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Chapter 10

Back in the Spotlight: The Surface Mining Control and Reclamation Act in 2013

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Synopsis

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1 The authors of this chapter are or have previously been counsel in many of the cases discussed herein. The views expressed in this chapter are their own and do not necessarily reflect the views of their clients.

The Surface Mining Control and Reclamation Act was enacted almost 36 years ago to balance the nation's need for coal as a source of fuel with the need for national environmental regulation of coal mining. The Act (known by its acronym, SMCRA) was a lightning rod for controversy from its inception, inspiring two presidential vetoes even before its passage in 1977. And once SMCRA became law, it spawned decades of intensive rulemaking and enforcement litigation as one group or another attempted to tilt the Act's balance in their direction. But as the 21st century dawned, the regulation of surface mining and reclamation seemed to have largely stabilized and matured.

SMCRA is now back in the spotlight as a center of controversy as the Obama administration declared what critics have called a "war on coal." Driven by environmental concerns — principally, a belief that the burning of coal must be eliminated as soon as possible to save the planet from the perils of climate change — the administration and environmental activists have rediscovered SMCRA, pressing it into service as a weapon in their arsenal to move "America Beyond Coal." Recent developments have fulfilled President Obama's campaign promise to bankrupt the coal industry and have done much to upset Congress' balancing act between encouraging coal mining and protecting the environment. With SMCRA back in the spotlight, this chapter canvasses recent regulatory and litigation developments and addresses the outlook for prospective developments in surface mining regulation.

§ 10.01. Introduction.

[1] — Overview of Surface Mining Control and Reclamation Act.

The 95th Congress enacted the Surface Mining Control and Reclamation Act (SMCRA) on August 3, 1977, to strike a balance between the nation's interests in protecting the environment from the adverse effects of surface coal mining and in assuring the supply of coal that was (and still is) essential to the nation's energy requirements.[2] To meet those goals, the Act established a system of "cooperative federalism," in which responsibility for the regulation of coal mining and its surface effects in the United States is "shared" between the U.S. Secretary of the Interior (acting through the U.S. Office of Surface Mining Reclamation and Enforcement (OSM)) and state regulatory authorities.[3]

Under SMCRA, Congress established "minimum national standards" for regulating surface coal mining and reclamation, but allowed states to enact their own laws incorporating these standards, as well as any "more stringent," but not inconsistent, standards that they might choose.[4] Once a state has done so, and its program has been approved by the Secretary, the federal laws and regulations drop out and the state becomes the *exclusive* regulator of surface coal mining (and is known as a "primacy" state).[5] In

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2 *See* SMCRA, Pub. L. 95-87 (1977), codified at 30 U.S.C. §§ 1201-1328; *see also* 30 U.S.C. § 1202(a), (d), (f). As an illustration of the importance of that balance, the federal agency charged with administering SMCRA, the U.S. Office of Surface Mining Reclamation and Enforcement, even displays a scale on its seal, with a depiction of trees on one side of the scale evenly balanced with a depiction of a pile of coal on the other.

3 *See* Bragg v. W. Va. Coal Ass'n, 248 F.3d 275, 288 (4th Cir. 2001) (citing H.R. Rep. No. 95-218, at 57 (1977), reprinted in 1977 U.S.C.C.A.N. 593, 595).

4 *Id*. at 288 (citing H.R. Rep. No. 95-218, at 167 (1977), reprinted in 1977 U.S.C.C.A.N. at 698).

5 *Id*. at 288-89 (explaining that "SMCRA provides for *either* State regulation of surface coal mining *or* federal regulation, but not both. . . . Thus, after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the 'blueprint' against which to evaluate the State's program, 'drop out' as operative provisions."); *see also In re* Permanent Surface Mining Litig., 653 F.2d 514, 519 (D.C. Cir. 1981) (holding that "it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply. *Administrative and judicial appeals of permit decisions*

other words, the state, not OSM, is entitled to regulate the environmental aspects of coal mining and its surface effects. And the state, not OSM, issues mining permits and inspects mines for compliance. For that reason, the cooperative federalism system under SMCRA is far more robust than under other environmental statutes and regulatory authority is not really "shared" between the two sovereigns.[6] As the U.S. Court of Appeals for the Fourth Circuit has explained, "in contrast to other 'cooperative federalism' statutes, SMCRA exhibits extraordinary deference to the states:" ***either*** the federal government ***or*** the state is the regulatory authority, but not both.[7]

SMCRA has been a focus of controversy since before it became law. Similar legislation proposing federal regulation of surface mining had been introduced, debated, presented, and twice vetoed by President Ford in 1974 and 1975. SMCRA was then passed by the 95th Congress and signed into law by President Carter.[8] The new Act was immediately the subject of a pre-enforcement (and ultimately unsuccessful) constitutional challenge before the U.S. Supreme Court.[9]

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are matters of state jurisdiction in which the Secretary plays no role" (citations omitted) (emphasis added)).

6 *See* Christopher B. Power and Donnie L. Adkins II, "SMCRA Primacy, Mine Permit Transfers, Ownership and Control, and Excess Reclamation Responsibilities: A Primer on Confusing Topics," 31 *Energy & Min. L. Inst.* ch. 8 (2010) (describing how SMCRA's system of cooperative federalism is different from the division of authority in other environmental statutes) (hereinafter Power and Adkins).

7 *Bragg,* 248 F.3d at 289, 293.

8 For information about state regulation of surface mining prior to the Act's passage, the many failed attempts to enact a national regulatory scheme, and the early days of the Act's implementation, *see* Edward M. Green *et al*., "The Surface Mining Control and Reclamation Act of 1977: New Era of Federal-State Cooperation or Prologue to Future Controversy?," 16 *E. Min. L. Inst.* 11 (1997); *see also In re Permanent Surface Mining Litig*., 653 F.2d 514; *In re* Surface Mining Regulation Litig*.,* 627 F.2d 1346 (D.C. Cir. 1980).

9 *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981). That challenge was brought by the Virginia Surface Mining and Reclamation Association, Inc., 63 of its member companies, and four individual landowners, who were later joined by the Commonwealth of Virginia and the town of Wise, Virginia, and who challenged the Act as violating the Commerce Clause, the Fifth Amendment Due Process Clause, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment. The Supreme Court rejected those arguments and upheld the Act as constitutional.

SMCRA's implementing regulations also have long been controversial. After the Supreme Court deemed the Act constitutional, OSM promulgated interim and then permanent implementing regulations through notice-and-comment rulemaking, many of which were immediately challenged with varying degrees of success.[10]

[2] — Chapter Roadmap.

Although the era of wholesale challenges to SMCRA and large portions of its regulatory framework largely ended with the 20th century, the regulation of surface mining is still evolving due to (i) the controversy that continues to surround this mining practice (particularly in Appalachia where mountaintop mining results in valley fills and buried stream segments);[11] (ii) the federal government's recent efforts to increase "oversight" over state regulatory programs in order to ensure more aggressive environmental protections; and (iii) active litigation by environmental non-governmental organizations (ENGOs) that have rediscovered SMCRA and either are opposed to coal mining generally or selected aspects of it, and that bring suit against industry as well as federal and state regulators.[12] Rather than trying to amend the statute to rebalance SMCRA more in favor of the environment at the expense of coal mining, the administration and its environmental allies have sought through litigation and inter-agency agreements and policy changes to "reinterpret" SMCRA to achieve their environmental protection objectives.

This chapter explores those recent developments, concentrating on the following topics.

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10 *See* 30 C.F.R. Chapter VII; *see, e.g.,* Nat'l Mining Ass'n v. U.S. Dep't of Interior, 177 F.3d 1 (D.C. Cir. 1999) (challenge to Applicant Violator System regulations); Nat'l Mining Ass'n v. U.S. Dep't of Interior, 105 F.3d 691 (D.C. Cir. 1997) (same); Nat'l Wildlife Fed'n v. Lujan, 950 F.2d 765 (D.C. Cir. 1991) (challenge to bond release regulations); Nat'l Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991) (challenge to subsidence regulations); Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988) (challenge to various permanent regulations); *In re Permanent Surface Mining Litig.*, 653 F.2d 541, 519 (challenge to various permanent regulations); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346 (D.C. Cir. 1980) (challenge to interim regulations).

11 For a discussion of mountaintop mining techniques, *see* Ohio Valley Environmental Coalition. v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009).

12 *See* 30 U.S.C. § 1270(a).