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An Analysis of U.S. Surface Mining Law and Its Attitude Toward Land Use Planning

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By Lee W. Saperstein*

Introduction

When President Carter signed the Surface Mining Control and Reclamation Act of 1977[1] (SMCRA) on August 3, 1977, a decade-long struggle to enact federal surface mining environmental legislation was finished. This Act contains a variety of elements, of which uniform design and performance standards of a technical nature are prominent. However, its passage is also notable for the introduction of the principles of formal land use planning to surface mining for coal. While there are many other items of interest in the Act that are not specific to the mining process: restoration of abandoned mine lands, information inventorying for surface mining, and research programs, the items of land use planning are of great legislative interest. This is because of their newness to mining legislation and because of the limited precedent in U.S. mining law.

Examination of the various pre-existing state laws on mine reclamation shows the origins of most of the reclamation standards that are in the Act: backfill of pits to original contour, restoration of topsoil, revegetation with mixed native species, and control of mine water. However, explicit instructions on land use planning is a significant departure from the earlier, individual state laws. These instructions appear to come almost verbatim from earlier, unpassed legislation on national land use

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[1] Public Law 95-87, 91 Stat. 445-532, 30 U.S.C. §§ 1201-1328, Surface Mining Control and Reclamation Act of 1977, approved August 3, 1977, referred to as "the Act" or as P.L. 95-87. 30 C.F.R. § 700.

planning. They contain negative elements — designation of lands where mining will not occur — and positive elements — where mining is permitted, the reclamation plan should conform to land use plans applying to the mined area. While it can be argued that these controls are an essential part of a complete reclamation program, their presence, nonetheless, is a revolutionary step in the legal management of mining in the United States. Because of the magnitude of change, and because of the manner in which a previously denied concept has been introduced, this issue of land use controls for coal mining is examined.

Specific references to land use planning appear in three places in the Act: sections 507 and 508, having to do with application and reclamation plan requirements; section 522, Designating Areas Unsuitable for Surface Coal Mining; and section 601, Designation Procedures (for lands unsuitable for mining noncoal minerals).

The purpose of this Article is to examine the origins and the workings of the planning requirements of the Act. To this end, the sections of the Act containing the requirements are detailed. Then an attempt is made to interpret the dicta and legislative history of the planning section to examine intent. Finally, points of question on potential conflict are raised.

II. PUBLIC LAW 95-87 AND ITS LAND USE COMPONENTS

A. *State Regulation*

The Act recognizes the diversity of land forms and coal deposits throughout the United States by requiring that it be implemented individually in each state that has coal resources. Those jurisdictions, primarily states, that wish to obtain delegated responsibility for the Act may do so by obtaining primacy. To become a regulatory authority, the state must amend its existing surface mine acts, or pass new ones if there was none in existence, to meet the minimum requirements of the Act. The reward for primacy is a share of the monies collected for the abandoned mine reclamation fund. Those states that do not wish to create a mining agency can relinquish responsibility to the federal government, in which case the Office of Surface Mining will implement a program for them. In the period since

the Act's passage, final federal regulations[2] have been promulgated and, of the 34 states with coal programs, 24 have obtained primacy. The remaining ten, with few or no coal mines, have federal programs. States with substantial areas of federal coal lands have executed cooperative agreements with the federal government to provide for state control of this coal.

B. *Section 522, Designating Areas Unsuitable for Surface Coal Mining*

Section 522 of the Act, enforced by 30 CFR sections 761-69, both specifies certain mandated areas where surface mining is forbidden and requires a planning process for designating unspecified at-large areas as unsuitable areas. The specification of mandated areas, section 522(e),[3] found also at 30 CFR section 761, appears to be derived from pre-existing state surface mining laws, but the general requirement for a planning process, contained in sections 522(a-d),[4] also 30 CFR sections 762-69, is derived from some unpassed federal land use planning legislation. This inheritance by the coal mining industry of a scheme intended for national land use planning has provided the impetus for this Article. The Act (SMCRA) requires that each state shall establish a central office capable of determining those areas of the state that are not suitable for surface coal mining. In describing those areas that are eligible for designation, the Act lists four areas of concern:[5]

(A) incompatibility with existing land use plans;
(B) fragile or historic lands;
(C) renewable resources lands;
(D) natural hazard lands.

These areas, particularly (B), (C), and (D) have been termed in other documents as being of "critical environmental concern." The Act then proceeds to state how petitions for such designation are to be brought to the central office. While section 522 is the most novel portion of the Act, the following sections are no less significant in their approach toward land use planning.

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[2] 30 C.F.R. §§ 700-890.
[3] 30 U.S.C. § 1272, P.L. 95-87, Section 522.(e).
[4] SMCRA § 522(a)-(d), 30 U.S.C. § 1272(a)-(d).
[5] SMCRA § 522(a)(3)(A)-(D), 30 U.S.C. § 1272(a)(3)(A)-(D).

C. *Section 507, Application Requirements, and Section 508, Reclamation Plan Requirements.*

Section 507 sets out the requirements for an application for a permit to surface mine coal. It states explicitly that the public must be notified of an impending application[6] and that a copy of the application itself must be publicly available.[7] Naturally, it specifies further that a reclamation plan must be part of the application. The reclamation plan, then, is detailed in section 508, and it is here that specific reference is made to "the consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable state and local land use plans and programs."[8] Thus the drafters of the Act have allowed for coordination of the mineral reclamation plan with local land use plans. It is herein contended that, based on the evidence in the legislative history of Section 522, the drafters intended that this section would be a stimulus to the development of state and local land use plans.

D. *Title VI, Designation of Land Unsuitable for Noncoal Mining, Section 601, Designation Procedures*

This title, with its one section, is mentioned briefly because it appears at first reading to have the same significance for noncoal minerals as section 522 does for coal. This is not so. Closer examination reveals that it is limited only to those parts of the Federal land that are now being "used primarily for residential or related purposes."[9]

According to Representative Morris Udall, this section was inserted into the bill to remedy a problem particular to some Tucson suburbs.[10] With its constraints, it does not have the effect of providing a companion process for designating noncoal minerals and therefore will not be considered further.

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[6] SMCRA § 507(b)(6), 30 U.S.C. § 1257(b)(6).

[7] SMCRA § 507(e), 30 U.S.C. § 1257(e).

[8] SMCRA § 508(a)(8), 30 U.S.C. § 1258(a)(8).

[9] SMCRA § 601, 30 U.S.C. § 1281.

[10] Private address by Representative Udall to members of the NRC *ad hoc* Committee on Surface Mining and Reclamation, July 6, 1978, Tucson, Arizona.

III. INTERPRETING THE LAND USE PLANNING SECTIONS

A. *Introduction*

The Act states that land affected by mining will be restored to "a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood. . . ."[11] Although rhetorically complex, the Act states clearly that the mine designer must know the pre-existing land use in order to match or better it in the reclamation plan. This knowledge is required explicitly in the section on reclamation plans.[12] In other words, the mine designer must be able to perform a land use inventory for the lands in and surrounding the proposed permit area. As the process of land use identification becomes established, the mine planner will need to become familiar with standard terminology for land use categories and with increasingly sophisticated methods of identifying and inventorying land uses.

In identifying a proposed land use for the time when mining is completed, the Act requires[13] that the applicant establish "the relationship of such use to existing land use policies and plans", and that comments be included on the plan by owners of the surface and by any governmental agency, state or local, which would have to act or rule upon the proposed plan. The regulations that have been promulgated by the Office of Surface Mining under the authority of the Act repeat these requirements, stating explicitly that such comments must accompany an application for a permit.[14]

Interestingly, and presumably because of the diversity of such agencies throughout the United States, these regulations do not state what form these comments should take. Yet, because of the very requirement for their existence, it is inevitable that the method of comment will become increasingly more formal. This formality, in turn, will require an office or bureau to issue them and, thus, new land use planning offices will be

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[11] SMCRA § 515(b)(2), 30 U.S.C. § 1265(b)(2).

[12] SMCRA § 508(a)(2), 30 U.S.C. § 1258(a)(2).

[13] SMCRA § 508(a)(3), 30 U.S.C. § 1258(a)(3).

[14] 30 C.F.R. Chapter VII, Subchapter G, Part 780.23(B); these regulations first appeared in the *Federal Register*, Volume 44, No. 50, Tuesday, March 13, 1979, pp. 15312-15463; and will be referred to as the "Regulations."

created and existing ones enhanced in the coal fields. This comment procedure, plus the designation procedure described below, gives new importance to regional planning outside of incorporated communities.

B. *The Designation Process*

The process for designating lands as unsuitable for mining, because of its legislative heritage from the national land use planning bills, is presented in the Act in a more rigorous form than the previously discussed process for eliciting comments from local government. Essentially, as a prerequisite for primacy, the state or other regulatory authority must establish a planning process with an accompanying adjudicacy system or with linkage to an existing one. The designating office must be able to receive petitions, hold hearings, and make a decision within one year of receiving a petition.[15] They must be able to obtain information on the circumstances of the petition on the coal and its value that is within the petitioned area and on data in general about coal resources, demand for coal, the environment, and the economy of the state such that they can advise reasonably on these petitions. This is the same process envisioned in the national land use proposals described in Section IV for inventorying land use and for designating "critical areas" within a state.

C. *State and Federal Designation Programs*

With the advent of primacy and the development of federal programs for non-program states, there has developed a substantial structure for the adjudication of petitions for unsuitability. Each regulatory authority is capable of following the designation process set out by SMCRA. Normally, the identification of the lands that have been declared unsuitable can be found in the state's administrative regulations.

Essentially, states have created indices that compare petitions with land resources inventories, provide for public hearings, and make recommendations for petition acceptance or denial. These recommendations are acted upon by the state office responsible for promulgating regulations.

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[15] *Id.* at Subchapter F, pts 760-769.

An issue of some short-term importance to the designation process is that of "valid existing rights." No person or mining entity who possesses such rights before the date of a petition may lose the right to mine. The definition of these rights is still subject to some dispute and indeed, litigation. In time, these issues will be resolved.

IV. SOME LEGISLATIVE HISTORY

A. *Rationale*

A statement has been made that it is the intention of the Act to stimulate state and local land use planning. Additionally, it was said that the Act is complex and went through many permutations before approval. For both of these reasons, it is important to trace the legislative history of the act and of section 522 within the act. At the various times that surface mining was under consideration, Congress considered proposals of: a total ban on surface mining of coal, an all-minerals surface mining act, a very simple enabling act for the control of coal only, and then, as compromise was reached, various forms of the present Act, which, while complex, only pertains to coal.

B. *Surface Mining Control and Reclamation Act of 1977*

The center of this discussion is the Surface Mining Control and Reclamation Act of 1977,[16] a measure that had gone through many changes and two presidential vetoes before achieving approval. Dozens, perhaps hundreds, of surface mining bills had been proposed in one house or the other of Congress. The following annotated table attempts to trace the serious efforts at legislation, namely those bills marked up by committee and offered for a vote. The intention of Table 1 is not a total legislative history of surface mining control, but a search for the origins of land use planning in the Act. As such, the table starts with the present and works backwards. For the reader interested in the overall legislative history, Table 1 brings up to date the comprehensive report published in 1976.[17] Table 1 does

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[16] *See supra* note 1.

[17] Dunlap, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975*, 21 ROCKY MT. MIN. L. INST. 11 (1976).

not identify every reference to the bills in the *Congressional Record*, but does reference key congressional reports.

Table 1 begins with P.L. 95-87 and goes back to Senator Jackson's S. 630 of the 92nd Congress. A most interesting thing about S. 630 is that it was offered simultaneously with S. 632, a bill providing for national land use planning. Further, S. 630 had no section on the designation of lands unsuitable for mining; the designation process was contained in S. 632. Thus Table 1 ends with the 92nd Congress. The search for the intended role of land use planning in mining must then go into the general domain of national land use planning. The next section of this paper plots the position of the designation section within the various predecessor bills.

Table 1

Legislative History of P.L. 95-87

Surface Mining Control and Reclamation Act of 1977

House of Representatives	*Senate*
95TH CONGRESS, 1ST SESSION	
H.R. 2 (Conference Report)[18] *Surface Mining Control and Reclamation Act of 1977*	H.R. 2 (Conference Report)[19] *Surface Mining Control and Reclamation Act of 1977*
Although H.R. 2 was the conference vehicle, it was amended before final passage.	
H.R. 2[20] *Surface Mining Control and Reclamation Act of 1977* H.R. 2, although amended after reconsideration, was essentially the same as H.R. 25 in the 94th Congress.	S. 7[21] *Surface Mining Control and Reclamation Act of 1977*
94TH CONGRESS, 1ST SESSION	
H.R. 25 (Conference Report)[22] *Surface Mining Control and Reclamation Act of 1975*	H.R. 25 (Conference Report)[23] *Surface Mining Control and Reclamation Act of 1975*
Again, the house bill was the conference vehicle; it was vetoed by	

[18] H.R. REP. No. 493, 95th Cong., 1st Sess. (1977).
[19] S. REP. No. 337, 95th Cong., 1st Sess. (1977).
[20] H.R. REP. No. 218, 95th Cong., 1st Sess. (1977).
[21] S. REP. No. 128, 95th Cong., 1st Sess. (1977).
[22] H.R. REP. No. 189, 94th Cong., 1st Sess. (1975).
[23] S. REP. No. 101, 94th Cong., 1st Sess. (1975).

President Ford on May 20, 1975, and the veto was sustained by the House.

H.R. 25[24]
Surface Mining and Reclamation Act of 1975
H.R. 25 was essentially the same as S. 425 in the 93rd Congress

S. 7[25]
Surface Mining and Reclamation Act of 1975

93RD CONGRESS, 1ST AND 2ND SESSIONS

S. 425 (Conference Report)[26]
Surface Mining Control and Reclamation Act of 1974

S. 425 (Conference Report)[27]
Surface Mining Control and Reclamation Act of 1974

The conference on this bill was involved. The Senate leadership agreed to substitute the language of H.R. 11500 into S. 425 and then use this as the vehicle for the conference. Even so, the bill was additionally amended so that the conference required 18 meetings before a resolution could be reached. All differences were reconciled finally, but passage came too late to avoid a pocket veto by President Nixon.

H.R. 11500[28] Passed July 25, 1974
Surface Mining Control and Reclamation Act of 1974
This bill was the result of the third draft by the committee of a compromise which incorporated most of the important elements of the bills that had been offered to that point. A comprehensive hearings report[30] reprints all of the bills available at that time. H.R. 11500 incorporated portions of H.R. 4863 and S. 425, but was limited to coal. Although many bills were offered, the following are more germane than those not listed.

H.R. 5988[32]
Surface Mining Reclamation Act of 1973
This was an all-minerals bill.

S. 425[29] Passed Oct. 9, 1973
Surface Mining Control and Reclamation Act of 1973
(See text for comments on the origin of the language in this bill.)
A Senate report of similar significance[31] was released at this time. This was the report prepared at the request of Senator Jackson which examined alternatives in surface mining control. Many of the subsequent legislative compromises between total ban and very loose control were based on this report.

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[24] H.R. REP. No. 45, 94th Cong., 1st Sess. (1975).
[25] S. REP. No. 28, 94th Cong., 1st Sess. (1975).
[26] H.R. REP. No. 1522, 93rd Cong., 2nd Sess. (1974).
[27] H.R. REP. No. 1072, 93rd Cong., 2nd Sess. (1974).
[28] S. REP. No. 402, 93rd Cong., 1st Sess. (1973).
[30] "Coal Surface Mining and Reclamation: An Environmental and Economic

H.R. 3[33]
Coal Mine Surface Area Protection Act of 1973
This bill was coal only and was a re-offer of S. 630 and H.R. 6482 of the 92nd Congress

92ND CONGRESS

H.R. 6482, passed Oct. 1972.
Surface Mining Reclamation Act of 1972
The House version of S. 630. This became the basic bill for the House Interior Committee.[34]

S. 630
Surface Mining Reclamation Act of 1972
Unanimously endorsed by the committee and reported in September, 1972, was not passed by the Senate.[35]

At this point the history of the bill becomes more diffuse. The original S. 425 in the 93rd Congress contained much of the 92nd's S. 630, but it also had elements of S. 632, 'National Land Use Policy Act of 1971.' It is appropriate, therefore, to end this particular table and pick up the pieces later.

C. *Designating Areas Unsuitable for Surface Coal Mining*

In debate over S. 425 in the 93rd Congress, one Senator described the designation section as "an area that I believe has great potential for being the mechanism that prods national suicide."[36] While it may never, in fact, have such an extreme effect on the populace, it is an item that is unprecedented in mining control legislation in the United States.

The enacted Section 522[37] is an amalgam of prohibitions that stem from many sources. Section 522(e), prohibits mining

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Assessment of Alternatives," prepared by the Council on Environmental Quality (March 1973) for the Senate Interior and Insular Affairs Committee pursuant to S. RES. 45, 93rd Cong., 1st Sess., Serial No. 93-8 (92-43).

[29] Report of Hearings before the Joint Subcommittees on the Environment and on Mines and Mining of the Committee on Interior and Insular Affairs, House of Representatives, Serial 93-11, April 9, 10, 16, 17, May 14, 15, 1973. Referred to as H.R. Hearings Report Serial 93-11.

[31] *See supra* note 28. H.R. 5988 was offered by Representative Saylor on behalf of environmental organizations.

[32] *See supra* note 28. H.R. 4863 was offered by Representative Saylor on behalf of the administration.

[33] *See supra* note 28. H.R. 3 was offered by Representative Hays, Committee Chairman.

[34] H.R. REP. No. 1462, 92nd Cong., 1st Sess. (1972).

[35] S. REP. No. 1162, 92nd Cong., 1st Sess. (1972).

[36] Senator Fannin (R. Ariz.), 119 CONG. REC. 33188 (October 8, 1973).

[37] SMCRA § 522, 30 U.S.C § 1272.

on any number of categories of federal lands and parks, within publicly-owned parks, and within certain setback distances from roads, dwellings, public buildings, and cemeteries.[38] These prohibitions were expected and have precedent in the state laws controlling surface mining. What is different is subsections (a) through (d) of 522,[39] which require a planning process to inventory coal lands and to adjudicate petitions to designate as unsuitable specific areas of land. Table 2, acting as a companion to Table 1, endeavors to trace the history of the designation section.

Table 2

Legislative History of Section 522,
Designating Areas Unsuitable for Surface Coal Mining,
of Public Law 95-87

Legislation	Section	Comment
P.L. 95-87	522[40]	The omnibus section as passed.
H.R. 2, 95th Congress	522[41]	Identical to that above.
S.7, 95th Congress	422[42]	Identical to that above.
H.R. 25 (Conference version), 94th Congress	522[43]	Identical to that above.
H.R. 11500, 93rd Congress	206[44]	This section contains the planning process, but not the mandated prohibitions. These latter items are contained separately in Section 209, *Permit Approval or Denial.*
S. 425, 93rd Congress	216[45]	An earlier committee draft listed it as Section 215. This section contains the planning process. The language of this section contains specific reference to the need to protect "areas of critical environmental concern."

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *See supra* note 19.
[42] *See supra* note 20.
[43] *See supra* note 21.
[44] *See supra* note 26.
[45] *See supra* note 27.

H.R. 5988, 93rd Congress	213[46]	This is a designation section which specifies that reclamation plans should be compatible with land use plans and there should be no mining in "areas of critical environmental concerns."
H.R. 4863, 93rd Congress	(a)(8)[47]	The statement, "the regulations provide that the responsible State agency will identify areas, or types of areas, in the State which, if mined, cannot be reclaimed with existing techniques," is a predecessor to 522(a)(2).
H.R. 3, 93rd Congess	9[48]	No designation section is contained. However, in the sections on approval of permits, there appears language that forbids approval if mining would cause water pollution or was within one mile of publicly-owned land if the mining would create damage.
S. 630, 92nd Congress	—[49]	No designation section is contained.
S. 632, 92nd Congress	—[50]	However, this parallel measure is a complete land use planning bill.

As one reads through the various proposed sections for designation, there is a certain similarity of language to that in the Act. In particular, the language identifying "areas of critical environmental concern" survives intact from Congress to Congress. In version after version, there is repeated a definition of "critical areas." In an effort, perhaps, to disguise what was written, the text of the definition remains in the Act (SMCRA) but not its explicit title, "Areas of Critical Environmental Concern." It is the subject of "critical areas" that provides the direct link to land use planning.

S. 425 of the 93rd Congress is derived from S. 630 of the preceding Congress, however, it also contains language from S.

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[46] *See supra* note 28.

[47] *Id.*

[48] *Id.*

[49] *See supra* note 34.

[50] S. REP. No. 869, 92nd Cong., 2nd Sess. (1972).

632, "National Land Use Policy Act of 1971." Specifically, the Senate report on S. 425[51] states that, "the definition of 'areas of critical environmental concern' is identical to the definition in S. 268 — The Land Use Policy and Planning Assistance Act of 1973 — as passed by the Senate earlier this year." S. 268 of the 93rd Congress was a direct successor to S. 630 of the preceding Congress. S. 630 and S. 632 were introduced on the same day. From that time forward, "areas of critical environmental concern" became the concern of the drafters of surface mining legislation. Ultimately, they have become the concern of coal surface mine designers.

D. *National Land Use Policy*

Proposed legislation for national land use planning, in spite of announced support from President Nixon, did not pass and, to the best of this author's knowledge, has not been reintroduced. Yet, it has been said that "never has a bill that did not pass had so much influence on the path of national legislation."[52] The ideas embodied in this legislation, which are seen clearly in SMCRA, appear in many other acts. One in particular, The National Coastal Zone Management Act of *1972*[53] closely parallels the land use bill in its philosophy for planning and control. An earlier draft of the Coastal Zone Act states explicitly in its legislative history that portions were derived from a proposed land use bill.[54] The Coastal Zone Act as well as earlier drafts of the SMCRA were written as if they were to be companions to the National Land Use Planning Act.

The search for the origins of "critical areas" and their exclusion from mineral development is made easier by tabulating the land use bills in the same fashion as the surface mining bills. The starting point is S. 268, the "Land Use Policy and Planning Assistance Act of 1973," and the table works backwards in time.

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[51] *See supra* note 27.

[52] Quarles, Stephen, P., formerly Special Counsel to the Senate Committee on Interior and Insular Affairs, private communication, 24 October, 1980.

[53] S. REP. No. 753, 92nd Cong., 2nd Sess. (1972).

[54] S. REP. No. 526, 92nd Cong., 1st Sess. 17 (1971).

Table 3

Legislative History of S.268

Land Use Policy and Planning Assistance Act of 1973

With Attention to Areas of Critical Environmental Concern

House of Representatives	*Senate*
93RD CONGRESS	
The House version did not pass	S.268[55] *Land Use Policy and Planning Assistance Act of 1973* This bill was reported on June 14, 1973 and passed one week later. It was a reoffer of S.632 from the 92nd Congress. S.268 contains explicit references and definitions for "critical areas".
92ND CONGRESS	
The House version, H.R. 7211 was similar to S.632, but was never released from the Rules Committee.[57]	S.632[56] *Land Use Policy and Planning Assistance Act of 1972* S.632 was originally introduced by Senator Jackson (*National Land Use Policy Act of 1971*) as a reoffering of S.3554 of the 91st Congress. As such, it did not contain an explicit section on "critical areas." When it was taken up by committee, it was amended to incorporate substantial portions of the administration bill, S.992. The amended S.632, which was offered to the full Senate and passed, did have a section on critical areas.[58] S.992[59] Introduced by Senator Jackson and Allott by request of the administration. This bill had a "critical areas" section.

[55] S. REP. No. 197, 93rd Cong., 1st Sess. (1973).

[57] *See supra* note 49.

[56] *Id.* at 85.

[58] S. REP. No. 197, 93rd Cong., 1st Sess. 85 (1973).

[59] Senate Committee on Interior and Insular Affairs, *National Land Use Policy — Background Papers on Past and Pending Legislation and the Roles of the Executive Branch Congress, and the States in Land Use Policy and Planning*, 92nd Cong., 2nd Sess., April, 1972.

91ST CONGRESS

The House Interior Committee did not consider S.3354's counterpart.	S.3354[60] *National Land Use Planning Act of 1970* This bill was offered by Senator Jackson on behalf of himself and the Senate Interior Committee in December of 1970; no vote was taken by the full Senate. There was not an explicit "critical areas" section.

In examining land use planning, it is important to mention that much of the subject, including legislative drafts, has been presented in two comprehensive and useful reports.[61] The reader interested in land use planning is well advised to examine them.

Table 3 shows that the introduction of "critical areas" into the stream of legislation came with the administration's S. 992 in the 92nd Congress. Seeking the source of "critical areas" in earlier federal legislation proved to be fruitless. One source[62] identified the American Law Institute's (ALI) "A Model Land Development Code"[63] as the original presenter of the "critical areas" idea. The ALI Code began with a study of current land use laws in 1963 and progressed through four tentative drafts (1968, 1970, 1971, and 1972).[64] At the time of S. 632, the ALI had not adopted the Code officially. This lack of passage is of little import, however, as the concept of "critical areas", found in Article 7, part 2, of the Code[65] was born. "Tentative Draft No. 3" of the Code presents section 7; although it appeared in 1971, it is presumed that the foundation work for "critical areas" was done in the 1960s.

While this review only scratches the surface of the body of law and literature that composes the theory of land use planning, it does confirm the legislative link between the designation section (section 522) of SMCRA and the fundamentals of land

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[60] S. REP. No. 1435, 91st Cong., 2nd Sess. (1970).

[61] *See supra* note 59; Senate Committee on Interior and Insular Affairs, *National Land Use Policy Legislation, 93rd Congress: An Analysis of Legislative Proposals and State Laws*, 93rd Cong., 1st Sess., (April 1973).

[62] *See supra* note 51.

[63] American Law Institute, *A Model Land Development Code*, Tentative Draft No. 3 (Articles 7, 8, and 9 are reprinted in *National Land Use Policy Legislation*).

[64] *See supra* note 61 at 116.

[65] *See supra* note 61 at 393.

use planning. It appears that there is justification for the statement that the framers of the Act intended that it become a stimulus for mineral land use planning.

This is the same process envisioned in the national land use proposals (described in the section on legislative history) for inventorying land use and for designating "critical areas" within a state.

E. State and Federal Designation Programs

With the advent of primacy and the development of federal programs for non-program states, there has developed a substantial structure for the adjudication of petitions for unsuitability. Each regulatory authority is capable of following the designation process set out by SMCRA. Normally, the identification of the lands that have been declared unsuitable can be found in the state's administrative regulations.

Essentially, states have created offices that compare petitions with land resources inventories, provide for public hearings, and make recommendations for petition acceptance or denial. These recommendations are acted upon by the state office responsible for promulgating regulations.

An issue of some short-term importance to the designation process is that of "valid existing rights." No person or mining entity who possesses such rights before the date of a petition may lose the right to mine. The definition of these rights is still subject to some dispute and indeed, litigation. In time, these issues will be resolved.

V. SOME IMPLICATIONS OF DESIGNATION

A. *Introduction*

A review of the structure of the designation process and a guess at its operation in the future raises some difficult questions. Without doubt they will be answered in time by agency interpretation, by precedent through practice, and by legal adjudication. In the meantime, though, it is possible to identify some of these questions and to anticipate their possible solution. The following paragraphs examine the significance of these issues.

B. *Mandated Exclusions*

Section 522(e) of the Act has several categories of mandated exclusion in it: absolute prohibitions against mining in lands of national significance such as national parks; laws against mining in amenity lands such as national forests, other public parks, and historic sites, except that limited variances from the ban can be obtained in these cases; and a proximity ban against mining too close to roads, occupied dwellings, public buildings, schools, churches, public parks, and cemeteries. In the last set of cases, variances for roads and dwellings can be obtained, but there is no provision for a variance from the setback bans for public buildings and cemeteries. In considering the effect of these interdictions, one should be mindful that this is a coal-only law, which removes any consideration of one-only rare deposits of strategic interest because there are alternative sources of coal. However, one should be equally mindful that most underground coal mining results in surface effects and that the prohibitions against surface mining will probably work against underground mining also.

Thus the first question derived from these bans is about underground mining. Is it prohibited from mandated areas also, or will it be prohibited on a case-by-case basis where a determination of potential surface damage will need to be made first? Remembering that underground coal mines can spread out miles from their portal, the likelihood of being under a park or historic area is not remote.

The second question is about the operation of the variances. How will these decisions be made, how can they be appealed, and how long will it take? An obvious answer to these questions is that each case will have to be appealed to the designation-process office and that a period of a year will be required for an answer. Equally obvious is that this is not necessarily the most efficient solution.

Since there is no provision for a variance from the ban on mining certain lands, there should be no question over the meaning of this absolute ban. Congressional intent is clear, there is to be no mining in national parks and in five other types of amenity lands. But included in this total ban are cemeteries. The question that we may have to bear in the future is that of the sanctity of burial grounds. As now written, it would take Congressional action to amend the Act to remove any cemetery by mining or to undermine it. The issue is not trivial for two

reasons. The first is the philosophical question of relative value. Congress has decided that any and all samples of cemeteries are more important than any coal mine. A variance not only removes the specific cemetery, but attacks the philosophy. The second reason is more immediate. What if mining were required under a burial ground, or a national park for that matter, to extinguish a mine fire or to eliminate an orphan source of polluted mine drainage? Apparently, congressional permission is required in order to obtain that right to mine.

C. *Reclamation Not Feasible*

The Act says that if its requirements are not technically or economically feasible, then mining should not be allowed. On the face of it, this is a sensible restriction. The obvious dilemma occurs when the mining company says that they can reclaim and the agency says that they cannot. Since the agency is likely to rule in its own favor in the case of a dispute, the potential for appeal is great. Then, the spectacle of opposing expert witnesses is the obvious outcome. Since the law states that there should be an appeal system but does not define it or require it to be uniform among the states, it is probable that many years will pass before this issue settles down.

Although the law has a provision for experimental practices[66] to determine if reclamation is technically feasible, the question of economic feasibility does not lend itself to such empiricism. The arbitration of a permit denial because it is declared by the agency that it is not economically feasible to reclaim will be most difficult. It would seem that the framers of the law did not want bankruptcy to be a cause for non-performance. Since the right to tempt bankruptcy appears to be an integral part of a free-enterprise system, it does seem to be an extraordinary move.

D. *Land Unsuitable*

As suggested earlier, the process for designating lands as unsuitable for mining because they are "critical areas" is elaborated well in the Act because of its extensive legislative history. The question that arises, however, is due directly to the extent

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[66] SMCRA § 711, 30 U.S.C. § 1301.

of the process. Will the designation process take up to a year, and untold cost, for each permit application? The answer to that question will lie in the planning agency's interpretation of regulations which state that a petition may be rejected if it is frivolous.[67] Such a rejection is permissible if a request for designation has already been denied for the same area. The open question is how the agency will define similarity or incorporation of areas. Hence, is a permit area that borders an area that has been petitioned unsuccessfully part of the previously petitioned area or not? If the agency decides that it is not, then each new permit could be contested by opponents of mining through the designation process. The number of petitions will also depend upon the interpretation placed by the agency on the definition of those persons with interests affected adversely by the mining. If the interpretation is global, *i.e.*, any member of the human community is affected by changes to the environment, then the number of petitions will be large. On the other hand, a narrower interpretation, residents of the area for instance, would keep the number of petitions much smaller.

Although the regulations contain a section on termination of designation,[68] there is no elaboration of a process for appeal of a decision. This means that such an appeal must follow established precedent for appeal of any agency decision. Hence, an appeal could well be heard by a board or a court who are not familiar with mining or with the petition process. Ultimately, an appeal could become a suit against the agent, the Secretary of the Department of Environmental Resources in Pennsylvania, for instance. Again, where there is ambiguity, there will be expense and delay.

It may be that an appeal procedure could have been built into the petition system if the decisions had been made by the local land use planners. The role of the state or central designation office would then be one of review, appeal, and support of the statewide process. Although it could be said that local officials may not have the experience or training to rule on such decisions, it is true that they are physically closer to the facts. The central office would then provide a tempering and unifying control which would prevent chaotic variations in decisions across the state. This conjectured system would link the desig-

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[67] 30 C.F.R. Chapter VII, Subchapter F. § 764.15(a)(3).

[68] *Id.* at § 764.13(c).

nation process with the land use review performed by local officials rather than have it as a separate process.

E. *Local Land Use Planning*

Since the above-conjectured designation process is not part of the law, the effect of the law on local officials is of an indirect nature. By asking local officials to review permits in light of their land use plans, the Act stimulates the development of such local plans. The presence of lands designated as unsuitable for mining in a region may stimulate that region's planners to think of zoning as a means of controlling, or, conversely, stimulating mining. Thus, with the stimulus provided by the Act, it is quite possible that there will be an increased number of mineral zones in the coal fields. By exclusionary means, or by the special-use-by-permit zoning methods, local land use planners will have more to say about the control of mining in their area. Of course, it is quite clear that local officials can act as petitioners in the designation process. In sum, the Act stimulates local officials to deal with mining in their region, but it does not give them any more direct authority over mining than they have at present.

CONCLUSION

During the debate before passage of S.268, the *Land Use Policy and Planning Act of 1973*, Senator Tunney said, "I want to emphasize that the legislation does not provide for a Federal zoning mechanism — as some have charged." Instead, he went on to say, it strengthens a state's control over its land areas.[69] Perhaps the same disclaimer should be made for section 522 of the Act since it is an inheritor of S.268. The essence of this Article, however, is that section 522 goes a long way toward establishing a federal system of land use controls for coal mining. True, section 522, like its predecessor land use act, operates through the states. Equally true is the premise that a land use plan is not a zone. Hence, Senator Tunney's statement, in the strictest sense is true. However, much more control over mineral development is given to the various levels of government by this Act than they have ever possessed before. The Act is limited to

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[69] Senator Tunney, 119 CONG. REC. 20631 (1973).

coal, but this does not mean that the designation process will be forever limited to coal. There is nothing in the Act that prevents its requirements from being applied to other minerals. Instead, practice in many states suggests that they will extend the designation process to all minerals.

Because a designation process is one of the requirements for primacy, it is obvious that there will ultimately be such an office in each of the states that have minable coal reserves (approximately 34). Further, the Act does not require the creation of a mineral zone; it requires instead that a planning and adjudication process be established to designate lands as unsuitable for mining. It is contended, however, that this planning office, plus the demand for land use review during the permit application process, will lead to increased zoning awareness and zoning activity by state and local officials.

The option not to have a designation office does not exist. Furthermore, each state application for primacy is reviewed by OSM before approval. Thus, the structure of the planning offices in the individual states will be similar. After primacy, it is fairly sure that the state offices will link into a network that is directed by OSM. In spite of the apparent state control over the planning process, it seems that there will be only one model for the designation office and that will be the one established by the Act.

On a note of optimism, it is possible that the planning process, if it evolves into full-scale mineral land use planning, will serve to remove conflict over the ability of a company to mine a specific site. Land use planning, or zoning, which is the local embodiment of a land use plan, does tend to expose expectations for use of a land site. Once established, a mineral land use plan removes many questions about approval or denial of a specific mining plan.

In its mandatory exclusions, the Act presumes a judgment against mining with respect to the listed areas and amenities. The Act has no room for individual decisions or compromises. In this respect, the Act is distrustful of mining. By its nature, it presumes that any park, cemetery, or designated stream is more important to the country than is the coal that might underlie these sites. It further presumes that the mining industry is incapable of restoring these sites. This presumption is made without reference to a particular site, whatever its worth, or to a particular company, no matter its skill or expertise in recla-

mation. It is possible that the Act will cause further concentration of mining restrictions. The mandated exclusions with their removal of choice, tend to work against the land use planning concept that land is used for its highest purpose, and that arbitrary designations are to be avoided.

Similarly, in the designation process, the Act presumes only to ban mining. There is no consideration given to the opposite possibility; that is the designation of lands suitable for coal mining. Implicit in the Act is the notion that there are infinite reserves of coal. Thus, designation need only work to prevent damage to the surface from coal mining. The Act gives no protection to coal reserves from development on the surface.

The designation process has become part of the mining picture. It is probable that this process will grow into a form of mineral land use planning throughout the coal fields. It may have some benefit for coal mining companies, but at the moment the costs are more obvious to the miners than are the benefits. The planning and designation process should be of value in protecting the environment, particularly those areas of a critical nature. The long-term or equilibrium nature of this designation process will not really be known until there has been enough experience to establish experience and precedent in the practice.