. *Id.*

268. 30 C.F.R. § 842.11(b)(1)(ii)(B)(3) (1995).

269. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) (1995).

270. 30 C.F.R. § 842.11(b)(1)(ii)(B)(2) (1995).

271. 30 C.F.R. § 842.11(b)(1)(iii)(A) (1995).

OSM's original reading of the phrase "appropriate action to cause said violation to be corrected" was that the State had to pursue an enforcement action to abate the violation.²⁷² Under the definition of appropriate action included in the regulations in 1988, it "includes enforcement *or other action* authorized under the State program to cause the violation to be corrected."²⁷³ Clearly, however, enforcement action will be the norm. One of the Secretary's examples of other action, starting a bond forfeiture proceeding, is at least arguably an enforcement proceeding.²⁷⁴ The other example, initiating the process to revise a permit,²⁷⁵ apparently assumes that a mistake was made in the permit when first issued.

The Secretary's definition of good cause contains five circumstances that constitute good cause. Each is reviewed by the Court. The first, that "[u]nder the State program, the possible violation does not exist,"²⁷⁶ is illustrated by the substantive situation in *Clinchfield Coal Co. v. Hodel*²⁷⁷ and the procedural situation in *United States v. Camp Coal Co.*²⁷⁸ The State variations in these two cases seem permissible under the Act. If the approved State program does not cover the alleged violation because something has been left out of the State program that should not have been left out, it is reasonable for the Secretary to argue that the appropriate procedure, absent imminent danger or threat of significant harm, is to amend the State program.²⁷⁹ It is the State program that is to be enforced by the federal government under § 504(b) and even under § 521(b). So, if something is not in the State program, it does not matter whether the State or the federal government is enforcing the state program, it is still not in the State program. The appropriate remedy for a deficiency in the State program, therefore, is to amend the program. If the matter is alleged to involve imminent danger or the threat of significant harm, the federal government may proceed directly regardless of the scope of the State or Federal program.²⁸⁰

272. 30 C.F.R. § 843.12(a)(2) (1995).

273. 30 C.F.R. § 842.11(b)(1)(ii)(B)(3) (1995) (emphasis added).

274. See the Secretary's discussion when promulgating the regulations in 1988, 53 Fed. Reg. 26,733 (1988). See also *National Coal Ass'n v. Interior Dep't*, 39 Env't Rep. Cas. (BNA) 1624, 1635 n.14 (1994).

275. *Id.*

276. 30 C.F.R. § 842.11(b)(ii)(B)(4)(i) (1995).

277. 640 F. Supp. 334 (W.D. Va. 1985). See *supra* note 234 and accompanying text.

278. 637 F. Supp. 336 (N.D. Ala. 1986). See *supra* notes 237-38 and accompanying text.

279. 30 C.F.R. § 732.17(e) (1995).

280. See *supra* part III. See also *Midwestern Mining Consultants, Inc. v. DNR of Indiana*, No. 83-102 (S.D. Ind. July 17, 1984).

The second circumstance, that the State requires more than ten days to determine whether there is a violation (“a reasonable and specified additional time”),²⁸¹ would seem to depend on what the reason for needing more time is. If, for example, it is because of a lack of State personnel, that would seem an inadequate reason to delay federal action unless there had been a recent rash of problems that was overtaxing the State agency for the moment. If, however, it has to do with the nature of the alleged violation, an allegation for example that some resource is being polluted, it may require the additional time. Thus, while there may be appropriate subject matter for this regulation, the scope apparently could be narrowed further.

The third circumstance, that the State regulatory authority lacks jurisdiction over the alleged violation,²⁸² is a function of State primacy. Congress was clear from 1974 on that it believed it is important for the operator to know what regulations are being applied, much more so than knowing who was doing the enforcing.²⁸³ If the State program is insufficient, as with the first circumstance noted above, the State program should be amended.

The fourth good cause circumstance is that the State is precluded by an administrative body or court from acting but only if that preclusion is based on a conclusion that the violation does not exist or on meeting the temporary relief standards of SMCRA §§ 525(c) and 526(c).²⁸⁴ Obviously §§ 525(c) and 526(c) are integral parts of SMCRA. The use of equivalent procedure in the State under a State program cannot be considered nonresponsive by the State. If the violation does not exist, as already noted above in the first circumstance, it does not exist; if it does and is not covered by the State program, amendment of the program is the appropriate remedy. Again if the matter involves imminent danger or the threat of significant harm, the Secretary can act.

The fifth circumstance, that the State “is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program”²⁸⁵ is a practical rule to avoid fruitless conduct and sustained as such. Obviously if the State is diligently pursuing enforcement, it is in compliance; if it has exhausted its enforcement provisions, it can do no more. If some State enforcement provisions comparable to federal

281. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(ii) (1995).

282. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iii) (1995).

283. *See supra* note 92.

284. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv) (1995).

285. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(v) (1995).

enforcement provisions were omitted from the State program, the State program should be amended.

Finally, the regulation that provides for review by the Secretary of a State's action or a State's response for inaction under the arbitrary, capricious or abuse of discretion standard would seem to be the primary focus of the NWF's challenge. Indeed, it is the only challenge worth much discussion. NWF's argument is that under SMCRA the Secretary must make an independent judgment on the alleged violation issue and that a deferential standard such as the arbitrary and capricious one forecloses the Secretary from making that independent judgment. The argument for example, recurs in the context of each of the definitional points of good cause. The Secretary and the Court justify the regulation on the basis that it furthers the State's primacy role.

While this may be too broad a policy justification and one which would be more properly limited to matters pertaining to terrain and other physical factors, the deference to the State can be justified on the basis that the State put the State program together and is regularly enforcing it and, therefore, is in the better position to know what it means. Hence, the State's interpretation is entitled to the weight that the arbitrary and capricious review standard accords it. If the federal government misunderstood the State program and as a result now believes that there is a deficiency in the State program, the State program should be amended. The only shortcoming with this justification would concern those provisions of the State program that were required by the Federal government as additions to overcome shortcomings the federal government saw during the State program approval process. The State does not necessarily have a better understanding of what was intended by those provisions.

E. *Current Regulatory and Congressional Initiatives*

Current regulatory and congressional initiatives are directly relevant to the subject-matter of this article. OSM is in the process of modifying its Directive setting forth its "policy and procedures for the use of Ten-Day Notices (TDN) in primacy States."²⁸⁶ In 1995, Representative Cubin of Wyoming, whose state ranks first in coal production and all of which comes from surface mining, introduced legislation, H.R. 2372, to modify the federal government's role as it

286. OSM, Draft INE-35, at 1 (Sept. 12, 1995).

relates to primacy states.²⁸⁷ Because of the level of controversy about that role that continues to exist, it is useful to review both the regulatory and congressional initiatives.

1. Draft Directive INE-35

As discussed earlier,²⁸⁸ there are instances when it would appear that OSM inspectors should have accepted state responses to 10-day notifications as sufficient. The proposed revisions in the Directive apparently constitute another effort²⁸⁹ by OSM to get field workers to accept more State responses as adequate as well as to short-circuit some of the paperwork, such as by verifying the need for a 10-day notification before issuing it or by not issuing a ten-day notification. In addition, the Director is consolidating policy on OSM response to citizen complaints during State primacy into this Directive. The discussion of Draft INE-35 will be divided into two parts:²⁹⁰ (1) Issuing the 10-day notification; and (2) Reviewing the State Response.

a. Issuing the 10-day notification

Analysis of when 10-day notifications are to issue has to begin with the statutory language. SMCRA provides that “[w]henever . . . the Secretary has reason to believe that any person is in violation of any requirement of this Chapter or any permit condition required by this Chapter, the Secretary shall notify the State regulatory authority”²⁹¹ Thus, the duty to notify is mandatory and no exceptions are included. The predicate is the Secretary having a “reason to believe.”²⁹² Furthermore, the notification is important because it sets into motion the 10-day period during which the State regulatory authority is to “take appropriate action” or “show good cause for such failure.”²⁹³ SMCRA does not, however, provide for the form that the notification is to take. It is open therefore to provide notification by a

287. H.R. 2372, 104th Cong., 1st Sess. (1995). *See also, Federal Oversight, State Primacy Issues Under Coal Mining Law Examined at Hearing*, 26 Env't Rep. (BNA) 526 (1995).

288. *See supra* text accompanying notes 234-44.

289. The first was to define good cause (*see supra* note 46 & text accompanying notes 276-85) and the two directives, and their predecessors, that this draft directive will replace. OSM, Directive INE-35, Transmittal Number 640 (Oct. 19, 1990) (Ten-Day Notices), and OSM, Directive INE-24, Transmittal Number 336 (May 26, 1987) (Response to Citizen Complaints in Primacy States).

290. This discussion will focus on the entire draft as an entity and will not focus on what changes to pre-existing INEs are being proposed.

291. SMCRA § 521(a)(1), 30 U.S.C. § 1271(a)(1) (1988).

292. 30 C.F.R. § 842.11(b)(2) (1995) (definition of “reason to believe” not helpful).

293. *See supra* part II(B) and text accompanying notes 182-85.

variety of means such as telephone, e-mail, letter, or even in person. The only other consideration is the ability to prove that notification was given if the need to do so arises.

The draft Directive lists four circumstances when 10-day notifications are to be issued:²⁹⁴ (1) violations of performance standards "or other obligations imposed on the operator,"²⁹⁵ (2) failure of permittee to submit reports or other information required by the permit,²⁹⁶ (3) omission in the permit of information or a procedural process that the approved program requires as a prerequisite for a permit,²⁹⁷ and (4) citizen complaints when (a) OSM has not investigated the complaint and the State regulatory authority does not participate in a joint inspection, or (b) OSM has investigated the complaint and an inspection showed reason to believe that a violation exists.²⁹⁸ Of the four instances arguably only (1)²⁹⁹ and (4) are appropriate for 10-day notifications. Only they relate to violation of environmental performance standards at the mining operation and that is what § 521 generally, and specifically § 521(a) which gives rise to the 10-day notification, deal with.³⁰⁰

The draft Directive does list six circumstances when 10-day notifications are not to be issued.³⁰¹ The first circumstance is the existence of imminent danger or threat of significant harm as that circumstance requires immediate inspection.³⁰² The second and third circumstances relate to each other in that in both circumstances there is in fact notification to the State. They are: (1) when a state inspector agrees to act within 10-days either during a joint federal/state inspection or shortly thereafter when informed of a problem area by the federal inspector,³⁰³ and (2) when after a citizen complaint, the State regulatory authority agrees to participate in a joint federal/state inspection and to take action within 10 days thereafter if necessary.³⁰⁴

The fourth and fifth circumstances also relate to each other in that what OSM appears to be doing in both is finding good cause in advance of the formal process of notification and response. However,

294. OSM, Draft INE-35, § 5(b)(1)(a)-(d) (Sept. 12, 1995).

295. *Id.* at § 5(b)(1)(a).

296. *Id.* at § 5(b)(1)(b).

297. *Id.* at § 5(b)(1)(c); *See also id.* § 6(e) ("Addressing Permit Deficiencies/Disputes").

298. *Id.* at § 5(b)(1)(d).

299. Assuming that the "other obligations" language was removed.

300. *See* discussion in text accompanying *infra* notes 304-09.

301. OSM, Draft INE-35, § 5(b)(2) (Sept. 12, 1995).

302. *Id.* § 5(b)(2)(a).

303. *Id.* § 5(b)(2)(b).

304. *Id.* § 5(b)(2)(c).

a more serious question needs to be asked as to whether either circumstance is even contemplated within the § 521(a) notification provision. Neither deals with alleged violations of environmental performance standards at the mining operation. Instead, the fourth circumstance deals with disputes between the State and OSM over “the adequacy of administrative or technical information or the adequacy of reviews required as a part of the permitting process.”³⁰⁵

The fifth circumstance deals with State implementation of an approved program aspect that OSM believes either (1) is inconsistent with the Secretary’s interpretation or (2) constitutes an omission from the State program.³⁰⁶ The fifth circumstance is qualified, however, by the requirement that a 732 letter³⁰⁷ has been issued or the State regulatory agency has committed to amending its State program.³⁰⁸ The implication is that if the circumstance does not apply a 10-day notification is appropriate. This implication makes no sense in the circumstance where the matter is not in the State program because all the federal government can do directly is enforce the State program. In the disagreement over the interpretation situation, however, a 10-day notification and response will provide the OSM with the State’s interpretation in a formal way that will allow OSM to review the State’s position pursuant to the arbitrary, capricious or abuse of discretion standard.

While it is true that enforcement pursuant to § 521 is not specifically limited to violation of an environmental performance standard at the mining operation, the nature of the language used throughout § 521 suggests such a focus. Therefore, the whole notification concept of § 521(a) seems inappropriate as to the disagreements focused on in circumstances 4 and 5.

The sixth circumstance covers (1) permittees’ failures to provide complete or accurate information regarding ownership or control or (2) an improvidently issued permit and the State regulatory authority has chosen to have a joint federal/state “investigation.”³⁰⁹ Again, OSM is not dealing with enforcement of environmental performance standards at the mining operation.

305. *Id.* § 5(2)(d).

306. *Id.* § 5(2)(e).

307. See 30 C.F.R. pt. 732 (1994) (“Procedures and Criteria for Approval or Disapproval of State Program Submissions”).

308. OSM, Draft INE-35, § 5(2)(e)(2) (Sept. 12, 1995).

309. *Id.* § 5(2)(f).

Clearly OSM, according to *In re Permanent Surface Mining Regulation Litigation*,³¹⁰ has an interest in accurate and complete data collection and other administrative details to facilitate OSM's oversight role, but to seek to enforce that interest through the § 521(a) notification concept seems cumbersome and unnecessary. Section 521 enforcement procedures should be limited to enforcement of environmental performance standards at the mining operation. Indeed this combination of supervision of administrative detail and enforcement of environmental performance standards threatens the whole of OSM's enforcement role after State primacy. Too many people view OSM's post-primacy activities as too intrusive.³¹¹ The best way to limit that intrusiveness is to separate enforcement of environmental performance standards at the mining operation from any other SMCRA requirements and limit the § 521(a) notification process to the former.

Although the draft Directive cautions verification of facts when a violation is perceived from reviewing State regulatory authority documents³¹² and recommends encouraging citizens with complaints to work through the State regulatory authority first,³¹³ the only instance where the Directive provides in essence for other than written notice "by certified mail"³¹⁴ is where information arises from a joint federal/state inspection. In that instance, the federal inspector should inform the State inspector of the problem area orally then or by telephone later. If the State inspector agrees at that time to take appropriate action within 10 days no further action is needed at that point.³¹⁵

The draft Directive sets forth detailed procedures not discussed in this article,³¹⁶ including specifying the roles of Field Office Directors³¹⁷ and Regional Coordinating Center Directors.³¹⁸

310. 653 F.2d 514 (D.C. Cir.) (en banc), *cert. denied*, 454 U.S. 822 (1981). This case is discussed in Robert Beck, *Setting the Course for the Surface Mining Control and Reclamation Act of 1977*, NAT. RESOURCES & ENV'T 24, 28 (1995).

311. See *supra* note 29; the discussion of H.R. 2372 at text accompanying *infra* notes 330-43.

312. OSM, Draft INE-35, § 6(a)(1) (Sept. 12, 1995). This obviously is relevant to the predicate "has reason to believe."

313. *Id.* § 6(d)(1). Such encouragement does not appear to violate any OSM duty under SMCRA.

314. *Id.* § 6(a)(3). It can also be "hand delivered." *Id.*

315. *Id.* § 6(a)(2). Notification has been given. See also *supra* text accompanying notes 303-04.

316. See generally OSM, Draft INE-35, § 6 (Sept. 12, 1995).

317. See *id.* §§ 5(b)(3)(d), 6(a)(5), 6(b)(4)-(6), & 6(c)(2).

318. See *id.* §§ 6(b)(5) & 6(c)(1), (4).

Thus, even with whatever changes from existing practice this draft Directive will engender, the remaining 10-day notification process appears much too comprehensive and cumbersome.

b. Reviewing the State response

If the State regulatory authority fails to “take appropriate action”³¹⁹ or “show good cause for such failure,”³²⁰ the federal government is to proceed with an inspection.³²¹ Thus, to analyze what OSM’s appropriate response is after the ten days have passed necessitates review of appropriate action, good cause, and arbitrary, capricious, or abuse of discretion concepts. The latter is added to the mix because the Secretary has determined that OSM is to gage the State’s response pursuant to that standard.³²² Whatever improvement there may be in the draft Directive over the earlier one, it is questionable how much the draft Directive adds to what is already in OSM regulations.

However, while the draft Directive definition of good cause³²³ is drawn largely from the Code of Federal Regulations definition,³²⁴ the draft Directive definition does provide instruction on what to do where the review process turns up deficiencies in the State program.³²⁵

Furthermore, the draft Directive attempts to explain application of the arbitrary, capricious or abuse of discretion standard of review.³²⁶ It does so by giving four instances where the standard would be violated.³²⁷ Thus, the standard is violated, first, if the State’s interpretation of its program is inconsistent with the terms of the program or any prior interpretation recognized by the Secretary. While the latter might be deemed occasion for strict scrutiny by the federal government, it hardly should call for an automatic conclusion in every case.

319. *Id.* at § 6(b)(6).

320. *Id.*

321. *Id.*

322. *See supra* text accompanying notes 204-05, 270-71, and the two paragraphs following note 285.

323. OSM, Draft INE-35, § 4(d) (Sept. 12, 1995).

324. 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) (1995), set forth *supra* at note 46 and discussed at notes 276-85 and accompanying text.

325. “The Director shall promptly prepare a draft under 30 C.F.R. 730.11(a) or under 30 C.F.R. 732.17 to require the approved program to be amended.” OSM, Draft INE-35, § 4(d)(1)(i), (iii) (Sept. 12, 1995).

326. *Id.* § 5(b)(3)(a)-(d). The standard was not explained in the Code of Federal Regulations, but was simply adopted. *See supra* note 270 and accompanying text and the two paragraphs following note 285.

327. OSM, Draft INE-35, § 5(b)(3)(b) (Sept. 12, 1995).

A second instance in which the standard is violated is if the State's response does not adhere to correct procedures. Again, although there may perhaps be instances where ignoring procedure would constitute a violation of the standard, it hardly should call for an automatic conclusion in every case. Third, the standard is violated where the State's response is inconsistent with "applicable law". The Directive gives no further explanation. It could at least point out that SMCRA is not applicable law, for once there is an approved State program, the applicable law is SMCRA as interpreted and applied through the State program. The final instance where the standard is violated is where the State's response is "without proper evaluation of relevant criteria."³²⁸ But, who is to say what constitutes proper evaluation and relevant criteria? This instance can only be described as not very helpful.

Perhaps several of the concerns noted in the preceding paragraph are overcome by the statement in the draft Directive that the standard is to be applied "in a highly deferential manner."³²⁹ But, the four instances do not seem to do this.

2. H.R. 2372

H.R. 2372³³⁰ would make a dozen substantive changes in SMCRA, all but one of which are directly related to the federal enforcement role in primacy States.³³¹ However, not all of the relevant changes need to be discussed here.³³² It appears that in general the purpose of the Bill is to provide for exclusive enforcement of approved State programs by the State except where the imminent danger or significant harm provision is implicated.³³³ At least in amending § 521(a) to provide exclusively for State-issued notices of violation in primacy States, the Bill specifically states "except as provided in Subparagraph (B)³³⁴ and Paragraph (2) of this subsection."³³⁵ Paragraph (2) contains the imminent danger or significant harm provision.

328. *Id.* at § 5(b)(3)(b)(4).

329. *Id.* § 5(b)(3)(c).

330. H.R. 2372, 104th Cong., 1st Sess. (1995).

331. The unrelated amendment which would change the definition of surface coal mine operations in SMCRA § 701(28)(B) to in essence exclude roads that are viewed as public roads under State law. See H.R. 2372, 104th Cong., 1st Sess. § 10 (1995).

332. References to other proposed changes have been included at the appropriate points in this article. See *supra* note 169 and *infra* note 361.

333. This provision is discussed in part III.

334. See *infra* notes 340-42 and accompanying text.

335. H.R. 2372, § 7, 104th Cong., 1st Sess. (1995).

However, several of the changes in the Bill to earlier sections of SMCRA are drafted so broadly as to seemingly foreclose even Paragraph (2) enforcement by OSM. Section 201(c) as amended would by implication deny OSM any authority to investigate, inspect, conduct hearings, administer oaths, issue subpoenas, compel attendance of witnesses, require production of written material, review and approve, vacate or modify orders and decisions, or suspend, revoke, or withhold permits unless in a State without an approved State program.³³⁶ Surely it is necessary for OSM to perform some of these acts in enforcing the imminent danger or significant harm provision. Similarly, section 503(e) would be amended so broadly as to appear to require that a State program be amended if the imminent danger or significant harm in question was not otherwise prevented by the State program before there could be enforcement.³³⁷ Congress clearly had determined in SMCRA that enforcement in the face of imminent danger or significant harm should proceed regardless of the source of the law being violated, so such a change would constitute a fundamental change in approach.³³⁸ This procedure would be inconsistent with H.R. 2372's apparent specific attempt to save the imminent danger or significant harm provision. Finally, section 506 would be amended to treat compliance with a permit as compliance with the environmental performance standards of the Act excepting only authorization to seek revision of the permit and, therefore, not excepting the imminent danger or significant harm situation.³³⁹

Thus, unless rewritten, these amendments to §§ 201(c), 503(e), and 506 would have to be interpreted more narrowly than their language suggests by qualifying them so that they are interpreted consistently with the Paragraph (2) exception provided for in amending § 521(a).

H.R. 2372 also appears to amend the Federal Water Pollution Control Act (FWPCA)³⁴⁰ by limiting enforcement of that Act to the regulatory authority approved by EPA under the FWPCA.³⁴¹ However, EPA clearly has concurrent enforcement power under the

336. *Id.* § 3. The amendment says "except in a State with an approved State program" the Secretary has authority to do these listed things. Therefore, by implication, where there is an approved State program, the Secretary does not have the authority to do these listed things.

337. *Id.* § 4. Otherwise the amendment merely makes explicit the current scheme of SMCRA, where enforcement of SMCRA during State primacy is by State program.

338. *See supra* notes 56-62 and accompanying text.

339. H.R. 2372, § 6, 104th Cong., 1st Sess. (1995).

340. 33 U.S.C. §§ 1251-1387 (1994).

341. H.R. 2372, § 7, 104th Cong., 1st Sess. (1995).

FWPCA.³⁴² The enforcement scheme provided for in the FWPCA should not be amended through a provision in a bill otherwise unrelated to the FWPCA and which provision would not have any kind of universal applicability in the FWPCA regulatory scheme.

Although related to enforcement during State primacy, but of more general applicability, the Bill would enact a statute of limitations on enforcement, including collection of penalties. The limitation period would be "three years from the date on which the violation first occurs."³⁴³ However, the bill does not clarify whether, for example, this would be three years from the date on which a penalty is assessed, or three years from the date an assessed penalty becomes due but not paid.

F. *Conclusion of Part IV*

Congress enacted SMCRA because it foresaw environmental problems with fulfilling the growth in demand for coal. Further, Congress viewed many preexisting state programs and actions as inadequate, thereby giving those states an economic advantage over states with tougher controls.³⁴⁴ As *Annaco, Inc.* shows,³⁴⁵ it would be easy for that pattern to recur through lax state enforcement of the existing tougher state statutes. That the desire of states to favor their own coal industry by giving them breaks is still operative is demonstrated aptly by recent negative commerce clause cases. In 1992, the U.S. Supreme Court struck down an Oklahoma statute requiring utilities in Oklahoma to burn at least 10 percent Oklahoma-mined coal.³⁴⁶ In 1995, the Seventh Circuit affirmed³⁴⁷ a District Court decision³⁴⁸ holding unconstitutional an Illinois statute³⁴⁹ that required the Illinois Commerce Commission to take into account the need to mine coal in

342. 33 U.S.C. § 1319 (1994).

343. H.R. 2372, § 9, 104th Cong., 1st Sess. (1995).

344. See generally *In Re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514 (D.C. Cir. 1981), cert. denied sub nom. *Peabody Coal Co. v. Watt*, 454 U.S. 822 (1981), where the court *en banc* examined the federal-state relationship at length. The D.C. Circuit opinion is discussed in Robert Beck, *Setting the Course for the Surface Mining Control and Reclamation Act of 1977*, NAT. RESOURCES & ENV'T 24, 28, 74-75 (1995).

345. See *supra* note 244-46 and accompanying text.

346. *Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992).

347. *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995).

348. *Alliance for Clean Coal v. Craig*, 840 F. Supp. 554 (N.D. Ill. 1993), discussed in Robert E. Beck, *Survey of Illinois Law: Natural Resources*, 18 S. ILL. U. L.J. 927, 936-38 (1994).

349. 220 ILCS 5/8-402.1(a)(i) & (e) (1993). See also, e.g., W. VA. CODE § 24-2-1d(c) (1992), which provides in part: "each utility shall acquire, if reasonable, its projected deficient capacity from electric generation situate in West Virginia and which burns coal or gas produced in West Virginia"

Illinois and some utilities to include scrubbers as part of their compliance plan. Also in 1995, the federal district court in Indiana invalidated similar favoritism provisions in the Indiana statute, and the Seventh Circuit affirmed the invalidation.³⁵⁰

While the concept of State primacy in SMCRA could be the basis of a general administrative policy to opt for federal noninterference unless clearly required by the Act, it appears more appropriately limited to where matters of terrain and other physical features are directly involved. If Congress wants to prevent the harmful consequences to the environment that could occur if the states lapse into the meager enforcement situations that Congress perceived existed before SMCRA was enacted, it is important for the Secretary to have the power to engage in direct enforcement of environmental performance standards at the mining operation. If OSM needs to cut back on its oversight in primacy states, it should do so in areas other than enforcement of environmental standards in the field. On the other hand, if Congress wants to change its mind and conclude that comprehensive environmental standards are bad and should not be enforced, it is free to do so.

V. PATTERN OF VIOLATIONS

If the Secretary finds a “pattern of violations” caused by “an unwarranted failure of the permittees to comply” or “willfully caused by the permittee,” the Secretary must issue an order to show cause why the permit should not be suspended or revoked.³⁵¹ While it is important to note the pattern of violations provision in this article in order to help illustrate the totality of the federal government’s oversight role and powers, the provision is not a focal point of the article. Therefore, the treatment will be summary.

The provision comes from the 1974 House bill and moved forward into SMCRA essentially unchanged³⁵² even though the House

350. *Alliance for Clean Coal v. Bayh*, 888 F. Supp. 924, 938 (S.D. Ind. 1995), *aff’d*, 72 F.3d 556 (7th Cir. 1995). The principal offending portions of the Indiana statute required compliance plans to analyze the effect on economic conditions and employment in Indiana coal mine regions, limited state approval of plans to those that continued or increased use of Indiana coal or justified its failure to do so through a review of economic conditions including the effects on Indiana coal mining regions, and required an annual review of plans that resulted in less use of Indiana coal.

351. SMCRA § 521 (a)(4), 30 U.S.C. § 1271(a)(4) (1994).

352. *See supra* note 129 and accompanying text. The identical language appears in the 1975 Conference bill except the language in brackets below, which apparently was left out inadvertently in the 1974 printing, has been added:

itself tried to change the approach in 1977.³⁵³ SMCRA does not define “pattern of violations,” but it does define “unwarranted failure to comply” as the failure to prevent or abate a violation of the permit or the Act “due to indifference, lack of diligence, or lack of reasonable care.”³⁵⁴ The Secretary has defined “willful violation” as an act or omission that violates the Act, the regulations, or the applicable program, when committed by a person “who intends the result which actually occurs.”³⁵⁵

The Senate Report accompanying S. 7 defined pattern of violations to mean “whenever the permittee violates the same or a related requirement of the Act or permit several times, or when the permittee violates different requirements of the Act or a permit at a rate above the national norm.”³⁵⁶ The Secretary’s regulations provide for circumstances when the Secretary must consider if there is a pattern of violations³⁵⁷ and lesser circumstances when the Secretary may consider the question.³⁵⁸ In addition, in either instance procedural aspects are provided.³⁵⁹

When, on the basis of a federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, [this language is identical to the introductory language of subdivision (3)] the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the [permit should not be suspended or revoked. Upon the] permittee’s failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

H.R. REP. NO. 189, 94th Cong., 1st Sess. 53 (1975).

353. H.R. No. 2 as passed by the House in 1977, 123 CONG. REC. 12,887-88 (1977), contained a material change. See §§ 504(a)(3) & 504(b), 123 CONG. REC. 12,663 (1977); § 521(a) & (b), 123 CONG. REC. 12,672 (1977). The House had eliminated the pattern of violations language from § 521(a)(4) including the reference back to § 504(b), 123 CONG. REC. 12,672 (1977). The House substituted “serious violation” language which would result in a notice of violation; three notices of violation within 90 days of each other would result in a cessation order which could include a show cause as to why the permit should not be suspended or revoked. *Id.* S. 7 as passed in the Senate, 123 CONG. REC. 15,794 (1977), continued the pattern of violation language including the reference back to § 402(b) as contrasted with the House’s change. The Conference also retained the pattern of violations approach which except for the House change in its 1977 version has been extant since 1974. However, the final version refers back to § 504 rather than § 504(b).

354. SMCRA § 701(29), 30 U.S.C. § 1291(29) (1994).

355. 30 C.F.R. § 701.5 (1995).

356. S. REP. NO. 128, 95th Cong., 1st Sess. 90 (1977).

357. 30 C.F.R. § 843.13(a)(3) (1995).

358. *Id.* § 843.13(a)(2).

359. *Id.* § 843.13(a)(1), (b)-(d).

The Secretary must decide whether there is a pattern of violations when there are violations of the same or related requirements during three or more qualifying Federal inspections of the permit area within any twelve-month period.³⁶⁰ To qualify as a Federal inspection for this purpose, it has to be conducted during Federal enforcement of (1) a Federal program, (2) the initial program before a State program is approved, or (3) a State program under § 504(b) or § 521(b).³⁶¹ The initial regulations provided that the Secretary could abort the process if the Secretary found “exceptional factors” that would make it “demonstrably unjust” to revoke the permit.³⁶² This language was deleted in 1982.³⁶³

The Secretary may decide whether there is a pattern of violations when there are violations during two or more Federal inspections of the permit area during any twelve-month period.³⁶⁴ The Secretary is to consider (1) the number of violations of the same or related requirements cited one or more times; (2) the number of violations of unrelated requirements cited one or more times; and (3) the extent to which the violations were “isolated departures from lawful conduct.”³⁶⁵ In the original regulation, all inspections could be used for this purpose,³⁶⁶ but the regulation was changed in 1982³⁶⁷ to provide that inspections other than the same that qualify for the required review above³⁶⁸ can be used only to evidence the willful or unwarranted nature of the noncompliance.³⁶⁹

VI. CONCLUSION

The foregoing review of the history of SMCRA makes it clear to this author that Congress intended federal oversight to include the full range of enforcement against a mine operator when there is a violation of an environmental standard at the mining operation if the State fails to enforce its State program. If the State fails to enforce a part or all of its Program, it could lead to loss of exclusivity and even the

360. *Id.* § 843.13(a)(3).

361. *Id.* § 843.13(a)(4)(i). 104 H.R. 2372, 104th Cong., 1st Sess. (1995) currently under consideration in the House of Representatives and discussed in Part IV(E) would strike the reference to § 504(b). *Id.* § 7.

362. 30 C.F.R. § 843.13(b) (1979).

363. 30 C.F.R. § 843.13 (1983).

364. 30 C.F.R. § 843.13(a)(2) (1995).

365. *Id.*

366. 30 C.F.R. § 843.13(a)(4)(ii) (1979).

367. 30 C.F.R. § 843.13(a)(4)(ii) (1983).

368. *See supra* note 361 and accompanying text.

369. 30 C.F.R. § 843.13(a)(4)(ii) (1995). *See supra* notes 354-55 and accompanying text.

substitution of a Federal program for the State program. As to permittees, it would include inspections, notices of violation, cessation orders, and suspension or revocation of permits. The scope of a particular Federal enforcement action would depend on the nature and frequency of violations.

As to the nature of the violations, it would depend on whether there was imminent danger or the threat of significant harm. If either existed, cessation orders would be issued; if not, notices of violation would be issued.

As to frequency of violations, it would depend on whether many were committed by one permittee or by permittees generally. In the former instance, suspension or revocation of permits would be the remedy; in the latter federal enforcement of a part or the entire State program would be in order. If the State failed totally; promulgation of a Federal program to replace the State program would be in order.

Whether Congress made this intent clear in the Surface Mining Control and Reclamation Act of 1977 is open to some debate as discussed in this article. Although this author would have used a different analysis to reach the Secretary's decision to enforce, the Secretary's current regulatory efforts would seem to be the minimum required as to Federal enforcement of environmental standards at mining operations during State primacy.