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# IMPACT ON INDUSTRY OF THE FEDERAL SURFACE MINING CONTROL AND RECLAMATION ACT

Marvin O. Young\*

## I. INTRODUCTION

I welcome this opportunity to comment on the new Federal Surface Mining Control and Reclamation Act of 1977. The general subject of this National Energy Forum is "Government Helping or Hurting?". From my vantage point, that question is very simple to answer. "Government", particularly the federal government is "hurting." Actions being taken by the federal government are often counterproductive in solving the nation's energy problem. Our focus here is on several such counterproductive regulations which are undoubtedly here to stay in some form. It would be unrealistic to talk about repeal of the new Federal Surface Mining Act because there is no chance of this happening.

Congress has passed a number of acts of the magnitude of the Surface Mining Act in recent years, including the Federal Coal Mine Safety & Health Act.<sup>1</sup> Some of these new laws have been characterized as "lawyers' relief acts." Many of us believe that the Surface Mining Control and Reclamation Act of 1977<sup>2</sup> is a "lawyers' and engineers' relief act." Not only will this new law require countless hours of lawyers' time, but the Act will require many additional engineers.

Some of the purposes of the Surface Mining Act are listed in section 102.<sup>3</sup> I would like to direct your attention to section 102(f),<sup>4</sup> be-

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1. Federal Coal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, § 102, 91 Stat. 1290 (amending 30 U.S.C. § 801 (1970)).

2. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 101, 91 Stat. 445 (to be codified as 30 U.S.C. § 1201).

3. *Id.* § 102, 91 Stat. 447 (to be codified as 30 U.S.C. § 1211).

4. Pub. L. No. 95-87, § 102(f), 91 Stat. 447 (to be codified as 30 U.S.C. § 1211(f)).

cause the interim regulations which were promulgated on December 13, 1977 surely failed to consider this purpose of the Act. The purpose listed in section 102(f) is to "assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being, is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy."<sup>5</sup> If the interim regulations are any indication of future regulatory action under this Act, no such balance exists and the Act will seriously impede the production of coal.

## II. BACKGROUND

I was asked to discuss the general impact that the Surface Mining Act would have on the production of coal. If the final interim regulations are any indication of enforcement of the Act, the impact on the production of coal can be described very succinctly as adverse, severe, serious, substantial, material, great, important, significant, and bad. While this legislation was pending in Congress, the coal industry repeatedly warned of the adverse effects which it would have on coal production. But in early 1977, following a change of national administrations, it became apparent that this legislation would be enacted. It is common to overreact to the adverse effects of legislation before it is passed. However, while burdensome and costly, new regulations often do not interfere with the conduct of businesses to the extent predicted. The Surface Mining Act appears to be an exception to this rule, and apparently the industry *underestimated* the severe impact of the additional regulation.

The National Coal Association and American Mining Congress created a joint committee to study this Act and to provide constructive input to proposed regulations. One purpose was to help the Department of Interior prepare regulations which would be workable and practical in accomplishing the purposes of the Act. The committee endeavored to provide comment prior to publication of the proposed regulations to avoid the difficulty of major changes once the proposed regulations were published. Some of the suggestions of the committee were adopted during the early drafting period. Unfortunately, however, many constructive suggestions of the committee were rejected. The governmental task force which drafted the regulations was not involved in drafting Department of Interior surface mining regulations in

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5. *Id.*

the past. This gave them a fresh point of view of what the regulations should contain, but unfortunately they appeared to lack practical knowledge of the real world of coal mining.

### III. TROUBLE SPOTS

While it is not possible to discuss all of the problems presented by this Act in the time allotted to me, I would like to mention a few of significant features. One difficulty is the rigid timetables<sup>6</sup> which are imposed by the Act. It is clear that many of these timetables will be impossible to meet. The government itself failed to meet an early deadline. The Department of the Interior was required to promulgate final interim regulations by November 1, 1977. They were actually issued forty-three days late. I have seen a seven page list of the various timetables that must be met under the Act over the next four years. If the experience under the Water Pollution Control Act of 1972<sup>7</sup> is any guide, many of the timetables will probably not be met.

Here are some of the areas of major activity under the Act. First, there are the interim compliance standards which were issued in final form on December 13, 1977. They are applicable to new mines as of February 3, 1978, and to existing mines as of May 3, 1978. The permanent regulations are required to be issued by August 3, 1978. The permanent regulations must cover all of the performance standards that will govern coal mining. The permanent regulations must also prescribe standards for programs to be adopted by the states, and also the standards for programs for federal lands. States must adopt programs by February 3, 1979,<sup>8</sup> if they are to qualify to administer the Act in their states. There is a provision, however, for a six-month extension, which many states will no doubt require since few state legislatures will meet between August, 1978, and February, 1979.

Focusing next on the interim compliance standards provided for in section 502(c)<sup>9</sup> of the Act, it is significant that some twenty lawsuits have been filed challenging the interim compliance standards. Peabody Coal Company filed one of those suits. National Coal Association and American Mining Congress also filed such a suit on behalf of themselves and eighty-two other plaintiffs. Texas and Virginia have

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6. *Highlights of Surface Mining in 1977*, 64 MINING CONGRESS J. STEVE MILLS —, Feb. 1977.

7. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (Supp. III 1973) (amending 30 U.S.C. § 1151 (1970)).

8. Pub. L. No. 95-87, § 503, 91 Stat. 470 (to be codified as 30 U.S.C. § 1253).

9. Pub. L. No. 95-87, § 502(c), 91 Stat. 468 (to be codified as 30 U.S.C. § 1252).

filed suits challenging these regulations. Three environmental groups have filed a suit, as have many of the major coal operators.

Section 526 of the Act<sup>10</sup> relates to judicial review of actions of the Secretary of the Interior. One requirement of section 526(a)<sup>11</sup> of the Act is that a person aggrieved by an action of the Secretary must have participated in the administrative proceedings. In the case of interim regulations this means that to challenge the regulations, the person must have participated by commenting on the proposed regulations. Section 526(a) provides for a "petition for review" to determine if the Secretary's action was arbitrary, capricious, or otherwise inconsistent with law. Some of the plaintiffs in the pending lawsuits have not limited their challenges to the grounds set forth in Section 526(a). For instance, Peabody has alleged the unconstitutionality of certain provisions of the regulations as they would apply to Peabody's operations, including a violation of the fourth amendment (unreasonable search and seizure), the fifth amendment (due process of law), and the tenth amendment (invasion of powers reserved to the states). Peabody also contends that some provisions contained in the final interim regulations are illegal because such provisions did not appear in the proposed regulations and therefore, were not subject to comment. Further, some of the interim compliance regulations conflict with regulations issued by the Mining Enforcement and Safety Administration (MESA) and the Environmental Protection Agency (EPA).

I will illustrate the impacts of the interim compliance standards on one operator (Peabody Coal Company). I will leave to the future the additional impacts of the permanent regulations and the state programs promulgated under the Federal Act, when these become law.

Peabody currently operates forty-seven mines in ten states—thirty-one surface mines and sixteen underground mines. Without prolonged strikes, we would produce around seventy million tons a year. About seventy percent of that production is from surface mining, and about thirty percent is from underground mining, although this will probably change in the future. Peabody grades and vegetates about seven thousand acres of land per year. The current cost of reclamation averages \$3,500 an acre, although the cost varies widely from state to state.

Under the Act, Peabody estimates that the average cost of reclamation will triple to about \$11,000 an acre. Operating costs will increase at least fifty million dollars a year, and more than 900 additional

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10. Pub. L. No. 95-87, § 526, 91 Stat. 512 (to be codified as 30 U.S.C. § 1276).

11. *Id.*

employees (out of a total workforce of 15,000) will be needed to comply with the interim regulations. Overhead costs will increase significantly. These economic influences are the basis of Peabody's challenge of the interim regulations.

Hopefully, Peabody will recover most of these costs from its customers under long-term coal supply agreements which provide for such recovery of costs, but that really does not solve the problem. Peabody sells most of its coal to electric utilities. The utilities will, in turn, recover these additional fuel costs from its customers. Thus it is the consumers who will ultimately pay the costs of the Act; therefore, those consumers have a direct stake in whether these regulations cause unreasonable and unnecessary costs. This point never seems to get across to our lawmakers and regulators, nor do consumers who demand additional environmental regulations seem to understand this.

In its suit, Peabody seeks relief on thirty-two specific provisions, which can not be discussed in detail here. However, an overview of the action will point out difficulties with the Act. Peabody feels that it has an obligation to protect customers from excessive and unwarranted costs. Further, there is an obligation to protect a precious natural resource—coal. If the Act prohibits the mining of small blocks of coal which logically should be mined along with nearby coal, the coal that is not mined is probably wasted because it will not be economically feasible to mine that coal in the future. In a variety of other ways, the Act and regulations will prohibit the mining of needed coal. This is contrary to the national interest because it deprives our country of a needed energy source.

Now for some specific objections to the requirements imposed by the interim compliance standards. In certain cases it will be physically impossible to comply with the interim regulations. Some of the interim regulations interfere with sound reclamation, while some conflict with other regulations promulgated by MESA and NEPA.<sup>12</sup> In a few cases, the interim regulations purport to amend the Act and are clearly beyond the authority of the Act. Other provisions in the regulations are not supported by any substantial evidence in the record and are clearly excessive and unreasonable. Some provisions are vague and overly broad, such as the one relating to blasting personnel which provides that they must be capable of "exercising mature judgment in all circumstances," a standard which provides few guidelines for the in-

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12. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970), *as amended by Act of Aug. 9, 1975, Pub. L. No. 94-83, § 1, 89 Stat. 424.*

dustry. Another ambiguity rises from some confusion between federal and state jurisdiction in parts of this Act.

To afford the Secretary of Interior an opportunity to change some of these regulations before a court holds them invalid, Peabody has filed a "petition for reconsideration, or in the alternative a petition for amendment or repeal of certain of the regulations." A "petition for reconsideration" is not expressly provided for in the Act nor in the regulations, but we believe a governmental agency possesses the inherent authority to reconsider regulations it has issued. If he feels he cannot reconsider a regulation or refuses to do so, the Act permits the Secretary to amend or repeal the regulations. Reconsideration is the better procedure because it could be accomplished in two or three weeks. In fact, the Secretary has already changed one of the regulations relating to sedimentation ponds.

Earlier, I referred to some of the major problems this Act will cause. Experience with legislation of this type suggests that the real impact of the legislation depends on the attitude and approach taken by those charged with its administration. The approach taken thus far by the Department of the Interior causes concern to the coal industry. A major concern centers around cessation orders which can be issued by an inspector if he finds significant, imminent environmental harm. Upon a unilateral finding that such a condition exists, the inspector can shut down a mine. This finding can, of course, be challenged by the operator, but this takes time during which the mine is closed.

As an example of impossibility of compliance with the interim regulations, the regulations<sup>13</sup> require that the topsoil be segregated and replaced in cases where overburden was removed prior to December 13, 1977, but the coal will not be removed until after May 3, 1978. In other words, the overburden has been removed prior to the effective date of the regulations, but the coal is not mined until after May 3, 1978 when the regulations become effective. In this instance, there is no way that topsoil can be segregated after May 3, 1978, when the actual mining occurs.

The regulations provide that blasting personnel must obtain a certificate of training and qualification from the state in which they work.<sup>14</sup> Several states do not issue such certificates of training and qualification. Here again is a requirement that is impossible to meet.

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13. 42 Fed. Reg. 62,686 (1977) (to be codified in 30 C.F.R. § 715).

14. 42 Fed. Reg. 62,689 (1977) (to be codified in 30 C.F.R. § 715).

The regulations further require that manganese be neutralized<sup>15</sup> and that facilities for such neutralization be completed by May 3, 1978. On the other hand, the EPA says that manganese neutralization is not necessary. In addition we cannot design manganese neutralization facilities until pond design criteria are established.

Another problem presented by the interim regulations relates to blasting limitations. The Act bans blasting within three hundred feet of an inhabited residence. The regulations have attempted to amend the Act by increasing that distance to one thousand feet.<sup>16</sup> Peabody will be forced to close at least one mine if that distance is enforced, unless we are able to purchase all of the inhabited residences within one thousand feet. As you can undoubtedly appreciate, purchasing those homes is not economically practical in some cases nor possible in others.

Let me give a couple of examples of arbitrary and capricious action. One of the interim regulations requires that land must be restored to its prior use, *if it had been properly managed*. The implication is that, if it had been improperly managed, the land must be restored to a condition as if it *had* been properly managed. In other words, the coal operator must remedy any prior mismanagement of that land, clearly an unreasonable requirement. Moreover, "proper management" is a very subjective test. Who determines whether land was "properly managed"? What are the standards to be used?

Another unreasonable requirement is the use of mulch on all re-vegetated areas. The Act itself does not say anything about mulch, but mulch must be *affixed* to all re-vegetated areas according to the interim regulations. Our knowledge of reclamation shows that in some cases mulch will actually retard growth.

Another regulation requires that there be "stable soil surfaces." Some areas simply do not have stable soil surfaces. What is the operator to do in such instances? Must stable soil be transported from Illinois to Montana?

Under the interim regulations, the prime farmland grandfather rights have been improperly limited. The limitation on air blast effects of 128 decibels in the interim regulations is far more stringent requirement than is needed. Further, MESA has a different and more reasonable decibel limitation. Other unreasonable and arbitrary standards include the prohibition of impoundment of wastes and the definition of

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15. 42 Fed. Reg. 62,684-88 (1977) (to be codified in 30 C.F.R. § 715).

16. 42 Fed. Reg. 62,690 (1977) (to be cidified in 30 C.F.R. § 715).



significant imminent environmental harm. In addition the Act uses the term "access road," while the regulations define the term "roads" to include haulage roads. An access road is a road used to provide access from a public road to a mine site. A haulage road is one used to transport coal from where it is being mined to the preparation facility. As a result the regulations have again attempted to amend the Act.

Here are further examples of unreasonable provisions. The interim regulations prohibit terracing, a provision which interferes with sound reclamation. There is also an attempt to regulate underground mining in the interim regulations, while it is clear that this is not a proper subject for the interim regulations. The operator is given a fixed period of time to abate a violation, but force majeure events preventing compliance are not recognized. Surely this is unreasonable and arbitrary.

#### IV. CONCLUSION

I hope I have given you some insight into some of the problems presented by the Interim regulations from the perspective of a coal operator. I would urge that more attention be given by the Secretary of the Interior to section 102(f) of the Act as being one of the purposes of this Act. It is my view that the interim compliance standards do not strike a balance between the protection of the environment and the nation's need for coal.