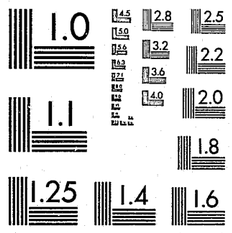

CONSTRUCTING A REGULATORY BUREAUCRACY: THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

by

Neal Shover, Donald A. Clelland and John Lynxwiler

Department of Sociology
University of Tennessee
Knoxville, 37996-0490

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ABSTRACT

Five methodological strategies were employed to examine the development of the Office of Surface Mining Reclamation and Enforcement (OSM) during its initial five years of operations. Created by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), the OSM was empowered to promulgate federal regulations for surface coal mining in the United States, and to assist the states in developing regulatory programs compatible with the federal Act.

The surface coal mining process is discussed and also the resulting environmental devastation prior to the mid-1970s. The grassroots and environmentalist movement to abolish or regulate surface mining is discussed, as well as the successful struggle to enact federal legislation.

As an analytic tool, two ideal-typical polar types of regulatory styles, enforced compliance and negotiated compliance, are introduced, distinguished, and discussed. The regulatory program developed by the OSM during its first two years of operation approximated the former type. The agency's development of the enforced compliance style was a response to the four sets of constraints: (1) the nature of the agency's enabling statute, (2) the political environment, (3) ideological premises held by influential members of the agency's initial leadership corps, and (4) scarce of resources, especially time, during the agency's formative months. The agency's choice of the enforced compliance style is documented through an analysis of their promulgated regulations. However, an enforcement style more akin to negotiated compliance was developed in one of the agency's five regional offices. This region is compared with another in order to develop an explanation of how local conditions shape a national regulatory program. The operation of the OSM's inspection and enforcement program also is examined. Despite the agency's enforced compliance style, the I&E program imposed relatively small civil fines on coal operators and collected only 20 percent of the total dollar amount of its fines.

The agency's gradual softening of its regulatory stance after its first two years is noted, discussed, and interpreted. Finally, the dramatic changes wrought in the agency after the arrival of President Ronald Reagan's appointees to the Department of the Interior and the Office of Surface Mining are described.

ACKNOWLEDGMENTS

We received assistance from many individuals while conducting this research. While circumstances do not permit us to thank each person individually, several were so helpful that they deserve special mention.

Bernie Auchter, our project monitor at the National Institute of Justice was an important source of information and assistance throughout the research. Always supportive and helpful, Bernie provided assistance and critical feedback whenever it was needed. Although we began the research with some misgivings about the possibly intrusive role of a "project monitor," Bernie performed so capably but unobtrusively that we eventually acquired a degree of tolerance -- even respect -- for such personnel.

Of course, we owe a special debt to the persons we interviewed -- some of them more than once -- during the research. Representatives of environmentalist groups, coal companies, coal industry trade associations, and state regulatory agencies proved to be interested in and helpful to our research efforts. There can be no other way to explain their patience and grace when, during the early months, as they tolerated questions from us which must have revealed an appalling ignorance of elementary matters. With remarkably few exceptions, they gave us their time and shared their experiences with and insights about surface mining issues and the Office of Surface Mining.

While all our respondents were helpful in some way, several provided extraordinary or crucial assistance. Walter N. Heine, the first director of the Office of Surface Mining, gave his

consent and assistance to the research effort. Richard M. ("Dick") Hall, the Office of Surface Mining's initial Assistant Director for Inspection and Enforcement, was instrumental in gaining a hearing for our research request, and in keeping the project alive when it seemed in danger of foundering. Dick's friendliness and intuitive grasp of the potential importance of the research provided a welcome relief from the necessity originally to explain and justify the project. Also, Paul Reeves, the agency's first Deputy Director, cleared away the final remaining obstacles to our efforts, thus assuring cooperation from others in the agency.

The current leadership at the Office of Surface Mining was no less helpful to and supportive of our efforts. James ("Dick") Harris, Director; J. Steven ("Steve") Griles, Deputy Director; and Dean Hunt, Assistant Director for Technical Standards and Research, deserve special mention.

A number of persons formerly or currently employed by the Department of the Interior or the Office of Surface Mining read and offered comments on a draft of this report. Two individuals devoted substantial time and energy to the task: William Eichbaum, former Associate Solicitor for Surface Mining, and Edgar Imhoff, former director of the agency's Region III. Included in the two groups are several persons who disagreed sharply with some of our analysis. Their comments and arguments alerted us to several factual errors and also forced us to reexamine some of our earlier assumptions and interpretations. Undoubtedly, some disagreements remain. Nevertheless, we appreciate their critical comments.

We extend our thanks as well to two professional colleagues. Gil Geis and Keith Hawkins read and critiqued an earlier draft of this report. Unquestionably, their efforts made this final report stronger.

Finally, we welcome the opportunity to acknowledge publicly the contributions made by the members of the research team and to express our appreciation publicly for their support and efforts. John Lynxwiler and Steve Groce worked capably and loyally as research assistants, and patiently tolerated more than a little ambiguity at several stages of the project. Betty Glenn, the project secretary, remained helpful and pleasant despite many difficult hours spent transcribing tape-recorded interviews.

We emphasize, however, that none of the individuals we have singled out here are responsible for any shortcomings in the interpretation of data or this report's findings.

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INTRODUCTION

For many Americans, the decade of the 1970s was a time of greatly intensified environmental consciousness. Citizens and environmentalist groups waged titanic battles with various sectors of industry over legislation intended to protect and enhance the environment. Among the several environmental protection statutes enacted was the Surface Mining Control and Reclamation Act of 1977 (SMCRA; Public Law 95-87; U.S.C. 1201 et seq.), which President Jimmy Carter signed on August 3 of that year.

This controversial Act established a federal presence in the regulation of surface coal mining. Its advocates sought to control the environmental degradation that resulted from strip mining. The federal government had been urged to take legislative action because of the manifest failure of many states to adequately regulate the coal industry. The Act created a regulatory agency, the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of Interior. The agency was empowered to promulgate and enforce interim federal regulations and to ensure the development and implementation of state regulatory programs consistent with the requirements of the Act.

Here we report the results of research on the development and impact of the Office of Surface Mining during the first five years of its operation. The focus of the research was on the entire regulatory process -- on what occurs behind the administrative facade.

Chapters one through four of this report describe the study's

methodology, the surface coal mining process and its environmental consequences, the drive to enact federal regulatory legislation, and the Act itself. Chapter five reviews social scientific writings on the regulatory process and discusses two ideal-typical sets of options available to regulatory personnel in the construction and day-to-day operations of such agencies. In chapters six through nine we examine how Office of Surface Mining personnel constructed and pursued agency objectives during the Carter administration, the constraints under which they operated, and why particular mission and policy options were selected. We also describe the continuing social construction of the law through the rule-making process, appellate litigation, bureaucratic structure and process, and finally, implementation of the law at the field level. In the final four chapters, we examine recent changes in the program, some impacts of the regulatory presence, and implications for regulatory policy in light of our theoretical approach and findings.

A NOTE ON RESEARCH METHODS

As conceived originally, our primary research objective was to develop a detailed understanding and theoretical interpretation of the forces, both from within and without, that shape a new regulatory agency and program. We planned to make extensive use of participant observation as a data collection technique, and to focus both on agency policy making and its field-level implementation in two distinctively different coal producing regions of the United States.

We approached headquarters executives of the Office of

Surface Mining -- rather naively as it turned out -- with our proposal and asked for their cooperation. They expressed an interest in the project's objectives and readily provided assurances that the research could proceed. However, nearly a year elapsed between this initial contact with headquarters (HQ) and the start of data collection. During this interim period, the agency came under intense attack on a variety of fronts, and its regional office personnel faced severe work pressures mandated by the agency's enabling statute. Consequently, when we moved to begin data collection in two of the agency's five regional offices, managers in the designated offices balked. Data collection was stalled for several months while we renegotiated the terms of the research agreement. Eventually we secured regional cooperation, but only on the condition that our plans for participant observation be dropped.

We employed five methodological techniques in the course of the research: (1) archival analysis, (2) personal interviews, (3) a mail questionnaire, (4) analysis of personal documents, and (5) analysis of secondary reports and analyses of the Office of Surface Mining and its operations. Here we give a brief overview of our methods; specific data collection techniques are detailed at appropriate places in the remainder of the report.

We examined trade publications of the coal industry spanning a period of nearly fifteen years, concentrating on the interval between 1968 and passage of the Act in 1977. The most useful publications here were the MINING CONGRESS JOURNAL and COAL AGE, though we also examined some issues of trade publications representing the viewpoints of smaller coal producers (e.g., the

NATIONAL INDEPENDENT COAL LEADER). We scrutinized published hearings held by Congressional committees and subcommittees during the period when Congress was considering federal legislation to regulate surface coal mining (1968-77). Also, we examined all subsequent House and Senate committee reports on oversight of the OSM.

We collected and examined numerous OSM internal reports and memoranda on the emerging regulatory program, its reception and impact, and the agency's relations with its various constituencies. We secured and analyzed routine, periodic statistical reports on the agency's inspection and enforcement operations. Additionally, we selected a sample of 83 coal mining firms and examined OSM's inspection and enforcement records for all enforcement actions taken against the companies during an 18 month period in 1978-80. Data from the files were coded and analyzed to determine the major variables that affect enforcement activities, especially the magnitude of civil fines assessed for violations of the agency's regulations.

Members of the research team attended eight public hearings -- all in southern Appalachia -- held by the OSM to collect public comments on portions of its emerging regulatory programs. We examined the transcripts of numerous other hearings of the same type for regions outside southern Appalachia.

In addition to these archival data, personal interviews were conducted with 154 persons. Many of the respondents were interviewed two or more times so that we conducted approximately 180 interviews. Overwhelmingly, the majority of the interviews

were conducted in Washington, D.C. and the two OSM regions targeted in our proposal. Although most of the interviews were face-to-face, approximately 10 were conducted by telephone. The majority of the interviews were tape recorded and later transcribed for analysis. However, physical circumstances and the preferences of respondents did not always permit us to record the interviews. In such situations we relied on field notes made either during the interview or immediately following its conclusion.

OSM respondents ranged from field-level personnel to the highest ranking executives at the headquarters level. We also interviewed personnel in the Department of the Interior, including the Solicitor's Office, whose attorneys represent the Office of Surface Mining. Exclusive of the agency itself, the personal interviews included Congressional staff members and former staff members, former White House personnel, representatives of environmentalist and other citizens' groups, representatives of coal industry trade and lobbying organizations, employees and officers of numerous mining companies, and personnel in a number of state-level surface mining regulatory agencies. TableI-1 summarizes the numbers and types of individuals who were interviewed.

As Table I-1 indicates, we interviewed 43 OSM inspectors and former inspectors regarding the regulatory process at the field-level. However, because the inspection and enforcement program was a special research focus, we constructed a mail questionnaire that was used to collect comparable data for OSM's entire inspector corps. The questionnaire, which is discussed in greater

TABLE I-1

SUMMARY DESCRIPTION OF INTERVIEW RESPONDENTS

Type of Respondent/Group	Number
OSM Personnel	
Headquarters Personnel:	
Executives	9
Others (e.g., branch chiefs)	3
Regional Level:	
Managers	11
Others (e.g., field supervisors, inspectors)	43
Interior Department	
Executives	2
Solicitors	6
Coal Industry	
Mining Companies	38
Trade Associations/Lobbying Organizations	9
Mining Consultants & Related Industry (e.g., heavy equipment salespersons)	6
Environmentalist Organizations	
National	4
Regional	6
State Personnel	
Managers	6
Others (e.g., field supervisors, inspectors)	8
Others (e.g., Congressional staff, White House aides)	3
TOTAL	154

detail in chapter 7, was mailed in July 1981 to all remaining OSM inspectors (N = 158). Replies were received from 126 inspectors (79.8 percent).

A number of OSM personnel or former personnel shared with us personal materials they compiled or collected during their tenure in the agency. Also, several individuals virtually opened their files to us, enabling us to examine a variety of materials such as internal memoranda and policy option papers that would not have been available otherwise.

Finally, we examined available published research on the surface coal mining process and the Office of Surface Mining (e.g., National Research Council, 1980; 1981; Menzel et al., 1980; Weiner, 1980). Several coal companies and industry trade associations gave us copies of their own studies on the impact of the OSM's regulatory program. Likewise, environmentalist groups helped us greatly by providing copies of some of their studies of surface mining regulation (e.g., Save Our Cumberland Mountains, n.d.; Environmental Policy Center, 1982).

CHAPTER 1

COAL AND SURFACE MINING IN AMERICA

The United States is underlain with enormous coal deposits; in 1979 the country's demonstrated coal reserve base was 474.6 billion tons. Given the present economics and technology of mining, about one-half of the demonstrated coal reserve base is estimated to be recoverable (U.S. Department of Energy, 1982: 137). This coal is approximately 25 percent of the estimated international recoverable reserves. Little wonder then that since the Arab oil embargo of the early 1970s the United States often has been referred to as the "Saudi Arabia of coal." In the past decade, many politicians and coal industry spokesmen alike have called for a greater use of coal as an energy source.

TRENDS IN AMERICAN COAL PRODUCTION

American coal has been mined commercially for more than a century. For many decades, however, excepting the impact of limited technological developments, the mining process remained virtually unchanged. Coal was mined almost exclusively by underground or deep mining methods; from combinations of shafts and tunnels, miners blasted and gouged the coal from its naturally occurring strata or seams. After loading onto conveyances of various kinds, the coal was hauled to the surface for processing and shipping.

In 1920, approximately 98 percent of the coal produced in America came from deep mines. And even though this percentage decreased gradually over the next few decades, in 1950 deep mining still accounted for 76 percent of American production (President's

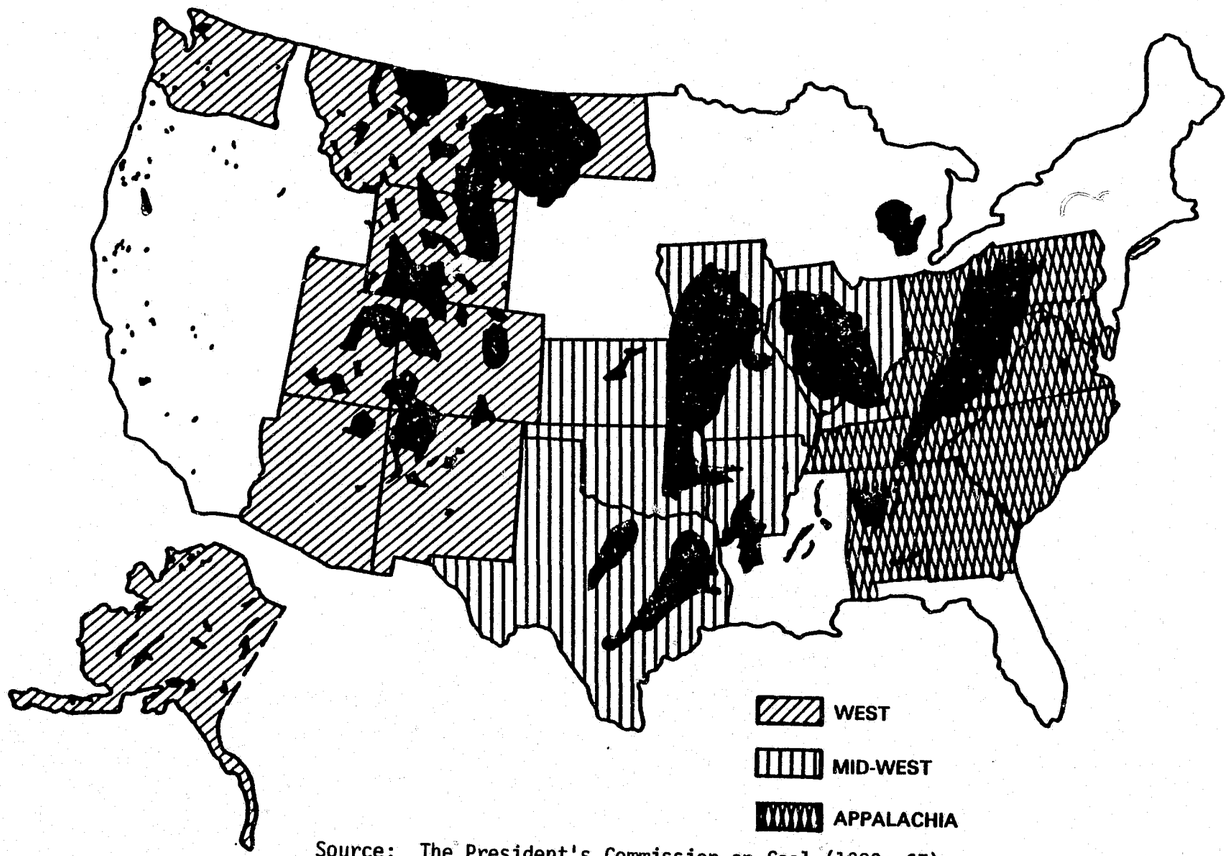
Commission on Coal, 1980). In recent years, however, two significant developments have altered drastically the traditional patterns of American coal mining: the growth of surface mining and the increasing importance of western coal production.

In the late 1950s and early 1960s, surface coal production rapidly began claiming a larger share of U.S. coal production. As a result, by 1970, deep mining methods accounted for only 55 percent of total U.S. coal production and, by 1980, this proportion had dropped to 41 percent (U.S. Dept. of Energy, 1982: 125).

The major reasons for the growth of surface mining are economic. To begin with, net production costs for surface mined coal are lower than for deep-mined coal. For example, the average surface miner produces approximately three times more coal per day than the average deep miner. Also, surface mining has a higher recovery rate; surface mining can recover up to 90 percent of the coal in a seam while deep mining recovers less than 60 percent (U.S. Dept. of Energy, 1980: 7). Further, the growth of surface mining has been spurred by dramatic increases in the size and handling capacity of heavy equipment. This has been especially important in the midwestern and western coal fields where terrain and thick coal seams permit the use of such machinery.

Although coal is found beneath 31 of the 50 states, coal deposits cluster in three regions of the United States: Appalachia, the midwest, and the west. The geographical distribution of American coal is depicted graphically in Figure 1-1.

U.S. COAL FIELDS



Source: The President's Commission on Coal (1980: 67)

FIGURE 1-1

Historically, the lion's share of coal production occurred east of the Mississippi River. For example, 92 percent of the coal produced in 1970 came from mines located in the east, and the bulk of this was from Appalachia. However, by 1980 only 62 percent of American coal production came from eastern mines (U.S. Dept. of Energy, 1982: 125).

In Appalachia, thousands of firms, many of them quite small, engage in surface mining. On steep mountain slopes and in narrow valleys, they mine relatively thin seams of high energy, high sulfur coal. In the midwest, the gently rolling terrain, much more hospitable to mine operators, permits the use of larger machinery than is possible in Appalachia. Also, coal seams generally are thicker than in Appalachia. Coal in the midwest and in Appalachia is primarily bituminous, which has a high heat content.

By contrast, western coal is primarily subbituminous. Compared to bituminous coal, it is not as "hot" when burned. However, more than compensating for its lower heat content is the fact that western coal seams are extremely thick, and they are covered by relatively thin overburden. Together these geological features make it highly profitable to strip mine in the west. In addition, western coal has a lower sulfur content than eastern coal. The demand for low-sulfur coal grew quickly following passage of the Clean Air Act in 1970. Western surface mines tend to be extremely large, and in marked contrast with Appalachia, there are only a few hundred mines west of the Mississippi River. In 1979, 43 percent of total Appalachian coal production was mined by surface methods, while the comparable percentage for western

production was 89 percent (U.S. Dept. of Energy, 1981: 7).

In sum, the locus of American coal production has been shifting from underground to the surface, and from Appalachia to the west. Both of these trends are expected to continue into the foreseeable future.

THE SURFACE COAL MINING PROCESS

The technical process of surface coal mining can be comprehended easily. A somewhat idyllic description is provided by the National Coal Association:

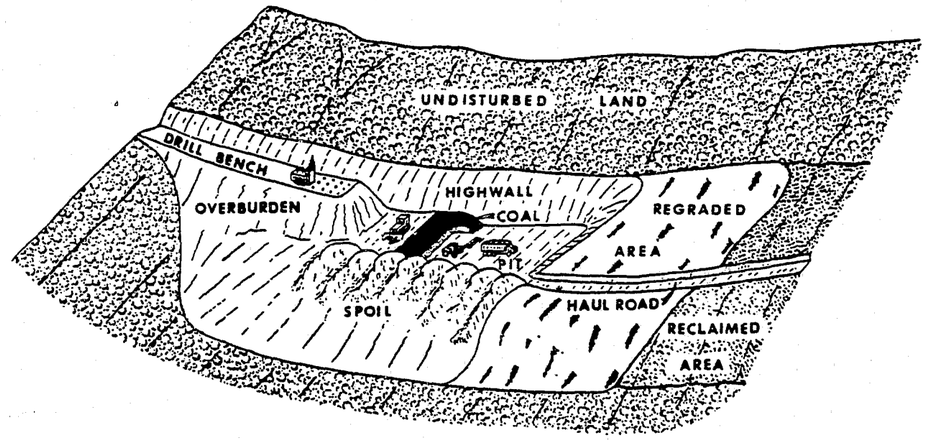
> [T]he coal is produced . . . from seams lying fairly close to the earth's surface. The earth and rock above the coal seam -- the overburden -- are removed and placed to one side; the exposed coal is broken up, loaded into trucks and hauled away. Bulldozers then grade the overburden to the desired shape, the surface is replanted with seeds or young trees, and the land is restored to productive use (COAL FACTS: 11).

There are two principal methods employed in coal surface mining: contour mining and area mining. In the contour mining process, bulldozers are used to cut a notch in the side of a mountain, exposing the coal seam. The vertical side of the notch is the highwall and the horizontal side is the bench. As mining proceeds, the bench is extended along the contour of the mountain. Figure 1-2 depicts the contour mining process.

Mountaintop removal is a special case of the contour method. In mountaintop mining, because the coal seam lies close to the top of the mountain, it is possible to slice off the peak to reach the

FIGURE 1-2

SURFACE MINING - CONTOUR METHOD



1. Topsoil is removed and stockpiled for later reclamation purposes.
2. A bench is dozed into the side of the slope.
3. Blasting cracks the dense overburden.
4. Overburden is hauled by scrapers or trucks and is backfilled continuously.
5. Coal is removed by loaders and/or shovels and carried out of the mining area along the haul road (which has been cut into the slope).
6. While blasting for the next stage of overburden removal, reclamation of the first cut is beginning: the pit is filled with overburden, regraded, layered with topsoil, then seeded.

Source: The President's Commission on Coal (1980: 159)

coal. When mining is completed, the top of the mountain, in contrast to the surrounding peaks, is flat. Figure 1-3 illustrates the process of mountaintop removal in surface mining.

Many times, auger mining is carried out in conjunction with contour mining. Large drill bits (augers) bore horizontally into the portion of the coal seam which is visible in the highwall after the contour mining process has been completed. The rotation of the auger simultaneously extends it deeper into the coal seam and deposits the loosened coal on the bench. This process is shown in Figure 1-4.

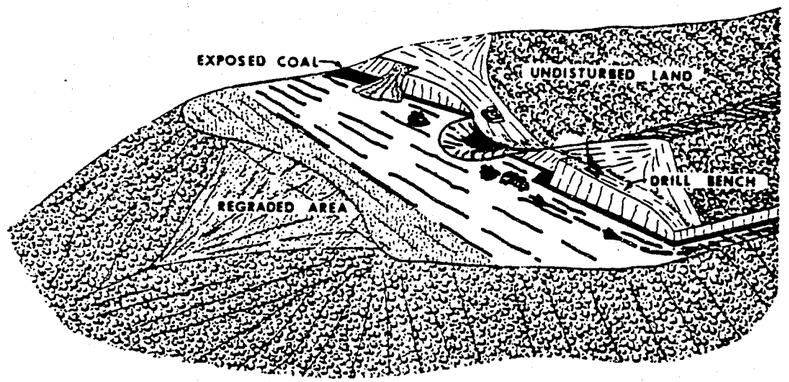
Whereas contour mining and its variants are dominant in the mountainous Appalachian terrain, area mining is dominant in the flat and gently rolling terrain of the midwest and west. Replacing the bulldozer as the primary type of machinery are the power-shovel and the dragline. Using this equipment, an initial trench is dug in the ground (the box cut) to expose the coal seam. The spoil -- removed overburden -- is placed beside the trench, and the coal is removed. As can be seen in Figure 1-5, the next cut is made parallel to the box cut, and the spoil is placed in the box cut trench. This process of parallel cuts is continued until mining is completed, with the spoil from each cut being placed in the earlier adjacent trench. In large mines, dozens of trenches may be cut before the process is completed.

THE DESTRUCTIVE EFFECTS OF EARLY SURFACE COAL MINING

Until passage of the Surface Mining Control and Reclamation Act of 1977, the regulation of surface coal mining was left to the states. In many cases this meant that it was largely

FIGURE 1-3

SURFACE MINING - MOUNTAINTOP REMOVAL METHOD



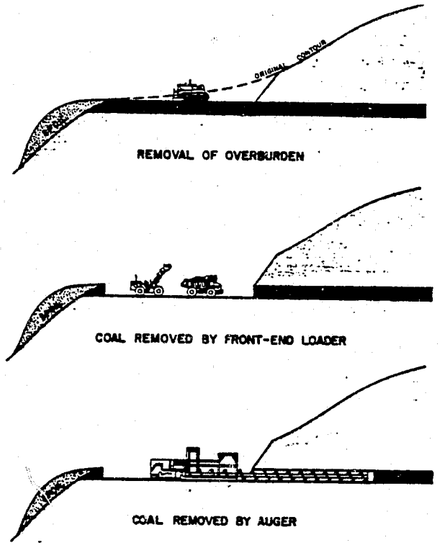
- A particular type of contour mining, in which mining proceeds all the way across the top of the mountain.

1. A drill bench is cut from the side of a mountain, both for use as a haul road, and for extending drilling.
2. Topsoil is removed and stockpiled.
3. The overburden is drilled for placement of explosives.
4. Blasting loosens the overburden.
5. Loaders or shovels load the overburden into trucks and it is backfilled in a previously-mined portion of the pit or placed in a head-of-hollow fill.
6. The exposed coal may be blasted or loaded from the seam, depending on its hardness. Trucks haul the coal out of the pit area.
7. The backfilled pit is graded, spread with topsoil, and revegetated, while the next "cut" is begun. A flat to gently-rolling area results.

Source: The President's Commission of Coal (1980: 161)

FIGURE 1-4

SURFACE MINING - AUGER METHOD

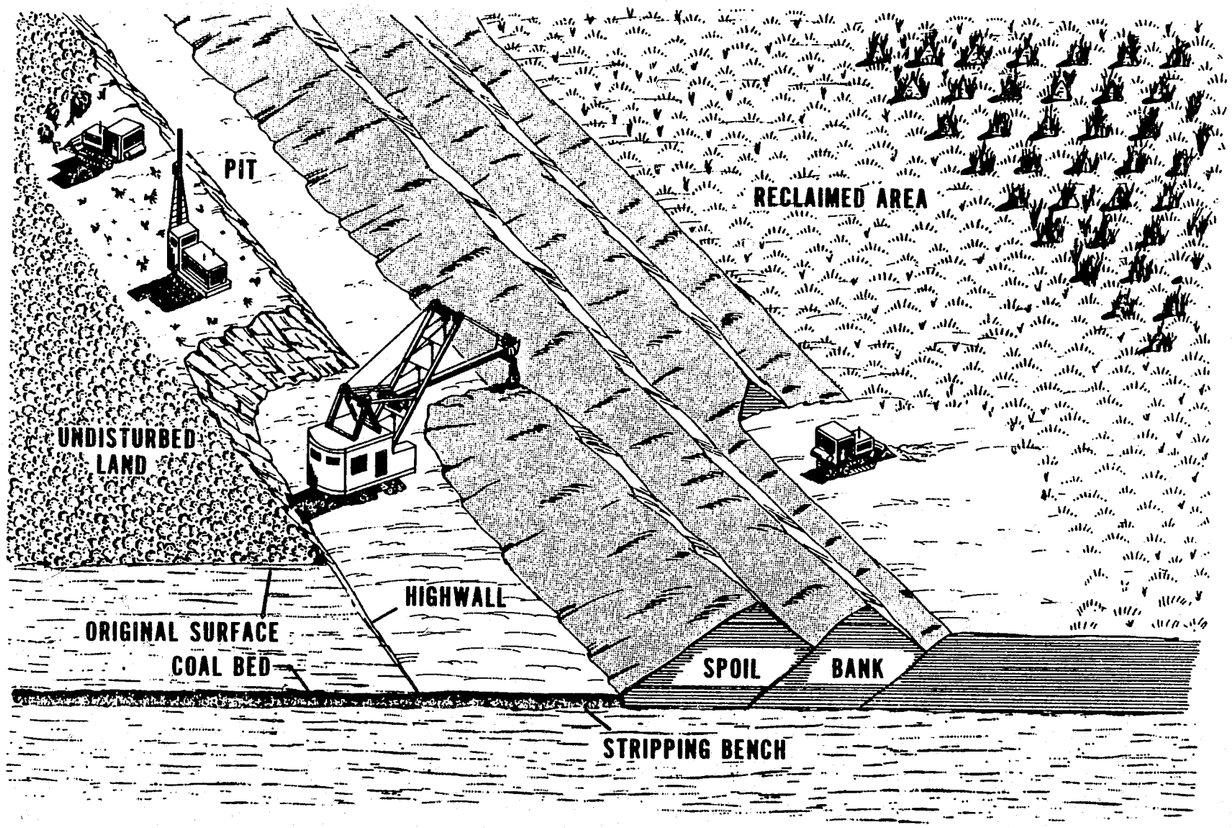


- Augering is a supplementary mining method, used to reach coal which cannot be economically strip mined because of deep overburden.

1. After the coal seam has been mined out to the desired depth (to the highwall face, as determined by the stripping ratio), an auger (like a large drill) is employed to bore horizontally into the seam, perpendicular to the bench.
2. As the auger bores, it carries back out to the pit area the loosened coal.
3. This coal is then trucked out of the mine area to be stored; reclamation of the pit begins.

Source: The President's Commission on Coal (1980: 163)

SURFACE MINING - AREA METHOD



Source: Grim and Hill (1974: 30)

FIGURE 1-5

unregulated. Though the earliest state law was enacted in the late 1930s (West Virginia), for decades state laws, regulations and regulatory agencies were woefully inadequate to the regulatory task. Statutes and regulations were weak, enforcement was lax and, in some states, corrupt. By the early 1970s, however, most states began to strengthen their regulatory laws (cf. Imhoff, Friz and LaFevers, 1976), partly in response to the threat of federal intervention. In most states, particularly in Appalachia, these laws were not enforced vigorously (cf. Save Our Cumberland Mountains, 1978).

In Appalachia, the period prior to the late 1970s is often referred to as one of shoot'n shove mining. This richly evocative label calls attention to the routine socially and environmentally harmful mining practices of those times. Coal was mined using the easiest and cheapest methods, with little regard to the social and environmental impacts. For example, explosives were used, often recklessly, to loosen and break up the coal deposits. In the process, nearby residents and their dwellings were subjected to rock and other debris (flyrock) hurled from the explosions. In Appalachia, spoil materials usually were pushed over the side of the mountain -- a practice known as pushing spoil over the downslope. In the midwest, spoil from the box cut and from subsequent trenches was left in ridges and piles. The final trench -- the last cut -- usually was left unfilled.

The absence of effective state regulation not only permitted these harmful mining practices but also enabled many mining companies to avoid any pretext of reclamation. Such mine operators, after extracting the coal, simply abandoned the mine

site. By the mid-1960s, nearly one million acres had been left in this unreclaimed condition (U.S. Dept. of the Interior, 1967). Consequently, the highly unstable and acidic spoil materials were left to erode under the onslaught of rains. In Appalachia, especially, the resulting sedimentation choked streams; the acidic runoff killed aquatic life and ruined wells and other water supplies. In other cases, mudslides damaged or destroyed property and dwellings. After the passage of several years, many spoil banks achieved a degree of stability, but even then they often would not support vegetation.

All this damage and environmental destruction was evident, of course, to anyone who cared to look. By the 1960s, a surge of published work by popular writers (e.g., Caudill, 1962) and government agencies (e.g., U.S. Dept. of the Interior, 1967) documented and called attention to it. Portions of the American landscape resembled the surface of the moon, having been rendered useless because of inadequate reclamation or abandonment. In the midwest and in Appalachia, indigenous citizen groups and landowners were becoming more vocal in their call for tough regulation of the surface mining industry. The marriage of this indigenous protest movement with the environmentalist movement gave new impetus to the demand for effective regulatory legislation.

CHAPTER 2

THE ANTI-STRIP MINING MOVEMENT AND THE BATTLE TO ENACT FEDERAL LEGISLATION

THE ANTI-STRIP MINING MOVEMENT

Vigorous opposition to strip mining arose in the latter half of the 1960s in Appalachia (Fisher and Foster, 1979) and in the early 1970s in the West (Parfit, 1980). Appalachian citizens' groups, discouraged by the ineffectiveness of state laws and lax enforcement (Schneider, 1971; Munn, 1975), overwhelmingly favored the abolition of strip mining. It was generally believed that acceptable reclamation was impossible in most mountainous areas. The grassroots anti-stripping movement did what it could with its limited resources: it engaged in sit-ins on strip mine sites, took its case to the courts, and tried to change state laws. On occasion, mining equipment was destroyed. However, its resources were few; its membership base was not broad; budgets were slim; its local constituent groups were only loosely coordinated; and political, legal and technical expertise was limited.

Constraints on the success of the movement were great. Most Appalachian coal is in the hands of absentee owners (Appalachian Land Ownership Task Force, 1981), a potential source of grass-roots solidarity. Unfortunately, most of the coal is mined by local operators who are protected by local politicians with mining interests. Even wildcatting (mining without a permit) was virtually impossible to prosecute successfully because of the collusion of mine operators and the "courthouse crowd." Additionally, in most of the Appalachian states, the deepest

ravages of surface mining were carried out in isolated areas whose residents had little political clout in the state legislatures. Faced with these difficulties, the movement quickly sought federal relief.

In the west, massive surface mining arose very rapidly in the 1970s. Most of the mining is done by the largest coal companies on land leased from the federal government. State governments moved quickly to regulate mining and to get their share of the new wealth. State regulations in the west were quite strict in comparison with those in the east. But opposition groups soon emerged around the issue of property rights, the loss of agricultural and grazing lands, and the question of whether or not reclamation is possible in arid regions. In both the midwest and far west, local rights groups and farmers provided strong support for a federal law.

The major success of the grassroots organizations was in publicizing the nature and extent of surface mining as an environmental issue. The issue appealed to the media, already attuned to environmental problems. Thus, strip mining, a particularly spectacular example of ecological abuse, became a national issue in the hands of the larger environmental movement.

What was the nature of this movement? Who were these environmentalists? What resources did they bring to the battle? Historically, environmentalism in the United States has its roots in the conservationist movement of the late nineteenth century. When the environmental movement emerged as a political force in the late 1960s, both the older conservationist groups (e.g., National Audubon Society, the Sierra Club), as well as newer, more

activist associations (e.g., the Friends of the Earth, the National Resources Defense Council) formed its organizational base. By the mid-1970s, such organizations had between four and five million members (Mitchell, 1979; Humphrey and Buttel, 1982). As in the case of the early movement (Reiger, 1975), research has consistently indicated that the membership base of these organizations is solidly upper-middle class (Harry et al., 1969; Devell, 1970; Faich and Gale, 1971; Harry, 1974). There is some evidence that it is the professional wing of the upper-middle class, not the managerial wing, that is dominant (Devell, 1970; Cotgrove and Duff, 1981). It is likely that critics are correct in designating the movement's social base as the "public and not-for-profit sectors" (Kristol, 1972; Weaver, 1978).

The national environmentalist organizations -- there also are thousands of smaller, local groups -- are "funded social movement organizations" (McCarthy and Zald, 1973). That is, they are groups whose policies are constructed and carried out by a small band of professional leaders supported by a "dues constituency." The latter also may be thought of as a "conscience constituency," in the sense that the pay-off for contributions is quite indirect. The passage of numerous environmental laws (e.g., the National Environmental Policy Act, the Clean Air Act, the Federal Water Pollution Act, and the Coastal Zone Management Act) testifies to the effectiveness of this lobbying by funded social movement organizations. It is also the environmental organizations which bear the brunt of sponsoring litigation meant to insure that laws will be enforced in the "public interest" (Handler, 1978).

It is not without some justification that environmentalist groups claim to stand for the public interest. During the late 1960s, concern for environmental reform rose from nowhere to second place among public issues (Erskine, 1972). Although there has been a decline (Dunlap and Dillman, 1976), there remains a high level of support for environmental concerns (Mitchell, 1980). In the early 1970s, this high level was marked by virtual consensus across class and regional lines (Dunlap and Van Liere, 1977). Somewhat higher support for environmental activism is found among the college educated (Tognacci et al., 1972; Van Liere and Dunlap, 1980), among those employed in the service sector, and among those who support welfare liberalism and reject laissez faire liberalism (Honnold, 1980; Buttle and Flinn, n.d.).

When the national environmental organizations joined the fray for surface mining reform, they possessed many of the resources needed for a long battle. They brought a record of legislative and lobbying success, a moderate financial base, a public mobilized for further reform action, and considerable legal and technical skills. The nine national environmental organizations whose representatives testified before Congress in 1971-72 on surface mining legislation represented approximately one-half million people. By 1973-74, their activities were coordinated with those of a number of local groups in a Coalition Against Strip Mining (26 organizations overall, representing ranchers, farmers, Native Americans, sportspersons, and churches, as well as environmentalists). As the activities and goals of these organizations coalesced, in Washington, D.C. the Environmental Policy Center was founded and became the major lobbying

organization for the increasingly united supporters of Congressional action.

The struggle for reform was led by a handful of young coordinators and lobbyists with strong backing from the varied array of citizens' groups and funds from environmentalist organizations and foundations. The desire of the grassroots groups for the abolition of surface mining was compromised almost from the beginning of the battle, a strategic choice that led to a certain amount of internal conflict. During the long march toward federal regulation, the leaders honed their political, legal, and technical skills, enabling them to help shape a tightly drawn law that could be used to limit the discretionary power of the proposed federal regulatory agency.

THE BATTLE TO ENACT FEDERAL SURFACE COAL MINING LEGISLATION

Federal surface coal mining legislation was supported by environmentalist, conservationist, and grass-roots regional groups. Group members pointed to the destructive impact of surface mining. They also disputed its economics and charged that the mining industry had been permitted to externalize most of the harmful costs of its operations. Legislative proposals ranged from total prohibition of strip mining to severe restrictions on the places where, and the conditions under which. it could be conducted. Arrayed against this coalition was the coal industry and those dependent upon it, manufacturers of heavy equipment and the electric utilities. In their nine-year effort to block federal legislation, the industry consistently put forth the same set of objections, though it occasionally shifted or modified

tactics to take account of developments on the legislative front.

90th Congress (1968): Hearings

In 1968 testimony before the Senate Interior Committee, coal industry representatives opposed any federal effort to regulate surface coal mining. Although the industry would later modify its opposition, the 1968 testimony contains most of the claims and tactics found subsequently.

Industry representatives were quick to admit that strip mining had produced serious environmental and property damage. This admission was made only in passing, as though it was not worthy of extended comment. And past damages were portrayed as the negligent practices of few irresponsible operators who, for the most part, were no longer mining coal. The American Mining Congress's (AMC) representative stated that the problems "have been recognized and are being dealt with by the States in which they exist. "[T]here is no indication that additional controls are needed" (U.S. Congress, Senate, 1968: 99). In addition, the

> establishment of [federal] guidelines or standards is especially difficult because every mining operation is to some extent unique, and what would be inconsistent with good mining practices in the desert country of the sparsely settled areas of the West might be unacceptable in the East where rainfall and the nature of alternative land uses create far different conditions (1968: 104).

The mining industry, the AMC representative assured the senators, has been

> actively engaged for years, on its own initiative and in

> cooperation with State and local governments, to minimize to every practicable extent the undesirable side effects of mining operations. Where land reclamation is desirable and feasible, the concerted efforts of our industry are increasingly directed to programs designed to bring about land reclamation (1968: 97).

Similarly, the vice-president of Consolidation Coal Company (one of the nation's largest) assured the committee that

> the industry today has the technical and engineering staffs to reclaim strip mined land - and they are doing the job - emphatically so! Remarkable progress has been made in the art of land reclamation in the last few years. This progress has been made under local and state supervision, and it is now in good hands (1968: 135).

The same witness acknowledged that the coal industry "may have made some mistakes in the past," but, he assured the committee, it is "our considered judgment that a Federal law would only slow down the progress we're now making" (1968: 138). An official of the National Coal Association (NCA), like other industry representatives, argued that "the principal surface coal mining operators are meeting the obligation to reclaim the land . . . therefore, you have before you reliable evidence to support the conclusion that there is no need for Federal intervention to control the surface mining of coal" (1968: 139). During questioning by Senator Len Jordan (Idaho) the witness again

distinguished between classes of mine operators:

> We don't say we can defend everything that has been done by a stripper anywhere . . . We are just saying that the major companies at the present time, and the industry as a whole, are all convinced that we have to do this job and we are trying to do it. We are asking for that opportunity (1968: 142).

In 1968, and every year thereafter, industry representatives raised the specter of economic retrogression, increased dependence on foreign fuel, and a damaged military defense posture. The coal industry's stand was that federal legislation would be "unnecessary, undesirable, and impractical" (1968: 98). Nevertheless, Senator Jordan asked one of the industry's representatives if it would help write an acceptable bill:

> Could not you people in the mining industry suggest amendments to this bill . . . What amendments would you suggest that . . . would provide for some of the things that you think this bill lacks (1968: 108)?

The witness again stressed the industry's "opposition to the total concept of Federal Control." He did suggest, however, that the federal government might spend monies on research:

> Research efforts by the Federal Government to aid and supplement the research of the mining industry will far better serve the public interest than the vast system of Federal regulatory control as envisioned in [the bills]. Cooperative research is an appropriate use of Federal resources (1968: 105).

Those who testified in favor of some type of federal surface

mining statute were divided, especially on the question of the adequacy of state reclamation laws. Harry Caudill, a former Kentucky legislator and the author of NIGHT COMES TO THE CUMBERLANDS and MY LAND IS DYING, urged the senators to "view with caution and skepticism industry claims that present State laws are working well and that voluntary efforts are handling the problems satisfactorily" (1968: 92). Others were less critical of state efforts. One witness, for example, told the committee that "new and strong state laws are all fairly recent, and the time to see whether they are going to be sufficient without further public action has not yet passed" (1968: 338).

This tendency to defer to state regulation was supported by the states themselves. Oklahoma's governor informed the committee by letter that "all segments of the mining industry in Oklahoma have shown their willingness to cooperate in implementation of our reclamation law. I see no reason to add additional burdens to the State by passing Federal reclamation legislation" (1968: 287). Georgia's chief geologist assured the senators that "in the light of the legislation to control surface mining passed by the 1968 session of the Georgia General Assembly, we see no need or justification for [federal legislation]" (1968: 326).

There were two points that, although they did not figure prominently in the 1968 hearings, assumed much more importance later. First, a number of senators and witnesses suggested that the states were reluctant to develop strong regulatory programs for fear of harming local mining interests. However, by equalizing the regulatory costs, it was argued, a federal law

would eliminate any competitive advantage a state with weak laws might have. Nonetheless, Wyoming's governor told the committee that "surface mining regulation should not be used to equalize competitive situations. It should be limited to its stated purpose -- to conserve natural resources" (1968: 351). The western governors recognized that, in the words of Montana's Tim Babcock, they were standing "on the threshold of development of great coal deposits" (1968: 346). Wyoming's Stanley Hathaway told the committee that states with comparable surface mining problems should be

> allowed the opportunity to cooperate regionally in solving their problems . . . States could cooperate in developing legislative objectives . . . Rehabilitation standards could be adopted. Duplication in research work could be avoided. Above all, by common agreement and action any competitive advantage to one state over another resulting from regulations could be prevented (1968: 352).

A second issue raised almost in passing during the 1968 Senate Interior Committee hearings appears in a written statement submitted to the committee by the National Association of Manufacturers (NAM). It notes that "a perpetual, overhanging possibility of federal intervention with a set of differing regulations . . . would make realistic planning -- from both the operational and economic standpoints -- practically impossible" (1968: 307). The NAM was suggesting that the uncertainty about federal regulatory legislation could prove damaging to the mining industry, quite apart from the substance of regulations

themselves.

Interim Events

The Senate Interior Committee did not report a bill in the 90th Congress, and further hearings were not held until 1971. In the interim, the states made various efforts to deal with surface mining problems. There was a dramatic increase in the pace and volume of state regulatory legislation. West Virginia had enacted the nation's first surface coal mining law in 1939, but it was not until the mid- to late 1960s that most states became seriously involved in surface mining regulation. Between 1965 and 1977, 38 states either enacted or amended their strip mining laws.

The states also made a limited effort to cope with strip mining problems cooperatively by establishing the Interstate Mining Compact Commission. The Compact, conceived in 1964 at the Southern Governors' Conference, was organized to prod the mining industry "to utilize techniques designed to minimize waste of our natural resources" and to take action "to assure adherence to sound standards and procedures by the mining industry" (Annual Report 1978, 1979: 6). The Compact required four members before it became operational, but this was not accomplished until 1971 when Oklahoma joined -- having been preceded by Kentucky, Pennsylvania, and North Carolina. Currently, there are 17 member states, all but three (Texas, Oklahoma and New Mexico) located in either the midwestern or Appalachian regions (Interstate Mining Compact Commission, 1981). None of the western states with large coal reserves has elected to join the Compact. During the Commission's organizational period, it noted:

> Many states have failed to pass adequate legislation for the protection of their lands and water and because of this the federal government has now undertaken the task of writing a law that will apply nationwide. Had the Compact become active a few years earlier, there would be no need for federal legislation in this field for it is required that each state pass adequate surface mining legislation in order to become a member of the Compact (IMCC, n.d.: 3-4).

The Compact movement was a case of "too little too late" and may have foundered on the problem of regional competition for coal markets. Some states apparently felt they had little to gain through tough regulations since their reclamation and existing environmental problems were not as severe as those in other regions, chiefly Appalachia. In any case, the western states generally have not elected to join the Compact.

Certainly, midwestern and eastern coal operators fear western competition. A 1974 study notes that "Midwestern coal markets have declined in recent years . . . A part of the regional demand for Midwestern coal has been transferred to the Northern Great Plains where extensive low-sulfur coal reserves are currently being developed." This movement, along with the "emerging Midwestern market for coal-based synthetic fuels, indicates a need for coordinated programs to develop the region's coal reserves" (Carter et al., 1974: 5). The president of the Harlan County (Kentucky) and National Independent Coal Operators' Associations expressed concern about western coal invading traditional markets

for eastern coal. He suggested forming an "operators' league to promote the use of Appalachian coal," saying that "if we don't unite our efforts together [sic] and offset some of the Western strippers," the Eastern coal industry may be severely damaged (National Independent Coal Leader, April 1977: 21).

92d and 93d Congresses: Hearings and Legislation

By 1971 any hope that the states could and would regulate surface mining had all but disappeared. In the 92d Congress (1971-1972) and 93d Congress (1973), approximately 20 bills to regulate strip mining were introduced. Committees of both the House and Senate held hearings. A witness for Save Our Kentucky, a citizens' group opposing strip mining, told the House committee that

> Kentucky's reclamation attempts have been a wholesale failure. Reclamation is a fiction. It is the grandest lie perpetuated upon the American public. The so-called reclamation which the strippers practice does not even merit the description of repair work (U.S. Congress, House, 1972: 541).

Replacing 1968's cautiously optimistic view for reclamation was the firm conviction by legislation supporters that strip mining would have to be banned entirely or, failing that, the job of regulating it turned over to the federal government. The former deputy director of West Virginia's Department of Natural Resources told the Senate committee:

> [T]he surface mining industry in Appalachia is not amenable to social control . . . In a word, State

> regulation is no match for the surface mine industry, at least in West Virginia, and I suspect from superficial observations the same can be said elsewhere (U.S. Congress, Senate, 1972: 285,287).

The witness doubted that a federal law would make any appreciable difference, but he noted such a law would have some advantages:

> [A]t least it offers escape from the depressing game of economic blackmail which has so frequently reduced State legislatures and State regulatory bodies to virtual impotence (U.S. Congress, Senate, 1972: 287).

Environmental, conservation, and affected-landowner groups were not completely united during the 1971-1973 hearings; their proposals took both "hard" and "soft" positions. The "hard" position called for an end to all strip mining commencing from six to eighteen months after enactment of legislation. The "soft" position advocated a ban on strip mining only in areas or locations where the possibility of adequate reclamation could not be conclusively demonstrated (e.g., on mountain slopes of 14 degrees or more). A variant of the "soft" position called for the abolition of certain types of strip mining, primarily contour stripping in mountainous regions. Supporters of both "hard" and "soft" positions maintained that deep mining could be stimulated both sufficiently and quickly in order to minimize any temporary decrease in coal production.

The coal industry, especially its largest producers, reversed the stand it had taken in 1968 when it opposed all federal legislation. It now supported the establishment of minimum federal guidelines for regulating surface mining. The states

would be given the opportunity to develop regulations consistent with the guidelines and, after a time, the federal government would be empowered to enforce federal regulations in states which failed to develop an acceptable regulatory program. The president of the National Coal Association told the Senate Committee that

> [T]he responsible companies of the coal industry now support reasonable Federal legislation which will enable the States to do a more effective job of regulating surface mining and reclamation. We believe fair and reasonable regulation, uniformly enforced, can and will allow the continued production of coal for the national interest and will assure that all operators - including some who might otherwise shirk their duty, to the detriment of the whole industry and the Nation -- follow good reclamation practice (1972: 315; emphasis added).

Although less enthusiastic, the National Independent Coal Operators' Association supported the NCA's position (U.S. Congress, Senate, 1972: 775-777). On the other hand, the Tri-County Independent Coal Operators (Virginia) -- which represented smaller operators -- continued to oppose federal legislation, generally making the same arguments the entire industry had advanced in 1968, that the states were adequate to the task (1972: 619-623).

The industry's "support" of federal legislation hardly could be called enthusiastic. In fact, it appears that it was pushed into publicly endorsing the concept of federal controls only by the extreme measures strip mining opponents demanded. Moreover,

the industry asserted that it would support only "workable, reasonable, and realistic" legislation. These words were to be repeated many times over the next six years as the industry nominally continued to support federal legislation, but only its own kind of legislation.

The 1971-1973 hearings were critical for the coal industry. Although our reconstruction of motives and objectives is speculative, the record suggests that the largest coal producers were primarily concerned with protecting, if not enhancing, the value of their western coal leases. They pursued this objective by working to defeat the call for the abolition of strip mining. They sought to allay the concerns of western lawmakers who did not want their states to become another Appalachia. The basic goal of large coal in nominally supporting federal legislation was to ensure that the law would be sufficiently flexible to accommodate site-specific mining variations. In addition, such support was a mechanism for pressuring "irresponsible" elements in the industry to put more effort into reclamation.

In emphasizing its support for "fair, realistic, and reasonable" federal legislation, the coal industry advanced eight key points in its 1971-1973 Congressional testimony:

> (1) Because of the immense diversity in mining conditions and problems in the 50 states, federal regulations would have to be broad and flexible rather than specific and rigid.
>
> (2) The environmental abuses of strip mining were a product of the past and were produced by a small percentage of operators, those on the fringe of the

industry. Comparable abuses could not and would not occur again.

(3) They would not occur again because the "science" of reclamation now was so much more developed than in earlier times. In fact, developments in reclamation technology were taking place at such a fast pace that virtually all land would be reclaimable in the future.

(4) A total ban on strip mining would reduce coal production, make the United States more dependent on foreign fuels, and lead to electric power shortages.

(5) A total ban on strip mining would produce rising unemployment and have a severe economic effect in areas dependent on coal mining.

(6) A rapid or substantial conversion to underground mining could not prevent these consequences because the lead time required to open deep mines was too long.

(7) A return to deep mining would consign increasing numbers of miners to death or injury.

(8) The federal government should play a larger part in supporting and conducting coal-related research.

It is not possible here to convey fully the extent of the industry's persistence in calling for flexibility in the guidelines. Nor is it possible to document the extensive disagreement over details of the various federal proposals. The industry generally avoided taking a rigid stance on any single aspect of the debated bills. For example, various bills called for the segregation of soil strata during a mining operation so

they could be put back in the same order in which they were removed. Hanna Coal Company's president told the Senate Committee:

> If the land is to be revegetated, the most important consideration of the reclaimer is to create a good growing medium for vegetation. Reclaimers have discovered that often the topsoil -- where it exists -- has become worn with time and usage and that a previously unexposed layer will contain better nutrients for maintaining healthy growth. More often than not, a mixture of several layers of earth uncovered in mining will provide the best growing medium.
>
> We have found in some cases that the upper strata are the best and should become the future growing surface. Each case is different, however, and for this reason I would suggest that any legislation drafted by this committee reject the idea that, replacing topsoil after mining necessarily insures good reclamation (U.S. Congress, Senate, 1972: 320).

The industry, it must be noted, called for flexibility only in those areas which would increase its options in planning and conducting mining activities. It opposed flexibility in legislative provisions which would decrease its own operating options or increase unpredictability. The industry, for example, urged a narrow, inflexible provision for public comment on mining permit applications and citizen suits against coal operators. While many environmental groups favored entrusting enforcement responsibilities to the Environmental Protection Agency, fearing

that the Interior Department had too much of a protectionist relationship with the coal industry, the industry insisted that the Department of the Interior was the "logical" place for surface mining enforcement responsibilities. Similarly, industry representatives generally opposed the inclusion of criminal sanctions in federal legislation:

> [W]e believe most emphatically that criminal sanctions in a Federal surface mining statute would be most inappropriate. It will not be possible to meet the due process requirements of the law. Moreover, in matters affecting mined land where every operation is necessarily unique, it is most unfair to suggest that operators should be subject to criminal sanctions when the regulations issued pursuant to the act will be couched in generalized language. The proper enforcement mechanism in such situations is by way of injunction, the terms of which will explicitly define the impact of the regulation in a specific mining operation (1972: 283).

Examination of the legislative record clearly indicates that opposition to criminal penalties was not a major concern of the coal industry. The matter received only peripheral attention; nor was the industry completely united on the issue. The NCA did not actively oppose the provision for criminal sanctions, suggesting only that they be reserved for cases in which a person "knowingly authorized, ordered or carried out" a violation of the law (1972: 411; emphasis in the original).

The importance of allaying western lawmakers' anxieties cannot be overestimated. This was made doubly important by the fact that an overwhelming majority of committee members in both the House and the Senate were from western states; in 1972, 77 percent of the House committee members were westerners while 100 percent of the Senate committee members were from the west. Arizona's Senator Paul Fannin told Tennessee's Senator Howard Baker that he had seen the damage done by stripping in Appalachia and "I don't want that to happen to my State" (1972: 586). Also, some western lawmakers' constituents resisted the encroachment of surface coal mining. A Montana witness told the Senate committee:

> We do not want our beautiful State of Montana ruined, nor other Western States, in order to decrease the air pollution in the East when the true motive behind strip mining is a higher margin of profit for the coal companies. This greed and irresponsibility of the coal companies will lead to the destruction of our area and others like it (1972: 646).

The coal industry was successful in the 1971-1973 session in defeating the call for a ban on strip mining. In general, the industry appeared to convince western lawmakers that their region was sufficiently different from Appalachia that they need not worry. A resident of the Hopi-Navajo reservation in New Mexico praised Peabody's Black Mesa project, which prompted Utah's Senator Frank Moss to remark:

> I am somewhat reassured to hear from the Peabody representative here today, as well as you, that there is

> restoration work going on and that there will be no permanent damage on Black Mesa after the coal is removed (1972: 471).

And if he ever had any doubts about the coal operators' intentions and integrity, Wyoming's Senator Clifford Hansen put them aside during the hearings:

> We are proud of the fact in Wyoming we have had our own land restoration law for some time and it has been accepted in good faith by the mining industry. They have been very cooperative and as a matter of fact they have suggested a number of measures that have since been written into law that I think reflect the kind of rapport that must exist between industry and legislators if we hope to come up with workable laws.
>
> It is one thing to hear from people not involved in the business. I don't say those persons shouldn't be heard. I do say it is crucially important that an affected industry be heard also (1972: 449).

After hearing the testimony, Arizona's Senator Paul Fannin said:

> I will pay tribute to Department of the Interior when this is all completed in 30 years. The land there will be in much better condition than when it started. In fact, as it goes along, they will have a productivity they do not have now. They will have facilities that are not available now (1972: 586).

Finally, perusal of the committee reports suggests the industry was successful in its efforts to portray the abolition of

strip mining as catastrophic:

> The Committee is aware of the critical energy situation facing the nation and the very significant role that coal plays in the energy supply picture. This was a significant factor in directing the Committee's attention to means for regulation and control of coal mining surface activities rather than outright prohibition. The latter would create an intolerable situation in the presently overstrained energy supply picture (1972a: 19).

The committee further expressed its concern about the economic and employment problems which would result from a ban on strip mining and declared its belief that reclamation not only was possible but that first-rate reclamation work was being conducted.

Although the House did pass a bill (H.R.6482), the 92d Congress did not enact surface coal mining legislation.

93d and 94th Congresses: Legislation and Vetoes

Gerald Ford's opposition to legislation regulating strip mining was well known. Consequently, the coal industry could stall as long as Ford occupied the White House. Between 1971 and 1977 -- when a bill finally was signed -- the industry supported the concept of federal controls but worked to defeat any specific bill. Its 1971-1973 testimony and the oil embargo of 1973 had served to put advocates of strong strip mining controls in a defensive position. In 1974, the bill which passed the 93d Congress (S.425) was modified to deal with the industry's contentions that regulation led to increased unemployment. S.425

contained a section providing extra unemployment benefits for anyone put out of work by surface mine shutdowns resulting from federal controls. The same section gave preference in contracts for reclamation work to former mine operators or employees who possessed the requisite heavy equipment (U.S. Congress, Senate, 1974). Still, the industry was not entirely happy. For one thing, the bill contained provisions permitting the Secretary of the Interior to designate lands or areas unsuitable for mining. The industry position opposed any flat prohibition on mining in designated areas or terrain conditions.

In 1974 Congress passed S.425 and sent it to the White House. President Ford vetoed the bill on December 30, 1974. Congress responded by passing a similar bill (H.R.25) in 1975 which Ford vetoed on May 20 of that year. Ford gave four prinicpal reasons for the action: (1) the unemployment the bill would cause, (2) higher electric bills for consumers, (3) an increasing American dependence on foreign oil, and (4) the resulting decrease in coal production (U.S. Congress, House, 1975).

95th Congress: The Surface Mining Control and Reclamation Act of 1977

Relevant congressional committees were angered by Ford's stated rationales for vetoing H.R.25 and they seemed determined to pass similar legislation early in the 95th Congress. Added to the fact that Congress had already enacted strip mining legislation twice, this resoluteness assured passage of another statute. The Surface Mining Control and Reclamation Act of 1977 was the second bill introduced in the House and the seventh bill introduced in the Senate -- that is, H.R.2 and S.7.

Between 1973 and 1977 Congress held no hearings on strip mining legislation and the President vetoed the bills it passed. Developments generally strengthened the industry's interpretation of the nation's energy problems and the need to do nothing to handicap surface mining. Other developments, however, made the industry more willing to accept federal controls.

Data suggest that the climate of uncertainty surrounding federal coal mining regulations was making it difficult for the industry to attract external capital and, thus, to plan mining ventures. Colorado's Governor Richard Lamm indicated that in the west,

> one of the problems we have . . . is the whole question of predictability. If we can have better predictability about where coal development or energy development is going to take place, we have a number of coal leases in Colorado, and we are getting production on less than 10 percent of our coal leases...and what we would like to know is to have some overall idea about where the impact is going to take place so that we can react to it and anticipate (U.S. Congress, House, 1977:101-102).

These remarks were echoed by Atlantic-Richfield's representative, who testified that "what we need is to understand the rules and to be able to obey them from this point forward . . . We need to understand what the risks are, and what the ground rules are" (U.S. Congress, House, 1977:61). Of course, considerable mine planning had been conducted during the period when strip mining legislation was debated. Protection of these plans and capital

investments was a major plea by the industry by 1977.

As a presidential candidate, Jimmy Carter stated that he would have signed the second bill Ford had vetoed. According to COAL AGE (December 1976: 21), part of Carter's reason for pledging to do so was his belief that "substantial increases in coal production and utilization will only come with a stable regulatory climate. The veto of the strip mining bill merely prolonged the climate of uncertainty." The industry realized that it no longer could count on a sympathetic President's veto of any bill it opposed.

Finally, it could be argued that western coal developers by now needed federal legislation for other reasons as well. Much of western coal, as noted, is owned by the federal government, even though private parties own the surface rights. Federal regulation of some kind would be required for the mining of federally owned coal. In 1976, the Interior Department secretary issued regulations for surface coal mining on federal lands (known as the "211 regs"). This move, by itself, meant that western mine operators would now be operating under some kind of federal controls.

For various reasons, then -- a new President, the industry's difficulty in attracting capital because of regulatory uncertainty, and the fact that the entire issue of federal controls had become moot -- by 1977 the coal industry was ready to "capitulate." At the same time, Congress was concerned with writing a bill with which "the industry [can] live."

Although by 1977 passage of legislation was a foregone conclusion, there remained groups and individuals who wanted to

contest issues which were then moot. They had not heard the message that Congress no longer was considering a total ban on strip mining. The president of Save Our Cumberland Mountains told the House subcommittee "we feel that the only sensible thing is to start a regulated phase out of strip mining" (U.S. Congress, House, 1977: 29). Others wanted to contest the issue of whether mined land could be reclaimed, apparently not realizing that Congress already had accepted the industry's assurances that the "science of reclamation" was progressing daily. A Montana cattle rancher called this a "dangerous premise," arguing that

> reclamation research is a new form of alchemy. Although old-time alchemists abandoned the idea of turning base metals into gold, the present-day reclamation alchemists are now faced with transforming money and spoil material into diverse vegetative forage.
>
> The saddest aspect . . . is that the reclaimers and researchers and the general public desperately want to believe the new alchemic theory, because it rationalizes the advisability of strip mining (1977: 51).

Members of the House and Senate subcommittee assured industry representatives that they wanted to write a bill which would permit the industry to increase coal production. Arizona's Representative Morris Udall told a utility company representative:

> I want to assure you that I believe the Nation has got to increase the production of coal over the next decade. It is our insurance policy against the Arabs . . . I want to write [a bill] that lets more coal be mined and

lets it be mined at a reasonable cost . . . but this uncertainty is paralyzing the country (1977: 49).

Although the entire coal industry opposed the 1977 bill (H.R.2), at least nominally, a clear split in interest between eastern and western coal producers became evident. (Many believe that federal controls do not work as heavy a burden on the larger coal producers as on the smaller mine operators.) These two segments of the industry differed in the adamance and extent of their opposition to H.R.2. Western witnesses made statements of opposition almost in an obligatory fashion but then went on to offer detailed amendments. Eastern witnesses were more vociferous -- even defiant -- in their statements of opposition.

Eastern and western industry representatives were united, however, in their calls for amendments to three sections in H.R.2: provisions for public hearings and citizen suits, and requirements for determining the hydrological consequences of surface mining. At the same time, western witnesses were concerned about prohibitions on mining on alluvial valley floors, provisions for acquiring surface owner consent to mine, and restrictions on the length of mining permits and the permit renewal process. While these issues did not concern eastern operators, they were more concerned about the provision that mined land be returned to its approximate original contour. Generally, eastern operators were fearful that the bill would make it (1) effectively impossible to mine much eastern coal and (2) too costly for small operators to comply. Western operators expressed few, if any, concerns in these areas.

In their testimony, the coal industry and utilities

consistently sought to increase their options under the forthcoming bill while limiting others' options. Industry saw citizen suits and public hearings on applications for mining permits as potential sources of harassment and, therefore, delay and unpredictability. With respect to citizen suits, Congressman Udall reassured a witness:

> One of the most utter frustrations of people who fear coal mining in Appalachia is that there is no one to talk to. The legislature has been bought off, in their view, and at the county courthouse the judge and all the lawyers are on the side of the coal companies. If they had some place to be heard and take out the frustrations, a lot of times that helps. You give your wife the right to complain and sometimes she won't complain. They don't have a forum to be heard, and that is the philosophy behind the citizen suit provisions, to legitimize and standardize some kind of forum through which people who haven't been heard on the strip mining provisions could be heard (1977: 50).

Bill H.R.2 was passed by Congress in July 1977 and the President signed it into law on August 3.

CHAPTER 3

AN OVERVIEW OF THE ACT

The Surface Mining Control and Reclamation Act of 1977 has been reviewed and discussed elsewhere (e.g., Dale, 1978; Harvey, 1978). Here we present a brief overview of the more important provisions in the Act. Taken together, however, the nine titles in the eighty-eight page Act provide for a national regulatory program "to prevent or mitigate adverse environmental effects of present and future coal mining operations."

Title I sets out Congressional findings and the purposes of the Act. Briefly, Congress asserted its belief that (1) technology is available to reclaim some of the economic and environmental impacts of surface coal mining, and (2) regulatory efforts should be focused at the state level. Nevertheless, one purpose of the Act is to establish minimum national standards for regulating surface coal mining reclamation and the surface impacts of underground mining. Other purposes are to (1) encourage the states to regulate mining in accord with such standards, and (2) effect a program for the reclamation of previously mined lands.

Title II established the Office of Surface Mining Reclamation and Enforcement within the Department of the Interior and empowered it to promulgate and enforce surface coal mining regulations. The Act provides for a two-step implementation of the new regulatory program. Initially, 90 days after enactment of the SMCRA, the OSM would publish interim regulations for all surface coal mining. Enforcement of the interim program regulations was to commence 6 months after the passage of the Act.

During the interim program, coal operators were subject to a dual system of state and federal regulation. However, by August 3, 1978, after the interim program was operating, a permanent program would be developed, and the states would be given the opportunity to devise their own regulatory programs to meet the standards of the Act and the federal permanent program. States would develop their own regulatory programs and submit them to the OSM for approval. States with approved programs would become the primary enforcement authority (i.e., they were to have "primacy"). In these states, the OSM would function only in an oversight capacity. The permanent program would be enforced by the OSM only in states that failed to submit or to receive approval of their primacy applications.

The Act provides the OSM with incentives and prods to motivate the states to develop and enforce stronger regulatory programs. One of the most attractive incentives appears in Title IV. It establishes an Abandoned Mine Land Reclamation Fund (AML fund) to be administered by the Secretary of Interior. The AML fund is to be used for the reclamation of lands mined prior to the date of enactment. The principal source of revenue for the fund is, for bituminous and sub-bituminous coal, a reclamation fee of 35 cents per ton of coal produced by surface mining and 15 cents per ton of coal produced by deep mining or 10 percent of the value of the coal at the mine, whichever is less. The reclamation fee for lower quality, lignite coal is 2 percent of the value of the coal at the mine or 10 cents per ton, whichever is less. Once a state acquires primacy, one-half of the AML fees collected from its mines are to be returned to it for reclamation projects on

abandoned mined lands.

Other incentives for the states are contained in Titles III, VII, VIII and IX. Included are provisions for federal funds to create state mining research institutes, university coal research laboratories, and graduate fellowships for studies in energy resources. Also, federal grants are authorized to aid the states in developing and operating their regulatory programs.

To many, the procedures set forth in Title V are the "guts" of the Act. Title V contains 115 performance standards for surface mining and reclamation that both the interim and permanent programs are to incorporate and build upon. Just as important, section 501 specifies a rigid timetable for the promulgation of interim and permanent regulations and submission of state primacy applications. The requirements for establishing state programs are also contained in Title V.

The Act contains provisions for citizen participation in and review of the development and implementation of the federal and state programs. For instance, public hearings are required at several stages in the development both of federal and state programs. And once developed, in order to incorporate any changes in the respective regulations, the OSM was to hold public hearings allowing a thirty-day comment period from interested parties and state governments. Also, public hearings were mandated in states requesting primacy, with the Secretary of the Interior making his decisions after these hearings had been examined. If the primacy package was not approved, states were permitted sixty days to submit a revised program.

Section 515 establishes detailed mining and reclamation performance standards. Examples -- required in the interim, permanent and approved state programs -- require mine operators to: (1) submit detailed information on the proposed mine site and a reclamation plan before a permit to mine is issued, (2) secure a performance bond of sufficient size to pay for reclamation should the mine operator fail to do so, (3) remove and store topsoil separately so it can be used in reclamation, (4) conduct blasting only under specified conditions, (5) monitor and take steps to ensure that mining does not effect the hydrological balance of the mined area, (6) handle and store spoil materials only in specified ways, with no placement of spoil on the downslope, (7) reclaim portions of the mined area as quickly as possible after mining is completed, (8) eliminate all highwalls in the reclamation process, (9) regrade the mined area to its approximate original contour, and (10) establish a self-revegetating cover on the mined area. Other sections of the Act contain provisions designed to restrict coal mining in certain ecologically fragile or economically significant areas, such as prime farmlands and alluvial valley floors in the west (i.e., naturally irrigated or subirrigated areas capable of supporting agricultural activities).

Further, Title V outlines the inspection and enforcement policies and the penalty provisions of the Act. The Act provides for a system of mandatory enforcement and close cooperation between federal and state regulatory personnel. During the interim program, OSM inspectors were required to inspect each permitted mine site twice annually without giving prior notice to the operator. Section 521 explicitly requires inspectors to write

a notice of violation for every regulatory infraction they observe on a mine site. In addition, it requires them to issue a cessation order (an order to cease all mining) under conditions of imminent danger to public health or safety, or when an operator fails to abate a violation.

Section 518 establishes the monetary values of penalties assessed for violations and the process by which they are assessed, adjusted and collected. A maximum of $5,000 may be assessed for each violation. Violations not corrected within the time period set by the inspector may be assessed an additional $750 a day. Maximum civil and criminal penalties of $10,000 or one year imprisonment (or both) may be imposed if a person knowingly and willfully fails to comply with the Act or the regulations.

For at least a decade, the coal industry resisted all efforts to establish a new regulatory apparatus. Clearly, it wanted to defeat federal surface mining legislation. Not until Jimmy Carter's victory in the 1976 Presidential election did it begin detailed bargaining over many specific provisions in the impending Act. By that late date the fundamental structure of the Act and many of its detailed requirements were accepted by a Congressional majority. Nonetheless, the industry successfully lobbied for requirements more to its liking. As a result, many of the Act's requirements contain variance procedures (e.g., in the requirement that mined land be returned to its approximate original contour). Other sections of the Act clearly are beneficial to the coal industry (e.g., federal funds for coal

research, and for training graduate mining engineers and other technical personnel). The Act also contains a mechanism, the Small Operators Assistance Program (SOAP), to help small operators meet the costs of preparing mine permit applications. In areas that impose financial burdens on the industry, such as the AML fund, the cost is fixed and, therefore, calculable. In many ways, the coal industry successfully reshaped the Act for its own benefit.

Nevertheless, passage of the SMCRA was a victory for its environmentalist and citizen supporters. Generally, the Act's requirements are comprehensive and stringent, containing many "agency forcing" provisions (cf. Ackerman and Hassler, 1981). At the same time, and paradoxically, this stringency and rigidity are deceptive. By including procedures for variances from the Act's requirements, Congress left to the Office of Surface Mining the task of resolving issues related to the breadth and application of the variance procedures. In effect, Congress passed the buck. More importantly, the relationship between the OSM and state regulatory authorities was left ambiguous. OSM's task is to ensure that the states develop adequate regulatory programs, but responsibility for program development and implementation (primacy) was left to the states. Thus, the Act contains the seeds for serious tension and conflict.

CHAPTER 4

THE POLITICS OF REGULATION: INTERPRETATIONS

Current discussions of regulation make a distinction between the regulation of prices and the regulation of quality (Arrow, 1981), between "old-style economic regulation" and "new-style social regulation" (Lilly and Miller, 1977), or simply between economic and social regulation (Klass and Weiss, 1978). This distinction is important, not only because the two types of agencies pursue different goals, but also because they tend to vary in the authority of their legal bases, the strength of their social bases, and the orientations of their regulatory staffs.

The intent behind the creation of old-style agencies was to protect the "public interest" from market imbalances. The agencies were to be staffed by independent experts, free from partisan and special interests, who would provide rational policy, full-time oversight, and operational continuity and flexibility. Analyses of the origins, workings, and consequences of these economic regulatory agencies are found in a substantial body of empirical and theoretical writings by historians, political scientists, economists, and muckrakers (for a review of this literature, see McCraw, 1975).

The mandate given the new-style agencies, such as the Office of Surface Mining, is to control the social costs of production. In contrast to the the earlier economic regulatory agencies, the new agencies are based on relatively stringent enabling legislation with little explicit responsibility to protect industry from economic distress. Only recently, however, have

social scientists begun to provide empirical and theoretical analyses of these new regulatory agencies (e.g., Mendeloff, 1979; Wilson, 1980; Keiser, 1980; Quirk, 1980; Kelman, 1981; Menzel, 1981).

THEORETICAL APPROACHES

Theories of regulation are generally based on analyses of old-style agencies. Although there is a large array of theories of the politics of regulation (cf. Mitnick, 1980), they represent variants of four answers to the basic question of who benefits from regulation: (1) the public at large (i.e., the public interest), (2) the groups that agitated for regulatory change (e.g., moral crusaders), (3) the regulated industry, and (4) the regulatory apparatus (i.e., the bureaucracy itself).

Public Interest Theory

Nearly all regulatory law is justified as social control that serves the interest of the general public. In addition, the idea of serving the public interest is a common legitimating mechanism for regulatory agencies and their personnel. With few exceptions, however (e.g., Sharfman, 1931), empirical research has been used as witness against this theory. The difficulty, of course, is in specifying precisely what is meant by "public interest."

Nevertheless, the idea that regulation reflects the public interest is not without utility. It focuses our attention on the need for legitimation as a constraint in the production and application of regulatory law, and as a basis for opposition to special interests. Further, it suggests that regulatory agencies themselves, when perceived as acting in the public interest, act

as legitimizers of the regulated and of the economic system as a whole. In the process, regulation is transformed into a signal that "everything is under control."

Unfortunately, public interest theory explains too much. It tends to neglect the question of whether some strata in "the" public benefit more than others, and it downplays the importance of investigating precisely how things happen (i.e., the social and political forces which produce legislative change and regulatory programs).

Countervailing Interest Group Theory

Careful empirical investigation of regulation generally elicits one form or another of interest group theory. If the focus of research is on the origins of a regulatory agency, the most common explanation pictures the instigating group(s) (or quasi-groups) as the major beneficiaries, although generally the final regulatory package is a compromise containing some benefits for the regulated industry as well.

The most studied case is the attempt to regulate the railroads through formation of the Interstate Commerce Commission, the first independent regulatory commission in the United States. Midwestern farmers (Buck, 1913), midwestern small capitalists (Miller, 1971; Martin, 1971), and eastern small capitalists (Benson, 1955; Nash, 1957), are given various degrees of primacy in these accounts of the origins of railroad regulation. The valuable common component of these interpretations is the identification of real historical actors struggling to protect economic interests, demanding governmental protection from

subordination to monopoly capital. The overall picture is one of class struggle involving middle classes and opposing fractions of capital.

The ideological justification for railroad regulation contained three components that became the basis of further demands for regulatory reform: hostility toward monopoly power, distrust of politicians, and respect for experts. These are the basis of Progressivism, the broad social movement that often is viewed as the major source of reform and expanding governmental regulation of the economy during the first two decades of the century (McConnell, 1967). Progressivism had its roots in the various fractions of the middle class. Hostility toward monopoly emanated especially from small entrepreneurs and farmers. Trust in expertise was a reflection of the world view of the new middle class of educated employees, an emerging knowledge elite. The cleavage within the middle class has increased over time and is reflected in the "new" regulation (e.g., EPA, OSHA, OSM), which we view as new middle class projects.

Interest group theories draw our attention to forces beyond the regulatory arena that constrain the formulation and implementation of regulations. In practice, however, such approaches tend to ignore the politics of the full regulatory process. Further, the role of the state in the origin of regulations is not given sufficient attention. Finally, it may be doubted that knowledge of input (group pressure) provides a good explanation of output (the consequences of regulation).

Capture Theory

When regulatory agencies have been studied over time or in terms of objective economic benefits of regulation, the evidence tends to support a second type of interest group theory, capture theory. The idea that regulatory agencies become the agents of the industries which they were established to regulate is perhaps the most widely accepted proposition in the field of regulatory analysis (McConnell, 1967; Zeigler and Peak, 1972; Salamon and Wormsley, 1976; Owen and Braeutigam, 1978). Because the term "capture" may refer to direct control, cooptation, the establishment of a community of interests, or neutralization, there are two somewhat different versions of capture theory.

Incremental capture theory holds that capture is a relatively natural consequence of the aging process (Bernstein, 1955; Downs, 1967). The major basis for capture is the loss of the broad-based public support that was instigated by reform groups at the point of origin, and the subsequent loss of support by elected politicians. The agency, then, in quiet desperation, turns to its own clientele for support. Alternatively, once the reformers have turned their attention and limited resources to other areas, the regulated industry is able to mobilize its resources more effectively to control the agency. Factors that push agencies toward capture include insufficient monetary and material resources, shortage of personnel, inadequate quality of personnel, industry control of essential information and expertise, the establishment of cooperative relationships for the solution of problems, and the greater rewards for competent personnel in the regulated industry (cf. Mitnick, 1980).

The utility of theories of incremental capture is that they direct attention to change within agencies, to the constraints under which they operate, and to continuing group struggle beyond the sphere of public politics. These theories lead us to investigate the background and mobility patterns of agency personnel and to focus on changing outcomes. Deficiencies of these theories, in practice, include the lack of attention to the actual implementation of regulations and to legal-bureaucratic constraints on capture.

Another form of capture theory shares these deficiencies but not all of its advantages: direct capture theory. The most noted proponent of this theory is the radical historian Gabriel Kolko, whose research shows the direct influence of big business in shaping regulatory legislation and staffing regulatory agencies, particularly the Federal Reserve Board, the Board of Food and Drug Inspection, the Federal Trade Commission (1963) and the Interstate Commerce Commission (1965). In all of these cases, business was seeking the rationalization of the economy, that is, stability, predictability and security through protection from competition (see also Weinstein, 1968). The thesis may be readily applied to a number of other agencies (e.g., the CAB, the SEC). In fact, a similar general theory has been produced by a conservative economist (Stigler, 1971).

Direct capture theory is a form of instrumentalism, the theory that the state is the instrument of power elites or the ruling class. The advantages of this approach are its emphases on agency formation and the backgrounds of agency officials. Among

the major complaints against instrumentalism (or direct capture theory) is that it overplays the importance (and necessity) of class consciousness, direct participation, and conscious planning by elites or the capitalist class. Obversely, it underplays the role of class struggle, countervailing interest groups, and the relative autonomy of the state.

Relative Autonomy Theory

Among neo-Marxist scholars, increasing recognition of the deficiencies of instrumentalism as a tool for understanding advanced capitalism has led to a proliferation of theories of the state (some of the key works are Poulantzas, 1969; Offe, 1974; Habermas, 1975; O'Connor, 1973; 1981; Block, 1977; 1981). Despite considerable internal dispute, there is agreement on the key concept: the relative autonomy of the state. The basic thrust of this idea is that the state is a steering mechanism, operating relatively independently from capitalist manipulation but within the constraints of the capitalist system. Its major function is the rationalization of the system; that is, it is the state's task to work out emergent problems in a rapidly changing system that is subject to contradictions, crises, and disjunctions. Among the crises that must be continuously resolved are "the accumulation crisis" and the "legitimation crisis" (O'Conner, 1973). Put differently, the state must prevent economic stagnation and quell dissent. In attempting to steer the economy, the state acts as "collective capitalist" and one part of its steering function is regulation, such as controlling the supply of money, some prices and rates of profit, business competition, product quality, and

economic externalities. The state acts as collective capitalist insofar as it optimizes the stability of the system, as a capitalistic system. The state need not act directly in the interests of the capitalist class in the short run. As collective capitalist, its policies necessarily damage some individual capitalists and sectors even as it aids others.

Such theorizing provides a general explanation for the relative independence of regulatory agencies but often neglects the empirical question of how, specifically, the capitalist system operates through the concrete actions of state managers. These state agents include bureaucratic regulators who often construct and enforce regulation of economic activity that is detrimental to many businessmen but beneficial to the capitalist system as a whole (Block, 1977). For example, the new regulatory agencies enforce the internalization of costs formerly borne externally, an impossibility under unregulated competition. Such regulation rationalizes the system by sparing the commons from degradation (cf. Hardin, 1968) and, in addition, legitimates the political economy by the show of state autonomy from business.

The study of regulation, then, must recognize the regulatory agencies as more than "black boxes" that are "through-puts" for interest group pressures ("inputs"). Regulators operate with some autonomy within the constraints of the system. The empirical question is to determine just how they operate and the nature of the constraints to which they respond.

DIRECTIONS FOR RESEARCH

We have used components of each of the four theories in our

investigation and analysis of federal surface mining regulation. Public interest draws our attention to the regulatory agency's need for legitimation. Countervailing interest group theory points to the role of group struggle in agency formation and operation. Capture theory alerts us to factors that limit regulatory effectiveness. And relative autonomy theory leads us to focus on the goals, strategies and activities of the regulatory agents themselves (cf., Serber, 1975).

The regulation of surface mining, like all regulation, is the social control of activities judged detrimental to the interests of others. Regulation is an outcome and reflection of social conflict. It is the politically constructed "resolution" of social struggle. Like other forms of politics, the study of regulations involves issues of who gets what, why, when, how and with what consequences (Lasswell, 1935; Clark, 1967). But politics is not static, nor are political disputes ever fully resolved. Regulation is not the final solution to the X (e.g., environmental) problem, but a political process.

The answers to the question "who gets what" are deeply embedded in the answer to the question "how" -- a process. Regulatory law is an attempt to formally specify constraints on how social benefits and damages will be distributed. But the implementation of such law subjects it to deconstruction and reconstruction at every point -- the making of formal rules and less formal policy guidelines, judicial response to litigation, the formation of an administrative structure, the establishment of enforcement procedures, and implementation in the field. Previous studies of regulation have tended to focus on the questions "who

gets what" by examining the content of the law itself and the consequences of regulation (beneficiaries and losers). In determining how this occurs, scholars have centered their attention on interest groups, formal bureaucratic mechanisms and high level administrators. An emphasis on the politics of the implementation process -- on what goes on behind the administrative facade -- is a notable gap in theoretical approaches to regulation. Only recently have scholars begun to study the implementation process in regulatory agencies (e.g., Kagan, 1978; Katzman, 1980; Hawkins, 1980; Thomas, 1980; Kelman, 1981).

In this study of the initial implementation of the federal surface mining law, the analytical questions that we address are "what are the choices available at the various points in the regulatory process," and "what are the determinants of and limitations on effectiveness and capture?" These questions are part and parcel of the larger questions of "how" and "why" the process operates as it does.

Our analysis of the Office of Surface Mining centers on the identification and explanation of the agency's basic style of operation. By "style" we mean the underlying pattern that is found in seemingly discrete decisions and actions, and in forms of social structure. Such a style is determined by a multitude of factors. It may be established by the intent of Congress or top administrators; it may be developed through organizational drift in response to external conditions and internal dilemmas.

Since regulatory agencies are subject to contradictory

pressures, it is quite possible that no clear, dominant style will emerge. When the dominant style of an agency has been established by intent, the style may be thought of as a component of a basic strategy, a fundamental plan for action. When a style is under construction and after it has been instituted, whether by planned choice or by a series of accidents, it is constantly shaped and reshaped by constraints (i.e., limiting conditions), some of which may reinforce the style, others of which may undermine or modify it.

Two concepts are central to our mode of analysis: choices and constraints. Our case study of the Office of Surface Mining began with the assumption that the implementation of any regulatory program is open to choice of options at a variety of points -- that regulatory personnel enjoy considerable, but not unlimited latitude in the construction of programs. Our task then was to discover why certain options were selected and not others. All choices have the appearance of voluntary, undetermined action, or at least, can be viewed as largely determined by previous choices. At some level of analysis, choice must be accepted as partial explanation of action, i.e., the search for determinants of choice must cease.

For the sociologist, identification of the conditions limiting choice provides the most interesting contribution to the explanation of actions and activity patterns (e.g., agency styles). We refer to these limiting conditions as constraints. Constraints are social forces which channel, but do not rigidly determine, decisions and actions. Among the constraints on choice are the values and ideological biases which limit a person's

willingness to "see" and entertain seriously a host of alternative choices. When individuals are ensconced in a bureaucratic setting, their decision options are constrained by social and political forces which narrow the consideration of options. We discuss some of these constraints later.

TYPOLOGICAL ANALYSIS OF THE REGULATORY PROCESS

In thinking about how a regulatory agency works, what is needed is an approach that analyzes the full regulatory process, from agenda setting to field implementation. One way to approach this task is to examine the stages of decision-making and the constraints affecting such decisions, including the previous selection of options, at every stage. Our theoretical approach is typological. Each of the steps in the regulatory process entails a decision process or is the result of such a process. That is, an option taken at any point acts as a constraint on choices made at later points. For purposes of simplicity, we present polar choices at each stage of the regulatory process. The steps in that process and the polar options are presented in Table 2. Of course, such choices represent ideal types. At no point is it likely that a concrete regulatory process will fall into the most extreme category. It is reasonable to assume that the options selected vary from law to law and from agency to agency. Further, the comparison of any concrete regulatory process with the ideal-typical model provides a starting point for the theoretical understanding of specific regulatory actions. Movement toward the development of such a model appears in several recent discussions of regulatory agencies (Bernstein, 1955; Bardach, 1977; Kagan,

1978; Mitnick, 1980; Keiser, 1980; Hawkins, 1980; Thomas, 1980; Kelman, 1980).

Although numerous choices must be made at each stage of the regulatory process, many are reflections of quite distinctive, dominant styles: enforced compliance and negotiated compliance. In its ideal-typical form, the enforced compliance style of regulation encompasses an overriding drive toward the rationalization of all aspects of the regulatory process. Its components include: reliance on formal, precise and specific rules; the literal interpretation of rules; reliance on the advice of legal technicians (attorneys); the quest for uniformity; centralized and hierarchical organizational structure; and the distrust of and an adversarial orientation toward the regulated. The negotiated compliance style of regulation reflects a dominant orientation toward obtaining compliance with the spirit of the law through the use of bargaining and discretion. Its components include: the use of general, flexible guidelines; the discretionary interpretation of rules; negotiation between scientific technicians ("experts"); allowance for situational factors in rule application; a loosely structured organization; and an accommodative stance toward the regulated.

An advantage of this typology is that it can be tied to the fundamental question of capture versus autonomy. In general, it may be expected that selection of enforced compliance options are conducive to agency autonomy while selection of negotiated compliance options are conducive to capture. The enforced compliance model uses the relatively autonomous legal system to

promote a relatively autonomous administrative apparatus within the capitalist state for the control of the production activities of a segment of capital. Such a model fits the interests of reformers and is particularly compatible with the ideology of the new middle class, an ideology of reform through legal expertise. This model promotes the power of agency officials at the expense of specific units of capital. It is to be expected that the regulated industry generally desires a negotiated compliance approach. This approach increases the influence of the clientele in establishing the operational meaning of the law. It enhances the possibility for incremental capture of the regulatory agency.

Stages of the Regulatory Process: The Choice of Options

We focus now on selected aspects of the two polar strategies at the various stages of the regulatory process, as delineated in Table 4-1. Here and in the following section, we discuss hypothetical constraints on strategic choices.

The enabling legislation that provides the basis for any regulatory program is formulated in an arena of political conflict. When the resolution of such conflict is weighted on the side of the industry to be regulated, the law is likely to be vague or ambiguous concerning goals and/or appropriate means of attaining them (Bernstein, 1955). A mandate for negotiated compliance is implied, and the regulatory agency is likely to become the instrument of the "regulated." In contrast, when a political conflict is resolved in favor of an anti-industry coalition, the law is likely to be rigid and precise, implying a mandate of enforced compliance (Keiser, 1980). The regulatory

TABLE 4-1

TYPOLOGY OF REGULATORY STYLES AND STAGES IN THE REGULATORY PROCESS

Stages of the Regulatory Process	Regulatory Styles	
	Enforced Compliance	Negotiated Compliance
Statute Formation	Rigid Comprehensive Precise	Flexible Narrow General
Bureaucratic Process	Mechanistic Tightly Coupled	Organic Loosely Coupled
Rule-Making	Adversarial Formal Attorney Control	Negotiational Informal Administrative-Technical Control
Regulations	Literal Detailed Design Standards	Discretionary General Performance Standards
Rule Application	Rule-Based Stringent Penal	Results-Based Accommodative Conciliatory

agency is created as an instrument of a reformist coalition, relatively autonomous from industry control. In either case, the temporary resolution of conflict in the form of law is intended as an external constraint on future agency actions. Although it would be a mistake to assume that the regulatory process is determined solely by the structure of enabling statutes, there can be little doubt that the law is a powerful constraint on the options selected at later stages of the regulatory process.

Rule-making proceedings are the initial phase in the operationalization of law. In the older economic regulatory agencies, rule-making often was ad hoc, informal and based on direct negotiation with the regulated clients. From their origins the new social regulatory agencies' rule-making proceedings were subject to the Administrative Procedures Act, which requires technical and legal justification of rules, as well as rejected alternatives, and to the Advisory Committee Act, which requires open public meetings. Thus, agencies now must follow a number of formal procedures in rule-making. Under these conditions, rule-making often takes on an adversarial quality. Still, agencies are not without discretion in structuring the rule-making process. The option of selecting a relatively adversarial versus a relatively negotiational rule-making strategy remains. It is likely that selection of a more adversarial set of procedures increases the probability that the agency will establish and guard its relative autonomy.

The product of rule-making, regulations, are a social and political product. An agency may construct legalistic rules, precise and rigid in their demands on the regulated or it may

construct rules allowing a more discretionary approach to compliance. Legalistic rules are usually quite detailed and emphasize design standards as contrasted with discretionary rules that are general and stress performance standards. Legalistic rules are intended to control industry by specifying not only what must be done, but exactly how it is to be done.

Once promulgated, regulations must be implemented through an organizational structure and management strategy. As we have emphasized, the selection of a dominant management styles is not rigidly determined. Again, those who construct a regulatory bureaucracy retain a degree of latitude and discretion to structure both their "internal" and "external" relations. As these labels suggest, the former refers to agency itself while the latter refers to relationships between more or less self-sustaining bureaucratic units.

Social scientists have sketched two ideal-typical forms of bureaucratic organization. Although the labels for these types vary, their substance shows remarkable similarity. Burns and Stalker (1961) designate their version of the two types as mechanistic and organic styles. Mechanistic management tends to be highly centralized and hierarchical. Individual tasks tend to be defined rigidly and narrowly, and channels of communication are hierarchical and formalized. By contrast, organic management is collegial and authority is diffused. There is much less emphasis on hierarchy and formalized, vertical lines of communication. Individual tasks are defined generally rather than specifically. And, personnel are encouraged to exercise creativity and

initiative in task performance. We assumed that mechanistic management would be more characteristic of organizations that adopt an enforced compliance style, while organic management would be more likely in regulatory agencies which adopt a style of negotiated compliance.

In its relations with subunits and other agencies, we employed the distinction between "loosely coupled" and "tightly coupled" systems (Hagan et al., 1979). The American criminal justice system has been characterized as a loosely coupled system which is only weakly rationalized, with discretion dispersed throughout a variety of agencies in an unsystematic manner (Hagan et al., 1979). Regulatory agencies may be loosely or tightly coupled in two senses: internally (e.g., ties between headquarters and the field) and externally (e.g., ties between the primary regulatory agency and other agencies, such as state bodies). The structuration of a regulatory system is not wholly constrained but is subject to a certain amount of administrative choice. In general, it seems reasonable to assume that loosely coupled systems are compatible with negotiated compliance and tightly coupled systems with enforced compliance.

However constrained by previous steps in the regulatory process, field agents still are faced with decisional strategies in actual rule application. A stringent strategy is based on criteria of uniformity, adherence to the letter of the law, and distrust of the regulated. Contrarily, accommodative implementation policies are based on criteria of the need to take variable conditions into account and a degree of trust that the regulated will adhere to the spirit of the law. A stringent

policy is generally advanced by "tying enforcement agents to the book" (i.e., the regulations) rather than allowing a relatively independent application of expertise. It seems likely that such a strategy will be associated with a coercive rather than an educational role model for field agents. A stringent implementation policy is intended to keep the field agents, as well as the regulated, in line.

Part of rule-application is the imposition of a scale of sanctions. The sanctioning process may be approached from a punitive or a reformist standpoint. The former approach holds that violations will be limited and deterred most effectively if judgment is swift, certain, and uniform. The latter approach holds that consideration of situational variables is the most effective basis for gaining compliance. The development of a rather severe set of penalties would be congruent with an ideal-typical style of enforced compliance and more symbolic kinds of punishments (or possibly, rewards) with a negotiated compliance style.

Constraints

In discussing our typology of polar options available at various steps in the regulatory process, we have indicated the manner in which internal constraints (previous decisions) limit the options available at every point. Real choice is limited further by an array of external constraints. We will focus on three types of constraints: political forces, resources, and the state of the economy.

If politics is defined in its broadest sense as all attempts

to influence or control state policy, then it is likely that political forces will act as external constraints on state agencies at every step of the regulatory process. In the case of the old economic regulatory agencies, oppositional groups tended to withdraw to the sidelines after the passage of an already weak Act. In the case of the new social regulatory agencies, this withdrawal has not yet occurred (Sabatier, 1975). The shaping of the regulatory process within these new agencies is subject to the external constraint of continuing political pressures. These political forces include reformist organizations, the regulated industries (usually somewhat divided along "monopoly" capital and "competitive" capital lines), the states, Congress, and the courts. It may be expected that reformists will continue to press for enforced compliance policies, while the states, generally, and industry, always, press for negotiated compliance strategies (competitive capital more so than monopoly capital). Congress and the courts may swing either way, although the courts typically support any agency action that follows legal procedures.

Available resources are important constraints on agency policies. It is likely that insufficient budgets, inadequate personnel, in terms of either quantity or quality, and lack of adequate information tend to force agencies toward adopting negotiated compliance strategies.

Finally, regulatory agencies are constrained by the state of the economy. In general, economic regulation seems to be the result of class conflict in "hard times." Such regulation reformulates the economic system and legitimates both that system

and the role of the state as the protector of the public interest. Support for economic regulatory agencies apparently is subject to gradual erosion (de-legitimation) in periods of prosperity and, thus, to demands for deregulation in succeeding periods of stagnation or decline. The regulation of products and the production process seems a result of the class politics of relatively prosperous times. Initially, such regulation also legitimates a reformed economic system and the role of the state. As social regulation contributes to the fiscal crisis of the state, it may lose its legitimating function. Since this new regulation appears to limit economic growth, economic stagnation pushes social regulators toward policies of increased negotiated compliance.

In the remainder of this report we employ our interpretive typological schema to describe and analyze the creation, implementation and impact of the federal government's attempt to regulate the surface coal mining industry. In the concluding chapter we return to our theoretical typology in a more explicit manner, including a discussion of policy implications in light of this approach.

CHAPTER 5

THE SOCIAL CONSTRUCTION OF THE AGENCY

After Jimmy Carter's inauguration, the new Secretary of the Interior, Cecil Andrus, created an interagency Task Force to prepare for implementation of the forthcoming surface mining statute. Eventually, some 90 persons from approximately 20 agencies comprised the OSMRE Task Force. The larger Task Force was broken down into 17 "task groups," each of which worked on developing a piece of the new Office of Surface Mining and its regulatory programs.

EARLY ACTIVITIES

The Task Force leader was a career civil servant who previously had a managerial position in the Department of the Interior. Because of budgetary problems, the OSM's initial director was not hired until several months later. A professional engineer, he formerly had served as head of Pennsylvania's agency for regulation of surface mining. His selection was acceptable both to the states and the environmentalist community. Like him, the agency's intial group of Assistant Directors were not hired until several months after creation of the Task Force. For varying tenure, most of them previously had been employed by the federal government.

Initial Selection of Staff

Like its leader, most members of the Task Force were recruited or specifically assigned from other agencies in the Department of the Interior. They were selected because of their

expertise in the area of mining or in related technical areas (e.g., hydrology, geology). They were needed to help the Task Force draft its interim regulatory program, and later they would be needed to help review state program submissions. As the Task Force grew in size, an increasing amount of the work was performed by the task groups.

Constructing Legislative History

To avoid becoming entangled in the final stages of the legislative battle over the Act, the Task Force operated unobtrusively.

> One of the things we attempted -- and, I think, reasonably adequately -- was to keep Task Force operations out of the debate and hearings and markups going on on the Hill. Now, there were two or three of us who were working with the Secretary's legislative people, and what he wanted to do on the Hill. And we'd point out some of the problems we had. But as far as the run-of-the-mill Task Force, you know, the people who were actually trying to develop the agency infrastructure, we just, as much as we could, we severed that. And we were very careful, or tried to be very careful, that the draft regulations didn't get out into industry, or up on the Hill, floating around.

Still, there were important chores to perform in the final days of the legislative deliberations over the SMCRA.

> The first chore was the last minute lobbying. Were there things in this Act which we wanted to change --

now that it looked like it was going to be signed? So, we collected a series of possible adjustments. So, first we had to identify those. . . . So there was lobbying going on in the sense of the administration expressing its views and taking a position on some of the spicey issues: prime farmland, alluvial valley floors. While at the same time preparing a set of what might be called technical amendments. . . . We got legislative history. We asked the Committee to put in an extra sentence or two in the Committee report. Or, we had some -- we wrote floor colloquies where you have Senator _____ saying, "Isn't it correct Congressman so-and-so that . . .?" (They're all made up you know. He's reading off a cue sheet.) But those are the last minute kind of mechanics of legislation. They range from the big policy issues -- what to do about prime farmlands, alluvial valley floors -- to floor colloquy to bolt down some little mechanical thing you know is going to come up . . . You'd see where you'd get a little mechanical weakness in the way a statute would work, and if that fell apart, you'd have this enormous discontinuity and screw up. And the mechanical hook . . . can be strengthened by just the right kind of legislative history . . . That's what Congress meant, but the words are ambiguous and it could be interpreted another way and the whole thing would just go . . . And you can tighten that so it's closed with a nice sentence or two, or colloquy. Or, better yet, something in the

Committee report.

Choosing an Organizational Structure

Early in its operations, the OSM Task Force collectively developed a set of planning assumptions in order to "get everyone thinking along the same lines" and to guide individual and task group activities. Consistent with the spirit of the enabling statute -- and, to some extent, letter as well -- the Task Force decided to create a self-contained agency. Put differently, they decided that portions of its program would not be delegated to other federal agencies. Instead, the OSM would encompass all aspects of the regulation of surface coal mining. Once this planning assumption was made, the Task Force moved to create an appropriate structure for the Office of Surface Mining.

The Task Force selected an organizational structure for the Office of Surface Mining which, nominally, permits a substantial degree of decentralization. Such a structure has a number of important advantages. For example, it permits the development of regional programs which are, to some extent, tailored to the varying conditions and demands of different areas of the country. Also, it permits a degree of timely responsiveness which is difficult to obtain if most problem-solving and decisions are handled at headquarters in Washington. Consequently, in opting for this type of regional organizational structure, the Task Force created the potential for regional autonomy and regulatory reponsiveness to local conditions.

There were practical, time-consuming problems involved in selecting locations for the regional offices and securing approval

for the choices. The latter proved to be especially important because the Task Force deviated in its choice of regional locations from what had come to be "standard cities" for regional offices within the Department of the Interior.

> [We looked at what would be required] to get inspectors somewhere in proximity to the mines they had to inspect . . . What's the dispersion of the mines? What's the dispersion of cities -- that are likely to have housing, that are likely to have airports that you can get into, communications, office space, this type of thing . . . And we probably decided fairly early that the regional approach was desirable.
>
> That's a case that was documented very, very heavily. Because we had an OMB process to go through when we decided not to go with the standard regional cities, like Chicago, and Atlanta, and Philadelphia . . . There was no logic in putting a regional office for coal mining in any of those cities; they're all three outside the coal area. So we ended up, you know, researching airline schedules, number of flights, number of coal companies located in those cities.

Until early 1982, when appointees of the Reagan administration reorganized the agency, the OSM maintained five regional offices (in Charleston, West Virginia; Knoxville, Tennessee; Indianapolis, Indiana; Kansas City, Missouri; and Denver, Colorado). The formal structure of the regional offices paralleled the structure of headquarters (HQ). The location and

geographical coverage of the respective regions is depicted in Figure 5-1. Figure 5-2 shows the agency's organizational structure during the period from 1978 until early 1982, both at HQ and, inferentially, at the regional level.

As a group, the regional directors were knowledgable about surface mining. Several had previous experience in the regulatory area. A native of the Appalachian coal fields, the initial director in region I is a Ph.D. in mining engineering who had done consulting work for the mining industry. The region II director, a native of coal producing Harlan County, Kentucky, previously had worked for the state of Kentucky in the regulatory area. Region III's director is a hydrologist and career employee of the U.S. Geological Survey. Previously he had conducted research on state mining laws in the U.S. (cf. Imhoff, Friz and LaFevers, 1976). The region IV director previously had worked with the U.S. Bureau of Mines and also had served for two years as director of Ohio's surface mining regulatory agency. Prior to his appointment with the OSM, the region V director had served on the staff of the House of Representatives subcommittee which was instrumental in passing the SMCRA. As a Congressional staff member, he had spent several years' studying the problems of unregulated surface mining and the testimony of various groups involved in the legislative debates.

Partly because Congress delayed the OSM's appropriations, it was unable to hire its regional managers until almost the middle of 1978. By that time, the agency already was represented in the regions by regional solicitors -- the Solicitor's Office has an independent budget -- and by the initial group of inspectors.

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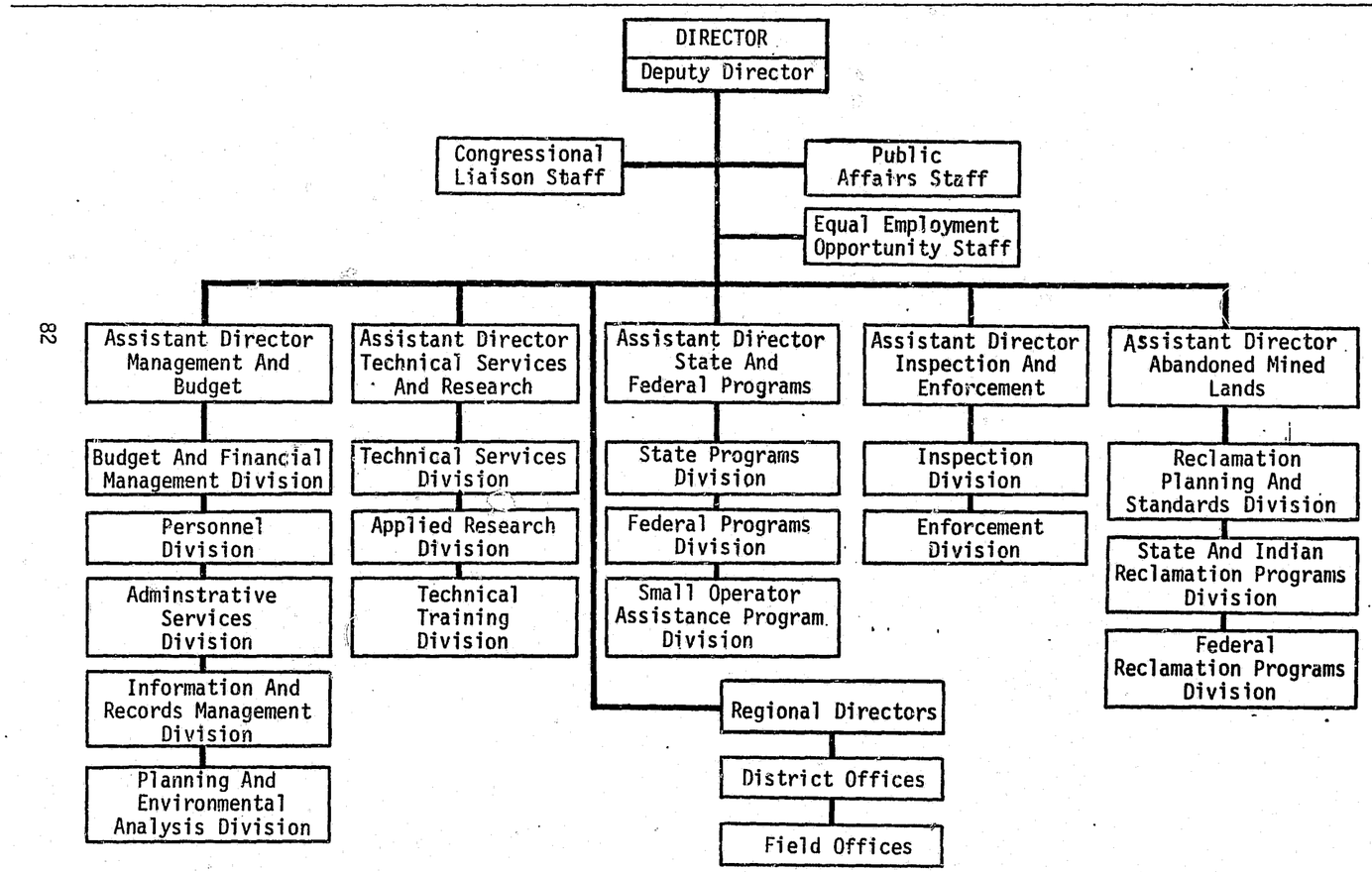
1 OF 4

FIGURE 5-1
OSM REGIONS

FIGURE 5-2

OSM ORGANIZATION CHART



Several regional directors reported for work to find some field-level personnel already working.

THE LEGACY OF ACRIMONIOUS CONFLICT

Passage of the SMCRA was the most visible result of the struggle over federal legislation. Just as important, though far less apparent during the struggle, was the development during the struggle of hostile perspectives toward one another by the legislative adversaries.

Generally, the hotly contested, protracted Congressional battles of the 1970s forged narrow, antagonistic beliefs among the various parties to the conflict. On the one hand, supporters of strip mining regulation were described in the MINING CONGRESS JOURNAL as "impassioned crusaders," "environmental zealots," "small groups of elitists" and as a "vociferous and obstinate few." Their efforts on behalf of legislation were ridiculed as "arousing public passions" and "simplistic appeals." Their proposals were derided as "reckless folly" and "frenzied fretting" (Shover, 1980). On the other hand, members of environmentalist and citizens' groups whom we interviewed often times likened segments of the coal industry to robber barons and depicted them as throwbacks to an age of industrial callousness. Environmentalists viewed state regulators, with a few exceptions, as incompetent or as corrupt lackeys who had "crawled into bed" with the coal industry.

After enactment of the SMCRA, the retention of these hostile stereotypes influenced efforts to shape the OSM's regulatory program. Mutual distrust and acrimony permeated the responses of

environmentalists and the coal industry to each other's proposals. The new Office of Surface Mining received its Congressional mandate and began its work amidst this rancorous political conflict. An attorney who represents environmentalist and citizens' groups told us:

> Strip mining, in my mind, has been one of the most controversial areas in the entire realm of federal regulations. Far more than, really, its importance to the nation as a whole . . . Now, why has it been so controversial? . . . It was terribly contested in Congress . . . [I]t was bitterly contested . . . Therefore, I think anyone who thought that it was going to be implemented without a great deal of problems was just whistling into the wind. There were bound to be problems, if the agency stuck to the mandate, 'cause simply put, a number of the major coal states and coal operators never accepted the Surface Mining Act, when it was on the Hill or when it was passed.

Against the backdrop of bitter, politically polarized debate over surface mining regulation, the Task Force strove to work dispassionately. Unfortunately, in such a context, any apparent sensitivity and deference toward either side of the dispute exposed the agency to charges of favoritism from the other.

CONSTRAINING FACTORS

Operating in this context, the Task Force was affected by four broad constraints that influenced its selection of a mission and policies: (1) its members' shared perceptions of a mandate for

a stringent surface mining program, (2) its members' guiding ideology, (3) the differential organization and effectiveness of external groups, and (4) statutory requirements and limited resources.

Perceived Congressional and Presidential Mandate

Based on their knowledge of the legislative history of the Act, Task Force members shared a number of assumptions about Congressional and Presidential support. Despite opposition from the coal industry, by 1977 Congress had passed surface mining legislation three times. Also, the new President was known to be supportive of environmental legislation generally, and the SMCRA in particular. A White House staff member told us:

> Q.: Tell me, if you can, what President Carter's stance was toward the environmentalist community and the environmentalist movement prior to his election?
>
> A.: He considered himself very closely affiliated with the environmental movement. I think his own experiences were both personal and out of his experiences as Governor of Georgia, where he had grown very concerned about some water resources issues, in particular. But he had a wide range of interests in the environmental area . . . He felt very close to the environmental movement. He considered himself part of it.

After his inauguration, Carter appointed several persons believed sympathetic to environmentalism to positions in the Department of the Interior. When he signed the SMCRA in the White House rose garden, President Carter publicly expressed his disappointment

that the bill was not as "tough" as he would have liked.

The President's openly-expressed sympathies for environmental protection, the fact that the signing ceremony was attended by a number of individuals who had campaigned tirelessly for enactment of the bill, and the fact that Carter appointed several persons with similar leanings to important positions in the Department of the Interior all combined to send a symbolic message to members of the Task Force. They believed they had received a clear, strong mandate from Congress and the Carter administration to create a program that, if it was biased at all, would be biased in favor of environmental protection rather than developmentalism. In sum, the belief that they were to produce a stringent program was taken for granted by many Task Force members. As one of the solicitors to whom we talked put it, such beliefs "were in the air on the sixth floor of the Interior Building" as the interim program took shape.

Guiding Ideology

Most persons were selected for the Task Force solely because of their technical expertise. However, some of its most energetic, committed members had sought positions because they welcomed the opportunity to shape a program to deal with strip mining abuses. A solicitor told us that the OSM

> attracted a large portion of people who were extremely enthusiastic about the goals of [the] statute . . . [T]here were a lot of people around, from the inspector rank on up, who were long-time opponents of . . . bad strip mining practices.

Such persons worked long hard hours developing the agency, primarily because they enthusiastically believed in its goals. They brought to their work a sense of mission and commitment. An important Task Force member told us "we were reformers." Asked if he meant everyone on the Task Force, he replied: "Everyone who counted". (The respondent exaggerated; our data suggest that several members of the Task Force who 'counted' initially cared more about completing their charge than with the substance of their product.)

Some members of the Task Force, among them the reform-minded, were distrustful of the coal industry's motives. They had watched over a period of nearly ten years as representatives of the industry made assertions before Congress which Task Force members believed to be totally untrue or extremely misleading. Also, they were aware of the history of lax state regulation, and they attributed this in part to the machinations of the industry. They fully expected the coal industry to challenge and fight the new agency and its regulatory program at every opportunity and in every forum. Consequently, believing the coal industry incapable of a good faith effort to comply with federal regulation, their assumptions led them to espouse enforced compliance strategies that might provide immunity to capture by industry.

Because they expected the coal industry to fight the emerging regulatory program, top officials on the Task Force became concerned with designing a program that could withstand legal challenge. The desire for defensibility generally thrust the agency's attorneys into a prominent role in drafting regulations and shaping the program. Among the major program consequences

were the reinforcement of an adversarial mode of relationships and an emphasis on detail and precision in the regulations. However, the developing enforced compliance style of operations left the agency vulnerable to charges, both by industry and the states, that it was inflexible, arrogant, and unwilling to listen to parties with alternative views and ideas about the regulatory program.

Some influential members of the Task Force viewed with skepticism the states' willingness to implement strong regulatory programs since their failure to regulate mining effectively had led to the SMCRA. It was assumed that the states would drag their feet and, at worst, would actively resist the OSM's efforts to prod them into a more effective regulatory posture. A solicitor noted: "I think there was a healthy skepticism about the willingness of the states to change direction." At first, the new federal regulators did not take seriously the states' objections to the program. The same respondent told us:

> I suppose that the resistance of the state institutions was somewhat discounted [by OSM], on the rationale that "well, the whole purpose of the Act was to change these people, and they're not gonna' like it anyway. Discount it."

Eventually, the states retaliated with persistent, virulent attacks on the OSM and its regulatory products.

Differential Effectiveness of External Groups

During the legislative struggle, the coal industry's opposition to all efforts to enact legislation at once was adamant

and cavalier. The industry simply dug in its heels. It developed few new organizational arrangements to defeat legislation, relying instead on sympathetic members of Congress and Republican Presidents to stall the regulatory movement. When the Act passed, the coal industry determined to fight harder and more effectively for its own brand of regulation. The National Coal Association (NCA) and the American Mining Congress (AMC), which represent larger mining companies, formed a Joint Committee to represent their interests; smaller mining companies established the Washington-based Mining and Reclamation Council of America (MARC).

During the legislative struggle, citizens' groups and environmentalists, unlike the coal industry, developed a disciplined, responsive national coalition that was able to work effectively for their proposals. When the Task Force began its work, the organizational effectiveness of these groups was brought to bear. An important member of the Task Force told us:

> The environmentalists were more constant in being in, in asking for meetings, looking at what's going on. And that [was] true all the way, all the way through. My experience with OSM is that you had -- and it varied with individuals -- but, an individual from an environmental organization, once you met him he was likely to be in fairly regular.

Just as importantly, this coalition was one of the few "natural" sources of support for the new Office of Surface Mining. Put differently, few if any other constituencies clearly desired a

federal regulatory presence. The fact that several members of the Task Force shared the environmentalists' reformist orientation served only to cement the natural affinity between them. This bond, together with the organizational effectiveness of the environmentalist movement, generated an aura of mutual deference and respect. Thus, some of the ideological premises of the enivronmentalist movement received a sympathetic reception within the Task Force and, later, the agency. Unlike the environmentalists, a key member of the Task Force told us that the coal

> industry was more spotty, with a few exceptions . . . [T]here was a different approach. You could tell a difference. And that probably had an influence. I'd say the constant contact of environmentalists [had an influence]. But, again, I don't think anyone was ever told, "no, I can't meet with you," to my knowledge.

Unlike the environmentalist groups, coal industry representatives received a formally correct, polite reception from the Task Force. An industry spokesman said:

> You have to believe that there was an intent not to have contact. I don't know how you could believe anything else. I mean, the results of 3 and 1/2 years of constant efforts of one side, and nothing on the other side has to lead you to believe that there was no desire to have contact . . . [Nevertheless], I could generally get through to them, yeah. I'd be delayed a lot of times, but we had contact with them. Don't get me wrong, we had contact with them. But it was always

initiated from our side. No one ever told you, "well, look, something big is coming up. Get ready for it." The only way you ever -- let me characterize the communications. Communications was: We go down and we talk with them. And we see our answer in the FEDERAL REGISTER. O.K.? That's how we get an answer, the FEDERAL REGISTER.

While it could be charged that the respondent exaggerated, the data suggest with some consistency that his comments were reasonably valid. A Task Force member told us:

> I will say the environmentalists -- and bless them, there's some great ones -- were so delighted over their offspring that they paid a lot of attention to it in the early days. It was . . . like they had produced this beautiful child, and they couldn't quite leave it alone . . . [The OSM] had too much "loving care" from the environmentalists.

Unfortunately, the sympathetic hearing afforded environmentalists infuriated the coal industry, which used it to charge that the agency was biased and "loaded" with "environmental zealots."

Statutory Requirements and Limited Resources

As noted, the SMCRA required the new agency to develop, within 90 days after enactment of the law, an interim regulatory program for all surface coal mining operations. Then, within one year of enactment, the OSM was to publish its permanent program regulations. The need to meet the deadlines mandated by Congress was a major constraint on the agency's operations during its first

three years. Congress compounded the OSM's difficulties by failing to provide the agency with operating funds until seven months after the Act was signed into law. The combination of mandatory deadlines and the absence of a budget created severe problems for the Task Force.

In this context, what should have been a studied, methodical process was truncated severely. The Task Force could not subject its proposals to the critical internal debate which invariably leads to the detection and correction of mistakes and potential problems. Because time did not permit them to devote equal emphasis to procedures and objectives in constructing the regulations, they emphasized the latter (i.e., getting the job done). An important member of the Task Force told us:

> It would have been useful to have [records of options considered]. It'd be useful for things like you guys are doing, to go back and see what was considered. Some parts of the program went through more debate than others, you know. There were some pretty hard debates about the enforcement program, and I think three or four options that were documented fairly heavily. It wasn't so much an effort to try to sit down and try to write out your options as it was, "well, let's develop this one and see where it leads, develop this one and see where it leads, develop this one" type of thing. It was less formal. Had to be.

Understandably, the Task Force -- and, later, the agency -- responded to its time constraints by utilizing a highly

centralized, disciplined process for accomplishing its work. This created an operational tension or contradiction between the form of organization it selected and the style of management it was constrained to employ. The nature of its mandate lent itself well to an organic structure and management style, but the constraints on accomplishment of the mandate led the Task Force to choose a hierarchical, centralized method of operation (i.e., a mechanistic form) (cf. Burns and Stalker, 1961). The Office of Surface Mining never has resolved satisfactorily this operational contradiction between its organizational form and its dominant management style. Clearly, however, the imposition of severe hierarchical dynamics, on top of a work process that permitted only limited debate and questioning, served to undermine further the Task Force's ability to obtain feedback from the technical staff. Effectively, the process of writing regulations was influenced disproportionately by a small number of Task Force members: (1) informal leaders who could "get things done," and (2) formally designated leaders who could use their bureaucratic power to accomplish Task Force objectives.

OSM personnel who were interviewed suggested that the agency generally was given adequate resources for its tasks. Unfortunately, Congress prevented it from acquiring and utilizing the planned resources. Eventually, when budgetary appropriations were forthcoming, the agency was forced to use them quickly for fear that the Office of Management and the Budget would reclaim them (i.e., "Use them or lose them.") Consequently, when the agency hired technical personnel it had to do so quickly. In the process, personnel were not screened thoroughly and the agency did

not always employ the best qualified technical personnel. If time had permitted a more studied recruitment process, this might have been avoided. Thus, Congressional delay harmed the agency initially -- when it did not receive its resources -- and later as well -- when its personnel sometimes proved incapable of performing assigned tasks expeditiously. This accident of resource allocation was a factor in establishing an enforced compliance style of regulation within the agency.

In this context of external scrutiny, resource delays, and agency construction under the crisis conditions of rigorous deadlines, the Department of Interior solicitors who were assigned to the Office of Surface Mining enjoyed several advantages. Unlike the OSM, the solicitors are funded separately and they already had an operating budget and a full complement of personnel. The Solicitor's Office did not operate with temporary personnel loaned from other agencies. It did not operate under resource constraints such as those confronting the OSM. Partly for this reason, the solicitors played an active, major part in creating the OSM's regulatory programs.

Over a period of years, according to our respondents, a certain tendency and willingness to defer to attorneys has become traditional within federal executive agencies. A solicitor told us:

> The solicitor is the Secretary's lawyer, and if he says he can't do something, the Secretary doesn't do it. And my feeling about Washington, after having been there three years dealing with other lawyers and bureaucrats

in other agencies, that's fairly widespread and common. And lawyers have power in government far beyond what they say is comparable in the private sector.

The OSM Task Force was no different in this regard. An influential member of the Task Force noted:

> There's a tendency in federal government -- and we were no different -- to, rather than go to the attorney and say, "this is what I <u>want</u> to do," to go to the attorney and say, "what <u>can</u> I do?" So, [the influence of the attorneys] was a function of, you know, the tendency to ask rather than tell what you wanted to do, I guess.

Although we lack comparative data from other regulatory agencies, a variety of data suggest that the OSM's HQ solicitors played a prominent role in shaping the emerging regulatory program. We can illustrate this process and, simultaneously, point to some of its intra-organizational consequences.

Surface mining on steep mountain slopes presents especially severe threats to the environment. Consequently, along with the requirement that mined land be restored to its approximate original contour (AOC), the Act contains special protection measures for mining on steep slopes (defined by statute as slopes of 20 degrees or more). The OSM's interim regulations, however, contain some provisions for a variance from AOC on non-steep slopes (less than 20 degrees). Later, when the agency promulgated its permanent program regulations, the variance from AOC on non-steep slopes was eliminated. But, curiously, it was permitted for <u>steep slope</u> mining. This result was produced by a narrow interpretation of the Act, as contained in a solicitor's

opinion of August 23, 1978. OSM regional managers asked HQ to modify this "illogical" situation and to extend the permanent program's AOC variance procedure for steep slopes to the interim program regulations for mining on non-steep slopes. In making the request, a regional manager said:

> Policy choices must not be dictated by legal memoranda that do not explore the other policy options available and do not discuss the various legal arguments for each position. With all due respect to the [solicitor's opinion], it reads more like a brief for a particular position than like a legitimate unbiased evaluation of the policy options available to a program director. To allow such legal memoranda to dictate policy is to default to the Solicitor's Office the control and direction of OSM's programs . . . It is a defensible legitimate policy choice to [extend the AOC variance to non-steep slope mining] during the interim program. It is the responsibility of the Solicitor's Office to defend that position once it has been decided and not to present policy options as appellate briefs for a particular position. To allow this is to let the agency be captured by the Solicitor's Office and will almost certainly result in inequitable and unreasonable impacts both upon the public, the states, the industry and OSM.

In mid-1979, another solicitor's opinion concurred with the original one. Extension of the variance procedure to the interim regulatory program was denied.

THE AGENCY EMBARKS UPON ITS COURSE

By early 1978, the essential direction of the OSM's programs had been determined and the contours of its emerging regulatory program were clear. The agency had chosen an enforced compliance interpretation of its mission and a corresponding set of strategies for accomplishing it. For better or worse, important decisions had been made which would constrain the agency for the next two years. Some of its personnel eventually would come to question some of the policy choices made in the early months. By the beginning of 1980, early, tentative efforts were underway to rectify past decisions and to plot a modified enforcement style for the agency. However, it was not until Ronald Reagan's election that a fundamental shift occurred in the agency's mission and direction. A discussion of this must be put off until a later chapter. For now, we continue our analysis of how the Office of Surface Mining constructed and implemented regulatory strategies during its first three years.

CHAPTER 6

THE SOCIAL CONSTRUCTION OF REGULATIONS

Between September 7, 1977 and March 13, 1979, the Office of Surface Mining published four sets of surface coal mining regulations. These were: on September 7, 1977, a set of proposed interim regulations (42 FEDERAL REGISTER 44920-44957); on December 13, 1977, a set of final interim regulations (42 FEDERAL REGISTER 62639-62716); on September 18, 1978 a set of proposed permanent regulations (43 FEDERAL REGISTER 41661-41940); and on March 13, 1979, a set of final permanent regulations (44 FEDERAL REGISTER 14901-15463). To examine the agency's construction of regulations, we selected four "key issues" of primary concern to the principal interest groups: (1) regulations requiring citizen participation in inspection and enforcement, a major concern of environmentalists, (2) regulations requiring the construction of, and specifying the design criteria for, sedimentation ponds on mine sites, a costly requirement for eastern coal producers, (3) regulations in the permanent program specifying the range of permissible variation in state programs -- known as the "state window" -- an obvious concern of the states, and (4) regulations governing coal mining on alluvial valley floors, a basic problem for western coal producers.

Changes in the regulations governing these issues provide insights concerning the relative effectiveness of contending parties in the rule-making process. Treating the OSM's four sets of regulations as representing a linear developmental process, we examined the agency's administrative record of public comments and

materials submitted by various interest groups bearing on each of these issues. For each of the four issues, we examined changes in the regulations from the first through the fourth set. We noted changes in the regulations and linked them to the objectives sought and comments submitted by the various groups.

INSPECTION AND ENFORCEMENT: CITIZEN PARTICIPATION

Throughout the debate over surface mining legislation and continuing into OSM's efforts to promulgate regulations, adequate provisions for citizen participation in various phases of surface mining control were a major objective of environmentalist groups. A number of sections of the regulations explicitly permit citizen participation. We selected one of these, citizen participation in inspection and enforcement, for analysis.

Interim Regulations

Section 721.13 of OSM's proposed interim regulations provided that

> (a) (1) Any person who suspects or knows of a violation of the Act, regulations or permit conditions required by the Act or of any imminent hazard may report this information in writing to the Office of Surface Mining Reclamation and Enforcement . . . Written complaints must be signed and include a phone number where the complaining party can be contacted. The complaint or other information shall be considered as having a reasonable basis if it alleges facts which, if proven to be true, would be sufficient to show a violation of the Act, regulations or permit. Unless the Office has

> reason to believe that the information is incorrect, or determines that even if true it would not constitute a violation, the Office shall conduct an inspection.
>
> (2) The identity of any person supplying information to the Office relating to possible violations or imminent hazards shall remain confidential within the Office unless the person supplying the information consents in writing to disclosure.
>
> (b)(1) . . . If a Federal inspection is conducted as a result of information provided to the Office, the person who provided the information shall be notified when the inspection is to occur and the person will be allowed to accompany the authorized representative during the inspection.
>
> (2) Any person accompanying an authorized representative of the Secretary has the right of entry to, upon and through the mining and reclamation operations about which he supplied information only if he is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property.
>
> (c) . . . Within 10 days of the inspection or, if no inspection, within 10 days of the complaint, the Office shall notify the person in writing of the following --
>
> (1) The results of the investigation, including a description of any inspection which occurred and any enforcement action taken; copies of Federal inspection

reports, notices of violation, and cessation orders may be forwarded to the person in satisfaction of this requirement.

(2) If no inspection was conducted, an explanation of the reason for not inspecting;

(3) A statement as to the person's right to informal review of the actions or inactions of the Office.

The coal industry raised a number of objections to one or more of these provisions. Here we illustrate some of their suggested changes and the attendant rationales before offering a brief summary of their principal themes and lines of argument.

The NCA-AMC Joint Committee argued:

> The provisions of the Act should not be triggered by a mere "Suspicion" but should require at least "reasonable belief" that a violation . . . has occurred. If the process is to be triggered by mere suspicion, then any disgruntled landowner seeking to negotiate a coal lease may invoke the onerous inspection and enforcement provisions of the Act as a bargaining too (sic) to be used at his whim (C83). [Identification numbers for quotations are the numbers assigned by OSM for their files in the Administrative Record Office.]

The Committee suggested alternative language for the regulations which would delete the words "suspects or" from sec. 721.13.(a)(1). As a rationale they indicated that "the danger of the agency being inundated with spurious 'suspicions' is compounded when the suspicious citizen is cloaked with anonymity" (C83). Echoing these remarks, the representative of a large mi-

ning corporation claimed that "there is no provision in the Act to authorize the Secretary to act on the basis of suspicion" (C34).

Other industry commenters -- and the Joint Committee as well -- objected to the promise of complainant anonymity contained in the regulations. The president of a small mining company urged the deletion of sec. 721.13.(a)(2) in its entirety on the grounds that "it is a basic right of all Americans to know the identity of their accusor" (C159). Another industry representative indicated his strong objection

> to this attempt by OSM to create a secret police force of those individuals who, based upon some real or imagined danger to the environment or the public, have dedicated their lives to blocking any attempt by industry to provide energy to that public (C276).

Industry also pressed for specific clarification of who would be responsible for any injury to a citizen accompanying an OSM inspector onto a mine site. One company representative opined that

> as the [OSM] well knows, mining operations are dangerous and any inspection by a person not otherwise permitted to be on the site, should be at that person's own risk (C82).

Other industry officials urged revision of the regulation so that, in the event of injury to the citizen complainant, "liability clearly lies with the Office of Surface Mining Reclamation and Enforcement" (C34). Some commenters wished to go even further, indicating that the regulations should

apply financial penalties to any citizen or organization who reports violations which require inspections where the reported violations are unsubstantiated. We expect both the cost of the Federal inspection and any losses in time or production incurred by the Operator to be borne by the person making the charges (C145).

As some of these comments suggest, many representatives of mining companies seemed to fear that the citizen complaint provisions would encourage frivolous and harrassing complaints by vindictive citizens. For example:

> It has been our experience that there are those who are not nearly as interested in environmental protection in mining as in harassing the operator in an attempt to prevent mining under any circumstances. Responding to such complaints is a waste of everybody's time, and the opportunities for occurrence should be minimized (C195).

Another important complaint by industry is captured in the remarks offered by a western coal producer:

> The proposed provision greatly enlarges citizen "standing" from [the Act] (" . . . any person who is or may be adversely affected . . . ") to " . . . <u>any</u> person who <u>suspects</u> . . . " regardless of his interest in the violation. Such expanded citizen standing is without statutory authority (C149; emphasis in original).

The same commenter went on to inquire whether there is to be any "informal review of reasons or motives behind citizen notifications?"

The fear of harassment by opponents of strip mining was the

basic reason cited by industry to support their request that the regulations should not contain provisions protecting the confidentiality of informants. In essence, industry argued the draft regulation, would permit extreme harassment of an operator by disgruntled lessors, employees, landowners, creditors, customers, environmentalists, and/or any one in the general public who has an aversion to mining (C130). In a less restrained manner, another commenter claimed:

> You merely give the right to the Sierra Clubs, Old Ladies Auxiliary, etc. to harass any operating mine they wish to -- and at the expense and with the help of the taxpayers -- the U.S. Government. Strike this entire paragraph and procedure (C26).

More importantly, perhaps, several commenters suggested that the assurance of confidentiality provided complainants "appears to conflict with the open records requirements of the federal government" (C195).

Not surprisingly, advocates of strong citizens' rights provisions resisted industry's efforts to modify the regulations on citizen participation in inspection and enforcement.

> [The provision] protecting the identity of the citizen reporting a suspected violation or known violation is essential to allow the citizen report section to work. It has been heavily criticized by industry as violating the operator's sixth amendment right to be confronted by the witnesses against him and as serving no purpose for bona fide complaints. Neither of these has any rational

basis. First, the witness against the operator would be the inspector, who, if a violation were found, would be confronting the operator. Secondly, many citizens would be reluctant to come forward if they would be, or fear they would be, harrassed, physically harmed, fired, or black listed. It is the lack of protection from reprisals that would keep a good citizen from filing a report, not the lack of a bona fide complaint (C113; emphasis in original).

Generally, industry's suggested changes were viewed as efforts to "weaken" or emasculate relevant portions of the regulations. While resisting these efforts, environmentalist groups pressed for even stronger citizens' rights provisions. The primary reason for this stand was a fear that the federal and state regulatory agencies might be too accommodative toward the coal industry. Consequently, they sought to reduce or to eliminate all possible agency discretion in regulatory matters, especially in the area of inspection and enforcement. The environmentalists' belief in enforced compliance and fears of negotiated compliance found characteristic expression in their comments on OSM's proposed interim regulations.

Whereas industry grudgingly had praised the requirement that citizen complaints be made in writing, environmentalist groups pressed for the recognition of oral complaints. An Appalachian citizens' group charged that

> Sec. 721.13 is deficient in that it fails to allow any person to give oral notice to the [OSM] of violations. In a situation where an imminent danger is present the

> requirement of written notice may increase the liklihood of harm when time is of the essence . . . If police agencies were to wait for written complaints of crimes in progress, it is likely that many offenders would escape detection (C248).

The National Wildlife Federation made a similar proposal, suggesting that oral complaints could be "reduced to writing at some convenient time" (C167).

Besides making these points, the environmentalists lodged their strongest complaint against the absence of time obligations on the OSM when responding to citizen complaints. A West Virginia attorney called this a "glaring defect," noting that while sec. 721.13 stipulates that "the office shall conduct an inspection' [in response to a citizen complaint], this section fails to provide when the inspection shall be conducted!" (C248). Claiming that the Act required "immediate inspection," he suggested that "the rule should make this clear" (emphasis in original). A western environmentalist group suggested that the regulation be revised to stipulate that an inspection in response to a citizen complaint "shall occur within ten days from the date of receipt of the information by the [OSM]" (C257). One rationale for such a revision, as suggested earlier, was stated concisely by a representative of the Sierra Club:

> Words such as "within a reasonable time" would leave too much discretion to federal inspectors who will be subjected to the same pressures for lax enforcement as are their state counterparts (C68).

Another rationale was stated by the Council of the Southern Mountains. While advocating a time limitation for inspections they suggested the limitation be adjustable for different classes of alleged violations; hence, they offered alternative wording for sec. 721.13.(a)(1):

> [U]nless the office has reason to believe that the information is incorrect, or determines that even if true would not constitute a violation or imminent hazard, the Office shall conduct an inspection within 10 days of receipt of the complaint if the complaint alleges a violation. If the complaint alleges an imminent hazard, the inspection shall be conducted immediately (C90; emphasis in original).

OSM published its final interim regulations on December 13, 1977. In sec. 721.13 the final interim regulations provide:

> (a)(1) Any person who believes that there is a violation of the Act, regulations or permit conditions required by the Act or that any imminent danger or harm exists may report this information to the [OSM]. Written reports must be signed and include a phone number where the reporting party can be contacted. Oral reports will be accepted but must be followed by a written and signed statement including the information reported. The complaint or other information shall be considered as having a reasonable basis if it alleges facts which, if proven to be true, would be sufficient to show a violation of the Act, regulations or permit. Unless the Office has reason to believe that the

> information is incorrect, or determines that even if true it would not constitute a violation, the Office shall conduct an inspection within 15 days of receipt of the complaint. If the complaint alleges an imminent danger or harm, the inspection shall be conducted promptly.
>
> (2) The identity of any person supplying information to the Office relating to possible violations or imminent dangers or harms shall remain confidential with the Office, if requested by the person supplying the information, unless disclosure is required under the Freedom of Information Act . . . or by other Federal law.
>
> (b) . . . (1) If a Federal inspection is conducted as a result of information provided to the Office, the person provided the information shall be notified when the inspection is to occur and the person will be allowed to accompany the authorized representative of the Secretary during the inspection.
>
> (2) Any person accompanying an authorized representative of the Secretary has a right of entry to, upon and through the mining and reclamation operations about which he supplied information, only if he is in the presence of and is under the control, direction and supervision of the authorized representative of the Secretary during the inspection.

A comparison of the draft and final interim regulations seems

to show that the more far reaching, fundamental changes made in the latter were consistent with the urgings of environmentalist groups (e.g., the addition of a time limit for inspections triggered by citizen complaints). By contrast, changes made in response to comments and suggestions by the coal industry seem minor and of limited significance and impact. Basically, the word "suspects" was deleted and replaced by "believes" in sec. 721.13.(a)(1) of the final regulations. And while the absolute confidentiality of citizen complaints was not preserved, the only stricture is other federal laws; there is no procedure otherwise for divulging the names of citizen complainants. Finally, whereas the coal industry had favored the requirement that complaints must be written, the final interim regulations recognized the validity of oral complaints, providing they are followed up by a written complaint. On balance, the coal industry "got" relatively little in the revision process: supporters of more stringent regulation were treated more accommodatingly.

Permanent Program Regulations

Sec. 842.12 of OSM's proposed permanent regulations differ from the final interim regulations in one important aspect: They do not bind the OSM to conduct an inspection within a specified period of time following a citizen complaint. Instead, the time limit now is imposed on the state regulatory authority. If the state fails to take action, the OSM would assume responsibility. In other ways, the two sets of regulations are nearly identical.

The OSM received very few comments regarding section 842.12 of the regulations. Moreover, the comments essentially repeated

the objections and suggestions raised in response to the proposed interim regulations. For example, the AMC-NCA Joint Committee suggested that a citizen complainant should forfeit his right to confidentiality if he elected to accompany an OSM inspector on an inspection.

> While it may be that a person who submits a written statement alleging a violation will generally be permitted to keep his identity unknown, once that person exercises his so-called "right of entry" he effectually waives his regulatory privilege of confidentiality. An operator is entitled to know who is on his property, and just as it is reasonable and proper for the authorized representative to show appropriate identification, it is equally reasonable the complaining person to do so. OSM's rationale for maintaining confidentiality must be balanced with the operator's right to know who is coming onto his property (F-507; emphasis in original).

The Joint Committee also raised again the question of who would be liable for injuries to a citizen complainant while on a mine site. And once again, the suggested remedy was to require the citizen to sign a written release of the operator "from damages for any injuries suffered by such person while on mine property" (F-507; emphasis in original).

When published in 1979, the final permanent regulations essentially were unchanged from the proposed permanent regulations.

SEDIMENTATION PONDS

Historically, eastern surface mining caused severe ecological damage to streams due to acid mine drainage and soil erosion. "In the words of an environmentalist lawyer, "Sediment is the major problem associated with strip mining; its control is too important to leave to the whim of often irresponsible operators." Public Law 95-87 addressed the sedimentation problem by requiring mine operations "to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area," to construct "siltation structures" prior to mining, "as certified by a qualified registered engineer," and to remove settling ponds after reclamation [sec. 515.(b)(10)(B)(ii)].

The phrase "best technology currently available" was used by the rule-making Task Force as a justification for drawing up regulations with stringent design criteria and standards. The rules for the construction of sedimentation ponds were immediately attacked by industry and some states through comments and litigation. The coal industry, of course, would have preferred simple "bottom line" enforcement of the suspended solids requirements for streams and runoff. Although the rules were gradually modified toward greater discretion and variance through a series of revisions, controversy and revision continues to the present.

Numerous comments by the coal industry on the sedimentation pond regulations can be boiled down to one major complaint: the Office of Surface Mining made the ponds too big. Technically, the large size of these ponds was required by a set of design criteria. The outcry came from the eastern coal industry, both

large and small, and from eastern states. Constructing large ponds in mountainous areas is, of course, extremely difficult and often impossible. Because small operations would bear a higher cost per ton of coal mined for pond construction, small operators were particularly incensed. Since the design criteria required ponds considerably larger than those in states recognized as having the most exemplary programs, the states became actively involved in defending their interests. Environmentalists were quite pleased, generally, with the stringent regulations, which potentially would limit sharply surface mining production. But environmentalists had to be concerned about environmental disruption caused by the very construction of the ponds and by the flood potential that could result from multiple ponds in steep areas.

The chronology of the debate over sedimentation pond regulations followed an intricate series of steps. Proposed interim regulations were published for comment on September 7, 1977. [The major relevant section is 715.123.(e).] These proposed rules were revised in the light of comments and published as the so-called "final interim regulations" on December 13, 1957 [section 715.17.(e)]. But further revision began immediately and amended interim final rules were published on February 27, 1978, effective immediately, though subject to further comment and revision. The original final rule, now revised as an interim rule, was challenged in the U.S. District Court and enforcement was enjoined until the rules were finally completed and reviewed by the court in the light of the plaintiffs' objections. Thus,

proposed rules (the word "final" had now been dropped), amended in response to comments on the February rules, were published for further review and comment on November 14, 1978. In the meantime, the nearly identical proposed sedimentation pond regulations for the permanent program had been published on September 18, 1978 (section 816.46). These regulations were finalized on March 13, 1979. In our truncated discussion of the sedimentation pond controversy, we focus on the major issue: design criteria. Related issues were particular design standards and whether or not sedimentation ponds are required in all instances.

It is significant that the regulations under discussion here were placed under the heading, "settling ponds," in the original proposed rules; under the title, "sediment control measures" in the subsequent revisions; and under the heading, "sedimentation ponds," in the permanent program regulations ("sediment control measures" being given a separate section). The proposed rules stated that settling ponds "shall be" constructed at all mining sites. In response to comments from industry, measures emphasizing alternative control measures as substitutes for sedimentation ponds, were recognized. Nonetheless, the pond requirement was retained. Later, sediment control measures were specified as a basis for establishing credits for the reduction of pond size. The sedimentation pond requirement was defended by OSM as the current "state of the art" in sedimentation control, reflecting the Act's requirement of "best technology currently available." The latter phrase had been placed in the law by the environmentalist lobby and had been included in the first final version of the interim rules at their suggestion. The

justification for the sedimentation pond requirement in the permanent program was heavily based on studies conducted by the Environmental Protection Agency. It was also supported by eastern states with the strongest reclamation programs. Clearly, the coal industry was less influential than the Environmental Protection Agency and environmentalists in establishing the basic rules for sedimentation control.

But the major issue was not the pond requirement per se, but the required size of the ponds as specified by design criteria. The original proposed design criteria specified that storage volume of ponds must include 0.2 acre-feet for each acre of disturbed area and additional capacity to handle a 10-year 24-hour precipitation event. Despite complaints by industry, the first edition of the final interim rules added further design criteria; a 24-hour detention time and a surface area of 1 square foot for each 50 gallons per day of inflow resulting from the design standard precipitation event. Since the design criteria of these regulations provided no relief to industry and vastly exceeded the standards of states with sedimentation pond regulations, OSM immediately encountered tremendous pressure for revision. This pressure came directly from coal associations and the states (particularly West Virginia) and from the threat of industry-initiated litigation. One state coal association estimated that the federal rules would require storage capacity eight times as large and eight times as costly as current state practice (in a state with relatively stringent requirements).

After litigation had already been filed OSM amended the

sedimentation pond rules. Now credits would be given for erosion control to reduce the still required 0.2 acre feet of storage volume. In addition, the 24-hour detention time criterion could be reduced to 10 hours if the operator demonstrated adequate supplementary control measures. Finally, the surface area per inflow criterion was dropped. These revisions were effectively immediately, prior to a public comment period, in order "to provide immediate guidance to State regulatory agencies and coal operators." In addition, OSM was concerned about the safety hazards of large ponds and about certain design criteria which "could result in disturbing an area in excess of the effective control provided."

These revisions still did not satisfy the coal industry, which already had its case before the court. The government's defense before the court was that litigation was premature since the rules in force at the time were temporary, being subject to further revision on the basis of comments. Because the government was unwilling to defend the substance of its regulations, the judge enjoined enforcement until revision had been completed and defended in court.

By this time, the revision of the interim regulations was occurring concurrently with the development of the permanent program rules. The two sets are essentially identical. In these rules the coal industry was given further relief on one major design criterion, the 0.2-acre feet storage volume standard. This criterion was cut back to 0.1-acre feet with a possible reduction to 0.035-acre feet if the operator utilizes additional erosion and sedimentation control measures. These standards had been

suggested by a major coal association in the first round of comments. Essentially, the Office of Surface Mining admitted that the technical basis for its 0.2-acre feet requirement had been weak. In addition, an alternative and highly technical design criterion was allowed (based on the Universal Soil Loss Equation, gully erosion rates and the appropriate delivery ratios).

In the struggle to establish primary design criteria for sedimentation ponds, the coal industry clearly won a battle. But they were hardly satisfied. The final standards were still probably more stringent than those of any state program and industry would have preferred no design criteria whatsoever. The 10 hour detention period, the result of a previous compromise in industry's favor, was not changed even though it was still opposed. Sedimentation ponds were still required and industry's call to eliminate an array of specific design standards in favor of turning everything over to profesional engineers was rejected.

The industry won some points on specific design standards, but the permanent program rules contain many more requirements than the original interim regulations. In some instances, the coal industry lost some ground in the permanent rules that had previously been won. For example, the proposed interim rules had required pond cleaning when the sediment had accumulated to 50 percent of the required storage volume. This number was first modified to 80 percent, then eliminated altogether, only to reappear as 60 percent in the final rules.

PERMISSIBLE VARIATION IN STATE PROGRAMS

Although relationships between the Task Force and the states

were good in the early months of its operations, shortly after enactment of the SMCRA, these amicable relations began to deteriorate. The states charged that local geographical and climatological conditions made variations in their regulatory programs necessary. The crux of the states' emerging hostility toward the OSM was contained in the charge that the latter was too inflexible and insistent that state programs be exactly like the federal regulatory program. Soon after passage of the Act, the states became increasingly resentful and angry with OSM, which they tended to view as arrogant and rigid. As an OSM headquarters executive noted, the section of the regulations known as the "state window" took shape in this context:

> When we got down to the state window situation, what we found was that the states were saying "you're inflexible, rigid, you won't allow differences." We'd been saying all along, without effect, that "we are flexible, we will allow differences." And the states said, "well, show us in these regulations where it says that." It didn't say that. We had started the whole process with the idea in our minds that we were flexible, that there was a lot of room, and that the words we had written into the regulations would allow the states to do things quite differently. And we never stopped and looked back to see whether it was clear to the states . . . As a result . . . we found ourselves being hammered by states and others for our rigidity and inflexibility. The state window was our solution to

> this. And in our minds . . . this was to make clear what we had already intended.

Because they were not needed in the interim program, the state window provisions appeared for the first time in the OSM's proposed permanent regulations. As contained in sec. 731.13, the state window provided:

> As part of its program submission, a State may request approval for alternatives to the requirements for permitting, bonding, inspection, enforcement and performance standards established in this Chapter where geologic, topographic, climatic, hydrologic and other regional conditions support alternative approaches. For each requirement for which the State proposes an alternative, the State shall --
>
> (a) Describe the requirement from which the variation is requested and the reason for the request;
>
> (b) Describe the alternative approach recommended and provide statutory or regulatory language to be used to implement the alternative and
>
> (c) Explain how the alternative approach is consistent with this Chapter, including supporting data which demonstrate that use of the proposed alternative will achieve the same or more stringent regulatory results as required by this Chapter.

Generally, the coal industry supported the state window concept. For example, the notes from a November meeting between members of the NCA-AMC Joint Committee and OSM's assistant director for state and federal programs indicates that the "Joint

committee favors inclusion of State window" (F-461). Industry support, however, was not unanimous; MARC took the enigmatic position that it should be deleted entirely from the regulations.

> As stated in section 101(f) of the Act, the states are named as the primary governmental entity responsible for developing, authorizing and issuing regulations because of regional conditions; thus the States should not have to request approval from OSM for these "alternatives" since they are the primary authority. As long as the regulations promulgated and the State programs meet requirements of the Act, then they should be acceptable (F-305).

Ignoring this minority position, industry commenters pushed for amendments to the state window provision which would permit the states greater latitude in program development. Island Creek Coal Company, self-described as "the fourth largest [coal] producer in the Nation" sounded a typical industry theme: "We accept the statement . . . that no leeway be permitted in achieving the results specified in the Act; but we object to the [OSM] restraints on alternative methods of achieving those results" (F-470; emphasis in original). In a word, the coal industry favored the concept of specific criteria for approval of state regulatory programs, but argued that the state window criteria were insufficiently flexible. They were supported on this point by the states themselves. In fact, the debate over the state window became the focal point for escalation of an already emerging coalition between the coal industry and the states, in

opposition to the environmentalists and what they perceived as the high handedness of the Office of Surface Mining.

Certainly, the states took issue with the state window regulation. On October 4, 1978, OSM's headquarters executives met with regulatory officials from six states who were representing the Interstate Mining Compact Commission. The state representatives inquired of OSM "what recourse does a State have if its alternative submissions are turned down?" They went on to suggest deletion of several words ("the same or more stringent than") from the state window provision (F-17). In written comments submitted several weeks later the IMCC suggested language changes for sec. 731.13 which would grant approval to state programs containing regulatory requirements "capable of achieving the same or more stringent . . . results" (F-58).

In a similar vein, on November 9, 1978 OSM headquarters executives and Region V managers met in Denver with representatives of six Western states. Regarding the state window, the meeting minutes indicate the

> [g]eneral reaction of the States was that the regulations should be stated more in the form of general goals which the States should meet. Less specificity should be given, and the State window should be broadened to provide that any provisions which would meet the general goals could be accepted. [The states] expressed particular concern regarding the definition of the phrase "consistent with" and of the way the phrase is used . . . The definition of "consistent with" to mean "the same as or similar to" appears to run contrary

to the State window concept . . . The States expressed the belief that this makes the State window meaningless (F-166).

As these comments suggest, inclusion of the state window in OSM's proposed permanent regulations did little to mollify the states' intensifying attacks on OSM's alleged inflexibility. For although some states (primarily in the west) continued to work diligently on program development, opposition by others actually may have been galvanized by what they perceived to be an overly restrictive state window. Thus, Tennessee's commissioner of conservation, in a letter to OSM's director on November 17, 1978, charged that all the proposed permanent regulations

> reflect the attitude OSM has consistently demonstrated regarding federal-state relationships during the development of the interim program and, thus far, during the development of the permanent program -- an attitude and a policy position which Tennessee finds highly objectionable . . . [A] review of the agency's proposed draft reveals voluminous, unnecessary, duplicative red tape and bureaucratic limitations that are designed to take this program away from the states, directl ignoring the intent of Congress . . . Our recommendations are for extensive revision to the proposed regulations in order to provide the states necessary management flexibility required to respond to the diversity of mining conditions and to create the state-federal partnership necessary to achieve the

results specified in the Act (F-551).

But, as we have pointed out at various points already, the objectives sought by industry and the states in the state window provision were precisely those which environmentalist groups found most objectionable. Whereas the former parties wanted to open wide the state window, the latter groups feared such a move because of what the opened window might admit. In a meeting on October 26, 1978 with an OSM executive, lawyers representing the Council of the Southern Mountains expressed a concern that "the state window approach was too broad and was not thought out" (F-209). The same opinions were expressed by the same attorneys -- this time accompanied by a representative of the National Wildlife Federation, in a November 29, 1978 meeting with OSM's director, an assistant director, and a representative of the Solicitor's Office (F-449). On November 27, 1978 the director of the Environmental Policy Center met with OSM's director and "questioned the need for the so called 'State Window'" (F-562). The Public Lands Institute, based in Denver, suggested that the state window should be stricken entirely from the regulations since Congress intended "deviations from the Act and regulations can only be for greater stringency or more extensive coverage, but not for 'alternatives' which are in effect variances" (Letter, Nov. 17, 1978).

As promulgated in final form on March 13, 1979, the state window, though retained, had been made considerably more difficult for the states to open.

> As part of its program submission or as an amendment to an approved State program, a State may request approval for alternatives to the provisions of the regulations .

. . For each alternative provision the State shall --

(a) Identify the provision in the regulations . . . for which the alternative is requested.

(b) Describe the alternative proposed and provide statutory or regulatory language to be used to implement the alternative; and,

(c) Explain how and submit data, analysis and information, including identification of sources, demonstrating --

(1) that the proposed alternative will be in accordance with the applicable provisions of the Act and consistent with the regulations . . . and

(2) that the proposed alternative is necessary because of local requirements or local environmental or agricultural conditions.

It would be difficult to read this regulation as a clear victory for any party to the conflict over the permissible limits of state program variation. But in the already acrimonious and overly polarized debate over surface coal mining regulation, the inevitable result was that the states and the coal industry viewed it as a defeat, as a rejection of their position. Certainly it did little to soften the developing sense of an adversarial relationship between the OSM and some of the states.

ALLUVIAL VALLEY FLOORS

In chapter 1 we pointed out some of the differences in surface mining in the three principal coal fields of the United

States. In Appalachia, the most severe environmental threats posed by surface mining are largely a result of abundant rainfall. In the west, however, paucity of rainfall and ground water poses some of the most severe threats from coal surface mining. If farming and ranching are to survive in the west, the quantity and distribution of fragile ground water supplies must be preserved. Essential to the preservation and distribution of ground water supplies are alluvial valley floors. Congress recognized these differences when it enacted the Surface Mining Control and Reclamation Act, stipulating special environmental protection provisions for various regions of the country. Special protection for alluvial valley floors are mandated in the Act.

Simply put, an alluvial valley floor is an area in an otherwise arid region which is naturally irrigated or subirrigated to a degree sufficient to serve agricultural purposes. Section 510.(b)(5) of the Act provides that any proposed surface coal mining operation, if located west of the one hundredth meridian west longitude must not "interrupt, discontinue, or preclude farming . . . on said valley floors" and "not materially damage the quantity or quality of water in surface or underground water systems that supply" them. In section 715.17.(j) of the proposed interim regulations, OSM operationalized this section of the statute.

Although the section is too lengthy to reproduce here, it imposes special obligations on surface miners in sections of the west to preserve the "essential elements of the hydrologic functions of alluvial valley floors throughout the mining and reclamation process." Surface mining and reclamation operations

conducted in or adjacent to alluvial valley floors "shall not interrupt, discontinue, or preclude farming" in the mined areas. Except for certain "grandfathered" mines, permit applicants are required to submit a variety of survey and baseline data which the regulatory authority would use to assess the impact of mining operations on the area's specified hydrologic functions.

As would be expected, regulations for mining in alluvial valley floors were of interest almost exclusively to western citizen groups and to large coal producers. Public comments on the different versions of the alluvial valley floor regulations echoes the respective groups comments on a variety of other regulations. On the one hand, the coal industry pressed for regulations with narrow application and sought to increase regulatory flexibility (i.e., operators' range of discretion). For example, in their comments on the proposed interim regulations, the Joint Committee suggested that mine operators should be required to preserve the hydrologic functions of alluvial valley floors only "where necessary" (C83). This comment was consistent with industry's plea that restrictions on mining should be balanced against an assessment of the area's productive importance.

On the other hand, citizens' and environmentalist groups pushed for wide reaching regulations that would leave little discretion to coal operators or to the regulatory authority. Comments submitted by these groups urged the OSM to incorporate language from the Act in the regulations and to increase the number of special regulatory requirements (C113; C257). For

example, the Colorado Friends of the Earth requested an extension of regulatory protections to ground water that "effects alluvial valley floors" (C257).

On these issues, as on nearly all those relating to regulation of alluvial valley floors, successive versions of the OSM's regulations grew more specific and detailed and more reflective of the comments offered by citizens' groups. Compare, for example, one portion of the proposed interim regulations with the corresponding portion of the final interim regulations:

> Proposed Interim: Surface mining and reclamation operations conducted in or adjacent to alluvial valley floors located west of the 100th meridian west longitude shall not interrupt, discontinue, or preclude farming on these alluvial valley floors . . . [section 715.17.(j)(2)].
>
> Final Interim: Surface coal mining operations located west of the 100th meridian west longitude shall not interrupt, discontinue, or preclude farming on alluvial valley floors and shall not materially damage the quantity or quality of surface or ground water that supplies these valley floors . . . [section 715.17.(j)(2)].

True, the final interim regulation seemingly does not apply to mines located "adjacent to" alluvial valley floors. However, this apparent loosening of the regulatory requirement may be illusory; note that the final interim regulation seems to accomplish the same objective by extending protection to "surface or ground water

that supplies these valley floors." Conceivably, the latter requirement could result in the regulation of mining operations quite far removed from areas "adjacent" to alluvial valley floors.

This isolated portion of the regulations illustrates what appears to be a more general trend in the development of the OSM's regulations for alluvial valley floors. In fact, simple measurements of the number of FEDERAL REGISTER column inches devoted to regulation of alluvial valley floors in successive versions of the regulations may be a crude, but not misleading, indication of the overall nature of changes. In the proposed interim regulations, 8.25 column inches dealt with the issue [section 715.17.(j)]. This increased to 18.25 column inches in the final interim regulations [715.17.(j)]. In the proposed permanent regulations the amount of space increased further to 74.75 column inches (sections 785.19; 786.17; and 822) only to increase even more (to 81.92 inches) in the final permanent regulations (sections 785.19 and 822).

INTERPRETATION

This extended review of the development of four areas of the OSM's regulations suggests one overall conclusion: in its rule making activities, the Office of Surface Mining constructed regulations designed to leave minimal discretion and flexibility to the states and the coal industry. Successive versions of the federal regulations became increasingly detailed and complex. Because of the constraints on the process of drafting the interim and permanent program regulations, the OSM came to emphasize an enforced compliance approach to its regulatory mission. As one

member of the Task Force related:

> [The OSM's program] was built on the fervor of the times, of the winners. And the winners were the environmental movement people, who had persisted . . . And, by god, they had slain the giant. And the wicked giant was lying there . . . "And the sinners are gonna be brought to justice." And they started, "these are gonna be rigid regulations, by god. We're not gonna leave anything out, because you can't trust them. We're gonna write these in great detail" . . . I would say it was a moment of zeal, and almost triumph.

And another member of the Task Force told us that "we wrote those regs as if there had to be 14 bolts holding down every piece."

CHAPTER 7

THE AGENCY UNDER SIEGE

Promulgation of OSM's interim program regulations marked the beginning of a state of increasing conflict with and attack by external groups or constitutencies. These groups became increasingly strident and persistent in their attacks throughout 1978 and 1979. By 1980 this barrage did diminish somewhat, in part because of concessions by the OSM. Still, the opposition had not decreased significantly by the time of the Presidential election of 1980. Ronald Reagan's election brought significant change to OSM, even before his administration took office. In this chapter we discuss the multi-frontal nature of this attack on OSM and its consequences within the agency. Additionally, we briefly discuss the process by which the agency promulgated its permanent program regulations.

CONSTRAINTS ON THE PERMANENT PROGRAM PROMULGATION PROCESS

The agency's HQ executives -- and, therefore, the agency -- became increasingly isolated from their various constitutencies during the permanent program rule-making process. A major reason for this was the agency's understandable preoccupation with completing the regulations on time.

Section 501.(b) of the Act states:

> Not later than one year after enactment of this Act, the Secretary [of the Interior] shall promulgate and publish in the Federal Register regulations covering a permanent regulatory program for surface coal mining and reclamation operations performance standards based on

> and conforming to the provisions of title V and establishing procedures and requirements for preparation, submission, and approval of State programs; and development and implementation of Federal programs under the title.

Given this severe time constraint, it is not surprising that the agency began drafting the permanent program regulations almost immediately after publication of the interim regulations.

Once again, these time constraints placed a premium on strong leadership and led OSM's highest level headquarters managers to employ a highly centralized process of regulation writing. In some respects, in fact, the pressures were even more acute than during the period when the interim regulations were aborning. Although the agency still did not have its appropriations at the beginning of the process, the entire start-up process of inspection and enforcement had to be accomplished even while the regulations were being written. In other words, there was even less time than the legislative deadline mandated, for now there was an agency to staff and operationalize. Now there were real, not hypothetical, problems to confront.

Of equal if not greater importance, however, was the erosion of the broad base of political support necessary for the strong mandate to develop a stringent regulatory program, a slippage which was gradual at first, but grew rapidly worse. Promulgation of the permanent program regulations took place in this context of eroding support and mounting attack from various directions. Without a prior consideration of this changing context, the

agency's permanent program cannot be fully understood.

THE CONTEXT: ERODING SUPPORT AND MOUNTING ATTACK

> It was clear by -- what, the Spring of '78? -- that the political acceptability of as vigorous an implementation of the Act as OSM had perceived it was supposed to do was less than wholehearted. Both in terms of politicians, as well as in terms of state institutions.

The States

Although the statute-defined relationship between the states and the Office of Surface Mining contained the potential for conflict, the Task Force had made considerable effort to work closely with the states. Nevertheless, many of the states were unhappy with the nature and impact of the OSM interim regulatory program. Consequently, by late Spring of 1978 the states already had begun to raise the complaints that were to become so familiar over the next two years. OSM, they charged, was too inflexible in what it expected the states to do and tended to be arrogant in its dealings with state regulatory personnel. Speaking with the benefit of hindsight, one of our respondents, who played a major role in the final editing of the permanent program regulations suggested:

> I suppose that the resistance of the state institutions was somewhat discounted [by OSM], on the rationale that "well, the whole purpose of the Act was to change these people. And they're not gonna' like it anyway. Discount it."

Despite these developing tensions, state-federal relations had not

become bitter.

We emphasize, however, that the states were not united in their dealings with OSM; clearly, the specific issues which animated individual states, and their degree of anger, varied. To some extent there was, as would be expected, a fundamental east-west split in the types of issues which bothered state authorities. The western states generally presented many problems common to all three coal fields, plus some unique to their interests. Among the latter was the necessity to develop special programs for Indian lands, cooperative agreements with the OSM for inspections on federal lands, and OSM's responsibility to review permit applications for mines on federal lands. With rare exception, these were not problems in the midwestern and eastern coalfields. Generally, we have omitted detailed discussion of the impact of some of these issues important to individual states or in special regions of the U.S. Instead, we have focused our comments on the types of issues on which most states agreed. We caution, however, that individual states layered their private complaints atop these more general criticisms of OSM and its regulatory operations.

In large part, the reason for the states' mounting hostility was the fact that the developing permanent program struck at the very heart of their own regulatory processes. The OSM would use its permanent program regulations as the yardstick to evaluate the states' applications for regulatory primacy. Clearly, the states had more reason to be concerned about the content of the permanent program regulations, especially the openness of the "state

window," the strictures placed on federal grants for the development of state programs, and deadlines imposed by the Act. Communication with the states would be doubly important during this new phase of regulation writing.

At this point of gradually increasing tension between the OSM and the states, the Associate Solicitor for surface mining issued an opinion on ex parte contacts during the rule making (i.e., regulation writing) process. The opinion held that OSM could not meet privately with the states to discuss the proposed regulations after the close of the period specified for public comments. Further, meetings held during the public comment period had to be announced in advance and opened to the public. This development severely limited contacts with the states, angered them and, correctly or not, reinforced their belief that the OSM viewed them as unequal partners, if not adversaries, in the regulatory process. Whether or not the OSM viewed the states as adversaries, there is more than a modicum of validity in the states' related belief that many officials of the federal agency were distrustful of them due to their overall past record of ineffective enforcement of reclamation laws.

> I think there was a healthy skepticism about the willingness of the states to change direction. And, again, I think if you go and read the legislative history, that attitude existed in Congress.

Our data suggest that skepticism about state agencies was common among OSM personnel.

The states also were angered by OSM's enforcement activities under the interim regulatory program. Again, whether right or

wrong, they believed that actions by federal enforcers made the states appear incompetent and unwilling to take aggressive enforcement actions.

The Coal Industries

Like the states, the coal industries subjected the OSM to severe criticism once its interim regulatory program was published and federal enforcement began. Industry's two-pronged attack on OSM and its interim regulatory program echoed the substance of many of the states' complaints.

The first line of criticism was the contention that the OSM both had misinterpreted and exceeded Congressional intent in devising the interim regulations. The NCA-AMC Joint Committee cautioned the agency:

> During the next few weeks, as the Department [Interior] reviews and considers these and other comments prior to promulgation of the permanent program regulations, it will be of paramount importance to bear in mind that the regulations must be reasonable, flexible and based upon an understanding of what is physically, technologically and economically achievable . . . [T]his exceedingly complex new Surface Mining Act must be judiciously and carefully implemented in accordance with its language and the underlying intent of Congress to ensure that needed flexibility is incorporated . . . (F-507).

On a second front, industry charged that the interim regulations did not allow sufficient flexibility in meeting the performance standards in the Act and regulations. The focal point

for their complaints was the performance standards vs. design standards approach to regulations.

Having determined the regulatory standard it intends for industrial firms to meet, a regulatory agency has at least two options in <u>how</u> it can require the firms to achieve that standard: design standards or performance standards. If it opts for the former, the agency notifies the target firms that they must meet <u>not only</u> X standard (e.g., chemical composition of all water flowing off of a mine site), <u>but also</u> a specific type and design of structure must be employed in meeting that particular performance objective (e.g., construction of sedimentation ponds according to specified criteria). If the agency chooses the latter approach, it merely notifies the target firms of the performance goal they are required to meet, but permits them wide latitude in the choice of methods for achieving the standard. The OSM opted for design standards at many places in its regulations, largely because they believed performance standards are difficult to enforce. And, from early on, the coal industry charged that OSM's reliance on design standards was misguided.

To be sure, industry's complaints are not exhausted by these two points. Those we have discussed thus far were rather widely shared, but the smaller coal producers (located primarily in Appalachia) lodged some complaints unique to firms of their size. First, they disliked what they viewed as the extreme expense involved in attaining compliance with the interim regulatory program. They charged that the costs of preparing a mine permit application, of securing adequate bonds for the mine operation,

and of designing and building the environmental protection structures would be prohibitive for firms of their size. And second, they alleged that OSM's regulatory program effectively made it impossible for them to mine in many areas of Appalachia and thus denied them their rights to use their land as they saw fit. Put differently, they charged that the federal government effectively was "taking" their property without due process of law. For example, a mine operator who signed his letter "Small Time Operator" wrote to the OSM to complain that the increase in regulation was harming his business:

> I am a small strip-mining coal operator and am very much concerned about the future of our nation. Currently, I have been unable to produce two thousand tons of coal a month. In 1973 I could produce five to six thousand tons a month . . . I venture to say that ninety percent of these regulations do not relate to the safety and welfare of the people . . . If there is not some relief of government regulations, a lot of people which are now providing employment trying to contribute something for the good of our nation will have no choice but fold . . . The longer I stay in business, the farther in the red I have become. I am not a young man and my family's life savings are invested in this business, but if there is not some relief from government so more thought can be placed on production, I along with numerous other small operators will have no choice but to fall by the wayside (F-129).

The Environmentalists

Individuals and organizations in the environmentalist community were not idle during this period when OSM came under attack from industry and the states. They too maintained a critical, watchful eye over the agency's operations and developing programs. While they generally were supportive of the agency, they also kept a vigilant watch on day-to-day operations lest there be slippage of the agency's resolve to implement a tough regulatory program. In fact, the Council of the Southern Mountains brought suit against the agency for failure to carry out the required number of inspections mandated in the Act (Council of the Southern Mountains v. Andrus, U.S. District Court, D.C., Civil Action #79-1521). Acknowledging its failure, the agency settled out of court with a written promise to fulfill the mandate.

CONSEQUENCES FOR THE PROCESS OF REGULATION WRITING

The Office of Surface Mining drafted and promulgated its permanent program regulations in this context of increasingly strident, multi-frontal attack. Generally, this increasingly hostile context, coupled with the constraints mentioned earlier, reinforced the already established dynamics of the regulation writing process.

Centralization of Decision-Making

It is useful to begin this discussion of the regulation writing process with some comments on the OSM's various groupings of headquarters personnel and some aspects of the dynamics among them. A categorization of all OSM employees would be more complex than this because, necessarily, it would take into account HQ-

regional distinctions. Clearly, the HQ solicitors were one important group, even though, formally, they were not employed by or accountable to the Office of Surface Mining. Another distinct group were the upper-level managerial/program personnel, which included the agency's director, deputy director, the assistant directors and their immediate subordinates. The final important group was the technical personnel, who generally were responsible for conducting research and providing the technical justification for the agency's regulations and research on technical problems essential to the agency.

The OSM attracted and placed in managerial positions (both at HQ and in the regions) a number of individuals with limited prior experience in the federal bureaucracy. They were unaccustomed to Their lack of knowledge about and sensitivity to the ways of the federal bureaucracy was more than balanced, however, by their high level of commitment and competence. In short, they were ready and willing to pull more than their share of the load. In combination with the tight schedule for promulgating the permanent regulations, this inexperience reinforced the importance of and need for personnel who were savvy in the ways of bureaucracy and could organize their efforts to accomplish the target goals. The result of this was a centralization of authority and ultimate decision-making responsibility in the hands of a few individuals. Thus, despite an organizational structure which would have permitted decentralization, the combination of tasks and constraints confronting the agency increased the appeal of a mechanistic style of management.

After the public comment period ended and OSM's technical and managerial staff analyzed the comments and issues associated with particular regulations, a small group of personnel made the final decisions on them. This small group included the agency's top administrators, and it also included attorneys (a solicitor and a representative of Interior).

> A couple of things had to be done. We had a very, very short timetable. [We had to] really go into isolation to develop those regulatiors. There was no way that we could do what the coal leasing program did and spend two years hobnobbing, as it were, within the Department and out in the field, putting together the program. Our timetable was much shorter . . . We then had what we called the "green folder process." Every single proposed regulation, together with all the comments that were filed on that regulation and the staff analysis, came forward to the "green folder room." [We] read every single comment on every single regulation. That's got to be fairly unique . . . They were 18, 20 hour days. We, many's the night that we got out at 1:00 or 2:00 in the morning . . . When we did that . . . I think it was 18 straight days that we were locked up without seeing anybody.

Increasing Influence of the Solicitors

The solicitors played an extremely important part in the process of drafting and issuing the permanent program regulations. There are two major reasons for this. First, litigation over the

agency's interim regulatory program and the Act itself already had begun by early 1978. Consequently, the agency fully expected to face major court challenges to its efforts. This thrust the solicitors into a prominent role in the rule-making process as a virtual obsession developed to assure that everything connected with it was done in a legally "correct manner." Second, the solicitors believed that the technical staff simply did not appreciate -- and perhaps did not care about sufficiently -- the importance of thoroughness and detail in the development of technical rationales for particular regulations.

> [F]or every one OSM hour you had about five lawyer hours on top of that. Patching, correcting, writing . . . [T]he lawyers really took an incredibly poor work product and made it what . . . held up in court . . . [Those] folks worked extraordinarily hard . . .

The lawyers' increasing centrality intensified an already existent antagonims for them within the agency itself. A rather intense animosity developed toward them, especially by HQ technical personnel.

> [The lawyers] were probably the most hated of the whole group. The agency hated them because the lawyers would say, "no, this is inadequate, insufficient. You haven't interpreted the law right," whatever. Made them more harder, made them do it [over]. But a huge animosity developed between lawyers and the agency. And then, you know, [agency personnel would say] "whose policy call is it, anyway? . . . And, who's developing this program?" So, all that friction. And the lawyers felt the agency

people were dumb and, you know, dimwitted and all the rest of it.

The final reason the solicitors became increasingly important -- perhaps even dominant -- in the rule-making process was that their eagerness, enthusiasm, and sense of battle were strengthened by a perception that the agency was engaged in a titanic struggle.

Q.: What was the effect, for individuals and for groups of people working together, of being under continuous attack?

A.: Well, as far as the lawyers, the people in the Solicitor's Office were concerned, many of us had come from litigation backgrounds. And were very used to that kind of situation. So, it really just fueled our fires all the more, I think.

Headquarters' Relations with the Regions

Some aspects of relations between OSM headquarters and the regional offices duplicated, at a much lower level of intensity but for substantially the same reasons, relations between OSM and the states.

[T]he regional OSM people -- there would be a spectrum -- were more eager to accomodate either the states' views or the industry's views than the Solicitor's Office, or even possibly OSM in Washington were prepared to do. Which is natural; the field is always gonna' be that way.

Added to this, however, was the tension and conflict endemic to the structure of bureaucracies. The result was a tendency to

overlook feedback grounded in the first-hand experiences and concerns of the field-level regulatory staff.

Some of the folks at headquarters were not "field-oriented." Of course, they were giving their full time to regulation writing; that was driving headquarters . . . They were doing it, pretty much in a vacuum . . . The regional directors, who constitute the senior staff . . . were never consulted. The regional directors had no input into the regulations. Our concerns at that point, we were so preoccupied with implementing the interim program, and hiring people, [and opening field offices].

As the target date for publication of the permanent program regulations drew near, regional managers grew increasingly apprehensive, based on the drafts they had seen, about their field-level reception. Largely on their own initiative, the five regional directors requested a meeting with HQ managers to discuss the substance and potential impact of the forthcoming regulations.

The regulations . . . were exceedingly burdensome in terms of just the detail and the -- it was just overdone. There's no question about that . . . We felt, meaning all the regional directors, that these things were just too comprehensive, and too all-encompassing, too detailed. And we're gonna' get killed -- "we," the agency, "we," the program.

The regional directors arrived in Washington and were given a short time to examine the package of regulations. Dismayed with what even a cursory review revealed, they elected a spokesperson

to meet with HQ managers the following day to press their concerns. Despite the expression of concern by the regional directors, "nothing happened, nothing changed."

In sum, much as it became isolated from the states during the permanent rule-making process, headquarters became increasingly isolated from the regions, and for substantially similar reasons, during the same time. In fact, it was during this time that regional personnel began to refer to headquarters as "The Bunker."

THE POLITICAL STRUGGLE OVER THE PERMANENT PROGRAM REGULATIONS

On March 13, 1979, when the final version of its permanent regulations were published, attacks on the Office of Surface Mining turned into a firestorm. And while substantially the same themes were sounded as were heard in the criticisms of the interim program, the intensity and diversity of the attack was different.

The Coal Industries

As we have indicated at several points, there are at least two different segments of the American coal industry. One segment is made up of thousands of small companies whose individual output is relatively small. The other segment is comprised of a comparative handful of very large firms -- owned by the oil companies -- which individually produce enormous amounts of coal each year. These two segments are represented by different organizations, but they were united in their attacks on the OSM's permanent program. To be sure, the issues they singled out for special focus were different. Also, the tone of their criticisms varied substantially, with the smaller, Appalachian-based firms generally employing a more strident, virulent line of attack,

including occasional physical assaults on OSM personnel. The large coal producers were able to carry their offensive on a larger number of fronts. But both segments of the industry were persistent and, ultimately, their efforts met with some success.

The coal industries were alike in most of their criticisms of the proposed -- and, later, the final -- permanent regulatory program. They charged that the regulations were inflexible, would increase the cost of mining coal, were responsible for a sharp decline in coal production at the very time when the nation was trying to achieve energy independence, and were causing unemployment and operator shutdowns due to the onerous nature of the regulations. They pressed these claims at every opportunity and in every available forum. For example, in comments submitted to the OSM on its proposed permanent regulations, the NCA-AMC Joint Committee charged:

> In all too many cases, the regulations as proposed, are in our opinion, unreasonable and unnecessarily inflexible. In other places, we find that the regulations are in conflict with the legislative intent of the underlying P.L. 95-87, as set forth in its legislative history.

The Joint Committee acknowledged that the regulations, in some areas, did provide for flexibility, but charged that

> any of the alternatives mentioned could result in enormous economic consequences upon the industry, its customers, and the American consumer as well as resultant impacts upon coal mining communities (F-507).

Along the same line, MARC complained about the "sheer volume of detailed, technical regulations" contained in the proposed program. They went on to state:

> We must also strongly re-state our concern for the small operator--another problem area recognized by Congress but seemingly ignored by OSM . . . The permit requirements as defined tend to be what would normally be needed for a large operation in the west or mid-west and have no relevance for small permits in the Appalachian area. There is no justification for the detailed studies, surveys, and other requirements on the great majority of smaller permits. To maintain these detailed requirements will result in the termination of many of these permits.
>
> Finally, there is absolutely no doubt that the inflationary impact of these rules as proposed will be staggering . . . Our preliminary estimates place the increased cost for mining coal under the Act from 50% to 100% or more (F-305).

The coal industry and its representatives did not confine their resistance to proffered verbal comments. In addition, they pursued their objectives on other fronts. In the words of an OSM regional manager:

> [In this area] 95% of the production is out of the top 100 corporations. Those aren't little mining companies, they're Exxon, and Shell, and General Dynamics, and Conoco . . . and Ashland Oil. Hey, <u>they're</u> not going to have interference . . . We weren't playing with little

> wildcat miners in Appalachia. That was a misconception. We're playing with Exxon. We're playing with Shell Oil, dumping a lot of oil and petroleum profits into coal. They're playing <u>high stakes poker.</u> And they come at you <u>a lot</u> of different ways: better lawyers, lots of Ph.D.s, the political way, the "buy you" way . . . the ad way.

Litigation

Commencing only a few weeks after promulgation of the interim regulations, and continuing to the present time, the coal industry and the states mounted a number of court challenges to OSM's regulatory program(s). The pace and intensity of litigation has abated substantially in the past two years, perhaps because industry generally was unsuccessful in its earlier efforts, and also because the Reagan administration has been more accommodating to the states and the coal industry. However, three notable series of court tests are important enough to mention here.

Early in 1978, twenty-two cases involving coal operators, trade assocations, and three states came before the U.S. District Court for the District of Columbia [<u>In re Surface Mining Regulation Litigation</u> 452 F. Supp. 327 (1978)]. The plaintiffs attacked the OSM's interim regulations asking for summary judgment and a preliminary injunction. The court consolidated the cases.

Industry's attack involved both procedural challenges concerning the manner of promulgation of the regulations and substantive challenges to the regulations themselves. The procedural challenges alleged that: (1) the Secretary of the

Interior failed to consider the effects of the regulations on the economy, inflation and the nation's coal supply, and (2) the basis and purpose statement (preamble) which accompanied the regulations was inadequate. The court denied the plaintiffs' motions concerning procedural challenges.

The plaintiffs raised nine substantive challenges: (1) that five matters slated for regulation in the permanent program were regulated improperly in the interim program, (2) that adequate exemption and variance procedures were lacking in the interim regulations, (3) that the interim regulations improperly extended to pre-existing structures and facilities, (4) that prime farmland standards were improperly extended to non-prime farmland areas, (5) that the prime farmlands statutory grandfather exemption was improperly narrowed, (6) that waste impoundments (dams) were regulated improperly, (7) that the regulations improperly limited blasting, (8) that the regulations improperly limited the discharge of manganese into alkaline surface waters, and (9) that the regulations improperly implemented the small operators' exemption contained in the Act. With only three relatively minor exceptions, for which the court remanded the relevant regulations to the Secretary for reconsideration, the plaintiffs' motions were denied. Understandably perhaps, personnel in the OSM and the Solicitor's Office felt vindicated by the court's decision.

Two other major challenges to the Act and to the OSM's interim regulatory program were mounted. Initially, an association of Virginia surface miners, some of its member companies, the state of Virginia, the town of Wise and individual

landowners challenged the Act in the U.S. District Court for the Western District of Virginia. The plaintiffs alleged that provisions of the Act which established the interim program violated the commerce clause of the U.S. Constitution. The plaintiffs sought declaratory and injunctive relief. The district court rejected some of the plaintiffs' claims and granted others. The Secretary of the Interior appealed directly to the U.S. Supreme Court, which merged the case with another challenge, this one brought by the state of Indiana. The Court decided the case on June 15, 1981 (Hodel v. Virginia Surface Mining and Reclamation Assn. 69 L. Ed. 2d). The Court decided unanimously that Congress, in adopting the Act, did not exceed its powers under the commerce clause of the Constitution, nor did the Act violate the Fifth and Tenth amendments to the Constitution. In sum, the Court upheld the Act as Constitutional.

In 1980, important court decisions were handed down as a result of challenges to various portions of the permanent program regulations. The cases were brought in the U.S. District Court for the District of Columbia (In re Permanent Surface Mining Regulation Litigation, Civil Action #79-1144). Various plaintiffs (including the Pennsylvania Coal Association, the National Coal Association, Peabody Coal Company, the states of Illinois and Virginia, and the National Wildlife Federation) filed nine complaints challenging the permanent regulatory program. The court consolidated the actions. However, because they raised approximately 100 challenges to the regulations, the court divided the issues into two rounds. The first round issues were dealt with in a February 26, 1980 decision and the second round was

decided on May 16, 1980. The court's opinion upheld the broad powers of the OSM to issue regulations pursuant to the Act. However, a number of specific regulations were remanded to the agency for reconsideration because the court found them to be arbitrary, capricious, or inconsistent with the law. In addition, the agency voluntarily remanded a number of its regulations, in part because of court challenges.

Although the foregoing discussion focuses upon litigation initiated by industry and the states, environmentalist groups also participated in some of the same court cases. They employed litigation for three principal reasons: (1) to win court decisions which would help to maintain and to buttress the stringency of the OSM regulatory program and operations, (2) to protect, if not enlarge, opportunities for citizen participation in and openess of many administrative procedures connected with implementation of federal and state surface mining programs, and (3) in the words of one of the OSM's HQ executives, "to fire at the industry." However, since the change in Presidential administrations, environmentalist groups have increased their use of litigation, and the Office of Surface Mining has become a principal target of their challenges.

As this brief discussion suggests, many legal challenges to the Act and the regulations have been mounted thus far. According to the National Research Council (1981: 97), "certain general points" already have been decided by the courts:

(1) The OSM's authority to promulgate detailed regulations, including design standards, has been

affirmed.

(2) "Detailed design specifications promulgated for nationwide application . . . can, however, be challenged on technical grounds related to site specific conditions."

(3) Some regulations have been challenged succesfully on grounds that the agency exceeded its statutory authority. For example, "one court held that since SMCRA requires a 300-ft buffer zone between blasting operations and an occupied dwelling, OSM cannot extend this to a 1,000-ft buffer zone."

(4) "Some of the gaps and overlaps between OSM regulations and those of other regulatory agencies [have been] adjusted by court actions."

(5) Exemptions from regulation provided in the SMCRA may not be ignored or circumscribed by the agency.

(6) The agency's jurisdiction over surface disturbances resulting from deep mining have been affirmed by the courts.

(7) Direct attacks on the Act and the regulations by the states generally have failed. The courts have found that the states must comply with the Act and the agency's regulations, including permitting and bonding.

Efforts to Influence Regulatory Personnel

Although a number of persons believe that the coal industry, historically, has worked to corrupt regulatory personnel, we did not gather data systematically on such processes. However,

several OSM personnel whom we interviewed spontaneously mentioned isolated incidents in which, they believed, individuals in industry made ambiguous overtures to them which they interpreted as attempts to purchase special treatment. One regional manager related:

> [We had a situation where an operator] had been cited, appeared in federal court, and paid a lawyer $10,000. And he shows up in my office and says, "boy, I'd sure rather paid you the $10,000 than to give it to this lawyer." And [he] brings that up two or three times . . . I mean, if somebody keeps bringing up the fact that "I'm paying him $10,000 to get me out of this and I'd sure rather paid you all than paid him," that's not a bribe but, you know, you don't have to be . . . an intellectual giant to read what's there . . . [T]hose situations were isolated, but there were a couple of items.

Similarly, another regional manager told us:

> People came by to see me, as if to cut a deal. Guys would come by, and I'd say, "wait a minute, I'll buy you lunch." I had a guy come in who wanted to talk a deal with me, I bought him lunch and a drink, so he could never say he bought me lunch. That really mystified them. That like to blew their mind. You bet you they came by . . . They weren't gross enough to make us both culpable. But they were there. 'Cause that's the time-honored way.

The same respondents indicated that while they had no way of

knowing with any degree of certainty, they believed that OSM inspectors were almost entirely free of involvement in such activities.

Certainly, we elicited no information to suggest that efforts to purchase leniency or favors were made systematically either by specific firms or by industry generally. Instead, such efforts apparently were made on a case-by-case basis by single individuals.

Media Campaigns

Several persons we interviewed mentioned the publicity campaign coal producers mounted in opposition to the Office of Surface Mining. For example:

> Amax was running full page ads against us, against OSM, in big newspapers. They were running 60 second breaks on prime time TV -- Super Bowl halftime, finals of NCAA, World Series. Millions of dollars were spent in adverstising contra OSM . . . Industry spent a fortune against this little outfit [OSM].

Although we did not collect data on the industry's media activities, on a less systematic basis we did examine some of its advertisements. For example, individual coal companies ran full-page advertisements in major American newspapers warning of the dangers of "overregulation." An exemplary ad, paid for by the Mobil Oil Corporation, appeared in the WASHINGTON STAR on February 16, 1981 (p. A-15). Under a bold-type title of "Let's end the coal nightmare," the advertisement responded to "a recent editorial" in the NEW YORK TIMES which had asserted editorially

that "coal mining in the western United States is not overregulated." The advertisement stated:

> We were so astounded by this statement that we took a closer look at what is required in typical situations by federal and state authorities before a western coal mine can be started . . .

The ad went on to detail what it claimed were the complex, time-consuming processes required to secure a permit to mine on federal lands in the west. It concluded:

> The issue isn't <u>whether</u> to regulate, but <u>how.</u> And finding the kind of regulatory formula that will enable America to put its coal resources to work is more than cosmetic surgery. What is needed, <u>The Times</u> notwithstanding is a <u>major</u> overhaul, and it's <u>long</u> overdue (emphasis in the original).

Political Pressures

Not content with the actions we have described above, the coal industries also mounted an intense political attack on the OSM and its operations. Congressional oversight hearings were one battleground. Others included support for Congressional legislation sharply curtailing the importance of OSM's permanent regulatory program, contacts in the White House, contacts in the Department of the Interior and, finally, nurturance of a coalition with states officials.

Congressional oversight hearings were held in 1979 (both House and Senate committees), 1980 (House), and 1981 (both houses). Excepting the 1981 hearings, which were held after the

change in political administrations, the coal industries used the hearings to attack on a number of points. Generally, their complaints were a repetition of those they had made in the preceding year (some of them as long ago as 1968 when federal legislation first was contemplated): OSM's inflexible regulations, the nation's need for the energy provided by coal; the excessive cost of compliance with the regulations; the excessive detail and scope of the regulations; the plight of small coal producers who would be forced out of business because of their inability to comply; OSM's misinterpretation and unreasonable extension of what Congress intended in the Act; and OSM's excessive influence by and susceptibility to environmentalist groups and sentiments. There was little new in these complaints, although they were repeated many times in tones of great anguish and urgency.

There was at least one new complaint, however. Industry scored the agency for its insistence that they and the states meet deadlines established in the Act even though OSM had missed some of its deadlines -- in the case of the permanent regulations, by several months. This, they charged, was more evidence of the agency's unreasonable, inflexible approach to its mandate and constituencies. In 1979 Congressional testimony, industry was united in requesting two actions. First, they requested an extension of the deadlines required for industry compliance with the regulations and for states' submission of primacy applications. And second, they requested amendment of the Act itself so that state programs need only meet the requirements of

the Act, not the regulations promulgated by the Office of Surface Mining. MARC's president did not mince words in telling the Senate committee:

> I think the only way to solve this problem is to amend the act and amend the act immediately. The public can't wait in gas lines forever. They can't wait another year. The coal operators who are currently marginal are not going to be around next year to wait and see what happens and get more experience.
>
> We have had enough experience. It has been almost 2 years, and everything has been a dismal failure (U.S. Congress, Senate, 1979: 242).

The coal industries also supported attacks on the agency by members of Congress who were angered by "leaked" OSM memoranda. These memos, provided to members of Congress by a disgruntled former OSM employee, became the basis for allegations that the agency was engaged illegally in political lobbying and had acquiesced in other illegal activities by employees of environmentalist organizations. The same materials proved damaging to the agency also because they contained rather unflattering descriptions of certain members of Congress. Additionally, the former employee testified in House oversight hearings during 1979. Some sense of the flavor of his testimony can be gained from this excerpt:

> As [OSM's] regulations were being drafted, the senior level staff of OSM, myself included, had numerous meetings to review and revise the proposed language. It became obvious to me early in the review process that

> the direction being taken by the agency was to make the regulations punitive, to remove from the States as much flexibility as possible, to straitjacket the operators with design criteria, to write regulations on every conceivable issue, and to disregard the President's Executive order requiring regulations to be concise and written in plain English (U.S. Congress, House, 1980: 83-84).

The witness also charged that "OSM seemed to pay attention mostly to the more strident environmentalists" and that "it appeared that satisfying [them] was more important than satisfying the law" (U.S. Congress, House, 1980: 82-83). His testimony lent support to those who had charged for several years that the OSM was staffed by environmental zealots who were determined to punish the coal industry and the states.

The witness's testimony, along with the "leaked" internal memoranda became ammunition for the industry and for members of Congress bent on reshaping the Office of Surface Mining. Because of the materials he provided, the Government Accounting Office (GAO) was asked to do a study of the agency to determine if it had engaged in criminal offenses (primarily illegal lobbying). The study produced inconclusive findings and, eventually, the entire incident was permitted to die.

Finally, some of the largest coal producers brought pressure to bear on the Office of Surface Mining through the Department of Energy (DOE) and their contacts in the White House. After the close of the comment period on the proposed permanent regulations,

industry representatives approached the DOE which, in turn, contacted the President's Council of Economic Advisors (CEA). The CEA then approached the Office of Surface Mining with claims about the inflationary impacts of some of the proposed permanent regulations and requested a meeting to present their materials. OSM refused to meet, citing the fact that the public comment period already had closed. The CEA approached the Department of Justice, which suggested that a meeting would not be improper (i.e., a violation of the Administrative Procedures Act). Eventually, the OSM agreed to hold the meeting, but only with the stipulation that the meeting minutes would be open to the public and that the public comment period would be reopened so that public comments on the CEA materials would be welcome.

The DOE and the CEA primarily expressed concern about one area of the regulations, control of fugitive dust (air quality), which is a "western regulation."

> According to persons who attended the meeting, the council [CEA] officials sought to have one element of the controls deleted as being too expensive; the rule writers contended that the officials' figures were wrong . . . The council record on the issue, which was made public, was said to be "replete with evidence of solicitation of industry views" by the economic council since the 60-day period for comment on the proposed regulations ended Nov. 27 (RICHMOND TIMES-DISPATCH, January 7, 1979).

Accounts generally agree that the OSM did not make any substantive changes in the regulations to accommodate the CEA and, ultimately,

large coal producers. However,a participant in the meetings did say that the OSM almost "was forced to cave in," but managed to avoid doing so when errors were discovered in the CEA's analysis of the regulatory impacts. Whether or not the meetings resulted in regulatory change, they did force a six-month delay in final publication of the permanent program regulations and this, of course, set back even further the original time table for state program submission and implementation.

Descriptions provided by insiders generally are supported by media accounts of the impact of the OSM-CEA meetings. On March 11, 1979, THE NEW YORK TIMES suggested that the CEA's

> tardy intervention -- relying heavily, it turned out, on the coal industry's own data -- further delayed the timetable . . . [b]ut in the end it, it appears to have had little impact on the regulations (Franklin, 1979).

Parenthetically, the National Wildlife Federation challenged the CEA's role in the promulgation of air quality regulations. It alleged that the CEA, first, acted as a conduit for industry views during the comment period and, second, attempted to influence the OSM's decisions subsequent to the close of the comment period. The NWF alleged that the Secretary of the Interior denied the NWF and the public the right to a full and fair rule-making process and asked that the fugitive dust regulations be remanded to the OSM. The court noted that the OSM had reopended the public comment period and, following its meetings with the CEA, had published a catalogue of contacts, both oral and written, between the latter group and outside parties (In re Permanent Surface

Mining Regulation Litigation, U.S. District Court, D.C., Civil Action #79-1144, May 16, 1980). The same published record revealed all contacts between the CEA and Interior personnel. By reopening the public comment period, the OSM allowed for comments to be submitted concerning the contacts. The court rejected the NWF's request that the regulations be remanded, saying that "regulations should be remanded, based on ex parte contacts, only when the agency fails to disclose them" (p. 43). In sum, it ruled that the NWF's and the public's opportunity for meaningful participation in the rulemaking process had not been compromised.

The States

Like the coal industries, many states subjected the OSM to a barrage of attacks once the permanent program regulations were published. Many of their efforts were coordinated by the National Governors' Association, but others were pursued by individual states and their chief executives. Three major avenues of attack were employed by the states.

First, West Virginia's Governor Jay Rockefeller, at the request of the National Governors' Association, urged the Congress in 1979 to amend the Act itself. His proposed amendment eventually was added to a Senate bill (S.1403) that was introduced at the behest of the OSM. As introduced originally, S.1403 would have granted the states a seven month extension of the deadline for submission of primacy applications. As amended by supporters of the states and the coal industries, it required that state programs only be consistent with environmental protection standards contained in the Act and not with regulations

promulgated by the OSM. The bill passed in the Senate in 1979 (U.S. Congress, Senate, 1979), but it was not reported out of committee in the House. The following year, West Virginia's Senator Robert Byrd employed a parliamentary maneuver to attach an amendment similar to S.1403 to a House-passed maritime bill. As with S.1403, this effort ultimately was unsuccessful. However, it did meet with considerable editorial criticism in the eastern press. For example, THE WASHINGTON POST reacted by proclaiming that it is "no time to strip the mining act" (August 20, 1980).

The states attacked on a second front by presenting testimony extremely critical of the OSM in Congressional oversight hearings. Wyoming's Governor Edward Herschler probably was the most persistent and outspoken critic of the OSM before Congressional committees:

> From the beginning the Office of Surface Mining has treated the States as if only the Federal Government could be trusted to care for the environment. Federal respect for our capabilities has been grudging at best. I think that this attitude is flagrantly contrary to what the Congress intended and that it has engendered a reciprocal mistrust which lies at the heart of the present Federal-State tensions . . . [T]he Act as passed by Congress is workable. The Office of Surface Mining is not (U.S. Congress, House, 1979: 11).

Increasingly, the states charged that the OSM insisted that state regulatory programs must be, in the states' words, "clones" of the federal program. In their review of state programs submitted for primacy, OSM insisted the states include numerous

provisions which seemed to the states to be inappropriate or unnecessary, and in many cases even requiring changes in other state statutes. Governor Herschler listed some examples of this process and of what he regarded as federal arrogance in their dealings with Wyoming. He cited as an example OSM's insistence that his state's surface mining regulations include specific regulations for mining by mountaintop removal.

> [T]he Federal attorneys insisted that we promulgate regulations to control mountaintop removal. Our Land Quality Division replied that there is no such mining activity in Wyoming and hence such regulation is unnecessary. The Federal attorneys responded by saying that "only the future can prove the veracity" of Land Quality's assertion, and that Wyoming must promulgate regulations for mountaintop removal (U.S. Congress, House, 1979: 9).

Seemingly, the states took special issue with OSM's insistence that their regulatory programs include some of the provisions most sought by environmentalists. Provisions for citizen particiption in inspection and enforcement and a procedure requiring state payment of attorney's fees in certain circumstances -- as when public interest lawyers sued the state regulatory agency -- met with especially strong state resistance.

Some governors, primarily those from western states, took advantage of their personal ties with Interior secretary Andrus -- who formerly was governor of Idaho -- to press their charges that OSM was too arrogant and inflexible. At various times, one or

more of them wrote to him directly or insisted upon personal meetings to air their complaints.

The states' attacks abated only slightly in 1980 as the OSM made some concessions to them, but a significant change in their relations with the agency did not occur until after the arrival of Ronald Reagan's OSM and Interior appointees.

The States-Industry Coalition

The states and the coal industries voiced a number of virtually identical complaints about the Office of Surface Mining, its regulations and its operations. They charged the agency viewed them as adversaries or incompetents who could not be trusted without close federal oversight to establish and implement credible reclamation programs. By 1979 the coal industry began to sound like rock-ribbed defenders of states' rights in voicing their complaints about the Office of Surface Mining. More specifically, industry supported passage of S.1403 and joined with the states in a number of court challenges to the Act and regulations.

Finally, both groups, in 1979, began to sound the same theme about the dangers of federal bureaucratization. They charged that the Office of Surface Mining, following some inherent law of bureaucracy, was bent on expanding its payroll and responsibilities. Governor Herschler complained about federal "redtape" and suggested:

> Since a great deal of this redtape ultimately has little to do with the welfare of the land, it seems sensible to conclude that it is related to the welfare of OSM

instead. It is inevitable that this redtape will be used to justify additional redtape, and additional OSM . . . We should stop this bureaucratic juggernaut before it grows beyond all control (U.S. Congress, Senate, 1979: 10).

Criticisms such as this were offered in a public-spirited tone, as though its intent included little or no self-interest. A reading of Congressional oversight transcripts suggests that both the states and the coal industries wanted to remove all threat of future problems from OSM by severe cuts and alterations in its budget and organizational structure. Only through a radical transformation of the agency could they be certain of no further interference. Apparently, they were fearful that the mere continued existence of the agency posed the potential for federal intervention. They were determined, therefore, to root it out.

IMPACTS IN THE AGENCY

The barrage of attacks to which the Office of Surface Mining was subjected during 1978-80 was not without impact. To be sure, it is not always easy to distinguish these effects from those occasioned or made possible merely by the fact that the agency, at least by mid-1979, had completed some of the most pressing objectives (promulgation of the interim and permanent program regulations). Regardless, the agency moved through a series of changes during 1978-80, and prior to the 1980 Presidential elections there were signs of a gradual "softening" of the stringent policies it pursued initially.

Increasing Sense of Isolation

Earlier we noted the development of a "bunker mentality" among some HQ personnel in response to the criticism the agency received. Although this never entirely disappeared, by 1979-80 it was coupled increasingly with a sense of isolation by headquarters executives. To a great extent, it was self-imposed, a result of a natural tendency by some HQ executives, understandable perhaps, to avoid initiating contacts with parties attacking the agency. But at the same time, it was produced by HQ executives' belief that higher officials in the Department of the Interior, and some members of Congress on whom they formerly had relied for support, either had failed to "protect" them adequately from critics or had deserted them. Whether this in fact occurred, a number of our respondents shared a perception that the agency was cast adrift by some of those who should have been supportive. Partly for this reason, they began to press their contacts in the executive and legislative branches for public statements of support for them and the programs they were implementing. Rather little came of these requests. By early 1980, however, the agency had begun to "reach out" more to the states and these contacts to some extent, although not entirely, began to erode the HQ executives' feelings of isolation.

Concessions and Regulatory "Softening"

Early in 1979, one of the first permit applications for a new, large western mine was sent to Washington for final decision by Secretary Andrus. The planned Con-Paso mine (a joint venture by Consolidation Coal Company and El Paso Natural Gas) would be

located on Indian lands. OSM's region V personnel, believing that revegetation potentially would be very difficult to achieve on the mine site, had recommended only limited approval of the mine permit for only seven years. At the end of that time, the mine operators would have to demonstrate that revegetation had been accomplished before mining could continue. Officials in the Department of the Interior were subjected to pressures from the tribe, the states and from politicians, to grant a full permit. Interior established a special technical panel to review the permit application and countermanded the regional recommendation. Not only was the permit granted for a longer period of time, but the permit conditions impose upon the OSM the obligation to demonstrate that revegetation cannot succeed before a permit extension can be denied. This action was viewed by some in region V as evidence that the agency (or, at least, officials in the Department of the Interior) were willing to compromise and soften the stringent permitting requirements of the regulatory program.

The Department of the Interior's Associate Solicitor for surface mining came to be a lightning rod for the states' attacks on the Office of Surface Mining. Individually and through the Interstate Mining Compact Commission, they urged Secretary Andrus to dismiss him. In mid-1979 they prevailed. (The Department's Deputy Assistant Secretary for Energy and Minerals was dismissed at the same time.) Agency personnel viewed the move as "political." A respondent told us, simply, that it became necessary for "someone to fall on their sword." As if to make sure the states were aware of the new signals from Washington, a few weeks later the Department of the Interior moved to revise

the earlier restrictions on ex parte contacts with the states (44 FEDERAL REGISTER 54444, Sept. 19, 1979).

By 1980, the regional offices were busily engaged in review of state submissions for regulatory primacy. Partly as a result of these experiences and partly because the regions were in close contact with the states, the regional offices began to provide Washington with feedback on state-federal relations.

> [T]hings [were] filtering from the regional staff up to the Washington leadership. We saw that the regional staff said, felt, that [the regulations] had very little flexibility and insisted on, practically word for word, correspondence. And then as the Washington staff learned that that might not be very reasonable, we were able to step back a little bit. But it had to be done pretty much at the top level, because of the impression those people had that it came from there.

For a variety of reasons, then, some of the HQ executives, by 1980, began to see and appreciate the limitations of their individual and collective regulatory approach.

> [A]s we got in '80, and decisions on the state programs . . . we saw more flexibility, not a lot, I don't think, but it was certainly starting to come out. Then, as we talked to specific states about the detailed regulations which they had, ones which didn't follow the federal regulations very closely, we got to appreciate more and more the problems which they had, and took different approaches. And approved them. Montana was the first

state, in the Spring of '80, to come in and really make a hard pitch to do things their way on a relatively small number of items . . . In some cases they had real differences of appproach. And they wanted to maintain them. And, after a hard negotiating session between [OSM HQ personnel and state staffs], we ended up accepting most of what they wanted to do. Then, as a few other states got into the same position, we came to be able to do that more and more.

There is no doubt that political attacks on the agency played a part in the move toward a more conciliatory stance with the states. One respondent told us baldly that "I think S.1403 scared us quite a bit. We hadn't realized the depth of feeling that was out there."

I think there was an attitude in-house that went something like this: we kept saying to the states: "Propose some differences. And a lot of them will be acceptable. If you follow the general procedures, and propose something different, we'll consider it. And if it's good, we'll approve it" . . . What we didn't see was that the states were in no mood to deal with us in that fashion."

Sensing perhaps that the federal government really did not want to regulate its large number of mines, Kentucky virtually threatened to make them do so. Its thinly-veiled threat produced a real fear in Washington and it helped some HQ executives see the desirability of a more conciliatory stance toward the states.

CHAPTER 8

THE INSPECTION AND ENFORCEMENT PROGRAM

During the legislative battle, environmentalists pressed for strong inspection and enforcment procedures, which would leave little discretion to enforcement personnel. An attorney, who played an important part in creating the I&E program told us:

> [I]n our judgment, in a regulatory situation where you have a large number of inspectable units, where you have significant variation in compliance -- including a minority, a significant minority of inspectable units that simply do not comply or have a history of non-compliance -- and third, where you have a significant shift in performance requirements, that you require a mandatory enforcement system. And the surface mine act enforcement system, in almost every one of its provisions, both penalties, cessation orders, NOVs, whatever, is premissed on that idea of mandatory enforcement . . . And it may be, in another situation, 20 years down the road before compliance is up very high, where you have a growing consensus of behavior . . . you should drop mandatory enforcement for discretionary enforcement. But where certain factors exist, we believe mandatory enforcement is justified, and indeed necessary, in surface mining.

The Act contains such provisions. Section 517.(c) of the Act requires the OSM, during the interim regulatory program, to conduct two unannounced inspections per year of every surface coal

The agency believed that legislative efforts to curb their powers (such as S.1403) might be defeated if they could gain some allies in the states. A more flexible approach to the review of state programs helped in this regard. In addition, the agency sent special emissaries to confer with and to reassure at least one of their most vocal critics. All these efforts met with some success; eventually, some of the western states took a stand publicly in opposition to legislation to trim the agency's sails.

By late 1980, there was a perceptible, although not a major, shift occurring in the shared understandings of HQ personnel regarding the agency's mission and strategies for pursuing it. At one of the regular meetings of regional and HQ executives -- this an extended one -- there was an indication that HQ would welcome a move toward more flexible regulations. Little came of this, however, since the meeting occurred less than one month before Ronald Reagan's election. The election outcome dichotomized the states. Some, and this included most of the western states, pressed ahead and worked with the OSM to complete the primacy process. Others, chiefly the Appalachian and several midwestern states, began to delay their movement toward primacy. In the agency's view, this move was inspired by the hope that they would be able to get "a better deal" with the incoming administration.

mining operation in the United States (as well as the surface areas which are a part of underground mining operations). Inspectors are required to issue a notice of violation (NOV) for every regulatory violation they observe [section 517(e)]. Mine operators then are required to abate the violative condition within a time limit set by the inspector (90 day maximum). Inspectors were required to issue a cessation order (CO; an order to cease all mining) under two conditions: (1) when they observe a violation which causes or creates the threat of imminent danger to the health or safety of the public, or significant environmental harm, or (2) when an operator fails to abate, within the time limit set by the inspector, a condition for which he previously received a notice of violation [sections 521.(a)(2) and (3)]. Thus, the Act established a policy that required strict, non-discretionary (i.e., rule bound) enforcement which was to begin on May 3, 1978.

Legislation supporters did not rest content with inclusion of these provisions in the statute. After the Act was passed, they pursued regulatory objectives consistent with their values. For at least two reasons, they met with considerable success. First, Task Force leaders did not have strong biases about inspection and enforcement and had, in fact, given it very little thought. In other words, the I&E portions of the emerging regulatory program represented a vacuum of sorts. Consequently, one member of the Task Force, who was interested in inspection and enforcement and who did have some beliefs about such a program, was asked to create a special task group and to begin preparation of the program. Because the task group leader was known to and on

amicable terms with environmentalists, there was a free and easy exchange of ideas between them and the inspection and enforcement task group.

Certainly, one of the most strongly-held values, not only in the I&E task group but also in the entire Task Force was a desire to protect the environment. The task group was aware of the past abuses of strip mining, especially in Appalachia, and a desire to ensure that future coal industry profits would no longer be made at the expense of the environment. Several Task Force members told us that this was an important premise for them personally as well as for most of them collectively.

In their efforts, environmentalists and the task group strove to create an I&E program which was non-discretionary, with penalties severe enough to serve as a deterrent. Both groups scrutinized the I&E programs of other regulatory agencies for clues as to what might be useful (and avoidable) for the OSM program. Several program features were borrowed directly from the Mine Safety and Health Administration (MSHA), which conducts safety inspections of deep mines. Another aspect of the OSM program was constructed in order to avoid a problem MSHA encountered: difficulties in collecting civil penalties. Unlike MSHA, the OSM program requires cited coal operators to pay their fines before they can appeal their violations. These funds are held in escrow until final disposition of the appeal, after which they are returned to the operator if the agency's action is reversed.

Designers of the OSM's I&E program shared with the other

members of the Task Force a belief that the entire program should be rigorous, uniform in application, and tied as closely as possible to specific provisions of the Act. But in addition to this, they held one other value bias which found expression in the I&E program: a belief in the importance of obeisance to law itself as an objective. The task group and its environmentalist supporters believed that the coal industry, historically, had operated in a lawless fashion and had become very skilled at evading the law. The task group wanted to design an inspection and enforcement program to take "the rule of law" to the coal fields, especially in Appalachia.

> I really came to believe that what was missing [under state regulation] . . . was just that [coal operators] were not told that "you're supposed to do it. And this is a serious rule. And if you're not, we'll just be on your case" . . . I mean, I really thought that if we had honest, motivated inspectors, we gave them the power and supervised them, and kept our lawyers arguing when they came back, that we would, in fact, you know, people would finally say: "Oh, you mean you're really not supposed to put spoil on the downslope? Ah, come on. I knew the law said that, but you mean you're really not supposed to do it?" "Yeah," you know. And that was the missing ingredient . . . One ought to do what the law says. It's as simple as that. And . . . eventually that relatively simple truth would get translated into a reality -- of compliance.

Later, with the benefit of several years' experience, members of

the I&E task group would look back and see that perhaps they were naive to think they could accomplish so much in so short a time. They would wonder if perhaps they had focused so much on the worst abuses and the states with the worst regulatory reputations that their program, designed to curb these abuses, was unnecessarily and unreasonably stringent. But in the first year or so of their work, such doubts, if they occurred at all, were not reflected in the developing I&E program.

THE INSPECTION AND ENFORCEMENT PROGRAM

Staffing Up and Beginning Operations

Because Congress delayed for seven months budgetary appropriations for the agency, the OSM had to hire and train the initial group of inspectors in an extremely short period of time. Since most of the regional offices were yet to be established, and others were operating in only skeletal form, most of the inspectors were hired, trained and supervised by HQ executives.

Headquarters identified a pool of potential inspectors through contacts with other federal agencies and former state regulatory managers. Another important source of names for this pool came from contacts with an informal network of attorneys and environmentalists who had been active in local and regional programs aimed at curbing mining abuses. Through these contacts, a chain of referrals was established which eventually identified potential inspectors.

An experience which typifies this process was provided to us by one of OSM's initial inspectors, a former inspector for an

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Appalachian state, who had a regional reputation of being environmentally-oriented. One evening he received a telephone call from an attorney in a nearby town, was told that one of OSM's HQ executives was there, and was asked to "come over." At the subsequent meeting, they discussed with him the possibility of joining the new agency. Also, he provided a list of persons -- inspectors or former inspectors -- whom he regarded as "good people, who were trying to do the right thing."

> [T]hat was the beginning of my part in the program. And not too long after that, of course, I filled in my application and sent it out to Washington. And wasn't too long until I was hired and then started my trips down to Knoxville, back and forth, trying to get this whole program together. Of course, the first thing that we did was, the whole group of people that we had picked as the first people in the program, they were scheduled to have two weeks training down in Madisonville, Kentucky . . . I've got a photograph out there of the original 50 or 55 people there about, that started this whole program throughout the United States.
>
> Q.: Well, most of them were hired in this area weren't they? The first bunch?
>
> A.: The majority of them, yes. The majority of them. Including the West Virginia boys that were hired, And _____ and the others from the Tennessee area.

Others in the initial inspector corps were hired in a similar way from the midwestern states.

Work for this initial group of inspectors was difficult,

because of the OSM's delayed funding, which led to shortages of staff and other resources. An "old timer" related this experience to us:

> [W]e would come in on Monday morning and get all of our stuff that we figured we would need from the office, and touch base with the supervisor. Give him a rough itinerary of where we were going to be, and we'd hit the woods. And we, you know, we'd be gone until Friday. We'd come back in Friday. We mailed our own, we did all of our certified mailing of citations and all that kind of thing from the post office nearest your house. Did our paperwork at home at night. We were inspecting, a lot of times, from 7:00 in the morning until 8, 9:00 at night.

While they worked long hours, often in isolated locations, they also had only a skeletal chain of command in some regions.

> [W]e worked more or less out of our houses. It varied from one area to another. Depending on how long it took them to find office space and get the phones hooked up, and so on and so forth.
>
> Q.: How long did you have to work out of your house?
>
> A.: Uh, about 8 or 9 months I guess. Because, see, we had the region, we were at an advantage here because we had the regional office . . . _____ was supervisor. He was acting head honcho, because they didn't have a district manager. They didn't have a regional director. They didn't have nothing. All they had was field

supervisors and inspectors. And we had 11 inspectors, I think, to cover all of region II.

Though the regulations were detailed and precise, still there was some uncertainty among the initial inspectors as to the enforcement style they should employ. Some of this ambiguity was resolved during their training session. There, inspectors met with HQ personnel and were able to establish procedures for interpreting the regulations and conducting inspections. In the beginning, an effort was made to conduct inspections by teams of inspectors (perhaps in anticipation of a hostile response from mine operators). However, this practice was discontinued shortly because of personnel shortages. Also, the I&E personnel determined that it would not be possible to conduct two inspections at each mine site in a given year, again because of limited personnel.

There were strong feelings of camaraderie and a sense of commitment among the first group of inspectors. As noted, many of them previously had worked for state regulatory programs and had experienced varying degrees of frustration in those experiences. They saw their OSM employment as an opportunity to establish a regulatory program that would be taken seriously by the industry -- something that many of them believed had not been true of the state programs in which they had labored. They shared the strong pro-environmental-protection philosophy that produced the Act and served as a pervasive influence in the process of creating the interim regulations. For many, a determination to promote better reclamation and environmental protection for future generations remained strong. This belief was an important component of their

socialization of subsequent groups of inspectors.

Although we have been talking primarily about the initial group of inspectors, actually they were hired in three distinct groups or "waves". The last two waves contained a much larger proportion of individuals with little or no previous experience with coal mining or regulation. Partly for this reason, the early I&E program was not entirely free of problems. As a regional manager told us:

> [W]e had some immaturity. We had some people who didn't know a whole hell of a lot about mining. We had to hire a lot of inspectors who couldn't be -- they didn't have "old heads." They were told, "goddamn, you're a cop. Get your ass out there and enforce the law."

A Profile of the Inspectors

At the peak of the interim program enforcement, the Office of Suface Mining employed approximately 220 inspectors. In the Summer of 1981, three years after the first inspectors were hired and several months after the new OSM administration had begun to reduce their numbers, we sent a mail questionnaire to all remaining inspectors (approximately 158). Table 8-1 contains some summary descriptive statistics on the survey's 126 respondents.

Based on our questionnaire data, the average OSM inspector was about 32 years old at the time of his employment. (We did not include data on sex or race since the OSM inspectors are almost entirely made up of white males.) Primarily coming from a rural or small town background, 75 percent of the inspectors had a four year college degree, and 63 percent had some experience in the

TABLE 8-1

SUMMARY DESCRIPTION OF OSM INSPECTORS -- JUNE 1981

Variable	$\bar{X}$ Score	S.D.	N
Age at Employment (years)	32.02	8.43	126
Length of Employment (months)	29.41	6.51	126
OSM Training Prior to Certification (months)	4.16	2.29	96

Variable	Per Cent	N
Background:		
Rural/Small Town (Pop. 2,500)	56%	70
Small Town (Pop. 2,500 - 100,000)	31	39
Large City (Pop. 100,000)	13	16
	100%	125
Pre-OSM Experience in Coal Regulation	63%	79
Education:		
High School/Some College	25%	32
4 Year College Degree	48	61
Some Graduate Work	16	20
Advanced Degree	10	13
	99%	126
College Major:		
Earth Sciences[a]	14%	14
Plant/Animal Sciences[b]	30	31
Environmental Management[c]	45	47
Other	10	11
	100%	103

[a] Includes degrees in geology, engineering, natural science, etc.
[b] Includes degrees in biology, agriculture, zoology, etc.
[c] Includes degrees in forestry, wildlife management, mining reclamation, etc.

regulation of coal mining before joining the OSM. Thus, while many coal operators complained that the OSM's inspectors were "young smart-asses who didn't know a dragline from a haul road," our data shows evidence to the contrary.

In addition, respondents were asked a number of questions concerning their OSM training and their attitudes about a variety of issues. We have produced the results of some of these items in Table 8-2.

The questionnaire items reproduced in Table 8-2 provide an interesting profile of inspectors' attitudes on some key issues. As a general rule, the majority of inspectors believe that the OSM's interim regulatory program was fair to all coal operators and, further, that it did not contribute significantly to the rising costs of coal production. Both of these positions are in opposition to similar attitudes voiced by members of the industry.

One of the more interesting anomalies that our questionnaire data produced deals with general attitudes toward federal intervention. In our scale of liberal versus conservative attitudes, the inspectors' average scores placed them in a position that slightly favored a conservative attitude. Yet, when we examined their attitudes on regulation, we found that their scores were supportive of a pro-regulatory posture. This may be related not to a general acceptance of regulation but to a particular belief about surface coal mining that reflects similar beliefs held by members of the new class who opposed surface mining (see Chapter 2).

TABLE 8-2

SUMMARY DESCRIPTION OF OSM INSPECTORS' ATTITUDES -- JUNE 1981

Variables	Per Cent Agree	N
Evaluation of OSM Training Programs:		
Formal Training Was Helpful	33%	41
On the Job Training Was Helpful	51%	65
OSM Regulatory Program Had No Impact On the Cost of Coal Production	75%	95
OSM Regulatory Program Is Fair to the Coal Industry	79%	100
State Programs Will Not Be Able to Regulate as Effectively as OSM	59%	74

Dimension	$\bar{X}$ Score	S.D.	N
Liberal Attitudes[a]	5.310	2.600	126
Attitudes Favoring Regulation[b]	9.016	2.187	126

[a] A three-item scale (Cronbach's Alpha = .69). Items are: "One of the major tasks of government is to ensure greater economic equality among its citizens"; "One of the Federal government's primary responsiblities is to direct the economy"; and "One of the major tasks of government is to ensure greater opportunity for economic equality among its citizens." Response alternatives were: [4 Strongly Agree; 3 Agree; 2 Undecided; 1 Disagree; 0 Strongly Disagree]. Scores on this scale ranged from a low of 0 to a high of 12.

[b] A three-item scale (Cronbach's alpha = .74). Items are: "Many of our country's problems could be solved if the Federal government would stop interfering with private industry"; "Generally, government regulation of industry has gone too far, so that now it harms more people than it helps"; and "Generally, government regulation of industry has had beneficial effects for the majority of citizens." Response alternatives were the same as those indicated above with the first two items reversed for coding. Scores on this scale ranged from a low of 0 to a high of 12.

Operators' and States' Responses to the Inspection Program

One easily could overestimate the importance of OSM's inspection and enforcement program, but the fact is that other aspects of the Act had a much greater impact on coal operators. The new bonding requirements or the need to conduct various hydrological tests and report the results as part of the permitting process had a much greater impact on the coal industry generally. Nevertheless, the I&E program was an extremely visible part of the OSM's operations. In the case of small, economically marginal operators, it became a major symbolic issue around which they -- and to some extent the states -- rallied their resistance efforts.

Coal operators, both individually and through their trade organizations, attacked the inspection and enforcement program relentlessly. Inspectors were depicted as individuals who were uninformed about mining, unreasonable and inflexible in their duties and generally given to issuing NOVs for "nitpicking" infractions. Stories which sounded these themes were passed around by word of mouth by coal operators in the field and at their trade association meetings. A regional manager told us:

> They passed around a story that made the newspaper --and [a mine operator] called me -- that we had dropped 100 inspectors on the state of _____, and they were blitzkrieging the state. And, "look for your mine to be inspected," miners were told. "These guys are coming." I had five guys in the whole damn state of _____ . . . See, the truth and what the reputation is are different. And it is the reputation . . . that "these

> [OSM] guys are like Nazis" [that mine operators reacted to]. Hell, we had cartoons being sent into this office showing an OSM inspector being shot, and it'd say "Pig" . . . When [OSM] came on the scene, I wanta' tell you, it agitated the jail.

As the respondent hinted, the discrepancy between the reality and the substance of these stories became less important even as it grew wider.

When OSM's inspectors began enforcing the interim program, they tried to conduct their inspections jointly with state personnel. However, for various reasons and with varying speed in the different regions, this policy of joint inspections eventually was discontinued. State opposition to the federal enforcement presence increased even as joint inspections were declining.

Some states found the program highly offensive, for two reasons. First, they believed that OSM's aggressive enforcement policy, by implication, amounted to a criticism of their own performance. And second, some states simply objected to OSM's actions for the same reasons they would have objected to any federal presence: a belief that states should handle all such matters without the intrusion of Washington. The states' attacks on the federal I&E program found a receptive audience among the coal industry and meshed nicely with the latter's attacks. The two groups became partners in their attacks on the "overzealous" federal inspectors.

In some areas of Appalachia and the midwest, mine operators were convinced that the OSM was determined to "shut them down."

Industry's opposition was strongest in these areas -- which have the highest concentration of small operators. Operators' resistance to the agency assumed a highly visible form in the defiance of a few individuals. Regional I&E personnel found it difficult to ignore these individuals. For example, a regional manager told us:

> [A] small mine operator . . . told me, "I ain't never taken no paper from any Fed. Hell, I've run off EPA, MESA, IRS, and now you guys. I just ain't gonna' play your games. This is my land!" Subsequently, he began to be such a symbol of defiance of . . . that we sought and received a court order and with the support of 8 to 10 armed marshalls we served appropriate notice of his violations to him on his mine site. The show of force was essential -- we used a helicopter and cars -- because his men were heavily armed and he had menaced our inspectors previously.

As this suggests, in some areas, the OSM's inspectors were threatened with physical violence on many occasions, and actually assaulted several times. However, these more extreme forms of violence were rare. For example:

> At a recent informal public hearing at an illegal minesite . . . [the operator] told [us] that the next time we flew over [this] area that our helicopter would be shot down. He told us that the miners in this area are uniting, and there was going to be the same kind of violence that occurred when the UMW tried to move into the area. This violence would be directed toward OSM

> inspectors, because the miners are not about to let OSM stop them from feeding their families. A recent helicopter flight, conducted by [state inspection personnel] was hit by small caliber ground fire in this area (OSM, 1980d).

Even within Appalachia, incidents of violence, whether real or potential, were concentrated in small areas or "pockets." Wildcatting -- mining coal without an approved permit -- is common in these areas. Detecting and responding to wildcat mining presents special problems.

> On wildcat operations things are a little bit different because a lot of times its a big problem just to ascertain who's responsible for the operation. And it requires, well it requires a lot of things that is not required on a routine permitted job. On a permitted job, you already know where they're at, who they are, how they're supposed to be conducting a mining operation, where the ponds are. Theoretically, you already know everything about the job before you get there. It's just a matter of getting the pit boss or the foreman or the owner, you go over it after you get there. On a wildcat job, first of all you've got to know they're there. That involves either a citizen's complaint or noticing a haul road that shouldn't be there when you're on your way to another mine site somewhere.

Typically, the environmental damage caused by wildcatting is

severe. Understandably, a mine operator who doesn't bother to secure a permit to mine would not be especially concerned with good reclamation practices.

Parameters of Program Performance

OSM headquarters executives took an active part in hiring the initial inspectors and directing the early inspection program. However, once the regional offices were established and operating, HQ took a less active part in the I&E program. In fact, HQ personnel were so busy producing regulations and responding to external attacks that little time was left for systematic coordination and direction of regional I&E operations. For example, the agency's own analysis indicated a number of management problems in the inspection and enforcement program (OSM, 1980b). The agency's INSPECTION MANUAL was not issued until February 1980, almost two years after the agency's May 1978 starting date (OSM, 1980a). Even then, it contained only one chapter; the other four chapters were "to be furnished at a later date". Consequently, the regions were allowed -- or, of necessity, developed -- considerable autonomy. Together with some distinctive regional differences in mining operations, this is one of the major reasons that an I&E program emphasizing a different enforcment style developed in the one of the regions.

For the agency as a whole, as Table 8-3 shows, enforcement activity varied somewhat over a two and one-half year period. The changes, however, are gradual and the direction is consistent with the agency's growth and reduction in personnel. Perhaps the major exception to this pattern of gradual change occurred after Ronald

TABLE 8-3

OSM INSPECTION AND ENFORCEMENT ACTIVITY PER INSPECTOR -- JUN 1978 TO JUN 1982

Time Period	Inspectors[a]	Notice of Violation		Cessation Order	
		# of NOVs	NOVs per Inspector	# of COs	COs per Inspector
Jun 78 - Dec 78	98	776	7.92	134	1.37
Jan 79 - Jun 79	181	1,469	8.12	274	1.51
Jul 79 - Dec 79	206	2,993	14.53	541	2.63
Jan 80 - Jun 80	209	3,797	18.17	812	3.89
Jul 80 - Dec 80	198	3,165	15.98	821	4.35
Jan 81 - Jun 81	171	1,330	7.78	396	2.32
Jul 81 - Dec 81	157	1,038	6.61	222	1.41
Jan 82 - Jun 82	134	693	5.17	192	1.43

[a] Number of active OSM inspectors certified to conduct mine inspections during the median date indicated.

Source: The Office of Surface Mining.

Reagan's election. OSM's I&E personnel began to reduce their level of activity even before his appointees took office, apparently in anticipation of their "new" approach to regulation.

Perhaps the closest approximation to a systematic examination of the agency's performance of inspections was conducted by a group of environmentalist organizations. (Interestingly, despite their barrage of criticism of the OSM I&E program, we know of no study conducted by mining companies or trade associations.) Results of the study were used in a suit filed by the groups charging the agency with under-enforcement of the Act and its own regulations (Council of the Southern Mountains v. Andrus, U.S. District Court, D.C., Civil Action #79-1521). (The case was settled without trial, with OSM promising to allocate additional resources to its I&E program.) Representatives of the groups which conducted the study reported their findings during 1980 Congressional oversight hearings (U.S. Congress, House, 1980: 420-21).

The study reported a "major failure" by the OSM to inspect the nation's mines during the interim program. It found that the Office of Surface Mining had not come close to meeting the regulatory requirement that it conduct on a random basis biannual inspections of every mine site. The results of their study are reproduced in Table 8-4.

The analysis of OSM records found that during the first seven months of the interim program (May-December 1978), the agency inspected only 10 percent of the eligible inspectable units. During the second six-month period, OSM inspected only 25 percent of all the inspectable units. Between June 1979 and March 1980

TABLE 8-4

OSM INSPECTION SUMMARY -- MAY 1978 TO MARCH 1980

Time Period	Inspectors	Inspectable Units	Total Inspections
May 78 - Dec 78	50	7,689	2,777
Jan 79 - Jul 79	71	15,023	6,927
Aug 79 - Mar 80	183	15,591	11,579

Adapted from: U.S. Congress, House, 1980: 420.

(when the testimony was given), the Office of Surface Mining conducted complete inspections of only about 50 percent of the units subject to inspection. Concluding their testimony, the groups' representatives suggested that "OSM is not now nor has it been the culprit or heavy-handed federal bureaucracy the industry and the States have tried so hard to portray" (U.S. Congress, House, 1980: 431).

The Denver-based Public Lands Institute, in conjunction with faculty of the University of Denver, also examined OSM's inspection and enforcement performance under the interim program. However, their study was limited to OSM's region V (Johnson et al., 1980). The study rightly notes there are differences in the region V I&E mandate because of its unique conditions (e.g., the prevalence of federally-owned coal, and Indian tribes with coal on their reservations). The investigators selected a sample of 48 mines located in five of the states in region V. They examined OSM's inspection and enforcement performance for the period beginning in 1978 and ending in August 1980. Also, they studied the performance of state-level regulatory agencies in each of the five states and compared the performance of the six agencies.

As regards the OSM's performance, the results revealed that in 1979 it performed only 33 percent of the required complete inspections. Performance improved in the first six months of 1980, but still stood at only 58 percent. The OSM made only 11 percent of the required partial inspections (on federal lands) during 1979. In their inspections of the sample mines, OSM observed a total of 464 violations. NOVs were issued for only 48.7 percent of these (or, 226). Of the 226 NOVs issued, 82.7

percent were issued on the mine site (or, 187). Thus, this study, like the one reviewed above, found a substantial discrepancy between statutory and regulatory I&E directives and the OSM's actual performance. Nevertheless, OSM's performance still was better than the state regulatory agencies.

THE PENALTY PROCESS

Assessment of Penalties

The Office of Surface Mining utilizes a centralized penalty-assessment procedure; all assessments are made in the Washington office, on the basis of information supplied by field inspectors using standardized notice of violation (NOV) reporting forms. The principal factors taken into account in the assessment process (at least during the time when our data were collected) are: (1) the seriousness of the violation (as measured by the degree of actual or potential damage it caused), and (2) the degree of operator fault represented by the violation. Using a predetermined formula (OSM, 1980c), the assessors assign points to these (and other) categories and the points are summed; the magnitude of the assessed fine is determined by the total point score (30 CFR section 723). After the corporate offender is informed of the civil fine, it may request an assesssment conference, basically to request a reduction in the fine. Additional, appeal procedures are available beyond the assessment conference.

Studies of the sentencing of ordinary criminal offenders have become rather commonplace in American social science. [Excellent reviews can be found in Hagan (1974), Nettler (1979), and Kleck

(1981).] Numerous investigators have examined the determinants of sentencing severity for individual offenders. This research generally suggests that the severity of penalties imposed on individuals is determined primarily by two variables: (1) the seriousness of their offense(s), and (2) the length and seriousness of their previous record of convictions. In short, recidivists who commit "serious" offenses generally receive the most severe sentences. With rare exceptions (e.g., Lizotte, 1978), recent research shows that the extra-legal characteristics of defendants have little impact on sentencing.

Although there are a number of interesting case studies and exposes on the sanctioning of corporate offenders and officers (e.g., Heilbroner et al., 1973; Geis, 1977), relatively little systematic research has been conducted on the issue. Further, the available studies, for the most part, have examined the imposition of criminal penalties (i.e., penalties provided for in criminal statutes) (e.g., Conklin, 1977; Goff and Reasons, 1978; Snider, 1982). Much less attention has been paid to the process of imposing "civil fines," and the variables which influence it. Apparently, most social scientists have assumed that since these fines tend to be rather small they possess little deterrent value and, therefore, are unworthy of study. Others, however, have taken a different stance, suggesting that "the initiation and termination of civil penalty actions . . . constitutes one of those vast areas of largely undocumented, unstudied, and misunderstood agency behavior customarily described as 'informal action'" (Diver, 1979: 1437).

An important exception to this pattern of neglect is Clinard

and Yeager's study of the illegal behaviors of 582 American corporations. Their analysis of the monetary penalties imposed on the sample of firms began with the assumption that "in terms of maximizing deterrence, a logical policy would suggest that the amount of the business fines be pegged to the size of the business." Their data, however, revealed no such relationship, for "corporation size seemed to make little difference in the median amount of monetary penalty imposed" (1980: 126). Still, this finding flies in the face of a substantial body of theoretical writing which contends that official agencies, in response to the power differential rooted in unequal resources, impose the harshest penalties on those who are disadvantaged (e.g., Chambliss and Seidman, 1971). Unfortunately, the lack of a sufficient number of studies makes it difficult to determine the effect of extra-legal variables on the disposition of white-collar and corporate offenders. Partly to rectify this omission, and also to learn about the OSM assessment and penalty-collection processes, we collected data on the fines imposed on a sample of mining companies.

A purposive sample was drawn of 83 coal mining companies in two of OSM's five regions (Appalachia and the west) that received at least one NOV during the period from October 1978 through March 1980. The sample was drawn in order to ensure approximately equal numbers of NOVs for small, mid- and large-size firms.

The 83 firms had received a total of 735 NOVs during the 18 months. Using records maintained by the Assessment Office, we coded a number of variables related to the nature of the

violation, the magnitude of the assessed fine, and the company's response to the NOVs and assessed penalties. The data were analyzed both for descriptive purposes and to examine causally the variables which apparently effect the magnitude of the assessed fine.

Dependent Variable

The major dependent variable utilized in the analysis is the magnitude of the fine assessed by the OSM for each of the NOVs. Useable data are available for 675 of the original 735 NOVs. Of the useable total, no fine was imposed in 264 cases (39.1 percent). The maximum fine imposed was $4,500. The average fine for all 675 NOVs was $1,027 (S.D. = $1,053). Generally, the picture which emerges from these data is one of relatively small fines for the majority of the NOVs.

Independent Variables

Drawing from the research literature on the sanctioning of ordinary offenders, we employed two categories of variables which, conceivably, effect the magnitude of the civil penalty: legal and extra-legal. The principal objective of our analysis is an assessment of the relative contributions which each of these two types of variables makes to an explanation of our dependent variable.

Legal variables are those "factors emphasized in official-normative descriptions of the criminal justice system" such as the seriousness of a defendant's offense, the nature of his previous criminal record, and degree of "viciousness" manifested in the

offense itself (Hagan, 1974: 358). The latter variables are those presumed to be legally irrelevant to the imposition of sentence, such as the defendant's race, sex, age and socio-economic status. We employed three legal variables in the analysis. For each violation we determined: assessed damage, assessed negligence of the corporate offender, and seriousness.

Assessed damage was operationalized as the total number of points OSM's assessors awarded for the actual or potential damage to property, individuals or the environment caused by the violative activity. Assessors can impose a maximum of 30 points for damage (OSM, 1980c: 17-24). The least serious violations are those for which the assessor, on the basis of the inspector's report, believes there is little actual or potential damage. By the same token, the most serious violations are those for which the degree of real or potential damage is adjudged to be high.

Assessed fault was operationalized as the number of points OSM's assessors awarded based on their appraisal of the relative importance of negligence versus willfulness manifested in the offender's violation. An increasing number of points -- up to a maximum of 30 -- is awarded according to whether the violation suggested: (1) no negligence, (2) negligence, (3) recklessness, or (4) knowing and willful misconduct (OSM, 1980c: 26).

The "damage points" assessed by the OSM emphasize the relative seriousness of a particular type of violation. By contrast, the concept of "seriousness" in the criminological literature generally refers to the relative heinousness of different kinds of violations (e.g., Sellin and Wolfgang, 1964; Rossi et al., 1974). In order to test the impact on fines of a

similar concept of seriousness, we constructed our own seriousness index (compare Clinard and Yeager, 1980). In doing so we drew upon the available literature of groups opposed to surface coal mining as well as interviews we conducted with OSM personnel and representatives of environmentalist groups. These sources enabled us to rank order sanctionable mining practices according to their immediate or potential harm to private property, public health or the environment. Three points were assigned to the most serious violations (e.g., placement of spoil on the downslope, altering the chemical balance or siltation level of existing water sources), two points to moderately serious violations (e.g., improper revegetation practices, insufficient segregation of removed topsoil), and one point to the least serious violations (e.g., failure to post adequate signs or markers on the mine site, failure to maintain proper records of mining activities).

Our data permitted the use of only one extra-legal independent variable: the size of the mining corporation. This was operationalized as the total number of tons output during the year 1979 (National Coal Association, 1980). This variable was grouped into three categories. Small companies are those which produce less than 300,000 tons of coal during 1979, medium-size companies produced between 300,000 and 1,000,000 tons of coal, and large companies produced more than 1,000,000 tons of coal.

Temporal Order of Variables

Our analysis assessed the relative explanatory contributions of legal and extra-legal variables to the size of the fine imposed for violations of the interim regulatory program. In Figure 8-1

we present graphically the temporal ordering of the variables discussed to this point. We did not attempt to specify the precise nature and direction of the relationships between the variables, preferring instead to generate them in the data analysis.

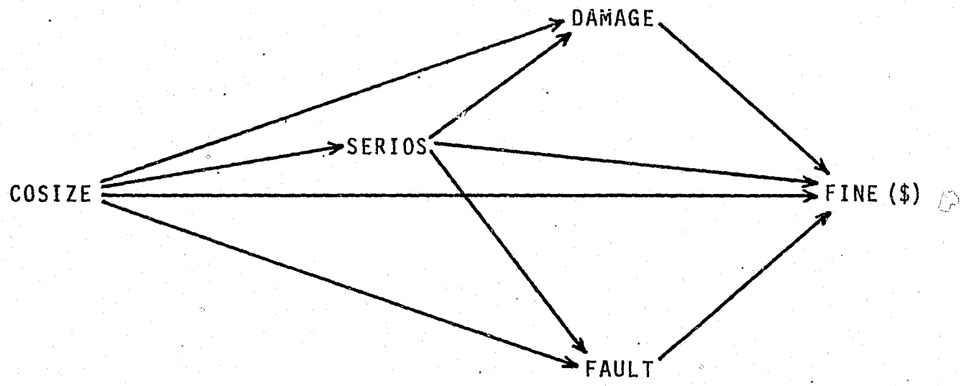
Analysis

We employed path analytic procedures to examine the direction and magnitude of the relationships between the variables in our model. The analysis enabled us to determine the nature and relative magnitude of the contributions which legal and extra-legal variables make to the size of the fine. We must emphasize, however, that since we did not select a probability sample, we employed regression analysis primarily for descriptive purposes. Therefore, inferences about extant populations or processes should be made with caution.

The analysis was an extremely stringent test of the impact of extra-legal variables. In previous research on criminal dispositions, the measure of seriousness has been based on the maximum sentence allowed by statute (e.g., Hagan et al., 1980) or on rankings of offenses by the public (e.g., Rossi et al., 1974). In such cases, seriousness potentially is independent of sanction severity, a characteristic of a "loosely coupled system" (Hagan et al., 1979). This study examined a "tightly coupled system," that is, a system in which law, regulations, detection of violations, and sanctions are closely conjoined. Two of our legal measures (assessed damage and assessed negligence) are among four used by OSM's assessors to set the amount of the fine. Thus, the

FIGURE 8-1

RELATIONSHIP BETWEEN VARIABLES



Where: FINE is the Magnitude of the Assessed Fine (in $)
DAMAGE is the Degree of Assessed Damage
FAULT is the Degree of Assessed Negligence
SERIOS is the Seriousness of the Violative Conduct
COSIZE is the Size of the Offending Corporation (trichotomized)

determinative impact of these legal variables necessarily will be quite strong. Under these conditions, any small increment to explained variance must be viewed as substantively significant.

Table 8-5 is a zero-order correlation matrix of the five variables in our analytic model. As can be seen, the simple relationships between the size of the fine and the degree of assessed negligence and assessed damage of the violation are positive and rather strong (r = .68 and .63 respectively). The relative independence of degree of negligence and damage is indicated by their moderate correlation (r = .25). Seriousness of violation is also related to size of fine and not so strongly related to assessed damage as to suggest that the two variables really are one. More importantly, these data support our expectation that company size is negatively related (r = -.18) to size of fine.

Table 8-6 shows the results of the path analysis. As expected, for the reasons previously indicated, the coefficient of determination is quite large (.70). The legal variables are strong, equal predictors of the size of the fine (B = .47 for assessed damage and .55 for assessed negligence). Our other measure of seriousness has no determinative impact when the remaining variables are controlled. This finding suggests that the extra-legal variable company size is a significant determinant of the size of the fine even after the closely coupled legal variables have been controlled (B = .11). Although it contributes only 1 percent to the explained variance, it remains statistically significant and theoretically interesting as well. Despite a rigorous effort by the OSM to eliminate bias from the santioning

TABLE 8-5

ZERO-ORDER CORRELATION MATRIX FOR ALL VARIABLES IN THE MODEL*

	FINE	DAMAGE	FAULT	SERIOS	Mean	S.D.
FINE					$994	$1,027
DAMAGE	.63				7.27	4.47
FAULT	.68	.25			12.84	5.08
SERIOS	.37	.53	.18		2.02	0.84
COSIZE	-.18	-.10	-.05	.01	2.01	0.84

*All correlations are calculated on listwise deletion basis (N = 663).

TABLE 8-6

STRUCTURAL EQUATIONS PERTAINING TO FIGURE

Dependent Variables	Independent Variables								
	COSIZE		SERIOS		DAMAGE		FAULT		
	B	b	B	b	B	b	B	b	R^2
SERIOS	.014	.014							.000
DAMAGE	-.104	-.546*	.534	2.800*					.295
FAULT	-.057	-.339	.184	1.094*					.037
FINE	-.106	-129.309*	.022	26.600*	.471	109.443*	.549	112.526*	.697

* Absolute value of the coefficient is at least twice as large as the standard error and the relationship is statistically significant (F test, $p < .05$).

process, large companies have entered a small wedge into the system. In addition, large companies benefit slightly in the assessment of penalities by virtue of the more limited damage wrought by their violations. We have interpreted this path as a reflection of an objective measure of damage.

Figure 8-2 is a summary path diagram in which all zero paths have been omitted. As would be expected, the coefficient of determination for the final model is substantially unchanged from Figure 8-1 (.70).

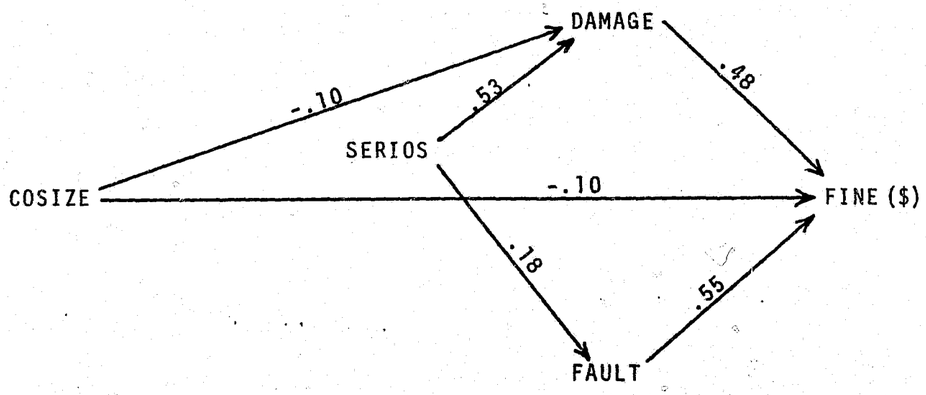
Discussion

As Hagan et al. (1979) suggest, the criminal justice system in the United States is a loosely coupled system. This absence of close integration is a major factor behind the rather large degree of unexplained variance in research on legal penalties.

Unlike the criminal justice system and many regulatory agencies, the Office of Surface Mining is a tightly coupled system. At least for the time period reported in this study, OSM enforced regulations which were very closely tied to its enabling legislation. OSM's enforcement agents were closely bound by promulgated regulations, and its penalty system was sharply constrained by law, regulations and inspection procedures. The size of the assessed fine reflects a concerted effort to rationalize the penalty system so that it is directly tied to the specific intent of the regulations and the mandate of the law. This tight coupling is a result of the technocratic, legalistic constraints operating during the period of agency formation. Even though OSM's regional offices were relatively autonomous in their

FIGURE 8-2

FINAL PATH MODEL



Where: FINE is the Magnitude of the Assessed Fine (in $)
DAMAGE is the Degree of Assessed Damage
FAULT is the Degree of Assessed Negligence
SERIOS is the Seriousness of the Violative Conduct
COSIZE is the Size of the Offending Corporation (trichotomized)

daily operations (loosely coupled to headquarters), the central Assessment Office represents an attempt to guard against regional or discretionary variances in the application of the law. Our data show the strong determinative impact of legal variables and the relative exclusion of extra-legal variables, at least for the early day of OSM's operations.

Nevertheless, our examination of the impact of extra-legal variables is quite stringent. Thus, the fact that company size directly influences size of the fine, even though minimally, suggests the presence of informal mechanisms of corporate influence on agency decision-making. The most likely source of bias is the field inspector (compare Diver, 1980). Interviews and survey data reveal that most inspectors feel confident they can influence the size of the fine by the wording of their reports. If this interpretation is correct, not only the direct path between company size and the fine but also the indirect path through assessed damage may reflect inspectors' biases favoring large companies. On the basis of a variety of data, it appears that larger mining companies benefit from the fact that agency-"client" confrontations are a match between salaried technicians in which large, but not small, industry has the upper hand. The dynamics of this process are discussed at greater length in chapter 9.

An additional point worthy of discussion is the nature of the enforcement process itself. OSM's enforcement strategy is strongly proactive. Hagan et al., (1980) show that a proactive enforcement strategy is a basis for a lessened degree of severity for white-collar offenders. They explain this as a consequence of

intensified negotiation (plea bargaining) which is an integral part of proactive law enforcement. Our study suggests a different relationship. The "new regulation" (Wilson, 1980), that is regulation of activities which may be detrimental to the quality of life, as opposed to the "old" economic regulation, is decidedly proactive. The OSM, enjoined by law to the mandatory inspection of all mining operations, employed an especially proactive enforcement strategy. Yet our data indicate only limited extra-legal bonuses for the advantaged parties (large mining corporations). The apparent difference in the two studies is the importance of negotiation. Extensive interviews with inspectors and operators alike indicate that negotiation plays a minor part in the determination of the violation and the subsequent fine. Our findings fit quite nicely with those of Hagan et al. in the sense that negotiations favoring the advantaged may be a minor source of differential penalties for the advantaged in both cases. Our study suggests that more limited negotiations produce more limited advantages. However, in contrast to Hagan et al's speculations, we see no reason to project that differentials in white-collar sanctioning are likely to increase because proactive enforcement is likely to expand. On the contrary, in the field of regulatory enforcement we expect that proactive operations will decline but that such decline will be associated with increased sanctioning advantage for the powerful.

Payment of Fines

As a final step in the data analysis, we examined the relationship between company size and whether OSM's files indicate

that the assessed fine ever was paid.

As noted earlier, we began with a sample of 735 notices of violation issued against 83 mining companies. Excluding cases in which no fine ever was imposed, those cases in which the initial fine was vacated entirely and cases which remained in the appeal process at the time of data collection, we determined that 301 NOVs had completed the penalty process. In Table 8-7 we show the relationship between company size and the dichotomous variables of whether the fine ever was paid. As can be seen, there is a strong relationship between the two variables; larger companies are substantially more likely than smaller companies to pay their fines.

While it is obvious that large companies can absorb the fine payments more easily than their small competitors, this finding also provides evidence for our earlier contention concerning the seriousness of violative behavior and company size. That is, because large companies tend to be more conscious of adverse publicity and the avoidance of a tarnished corporate reputation, they are less likely than smaller companies to commit serious infractions. By the same token, these large companies, who are concerned with the presentation of a respectable corporate image, will be more likely to pay their fines than smaller competitors whose image is not presented to a large public and corporate audience.

Collections and Referrals for Civil Prosecution

Examination of the OSM's efforts to collect civil fines also suggests that the penalty process did not function as its planners

TABLE 8-7

RELATIONSHIP BETWEEN COMPANY SIZE AND WHETHER ASSESSED FINE WAS PAID

Evidence Fine Was Paid?	Company Size			
	Small	Medium	Large	Total
Yes	38.3% (46)	67.7% (63)	81.8% (72)	60.1% (181)
No	61.7 (74)	32.3 (30)	18.2 (16)	39.9 (120)

Gamma = -.59

had projected. The collection of fines involves several steps within the federal bureaucracy. Once assessed, the violator has a period of time (about 30-90 days) to appeal the penalty in a regional conference. These conferences usually result in a 50 percent reduction from the initial fine imposed by the Assessment Office. After this period has expired, the OSM makes a collection attempt. When this is not successful, the OSM refers the fine to a contractor who reviews the file, determines the final assessment and tries to collect the fine. If full payment is not received, the contractor prepares a complaint and refers the case to the Department of Justice for collection.

By October of 1981, the OSM either had proposed or finalized assessments for $34,514,968.48. Of this sum, only $3,498,144.87 had been collected (about 10 percent). An additional $19,955,000.61 was still in the collection process; either it was not yet due from the violator or it was being processed for collection referral. This means that $11,061,823.61 had been referred to the Department of Justice for collection.

Of the total sum collected ($3,498,144.87), the OSM accounted for $1,888,358.05 (54 percent), the collection contractor was responsible for $1,596,964.00 (46 percent), and the Department of Justice had collected $72,822.00 (2 percent). A major problem in the collection of fines is locating the violators. In 1980, the agency cooperated with the regional solicitors to implement a test program to improve collection efforts. A private firm was hired to locate and bill violators who had not paid their fines. The test program reported an 87 percent "find rate," and was adjudged successful.

Traditionally, of course, most federal regulatory agencies have relied upon the Department of Justice to prosecute their civil and criminal penalty cases. The process, however, is not an efficient one, for after cases are referred to the Washington office of the Department of Justice, they are referred to the appropriate U.S. Attorney for follow-up. For a number of reasons, U.S. Attorneys do not assign high priority to such cases, especially those which involve only collection of civil fines. Data provided to us by the Department of Justice indicate that as of May 1982, a total of 1,373 cases had been referred by the OSM for collection of civil penalties. Of this total, 52.3 percent (718 cases) had not been filed as yet with the federal courts. Payment, either complete or partial, had been made in only 10.5 percent (144) of the total of 1,373 cases. The courts had issued judgments in an additional 15.4 percent of the cases, but they remained in various stages of the collection process (U.S. Department of Justice, Letter, May 6, 1982).

In the final analysis, there is more than a touch of irony in the fact that OSM's penalty process, which was constructed in order to avoid MSHA's inability to collect its penalties, encountered similar problems -- although for different reasons. Whereas the MSHA system permitted cited operators to exhaust all appeals before paying their fines -- a process which encouraged appeals -- OSM requires that penalties be paid <u>before</u> the appeal process is invoked. Unfortunately, the agency did not reckon with, nor plan for, the sheer magnitude of the task of collecting penalties from such a large number of mine operators. Collection

problems were exacerbated by the difficulty of locating many of the cited individuals and corporations, especially in Appalachia, who have tended historically to move in and out of the coal mining business on short notice. These individuals often times incorporate under one name, operate for a short period of time, and then dissolve the organization. Later, when the coal market "picks up," holding out the promise of substantial, rapid profits, they incorporate again, but under a different name. Obviously, the task of locating and inducing payment from such operators poses difficult problems. There is little evidence to suggest that the OSM anticipated and planned to deal with these problems. Inevitably, the rather poor record of collection calls into question the deterrent effectiveness of the threatened civil penalties (cf. Zimring and Hawkins, 1973).

CHAPTER 9

REGIONAL VARIATION IN INSPECTION AND ENFORCEMENT

In chapter 8 we examined the OSM inspection and enforcement program in terms of its initial organization, national mandates and policies, and its role in the implementation of the SMCRA. It was noted also that organization autonomy in the five regions produced variations in enforcement styles. That is, the organization of enforcement styles is contingent on a variety of variables external to the national mandates and policies as well as the daily routine of the OSM's field-level inspectors. This chapter documents the existence of relatively different enforcement styles in two of the OSM's five regions, and employs earlier theoretical analyses of regulatory bureaucracies and behavior to account for the different enforcement styles.

SOCIAL CONTEXTS AND ENFORCEMENT STYLES

Regulatory enforcement activity is a means of controlling or "policing" behavior. Consequently, there are some natural parallels between the work activities of regulators and the police. In both cases the controllers are faced with the problem of applying legal rules to specific cases. Typically, strict or literal enforcement of rules is impossible because they have ambiguous boundaries and referents, are subject to conflicting interpretations, or because the volume and complexity of violative activities exceeds enforcement resources. Thus, the manner in which law is interpreted or socially constructed is dependent on a variety of social factors.

We assumed, of course, that the distinction between enforced

compliance and negotiated compliance as regulatory styles should be apparent in field-level enforcement. In fact, observers of the regulatory process have distinguished, albeit in a somewhat more speculative fashion, different types of regulatory law enforcement (cf. Thomas, 1980; Kagan, 1980; Kagan and Scholz, forthcoming). Despite the fact that much of this work focuses on the individual inspector as the unit of analysis, the resulting theoretical insights would seem to be equally applicable to programmatic variation within extant regulatory bureaucracies.

An enforced compliance style is characteristic of inspectors who approach their work very much like police officers. Their orientation and approach is penal. This "rule-oriented" approach reflects the belief that literal application of rules, and strict, uniform enforcement deters violators and potential violators. Insofar as possible, these rule-oriented inspectors issue citations for every violation they observe during inspections. Correspondingly, they minimize the use of negotiational enforcement strategies, such as consultation and bargaining.

By contrast, other inspectors employ an enforcement style which emphasizes negotiated compliance. Employing a "results-oriented" approach, they are flexible and emphasize responsiveness, forebearance, and the transmission of information. Primary reliance on the strict, uniform application of rules and sanctions is considered less effective than negotiation as a method to secure compliance. Conciliatory inspectors may employ trade offs, gaming tactics and cajoling to gain compliance from violators and potential violators.

We must emphasize some potential limitations of these largely ad hoc formulations of enforcement styles. Fundamentally, they are hypothetical, ideal and global constructs and the nature and strength of their covariation is unknown. Doubtless they are not unidimensional, meaning that they are comprised of several different dimensions of enforcement behavior. Consequently, in the absence of additional research there is little reason to assume the two are entirely mutually exclusive or polar types. Stated differently, the constituent dimensions which comprise the respective types to some extent may vary independently of one another and thus produce mixed types. If this is true, then extant regulatory programs or personnel would be classified or typed on the basis of which type seems to predominate. Nevertheless, despite the qualifications these theoretical constructs clearly build upon real differences in the enforcement behavior of field-level regulatory personnel.

Research on the police has given us an embryonic understanding of the ways departments differ across communities and the kinds of contexts which seem to call forth certain types of organizational, i.e., structural, responses (cf. Reiss and Bordua, 1967; Gardiner, 1969: Manning 1977, 1980; Wilson, 1978). Obviously there is a lesson here for students of regulatory law enforcement: regulatory bureaucracies and operations are tied, in ways yet to be determined, to the characteristics of the "communities" (social matrix) in which they operate. Thus, regulatory personnel, like police officers, are not entirely free to work out idiosyncratic styles of enforcement behavior. Rather, the contexts in which they operate play an important part in their

"selection" of dominant organizational enforcement styles. Similarly, students of the regulatory process have begun to search for the apparent sources of structural and processual variation, not only across agencies but within them as well (e.g., Nivola, 1978). Our study of variations in enforcement styles among the OSM's regions proceeds against this backdrop of theoretical literature on styles of police and regulatory law enforcement.

BACKGROUND

In chapter 7 we discussed the OSM's formal organizational structure, which consisted of five regional offices providing coverage of the states. The formal structure of each regional office paralleled the formal structure of the headquarters, and each regional director was responsible to the Washington director. Within this formal structure, the regional directors managed to operate with some autonomy. The analysis in this chapter focuses on two of the regions, which we have called Region East and Region West.

Region East is located in the heart of the Appalachian coal fields. In Appalachia, coal is surface mined on relatively steep mountain slopes, in narrow valleys, and under a heavy average annual rainfall. There, much of the surface mined coal is produced by numerous small firms (Clelland et al., 1981). Among some Appalachian coal operators, indifference or hostility toward state regulatory programs and personnel was quite common before 1977. Wildcatting has been a problem in some areas of Appalachia and the abuses of surface mining there provided much of the impetus for passage of federal surface mining legislation.

By contrast, Region West is located in the west. The area is characterized by level or rolling terrain and an average annual rainfall that is much less than in Region East. Another important difference between regions is the pattern of ownership. Unlike Region East, where most of the coal is owned by industry or other private parties, the bulk of coal produced in Region West is owned by the federal government, by the railroads and by tribes of Native Americans.

Because so much coal in Region West is owned by the federal government, companies mining there have been accustomed to a federal presence over the past decade. These companies operate enormous surface mines which provide low-heat-content, low-sulfur coal to electric utilities under long-term contracts. As a rule, Western mines employ regulatory "professionals" who function as in-house "inspectors" and are responsible for tracking the operation's compliance with regulatory programs. Also, state regulatory authorities and programs have enjoyed a reputation for honesty and stringency superior to their Appalachian counterparts. Wildcat mining is not a significant problem in Region West.

CONTRASTS IN REGIONAL ENFORCEMENT ACTIVITIES

A variety of data suggest that OSM personnel in Regions East and West developed somewhat different approaches to or styles of enforcement. The approach in Region East emphasized enforced compliance, while Region West developed a negotiated compliance approach. This contention is supported by official statistics on OSM's enforcement activities and also by our interview and questionnaire data.

Statistical Data

Due to regional inconsistencies in record keeping in the early months, we chose the twelve-month period from July 1, 1979 through June 30, 1980 to examine OSM's inspection and enforcement performance in the two regions. Further, this period avoided the impact of funding and staffing delays discussed in Chapter 7. Also, by late 1980 many of the Western states had acquired primacy and OSM's enforcement activities were curtailed sharply in Region West.

In 1981, there were 6,689 "inspectable units" in Region East but only 161 comparable units in Region West (OSM, 1981). (Comparable, reliable statistics for earlier years are not available.) Given the substantial difference in these numbers, it would be expected that Region East inspectors would issue many more NOVs and COs than inspectors in Region West. In fact, this is what happened. During the specified time period, Region East issued 3,254 NOVs and 901 COs while Region West issued 88 and 5 repectively. However, these raw numbers on inspection activities must be converted into rates if they are to be used for purposes of comparison.

During 1979-80 Region East employed 60 certified, field-level inspectors while Region West employed only seven. Given this difference, and knowing nothing else about the two regions, we would expect that Region East inspectors would write a large number of NOVs and COs. When we convert the number of NOVs and COs to rates (# per inspector), this difference remains: Region East inspectors issued 54.23 NOVs and 15.02 COs per inspector

while Region West inspectors issued only 12.14 and 0.71, respectively.

Alternatively, we can calculate rates of enforcement activity by employing the amount of coal produced in the two regions as a base. Use of such a base measure can be defended as a surrogate measure of the total volume of earth which must be moved in mining operations. In turn, this serves as a reasonable measure of the total volume of mining activity that is potentially sanctionable. For the period of mid-1979 to mid-1980 the states in Region East produced 189.01 million tons (U.S. Department of Energy, 1981; 1981a). The rates of inspection and enforcement activity calculated for Regions East and West by these statistics indicate that inspectors in the former issued 17.22 NOVs and 4.77 COs per million short tons of coal produced during July 1979 and June 1980. At the same time, inspectors in Region West issued only 0.44 NOVs and 0.03 COs per million short tons of coal produced.

A final comparative measure of inspection activity in the two regions can be calculated using the total number of completed inspections. During the period in question, Region East inspectors completed 12,451 inspections and Region West inspectors completed 378 inspections. The resulting rates are 2.62 NOVs and 0.73 COs per ten inspections in Region East and 2.34 NOVs and 0.14 COs in Region West. On this measure, as on the others, there is a substantial difference in the level of inspection and enforcement activity in the two regions. Table 9-1 provides a summary of the various measures, including comparable statistics for all OSM regions.

TABLE 9-1

SUMMARY MEASURES OF OSM INSPECTION AND ENFORCEMENT ACTIVITY, JULY 1, 1979 TO JUNE 30, 1980

Region	Number of NOVs per:			Number of COs per:		
	Inspector	Ten Inspections	Million Short Tons of Coal[a]	Inspector	Ten Inspections	Million Short Tons of Coal[a]
East	54.23	2.62	17.22	15.02	0.73	4.77
West	12.14	2.34	0.44	0.71	0.14	0.03
Total (U.S.)	32.31	2.01	8.45	6.54	0.40	1.66

[a] U.S. Department of Energy, 1981; 1981a.

In addition to the data contained in Table 9-1, statistics on referrals for criminal prosecution show a marked regional difference (chapter 8). Between 1978 and 1982 Region East solicitors referred twelve cases to U.S. attorneys for criminal prosecution while their counterparts in Region West did not refer any cases.

In view of their different histories and production problems, we may assume that a part of the reason for these differences in inspection and enforcement activity in Region East and West is the natural result of real differences in the incidence and prevalence of sanctionable mining practices. Unfortunately, this interpretation only shifts the problem of understanding; we still need to determine how regulatory personnel interpret objective differences in mining practices and violations and how they convert these interpretations into distinctive enforcement policies and practices.

Interview and Questionnaire Data

As the foregoing statistical data suggest, a program of vigorous, rule-oriented enforcement took shape in Region East. There, as one inspector told us, OSM "started out . . . like a bunch of SS troops." Region East inspectors were imbued with a philosophy of firm, impartial enforcement and were encouraged to apply the regulations in a quite literal fashion. Another Region East inspector stated:

> When you put the hard hat on and get out of the truck on that mine site, you've got to be -- you just, you're like a state cop out there. You've got to enforce the

law. No more, or no less . . . At least that's the way this office is run. That's the way they're all run in this district. And in this Region.

Because relatively little emphasis was placed on the need for and the desirability of discretion and flexibility, enforcement in Region East manifested important features of the enforced compliance style discussed earlier.

A different style of enforcement was developed in Region West. From the outset, managers there viewed the SMCRA and the regulations as flexible resources. Whereas a rule-orientation was characteristic of Region East, Region West managers opted for the results-orientation of negotiated compliance. Vigorous, uniform rule enforcement was played down as a necessary or even desirable strategy.

I think [the director of Region West] thought, and had, you know, I think . . . I heard him speak one time in a citizen's group meeting and say: "Look, I understand in the East why they [OSM] 'hit the ground running,' but I'm not about to go to the Exxons and the Peabodys -- that's who I deal with out here. I don't deal with jackleg coal miners, you know, 'M.C. Coal Company,' you know, mining ten thousand tons a year. I deal with these multi-million dollar operations. So I'm going to be very cautious."

In Region West relatively greater emphasis was placed on conciliatory enforcement and efforts to work accommodatingly with mine operators.

We reasoned that Regional differences in enforcement styles

would be reflected in regional variation in inspectors' questionnaire responses. Based on an analysis of the enforced compliance and negotiated compliance styles, we constructed two scales designed to measure differences among inspectors: a legalistic scale and a conciliatory scale. A high score on the former indicates an enforced compliance approach, while a high score on the latter is consistent with a negotiated compliance approach to enforcement. Aggregated scores can be used to examine regional differences.

We have produced the results of the questionnaire measures in Table 9-2. (Readers should note that due to the low number of respondents in Region West the statistics must be interpreted with caution.) Consistent with expectations, Region East personnel scored substantially higher on the legalistic scale than did their counterparts in Region West (mean scores of 4.95 and 2.33 respectively). Contrary to our expectations, however, there was no appreciable difference between the two regions in inspectors' scores on the conciliatory scale (9.18 in Region East and 9.33 in Region West).

Although we are puzzled by the regions' comparable scores on the conciliatory scale, several possible explanations for this come to mind. First, we note that the three items which constitute the conciliatory scale, for the most part, deal with consultation and education of mine operators; there are no items which directly refer to inspectors' use of negotiational enforcement strategies. Thus, the conciliatory scale lacks the same degree of face validity which is evident in the legalistic

TABLE 9-2

REGIONAL VARIATION ON DIMENSIONS OF REGULATORY ENFORCEMENT STYLES

	Region East			Region West			U.S. Total		
Dimension	$\bar{X}$ Score	S.D. S.D.	N N	$\bar{X}$ Score	S.D.	N	$\bar{X}$ Score	S.D.	N
Legalism[a]	4.95	3.05	44	2.33	1.63	6	4.59	2.57	126
Conciliatory[b]	9.18	1.82	44	9.33	2.07	6	8.51	2.35	126

[a] A three-item scale (Cronbach's alpha = .67). Items are: "Generally the requirement that OSM inspectors write an NOV on every violation they observe is not an effective regulatory strategy" [0 Strongly Agree; 1 Agree; 2 Undecided; 3 Disagree; 4 Strongly Disagree]; "The best way for inspectors to do their job is to go strictly 'by the book'" [4 Strongly Agree; 3 Agree; 2 Undecided; 1 Disagree; 0 Strongly Disagree]; and "I have tried to enforce the interim regulations strictly and uniformly, much as a police officer would do" [4 Strongly Agree; 3 Agree; 2 Undecided; 1 Disagree; 0 Strongly Disagree]. Responses to the three items were summed.

[b] A three-item scale (Cronbach's alpha = .77). Items are: "Compliance with the regulations is easiest to obtain if the inspector advises and works to educate the operator"; "In my work I have tried primarily to educate and consult with coal operators"; and "The best way for inspectors to do their job is to consult with and try to educate mine operators." Response alternatives to all three items were: [4 Strongly Agree; 3 Agree; 2 Undecided; 1 Disagree; and 0 Strongly Disagree]. Responses to the three items were summed.

scale. Second, as we pointed out earlier, legalism and conciliation, as enforcement styles, probably do not appear in "pure" and mutually exclusive forms in the real world. If this is the case -- and there is little research to aid us here -- then our enigmatic findings may be more commonplace and representative of actual variation among inspectors and regulatory programs than existing theory allows. Third, because OSM was a new agency it may have been extremely difficult, especially in Region East where operators were poorly informed about the regulations, for personnel who implemented the program to emphasize excessively either of the two styles of enforcement. Put differently, inspectors charged with applying a new set of regulations may find it relatively difficult to avoid completely the use of some consultation and education as a routine part of their duties. There is, in fact, a good deal of interview data to suggest the validity of this interpretation. For example, a Region East inspector told us:

> I've had some [mine sites] where I go out there and make the inspection, and find he's not even started on it yet, still buttoning up his last job. And he's not started on the area I intended to inspect. And that's a sterling opportunity to take him by the hand and go out there to the area that he's going to mine and say, "now, you're permitted [mine permit] for a silt pond down here . . . and this is the way I want it constructed, just like the plans say. Now if you're going to have a problem with this, you know, need a board baffle in there and you want to change that to rock, it's easier

> to do. But, you know, these are things you need to be thinking about before you start in there and get yourself all sideways." He might have had some problems with his topsoil. "How are you going to pile your topsoil up above the highwall? That's ridiculous." I said, "there ain't no way." I said, "well, that's something you need to change before you get out here and get sideways, you know. You're doing the work I've told you on your other jobs but, you know, get the permit changed so you can stay straight before you get wrong. Do it right the first time."

Fourth, it is possible that Region East inspectors, because they deal with a more heterogeneous group of operators than does Region West, had various categories of operators in mind when they responded to the questionnaire items. Fully aware, on the one hand, of a group of willful violators -- amoral calculators, in the words of Kagan and Scholz (forthcoming) -- they endorsed the highly legalistic approach to enforcement. On the other hand, because they also were aware of operators whose noncompliance resulted from ignorance or ineptitude -- organizational incompetents (Kagan and Scholz, forthcoming) -- they scored high as well on the conciliatory scale. We suggest the latter two interpretations probably are the major explanation for the two regions' equivalent scores on the conciliatory scale.

ANALYSIS

Analysis of the data suggests that the major determinants of regional variation in enforcement styles can be grouped into

regional differences in: (1) employees' experiences with and beliefs about coal operators and state regulatory programs; (2) their political and regulatory environments; and (3) their regulatory tasks.

Employees' Experiences and Beliefs

Managerial personnel in the two regions took their posts with an understanding of the historical differences in surface mining east and west. Those placed in Region East were fully cognizant of the historical record of weak enforcement and operators' recalcitrance in Appalachia. Supervisors and managers in this region had prior experience of one kind or another with the Appalachian coal industry. A portion of their inspector corps previously had worked for state regulatory programs in Appalachia and had experienced the frustrations of those experiences. A number of them saw their OSM employment as an opportunity to establish a regulatory program that would be taken seriously by the industry -- something that, in their opinion, had not been true of the state programs in which they had labored.

They operated under no illusions about the ease of their task. A certain resistance to any form of external interference was seen as almost second nature in some areas of Appalachia.

> It's attitude. I don't know whether it's -- maybe environmental -- you know, the way that a person is from childhood, raised up with a certain independence. The people in _____ County -- and I admire them to a great extent . . . I admire them because they are a -- in the mountains they are an independent, very

> independent-type people. They don't appreciate anyone -- whether it is federal government, whether it's the county, the state, whoever, you know -- they don't appreciate anyone coming up there and saying "now, you've got to do this." They look at it that you're encroaching on something that's none of your business. Their attitude is "this is my land. I'll do with it what I darn well please." And they'll go so far as to say "as long a it's not hurting anyone else, then why are you up here hassling me about it?"

In addition to an awareness of this general antipathy toward external interference, supervisors and inspectors alike were aware of the existence of a group of operators considered to be "hard core nonconformists." Some of these operators had threatened or assaulted state inspectors in the past with relative impunity.

> [Y]ou've got [one kind of operator] that practically won't talk to you at all. They just . . . you don't, you really feel uncomfortable around them 'cause you don't know -- you're afraid they're going over the edge any minute. They practically won't talk to you, and consider you to be a Communist and everything else. But I've been fortunate, I haven't had too many of these kind. Usually this -- your wildcat category is where these kind of operators fall.

OSM's Region East personnel saw their task, in part, as one of curbing this segment of the industry and, generally, bringing the rule of law to the operation of the Appalachian surface mining

industry.

Aware of the history of ineffective state regulation, they wanted to set an example of vigorous, effective enforcement for the states, which eventually would acquire primacy.

> [O]ur philosophy was: "worst case operators" first -- ones the states wouldn't go on, you know . . . We realized that because there had never been enforcement back here, and there was going to be mandatory enforcement by the states, that OSM literally had to lead the way, sort of show that this is what was going to be expected in the future when you get your turn -- which is coming up. And you couldn't very well demand that of them [the states] if you didn't demand it of yourself, and at first take on the worst. It's sort of like beating up the "bully on the block." Take on the bully on the block. Beat him up real good . . . and then half your problems are over because the word gets out.

Region East managers believed that aggressive, consistent enforcement, especially against known violators, would enhance the operators' perceptions of the credibility and legitimacy of OSM and its operations. Because of the existence of operators' communication networks, such enforcement activities, would eventually convince them that the OSM, unlike state authorities, would not simply "go away." A Region East manager told us:

> Essentially, there's a big grapevine out there. I mean, I'm not a neophyte to the industry, not knowing there's a big grapevine. And if "Fred" tells "Joe" that "gee,

> yes, the OSM visited me and here's what they told me." And, "boy, they socked me a good one and I had to . . . and I've just been assessed a $27,000 fine. Oh, my God." And they do talk like that in bars. They don't share enough information, I think, for reclamation techniques.

In addition to their general suspicion of state regulators and segments of the coal industy, Region East personnel realized they would be dealing with many operators of limited literacy skills, whose mine planning rarely extended beyond a few days or weeks. For such operators, a major task simply of informing and educating them would be required. In short, OSM personnel approached their work with an assumption that the job would be difficult, that state regulation had been ineffective or corrupt, that many operators would resist their actions, and that an aggressive enforcement program would be required if the operators were to take the program seriously. Only by vigorous, impartial and consistent enforcement would the operators come to see the program as credible and legitimate, major objectives in Region East.

Although differences should not be overstated, on balance, personnel in Region West began their work with a different set of assumptions. They understood that western coal producers were accustomed to strict regulation, and perceived regulation itself as a legitimate governmental function. Consequently, Region West personnel did not anticipate a high level of operator resistance to their efforts. In the west, mines are extremely large and

mining is based on production schedules made sometimes years in advance. Long range planning is an integral part of the mining process and mine personnel do not present the same kinds of basic literacy problems encountered in portions of Appalachia. Furthermore, there is no evidence to suggest the existence of any significant level of operator defiance, either, as an individual or cultural phenomenon in the west -- especially when compared with Appalachia.

In Region West, personnel also assumed a higher overall level of good faith on the part of coal operators who, it was believed, were interested in mining in an environmentally sound way and also avoiding adverse publicity.

> Most of the mines out here are rather large mines. There are very few small ones . . . For instance, we're talking about mines with several thousands of acres involved. As compared to mines back East that have less than one acre. Now the people that run these mines are large companies, mostly, and public opinion is very important to these outfits. And the attitudes, the working relationships we had with the operators here were much different than those relationships back in Appalachia . . . The attitudes of people here are a lot different . . . so you don't have the failure to abate situations that arise in the East.

The importance of examining differences in an inspectorate's shared beliefs about or perceptions of (1) prior levels of regulation, and (2) operators' resistance and their compliance capabilities should be obvious. We assume that an agency's

personnel devise regulatory strategies, in part, on the basis of these collective perceptions (cf. Kagan and Scholz, forthcoming).

In our mail questionnaire we asked several questions designed to assess inspectors' perception of the trustworthiness of coal operators and state regulatory authorities. Table 9-3 summarizes responses to three questions about these issues and areas. As can be seen, the results are consistent on all three measures: Region East inspectors generally are more suspicious of coal operators, perceive a higher level of willful noncompliance, and are more fearful of an erosion of industry compliance after the states acquire regulatory primacy.

Political Environment

As discussed in other chapters and elsewhere (cf. Shover, 1980), the struggle to enact the SMCRA was bitter and protracted. Nowhere was the conflict more intense than in the coal fields of Appalachia. The suspicions and antagonisms engendered during the battle did not abate when the Act was passed. Rather, they persisted and were brought to bear in critical scrutiny of and attacks on the OSM, especially by segments of the mining industry (see chapter 8). Generally, industry's criticism has been considerably more intense in Region East than in Region West.

Though few in number, the large, complex surface mines in Region West promise to alter drastically the nature of the national coal market. As a result, many Appalachian operators view them as an economic threat. When the OSM appeared, they embraced a conspiratorial view of OSM and its relationship with the large mining companies. In the eyes of Appalachian operators,

TABLE 9-3

REGIONAL DIFFERENCES AMONG INSPECTORS IN PERCEPTIONS OF COAL OPERATORS AND STATE REGULATORY AUTHORITIES

Perceptions	Region East $\bar{X}$ Score	S.D.	N	Region West $\bar{X}$ Score	S.D.	N	U.S. Total $\bar{X}$ Score	S.D.	N
[a] Degree of Willful Noncompliance by Coal Operators	1.70	0.63	44	0.83	0.41	6	1.59	0.70	126
[b] Coal Operators' Trustworthiness	1.05	0.91	44	1.33	0.82	6	1.20	0.98	126
[c] Distrust of State Regulatory Authorities	2.61	0.97	44	1.83	0.75	6	2.59	0.98	126

[a] "Based on your personal experience, how often do mine operators willfully and knowingly violate the federal regulations?" [3 Very frequently; 2 Frequently; 1 Infrequently; 0 Almost Never]

[b] "Most coal operators can be trusted to do the right thing and to mine their coal in an environmentally sound way." [3 Strongly Agree; 3 Agree; 2 Undecided; 1 Disagree; 0 Strongly Disagree]

[c] "Most of the progress that OSM has made toward curbing mining abuses will be lost when state regulatory programs are implemented." [4 Strongly Agree; 3 Agree; 2 Undecided; 1 Disagree; 0 Strongly Disagree]

OSM was working in concert with western producers to eliminate eastern competition. As one Region East operator suggested:

> The [western coal producers] can't market their coal against our coal. So, they use the federal government to put the clamps on us in order for them to build the market up for their coal.

Such beliefs are widespread among the smaller Appalachian coal producers (cf. Lynxwiler and Groce, 1981).

Historically, the coal industry has been a major source of governmental revenue in Appalachia. Coal operators were aware of their importance to state economies and often times they used the threat of relocation to states with less stringent regulation in order to maintain regulation at the lowest common denominator. This history of economic blackmail was a major rationale for enactment of SMCRA. After OSM began operations, the various states in Region East attacked it for the feared harm it could produce for regional coal operators and, therefore, employment rates and tax revenues.

The picture has been different in Region West (see chapter 6). While the Western states have attacked the federal regulatory presence, it has been in the context of the more generalized "Sagebrush Rebellion." This movement by westerners and their elected state representatives casts the federal government in the role of a greedy, insensitive owner of large tracts of Western land, which usurps the states' right to use and develop them for their own purposes. In this context, attacks on OSM lost much of their special focus.

Finally, in Region East OSM began operations against an

historical backdrop of considerable indigenous citizen opposition to the excesses of surface coal mining. Because much of the strip mining in Appalachia is conducted adjacent to or near homes or rural settlements, the environmental, social and property damage from this type of mining has affected many citizens. Though not completely free from oversight by citizen's groups, this has not been true to the same extent in Region West, where there are relatively few mines which tend to be located in remote areas away from family farms and settlements. Moreover, in Appalachia, grassroots movements openly express feelings of pent-up frustration concerning the perceived venality and powerlessness of state regulatory authorities. When OSM arrived on the scene, citizens were urged to exercise their rights under the SMCRA and told that only by doing so would past abuses be corrected and curbed (e.g., Center for Law and Social Policy, 1978).

There is a clear, substantial difference between Regions East and West in the number of citizen complaints received about harmful or dangerous mining practices. During 1979-80, Region West received only five, while Region East received 445. Given the large number of mines in Region East, it is to be expected that some difference would occur. Consequently, we converted the number of citizen complaints to a rate, that makes comparison across regions more meaningful. These data are contained in Table 9-4. The data in Table 9-4 show clearly that even when alternative measures are used for the base, the rate of citizen complaints in Region East far exceeds the rate for Region West.

OSM's Region East program and personnel were attacked on a

TABLE 9-4

SUMMARY MEASURES OF CITIZEN COMPLAINT ACTIVITY, JULY 1, 1979 TO JUNE 30, 1980

Region	Number of Complaints	Number of Citizen Complaints Per: Inspector	Inspections	Million Short Tons of Coal
East	445	7.42	0.67	2.35
West	5	0.71	0.31	0.03
Total (U,S.)	1043	6.56	0.61	1.28

variety of fronts. Industry was hostile and suspicious that enforcement was conspiratorily lax in other regions, where larger companies mine coal. The states were critical because the federal government had usurped their primary regulatory role and they feared their "own coal producers would be disadvantaged by stringent regulations. And citizens' groups, who were emboldened and made more determined by passage of SMCRA, were vigilant in their scrutiny of Region East operations. In sum, the political environment in Region East was conflict-ridden, whereas Region West's was much more placid. Of what consequence is this difference in the two Regions' political environments?

Based on a review of the literature on regulatory agencies, Thomas has suggested:

> To the extent that an agency must concern itself with a hostile or unpredictable political environment, it will attempt to control the discretion available to officials who must apply rules to individual cases (1980: 121).

But did the alternative use of discretionary powers originate at the Region level, or in regionally-different policies emanating from OSM headquarters? Our analysis suggests the former as the major reason why Region East and West developed different enforcement styles. We determined that extra-regional directives and constraints were not appreciably different for the two regions; both operated under similar policies and incentives from OSM headquarters.

Headquarters executives generally favored a "hard line" and advocated aggressive, enforcement practices. They believed that environmentally harmful mining practices were ubiquitous, and fair

game for a relatively literal application of the regulations. Regional managers and personnel were aware of this preference for an enforcement style of enforced compliance, as well as efforts by HQ executives to determine if they were pursuing violations vigorously. For the most part, these efforts met with a polite resistance in the regions. For the first two years of OSM's operations a continuous, mild tension existed over this issue. Generally, the regions regarded headquarters' efforts as meddling. Just as importantly, headquarters never had the opportunity to develop and impose on the regions a uniform, consistent policy and guidelines for the inspection and enforcement program. Headquarters operated under severe time constraints imposed by the Act's rigid, mandated deadlines and OSM's late start-up, which was caused by its delayed funding. As a result, the regions operated in a vacuum of sorts and were compelled to develop their own inspection and enforcement approaches (OSM, 1980b). In any case, the evidence suggests that these hierarchical preferences and pressures were not of major importance in the development of different enforcement approaches in Regions East and West.

Thomas's comments indicates that regulatory agencies might adopt a police-like, impartial enforcement program as a strategem to separate the agency and its operations from a partisan, conflict-ridden political environment. Along the same lines, an investigator of a legalistic police department claims that

> the administrators of these departments want high arrest and ticketing rates [in traffic enforcement] not only because it is right but also to reduce the prospect (or

> the suspicion) of corruption, to protect themselves against criticism that they are not doing their job or are deciding themselves what laws are good or bad, and to achieve, by means of the law, certain larger social objectives (Wilson, 1968: 180).

A similar dynamic occurred in Region East. Little wonder that managers there felt it necessary to "prove" that OSM was not corrupt, playing favorites, or conspiring with large coal producers to destroy their smaller competitors. In the manner of Caesar's wife, they would be above suspicion. At the same time, they favored impartial, consistent enforcement throughout OSM's regions of operation. With respect to the more flexible enforcement style adopted in Region West, one Region East manager opined that personnel out there "never read the Act."

In the much calmer political environment of Region West, personnel could afford the luxury of more flexible enforcement. Relatively immune to the suspicions and criticisms of diverse groups, they were less concerned that weak enforcement in other regions would undermine their credibility with Region West operators. Consequently, there was little if any emphasis on the need for enforcement consistency across all five OSM regions. It is not surprising, therefore, that the Region West director would say that while the SMCRA "is a national Act,"

> in fact, there are distinct regions of coal mining with different histories and cultures and, therefore, there also will be distinct programs implementing this national Act. It isn't a regionalization of the objectives. It's a regionalization of the implemen-

tation (ENERGY DAILY, 1978).

There is an additional way in which local conditions in the two Regions affected their respective enforcement programs. The mining "community" in Region West is much smaller and homogeneous than in Region East. Further, the mining company representative, with whom regulators interact, usually are well-educated and outwardly sympathetic to the goals of regulation. In another word, the Region West mining community enjoyed a degree of consensus on mining and regulatory objectives to a much greater extent than in Region East. In communities where there is substantial consensus, according to an observer of the police, they are likely to

> feel that they can use their judgement in a particular case without having to choose, or without being thought to have chosen, between competing standards of order held by different persons or subcultures. And if the community is small in addition, the police are more likely to have information about the character of a large number of citizens and thus some grounds for making a valid judgement about their likely future conduct. Stated another way, the police in a small town may believe that they are treating equals equally even when they do not treat everybody the same (Wilson, 1968: 219-20).

In the small, normatively homogeneous community, enforcement takes on a personalized flavor. For example, while inspectors in Region East were assigned to areas of the states in which they worked and

responsible for inspecting all mines in their area, Region West managers made individual assignments to particular mines and inspection visits. This was done to achieve what they believed would be the optimal match of inspectors with mine personnel or mine problems:

> What I try to do is find out what strong points and what weaknesses each different inspector has, and make your assignments accordingly. (Unless it's to the point where you find a weakness that you have to correct.) . . . If you have an inspector who is a, who's able to get along with people well, then you'd make your decision, you know -- if you have a company that the people that are running the company are technically oriented . . . then you send a technical guy up there. They know how to communicate. If you got somebody that's running a company who's a little bit difficult to deal with, then you send your diplomat.

A final difference in the local environments of Regions East and West must be noted. In areas such as the latter, where a high level of consensus and, presumably, compliance exists, there is little need correspondingly for vigorous enforcement. Those already in compliance voluntarily will be relatively unaffected by what happens to those who do not comply. However, in areas where the rate of compliance is rather low, regulators must stand ready to employ aggressive enforcement against violators lest the rate erode even futher (compare Rose, 1959). Harsh enforcement serves as a signal of reassurance to voluntary compliers that they will not be harmed economically by their compliance. As Wilson notes

about legalistic police department:

> [T]he law must be enforced with a special vigor in those areas where community norms appear weakest; failure to do so would penalize law-abiding persons in those areas and inhibit the development of a regard for community norms among the law breakers (1968: 285-86).

Our data suggest the same relationship is true of regulatory agencies.

The environmental differences we have discussed here were the principal determinants of the development of somewhat different styles of enforcement in Regions East and West. However, we do not believe they account for all the variation in the respective enforcement styles; conditions or characteristics of the task OSM personnel were required to perform also played a part.

Regulatory Tasks

Inspection and enforcement personnel in Regions East and West were mandated by the Act to perform identical tasks: inspection of surface coal mines. However, this equality of legal task obscures real differences in their mandates, and in the social organization of mining and inspecting in Regions East and West. And these factors helped to create a difference in the nature and difficulty of the task which inspectors in the two Regions were called on to perform.

Despite passage of the SMCRA, responsibility for issuing mining permits, even during the interim program, was retained by the states. Because of the presence of federal coal, Region West presented the only deviation from this arrangement. To a great extent, Region West personnel used their control over the mine

permit process as an enforcement tool. They could, and did, employ permit reviews to extract promises of sound reclamation practices from potential mine operators. Other regions, because they lacked control over permitting, necessarily relied more extensively on conventional I&E procedures. However, this was not the only difference between Regions East and West.

Because the mines in Region West are large and complicated, their organization and staffing patterns are more complex than in Region East.

> Most of the mines in the west have a resident environmental specialist, either at the mine or at least someone who is assigned those duties. A lot of the larger mines -- most of them, in fact -- have people who are trained in regula-tory compliance function. And those are the people you deal with. The people back in the East -- at least when I was back there -- the people that you deal with are the pit foreman or the mine superintendent, who's actually at the mine. And his main job is production . . . you're dealing more with production-oriented people in the East. And in the West, most of the people you deal with are not <u>produc-tion</u> oriented, but environmentally oriented.

It is the responsibility of these specialized reclamation personnel to monitor developments in the regulatory matrix in which mining is conducted, to stay abreast of advances and alternatives in reclamation practices, and to plan for reclamation in a legal, cost-effective manner. Specialized personnel are

fellow salaried technicians, generally are well educated, and tend to accept the principle, if not the content, of regulation. Also, they possess a long-range understanding of mining and reclamation plans on particular mine sites. They can demonstrate to the inspector how apparent deviations from the regulations are integral parts of comprehensive plans and to suggest alternative methods for accomplishing reclamation objectives. In a word, specialized personnel are much more likely to be civil and "reasonable" toward inspectors.

The picture is very different in Region East. There, when inspectors arrive at a mine site they are more likely than not to encounter and deal with production personnel. Such individuals tend to be poorly educated, to lack a detailed understanding of the regulations, and to be unsympathetic toward any interference with production activities and schedules.

> Q.: . . . What are the relative advantages and disadvantages, from the inspector's standpoint, of having to deal with production people, as opposed to specialists in reclamation?
>
> A.: . . . The guy . . . the production people -- you have to explain, re-explain. He doesn't even know what part of the regulations you're talking about. The reclamation guy, that's his job. I mean, you don't even have to, probably, cite the regulations. He knows it. In other words, he <u>knows</u> he may be incorrect. Or he knows how to articulate, "gee, I'm trying to do this instead of doing that. So I'm not in violation." He knows how to properly -- for his side -- articulate the

argument against some sort of enforcement action, possible enforcement action. Or, he can demonstrate, "here's what we're doing, here's how the mine will proceed," you know. "Here's how I'm going to do this, and later, when I come around to this cut, I hope to take this point off and put the pond over here, relocate or divert." He can sort of look into the future, and look at what they did. He's <u>knowledgable</u> of those regs. Production guy -- I mean, I've been on sites with inspectors where some of the <u>simplest</u> violations . . . has to be explained ten times. Often [the] production guy will take his reclamation plan and never look at it. Throw it in the truck, that's it.

> Q.: It's much easier to deal with specialists?
>
> A.: Right.
>
> Q.: Makes the job more manageable and, I would imagine, just less of a headache?
>
> A.: Oh yeah. Oh yeah. Oh yeah, that's for sure. Even if you get in an argument, I think it's less of a headache. At least you're arguing with someone who can articulate with you and speak to you on the level of the regulations, rather than "I hate these goddamned things. And I can't do anything with them and I wish they were . . . They're a bag of shit and they're costing me a million dollars".

But while specialized personnel pose no physical threat to inspectors, they can be a threat nonetheless. As an inspector

told us:

A.: Back in the East], with small operators, it [is] more of a "down home attitude."

Q.: "Good-ole'-boy" type thing?

A.: Good-ole'-boy approach. Whereas out here, when you're dealing with, like a large technical staff, with a person in every specific field you're much more on your guard for technical issues and addressing things technically rather than just, you know, a broad, sweep-of-the-hand type approach.

Q.: Do the large companies ever intimidate you, just because they have so many experts in each different field?

A.: Sure.

Q.: How do you deal with that?

A.: Well, I personally, am more careful. When I'm writing a violation, I'm real careful that I have "the goods," so to speak, before I act. But the problem out here is a lot of the people that you're dealing with have a better technical understanding of the problems than perhaps I do which makes it difficult . . .

Q.: Well, what do you do in that case, just concede to a greater amount of knowledge?

A.: Well, I think in some cases I probably do, realistically . . . It's pretty hard to try to -- the correct word is "argue" -- about a specific situation and you don't know as much about it as the person you're arguing with.

On both counts then -- because specialized personnel are reasonable and knowledgable -- Region West inspectors may approach their duties with a degree of deference, circumspection and, therefore, conciliation which is less common in Region East. The lessons here, while commonplace, are important nonetheless. First, a civil clientele begets a civil, conciliatory enforcement style. Conversely, an angry, disrespectful or defiant clientele begets a more aggressive, determined enforcement style, on the assumption that only by such actions can future problems of a similar nature be deterred (compare Reiss, 1971). And second, regulatory encounters in which the enforcement agent feels less knowledgable than the other party contain the potential for overly deferential and, therefore, lenient treatment.

CONCLUSION

We have indicated some of the ways that differences in personnel, policital environments, and nature of the regulatory task produced somewhat different enforcement emphases or styles in two regions of a newly-created regulatory agency, the Federal Office of Surface Mining. While all three factors played some part in shaping the two enforcement programs, certainly the substantially different political environments of Regions East and West were important. There is ample support in this analysis for Kagan's (1980: 7) suggestion that "inspectorates . . . confronted with rising legal contestation and challenges to their authority, respond with enhanced mistrust and legalism."

CHAPTER 10

THE OFFICE OF SURFACE MINING SINCE 1980

Ronald Reagan's victory in the 1980 Presidential election was the precursor of dramatic, immediate change in the policies and practices of the Office of Surface Mining. Although it is easy to describe these changes and some of their more immediate consequences, their long-term impacts are more difficult to discern. This chapter focuses primarily on the immediate impact of the change in administrations.

POLITICAL VALUES

In his election campaign, Ronald Reagan sounded three themes which later found expression in his appointments to Interior and the policies they enunciated. Candidate Ronald Reagan expressed a determined faith in the "free enterprise system" and its ability, if unfettered, to provide economic prosperity for the American people and growth for the American economy. At the same time, he railed against "overregulation" as an economically harmful process which created unnecessary obstacles to productivity for American businesses. It was time, he charged, to throw off the yoke of government regulation so that business once again could exercise its creativity, provide jobs for American workers, and increase its productivity. Finally, Reagan charged that the federal government had usurped too many powers and prerogatives which properly belong to the states. This alleged usurpation was bad in its own right but, even worse, it led to inefficiency and ineffectiveness in the provision of innumerable governmental services. Significant gains in these areas would occur only if

responsibilities for a number of governmental programs which, over a period of some fifty years, gradually had been arrogated by the federal government, were returned to the states and local governments.

Consistent with these interpretations and charges, candidate Reagan pledged that if elected he would launch a program of "regulatory reform" to remove regulations and regulatory apparatuses which were burdensome, cost-ineffective, and counterproductive for Americans and for American business. Coupled with this pledge was another; Reagan promised to enhance the power and responsibility of states governments. Following his election, President Reagan moved to implement his promises and vision.

NEW DIRECTIONS

The Winds of Change

During the period of transition to the new administration, a number of agencies were the objects of study. The Heritage Foundation, a politically conservative, Washington-based "think tank," subjected the Office of Surface Mining to especially critical scrutiny (Heatherly, 1981). The report scorned the OSM for its "zealotry," in promulgating regulations "far in excess" of the requirements of the Act, and charged it with having completely excluded "developmental interests" (Heatherly, 1981: 345). The report recommended that the new President and Secretary of the Interior "make an example of OSM and its regulatory excesses and to place high priority on an early transition to a State lead

concept." It called for a review of the agency's "onerous reclamation regulations, an immediate review of other rules" and suggested:

> Abridgement of civil rights through warrantless search, excessive, punitive, and inconsistently applied in-field fines, and restrictive blasting and bonding requirements represent just a few of the areas of concern.

Additionally, the new administration was urged to reduce the OSM's enforcement staff, to cut the agency's budget, and to replace "current OSM senior staff and regional directors with professionals more attuned to a rational program" of reclamation. Changes in both the Act and OSM's regulations were urged, the latter to include a "cost analysis to identify rules which unnecessarily burden domestic coal development." Finally, the Heritage Foundation recommended that the new leadership in Interior, in pursuit of these objectives, should permit the states to "play a major role" (Heatherly, 1981: 346-47).

The New Administration

Less than one month after his inauguration, the new President established in the White House a Task Force on Regulatory Relief. The Executive Order establishing the Task Force requires: (1) federal agencies to "choose the least burdensome regulations," (2) agencies to "perform regulatory impact analysis of their major proposals and of especially burdensome regulations now on the books," (3) The OMB, under the direction of the Task Force, to review "these analyses and to make comments on them," (4) Task Force to resolve any disagreements between itself and OMB, and (5)

the Task Force to "engage in a broad-scale program of developing legislation in response to needs for reform in the underlying statutes" (Office of the Vice President, News Release, February 17, 1981).

In pursuit of its objectives, the Task Force has had little direct influence on the operations of the Office of Surface Mining. An exception occurred during the first few months of the Reagan presidency when it announced the withdrawal of several regulations which had been issued late in the Carter administration but had not yet been implemented (Office of the Vice President, News Release, March 25, 1981). The significance of the Task Force lies primarily in its symbolic role as a reminder of the movement for regulatory relief and its functional role as an arbiter of regulations for which the cost-benefits are in doubt.

The New Leadership in Interior

President Reagan's appointment to be Secretary of the Interior was James Watt, a westerner and Interior official during an earlier administration, who had strong developmental biases. Prior to his selection as Secretary of Interior, Mr. Watt was a founder of and attorney for the Mountain States Legal Foundation, a Denver-based conservative, "public-interest" law firm. His law firm had opposed the OSM and environmentalist groups in appellate litigation. The new Secretary was a strident, outspoken critic of environmentalists and of governmental policies which reflected their views. Moreover, he openly expressed sympathy for the "Sagebrush Rebellion," a western-based movement of state/local

officials and landowners who had attacked what they saw as an intrusive, heavy-handed federal presence in "their" region of the U.S.

Watt's appointment touched off a storm of protest from the eastern media and environmentalist and citizens' groups around the country. Editorials criticized the President's choice for Secretary of the Interior and Mr. Watt's record in particular. Editorial cartoonists sketched him as a rapacious despoiler of the nation's natural resources. He generally was depicted as being unreasonably in favor of developmentalism, at the sake of even the most enlightened environmental protections. The secretary-designate made little or no effort to dampen this wave of opposition; his public statements indicated that he shared completely the new administration's emphasis on curbing environmental protection agencies and controls, and the federal government generally. In Senate confirmation hearings (January 7-8, 1981), Watt's fitness to be Interior Secretary was attacked by many witnesses, even as he was supported by western politicians and representatives of western developmental interests (U.S. Congress, Senate, 1981). Despite opposition, the Energy and Natural Resources Committee recommended confirmation of Mr. Watt's appointment, and the full Senate voted accordingly.

THE OFFICE OF SURFACE MINING

The Office of Surface Mining was attacked during the Presidential election campaign and was singled out for particular criticism during the transition period. After the election, some OSM personnel, as if anticipating the forthcoming "change of

direction," began to modify many of their actions which conceivably may have antagonized the incoming leadership. One of the most visible signs of this spontaneous pulling back from a stringent regulatory stance is evident in statistics on inspection and enforcement. As Table 8-3 shows, both the number of inspections and the the rate of issuance of NOVs and COs declined rather precipitously after Ronald Reagan's election. This decline in I&E activities is explained partly by the fact that a few states had acquired regulatory primacy and partly by cut-backs and demoralization in the inspector force. But a major reason, apparently, was a spontaneous attempt by I&E personnel to reduce their potential vulnerability to charges of being overly zealous.

Charting a New Direction

Almost within hours of Ronald Reagan's inauguration, James Watt held a mass meeting with Interior employees to alert them to the new direction for Interior agencies. Uncompromisingly, he informed them that "the American people" had given a mandate for change. Those who felt they could not work for such change were invited to search for other employment. As is customary, OSM's political appointees -- among them the agency director -- resigned and the Secretary appointed a career civil servant from the USGS to serve as acting director. Several months elapsed before the top leadership positions in the agency were filled. During the interim period, environmentalists charged that the policies and day-to-day direction of the OSM was conducted by personnel in the Department of Interior committed to the new secretary's views, who

also had helped write the Heritage Foundation critique of the agency.

Later, individuals from two of the states which had resisted the agency's efforts most vigorously were named to the two top positions in the OSM. (The two states, Indiana and Virginia, had joined in a major consitutional challenge to the Act.) These appointments created concern among OSM personnel and environmentalists about the agency's potential for evenhandedness. In Senate hearings held to consider his fitness for the position, the OSM director-designate made it clear that he shared the new administration's view of "the new federalism."

> Gentlemen, I will bring to this job a critically needed understanding of State government and an appreciation for all sensitivity to the State's point of view . . . I would seek to eliminate the divisive, adversarial relationships that have built up and bring the States into a full partnership in the administration of the program.
>
> I reject, categorically, any suggestion that the States cannot do the job, or somehow cannot be trusted to do the job. I have met many of the State leaders, and I assure you that they have the resources and the ability, and stand ready to assume their share of the responsibility (U.S. Congress, Senate, 1981: 34).

Remarks such as this caused concern among those who doubted the states' willingness to regulate surface mining, and their concerns were only intensified by questions raised in a related incident. The director-designate, a former state legislator, was

accused of having purchased land in his native state, in a "sweetheart deal," from two large coal producers (U.S. Congress, Senate, 1981). The committee, apparently satisfied that the nominee had not received preferential treatment in the purchase, approved him to be the new director of the Office of Surface Mining.

Day-to-Day Operations

Persons we interviewed who were still in the agency during the first months of the new administration report that relations between new appointees and older employees often were strained. The newcomers did not confide any of their plans to the latter and indicated, in various ways, that they could not be trusted. Many persons felt as though the agency, internally, contained two distinct alignments of personnel, and while the two groups tried to work harmoniously and productively, the level of distrust was difficult to overcome.

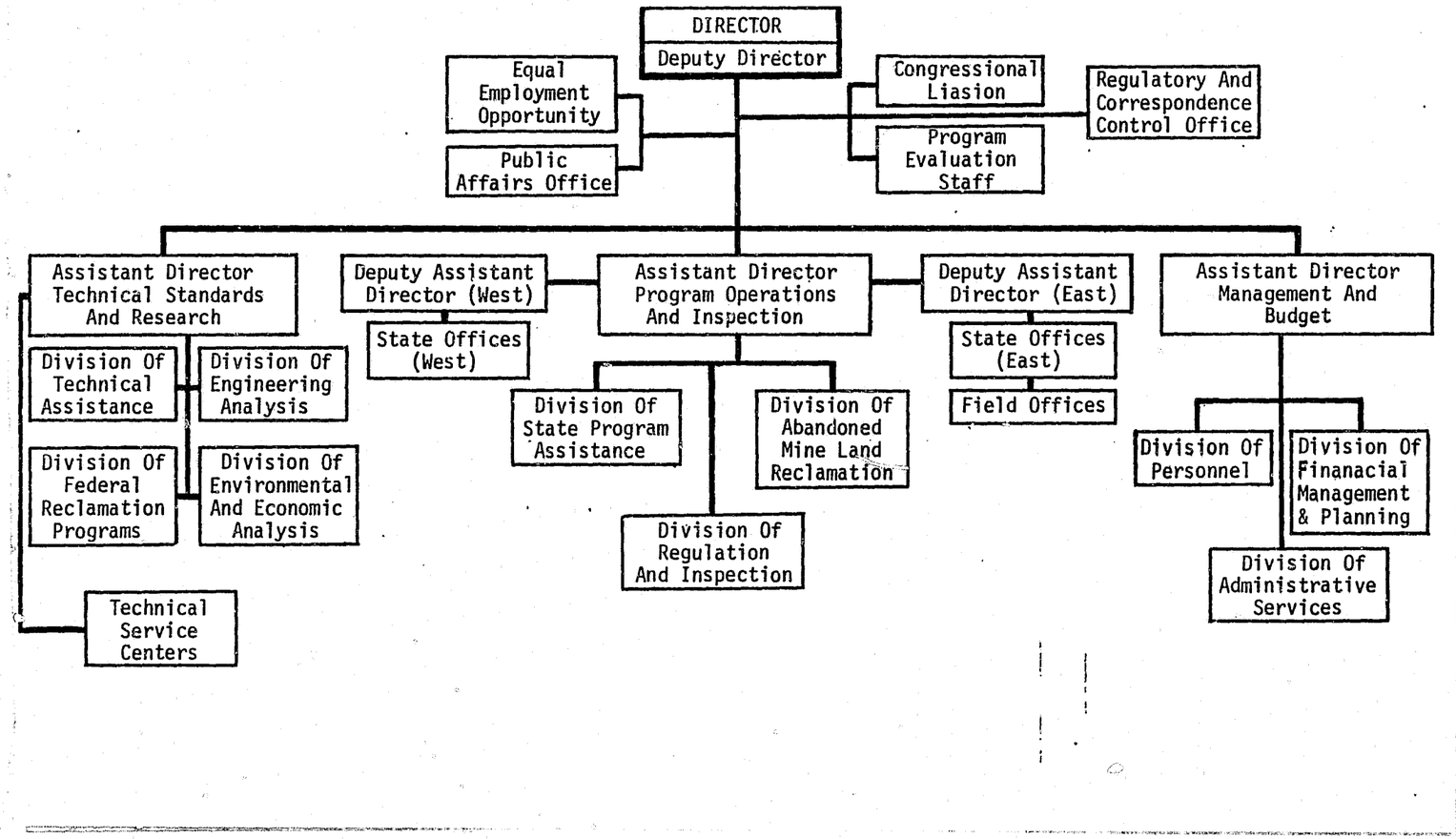
The formerly-held monthly Washington meetings between HQ executives and the regional directors were discontinued. Regional managers were left in a state of uncertainty while Interior officials and the newly-appointed HQ executives made decisions about the future of the agency. In May 1981 the regional directors were called to Washington and informed that the entire agency would be reorganized; there would be no regional offices and, therefore, no need for regional directors.

Reorganization

On May 20, 1981, Secretary Watt signed an order (#3065)

FIGURE 10-1

ORGANIZATION OF THE OFFICE OF SURFACE MINING (POST 1981)



directing a reorganization of the Office of Surface Mining. Outlines of the planned reorganization were disseminated to the OSM employees by the acting director on June 12, 1981 (OSM, 1981). The reorganization plan called for the elimination of regional offices, and their replacement with fourteen "State Offices, supported by six Field Offices and two Technical Service Centers." State offices would be located in the major coal-producing states. An eastern technical service center would be located in Pittsburgh; a comparable western center would be located in Casper, Wyoming (later shifted, under Congressional pressure, to Denver). Headquarters also would be reorganized. The five original assistant directors were to be replaced with only three (see Figure 10-1). Overall, there would be a sharp reduction in the number of OSM personnel, with major cuts occurring in the inspection and enforcement program. On July 15, 1981, the agency's new acting director (who subsequently became the deputy director) announced more details of the planned reorganization (OSM, 1981a; 1981b; 1981c). The following day, July 16, the House Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs held oversight hearings on the proposed reorganization.

Judging from the tone of questions, Subcommittee members held conflicting views of Interior's motives for reorganization, the proposed new structure for the OSM, and its likely impact on coal mining and regulation. Speaking to Secretary Watt, Subcommittee chairman Representative Morris Udall expressed the concerns of some members and also of the environmentalist community.

When you were nominated, . . . anxiety was expressed in

many quarters about the fate of the great cornerstones of environmental law enacted over the last two decades. You responded to these concerns with assurances . . .

Many people -- and I include myself -- found these statements consoling, but we feared what could be done within the strict letter of the law to undermine and destroy the intent and effect of the law, through administrative action or inaction.

My initial examination of the reorganization proposal for OSM gives new substance to those fears. If you carry out this plan, sure, we'll still have a strip mining law on the books . . . [but] we may not have a law that is effectively enforced by either the States or the Federal Government (U.S. Congress, House, 1981: 7).

The Secretary assured the Subcommittee that, despite what many critics of his leadership had charged, the reorganization plan was undertaken primarily to improve OSM's efficiency, and to save money; it was not proposed in order to punish agency personnel or to render the agency incapable of asserting an aggressive, stringent regulatory presence or of exercising effective oversight of state regulatory performance. The Secretary took the opportunity, as did some members of the Subcommittee, to criticize the earlier OSM leadership for its supposed mistakes. More importantly, however, he identified the issue which divided those who criticized from those who supported the planned reorganization: the fear that surface mining regulation would revert to pre-1978 conditions once the states acquired primacy.

> We do not accept the idea that the States cannot be trusted with primacy. Because a State may have had a poor record of enforcement does not now mean that they cannot be effective. Because a State in the past may have succumbed to alleged industry pressures does not mean the the State will now allow industry to get by with the same environmental abuses that occurred before passage of the act. To take a contrary position is an insult to the Governors and the State legislatures of America (U.S. Congress, House, 1981: 12).

He suggested that by establishing state liaison offices, "the new organization will be much more responsive to, and closely in step with the reclamation practices and other needs of every coal-producing region" (U.S. Congress, House, 1981: 13).

Figure 10-1 depicts graphically the new organizational structure of the Office of Surface Mining. By August 1982, the new structure was operational.

Regulatory Reform

The other half of Secretary Watt's agenda for the OSM was regulatory reform. Not surprisingly, therefore, early in 1981, OSM's acting director launched an effort to rewrite many of the agency's permanent program regulations. The task was entrusted to a small group of trusted individuals, but little came of it. The movement to provide "regulatory relief" did not begin in earnest until mid- to late 1981.

OSM's new leadership developed a SCHEDULE FOR REGULATORY REFORM (OSM, 1981). The schedule was designed to accomplish six

objectives:

1) "Remove excessive Federal regulations."

2) "Return control of surface coal mining and reclamation regulation to the States."

3) "Provide cost effective regulation."

4) "Provide minimum regulatory authority involvement in the development and design of mining operations."

5) "Assure continuity of State program regulation necessary to maintain coal productivity."

6) "Provide technical guidance and leadership to the States."

The SCHEDULE indicated that "immediate steps are being taken to remove excessively burdensome regulations and prepare a draft of revisions to all Federal regulations for surface coal mining and reclamation."

The report discussed two alternative approaches to achievement of the objectives for regulatory relief: a "State Program Approach" and a "Federal Program Approach." Under the first alternative, agency resources would be focused on working with the states to develop acceptable state programs, as amendments were made in state programs already approved by the previous OSM administration. Under the latter alternative, OSM resources would be focused on development of an administrative record to support revisions of the Federal regulations. Work on state programs would begin after revisions to the Federal regulations were complete. For a variety of reasons, leadership in the Department of Interior opted for the first alternative --

in the short run -- to be followed by a wide-ranging revision of the federal regulations.

One of the first steps in this process was a move to amend the state window provision of the permanent program regulations. By doing so, the new Interior and OSM leadership intended to give the states greater latitude to tailor their regulatory programs to local problems and conditions. In April 1981, a notice was published in the FEDERAL REGISTER (46 FR 22399-22400) announcing the availability of a draft proposed revision of the state window regulation and inviting comments on it. On July 1, 1981 the OSM published a proposed new state window regulation (46 FEDERAL REGISTER 34348-34351) intended to give the states more flexibility in development of regulations for surface coal mining within their borders. After two extensions, the public comment period was closed on September 23, 1981 and the final rule was published on October 28, 1981 (46 FEDERAL REGISTER 53376-53384).

The former state window (section 730.13 -- see chapter 6) was deleted in its entirety. The major substantive change was made in section 730.5. The original and revised wording are reproduced here:

Original: As used in this Subchapter unless otherwise indicted Consistent with and in accordance with mean:

(a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act.

(b) With regard to the Secretary's regulations, the State laws and regulations are no less stringent than

and meet the applicable provisions of the regulations of this Chapter.

In the "new" state window, section 730.5(b) reads:

(b) With regard to the Secretary's regulations, the State laws and regulations are no less effective than the Secretary's regulations in meeting the requirements of the Act.

As can be seen, the revised state window regulation explicitly replaced the requirement that state regulations be "no less stringent than" the federal regulations with the requirement that they be "no less effective than" the latter.

Predictably, environmentalists charged that this change amounted to an emasculation of the state window. Regardless of the validity of that contention, the revision served as an important symbolic signal to the states that the new administration intended to change regulatory directions and to assist them to acquire primacy.

Since 1981 and continuing to the present, the OSM has been engaged in an extensive revision of numerous portions of the permanent program. Originally, it was thought that the rewrite project could be accomplished quickly, but delays developed at numerous points. A major reason for this is an operational contradiction between the new leadership's twin objectives of reorganization and regulatory reform. HQ executives moved quickly to reduce the agency's number of employees, and to close or relocate offices. In the process, skilled technical personnel were encouraged to leave the agency. Others left voluntarily as

morale began to erode. Consequently, the OSM lost many of the technical personnel it needed to revise regulations. Also, the new HQ personnel did not appreciate the legal obstacles to rapid, wholesale changes in regulations. Finally, environmentalist and public-interest groups have challenged the regulatory relief effort in appellate litigation. The overall direction of the effort seems clear, however. The new administration is determined to give the states "what they want."

Inspection and Enforcement

With the exception of one area of the program -- collection of civil fines and AML payments -- the new OSM leadership generally has adopted a conciliatory approach to inspection and enforcement. Although a change in this direction had been anticipated at the field level following the Presidential election, the agency's executives and Interior officials now made it unmistakably clear that they wanted a diminished federal regulatory effort. They realized, however, that it would be hazardous to mandate changes too explicitly.

> [T]o have made any major policy changes [in I&E] would not have been worth the political risk and the political consequences . . . You could have gone out and said "hey, don't issue any more NOVs," but the Act specifically says you have to. So I think our approach has been . . . the trickle down effect.

For example, almost immediately after the change of administrations, OSM's acting director instituted a new policy on the handling and distribution of cessation orders (i.e., orders

issued by field inspectors to cease all mining):

> We haven't changed or, put out a policy any different than the previous administration has in I&E. Except we've asked that where a cessation order is issued that the supervisor or the inspector should verify that cessation order to be sure that it's right. And that a copy of that be sent to Washington.

Another incident which apparently had the same effect occurred at approximately the same time. On April 21, 1981, soon after the change in administration, the new Associate Solicitor for surface mining sent a memorandum to all the field solicitors. They were informed of the solicitor-designate's new policy on various types of OSM-initiated litigation. Generally, the field solicitors were told that future cases of litigation would require approval from the Washington Solicitor's office, and instructions were given on the procedure to follow in requesting permission in such cases.

> In those instances in which you determine that circumstances merit the initiation of litigation, the appeal of adverse decisions, or the intervention of the Department, you should prepare a memorandum recommending the action you deem appropriate. The memorandum should contain a factual statement, a discussion of the relevant law, an indication of the efforts made to reach voluntary settlement of the dispute and their result, and your recommendation. The memorandum should be accompanied by the OSM Regional Director's recommendation of appeal and, where appropriate, copies

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of prior administrative and court decisions.

The memo left little doubt that the new Solicitor was unsympathetic toward use of litigation, preferring instead to employ efforts at "voluntary settlement."

This interpretation was strengthened by other sections of the memo:

> I ask that you urge your staff attorneys to settle civil penalty collection cases without resort to litigation whereever possible. This may require some additional efforts and flexibility, but voluntary settlement in these cases is clearly preferable to protracted litigation brought to compel payment of the debt. Where voluntary settlement cannot be reached, I ask that you examine the underlying alleged violation to determine whether it conflicts with the Secretary's goals of decreasing regulatory restraints on productivity or deferring to State decision-making in local matters. Where such conflicts are perceived, you should recommend that OSM vacate the underlying enforcement action and the consequent penalty (emphasis added).

Less important than the author's use of the term "alleged" to refer to violations for which fines already had been assessed was the unmistakable signal contained in the memo, a signal that, henceforth, stringent enforcement would not be the preferred method of enforcement.

Headquarters executives were happy with the results of their low-key efforts to produce a change in I&E field performance:

> I think it's worked pretty well. I haven't been displeased with the OSM inspectors at all. I think that they've been responsive to their perceptions of what this administration wants. They've been much more responsive to the needs of the states and have taken a different attitude than they did before.

Late in 1981, the new OSM leadership moved one more step to dampen the stringency of the I&E program when it began to revise the I&E permanent program regulations. The revised I&E regulations were made less stringent in several respects.

STATES' RESPONSES

True to its promises, the new agency leadership worked closely with the states in the process of regulatory reform and the push for primacy. Both individually and through organizations, such as the Interstate Mining Compact Commission, the states have had numerous meetings with the new OSM leadership and have been consulted on many aspects of agency operations. The revision of regulations has reflected many state concerns and opinions. In turn, the states, for the most part, have responded with almost effusive public praise for the OSM.

Still, there are strains and problems in the OSM-states relationship. Some states simply have resisted efforts by the new OSM personnel to establish and implement even a minimally effective regulatory program. Others have continued to engage in collusive actions with coal operators to evade the spirit, if not the intent, of the SMCRA and the interim program regulations. In short, the new OSM executives have learned that some states are

unyielding in their one-sided demand for regulatory flexibility, in part because they realize that the Reagan administration, owing to its ideological biases, will be reluctant to compel compliance with stringent federal oversight.

State reactions to the OSM and its regulatory programs varied substantially during 1980-82. While few if any states supported the OSM publicly, the nature and intensity of their opposition took different forms. Generally, states west of the Mississippi River were less oppositional and worked more diligently with the agency to develop satisfactory regulatory programs and acquire primacy. On the other hand, many states in the midwest and in Appalachia delayed at every step and took advantage of many opportunities to stall the movement toward primacy. Seven states, all east of the Mississippi River, took advantage of a section of the Act [503.(d)] to stall the move toward primacy under the Carter administration. In each of the seven states, state court judges issued injunctions which prohibited the state from submitting primacy "packages." Hopeful that the new OSM leadership would be less demanding, some states -- primarily in the east -- weakened programs submitted earlier (and rejected by OSM).

> I think, for example, [names a state] recently submitted a permanent program [with] a lot of the problems that had been worked on for the last two or three years. And they just sort of ignored some of the solutions that had been arrived at, for example, and tried to submit with [some provisions] that are not consistent with 95-87, less stringent. Trying to slip things by, by

> burying them in the program, that an open, good faith effort might not have attempted to do.

At one extreme was Texas, where surface coal mining is a very recent occurrence and where approximately one dozen active mines are producing coal; Texas virtually copied the OSM's permanent regulatory program and was the first state to acquire primacy. At the other extreme were Indiana and Virginia which, among other tactics, mounted court challenges to the federal program. But in addition to a general opposition to the SMCRA-mandated process, some states and their coal operators developed more imaginative strategies to resist it. A substantial number of incidents in which the states either have balked or simply resisted federal regulations could be mentioned; we review only two of them: Virginia and Illinois.

Virginia: Haul Roads and the Two-Acre Exemption

Whether deserved or not, Virginia was seen by early federal regulators as the state having the worst record in surface coal mining regulation. Certainly, a variety of evidence can be mustered to demonstrate that Virginia has resisted fiercely the SMCRA and the Office of Surface Mining. One of the major consitutional challenges to the Act originated there, and the state intervened on the side of the plaintiffs. More important for present purposes, Virginia did not confine its opposition to the appellate courts; it either encouraged or looked the other way while coal operators engaged in more imaginative attacks on the federal interim program. Evasionary use of the two-acre exemption rule is one example.

Section 528.(2) of the Act exempts those who mine two acres or less from the requirement to meet the performance standards of the Act and the interim regulatory program. By inclusion of this provision, Congress meant to prevent the extensive regulatory requirements from falling on individuals or firms whose coal mining was "incidental" to their normal economic pursuits. Even before the change in OSM leadership, however, Virginia coal operators devised a ploy to use the two-acre exemption to circumvent the federal program. Two distinct, though interrelated practices were employed.

Typically, a large mining company which owns extensive coal leases contracted with a number of smaller companies to mine two-acre tracts of the larger company's coal. In some cases the larger company even leased mining equipment to their smaller partners. The subcontractors were required to sell their mined coal exclusively to the larger firm, and to use that firm's tipple(s). Many mines using this loophole also engaged in another ploy to defeat the federal regulatory program. They deeded their haul roads to the counties as "public roads." Use of these two loopholes

> was exacerbated by passage of two pieces of legislation, in 1979, by the Virginia General Assembly. The first was a bill which removed mines of two acres from regulation by the state; until then, the state had regulated all surface mines in Virginia, regardless of size. The second was a bill which allowed coal companies to "deed" their haul roads to county governments, thereby removing those roads from regulation by state or federal agencies, and their owners from all responsibility for proper construction or maintenance, and, at the same time, reducing the total acreage of many mine sites to under two acres (U.S. Congress, House, 1981: 241).

Working with coal operators, the state of Virginia was willing to defeat the intent of mining regulations. Statistics provided to an environmentalist group by the state of Virginia indicated that as of June 1981 there were 1,083 two-acre mine sites in the state. Of these, 926 were unpermitted (therefore, not required to meet any reclamation standards) and 157 were permitted voluntarily. There had been no reclamation on 783 of the sites (U.S. Congress, House, 1981: 255).

Illinois: Grandfathering Prime Farmlands

The major environmental threats posed by strip mining are different for the three American coal fields. In Appalachia, it is control of erosion and sedimentation. In the west, it is protection of alluvial valley floors. In the midwest, it is protection of prime farmlands. As with the first two, the Act contains special protection measures for these important agricultural areas, large portions of which are found in central and southern Illinois.

Section 510.(d) of the Act requires that permits to mine on prime farmland after August 3, 1977 may be approved only if the regulatory authority finds in writing that the permit applicant has the "technological capability to restore such mined area,

within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area." However, the Act also contains a provision for "grandfathering" prime farmlands. In other words, a mine operator need not meet the special prime farmlands requirements if he can demonstrate that his permit application is a revision or a renewal of a permit approved prior to August 3, 1977. In addition, the operator must demonstrate that the area to be mined is contiguous to areas mined earlier as part of the original permit (30 CFR 716.7). Unless permit applications are grandfathered by the regulatory authority, operators must restore the mined prime farmland to 100 percent of its original productivity.

Critics claimed that the Land Reclamation Division of the Illinois Department of Mines and Minerals unjustifiably grandfathered several permit renewals for mines in central Illinois (U.S. Congress, House, 1981: 56-66). In one of the cases cited, the new area to be mined was located in another county, and several miles away from the previously mined area. By granting a grandfather exemption from the federal interim program, the permitee was required only to meet state standards for productivity of mined farmland, a standard less stringent than the 100%-of-previous-productivity federal requirement. The critics charged that actions such as this, along with the fact that the state of Illinois joined in a court challenge to the Act, demonstrated that it was unable or unwilling to develop and enforce stringent strip mining regulations.

No one appeared to speak in defense of Virginia's use of the two-acre exemption, but Illinois' record was defended by the

supervisor of its Land Reclamation Division. Generally, he disputed the interpretation provided earlier by Illinois citizens. He then went on to praise the new OSM leadership for working cooperatively with the states in their regulatory reform efforts. Further, he used the opportunity to sound the often-heard call for state-level, flexible, site-specific regulations:

> I want to stress that in the states, and particularly in Illinois, there has been, and will continue to be, high quality reclamation even after the regulations are redrafted. However, the best reclamation for cropland will vary on a site-by-site basis, and states should have the flexibility to require various forms of reclamation with a view towards what types of soil and mining methods are going to be employed in each given case. The states are familiar with the techniques for high quality reclamation, and flexibility would allow states to match the best technique to each site (U.S. Congress, House, 1981: 270-71).

THE COAL INDUSTRIES

Throughout the battle over, first the SMCRA and later the regulations, large and small coal producers were united in efforts to forestall federal controls. They sounded some of the same themes in their attacks on the proposed legislation, regulations, and the Office of Surface Mining. True, the small producers were more strident in their efforts and truculent in opposition, but the larger producers did not appear unhappy with this. As one of our respondents suggested, large producers were more than happy to

see their smaller counterparts "out front, leading the charge, and throwing their bodies on the barbed wire; then they [large producers] can crawl over top of them."

Despite their obvious unity in wanting little or no federal controls, the most immediate and pressing objectives of large and small coal producers were quite different. Large producers have in-house technical and legal staffs that enable them to prepare permit applications with an ease and efficiency beyond most small producers who must hire outside consultants for the same purposes. For the economically marginal small producer, large increases in permiting costs threaten the very continuation of operation. Blasting regulations are less bothersome to large producers because they can employ trained blasters and also because many of their mines are located in unpopulated areas where restrictive blasting regulations do not apply. Finally, inspection and enforcement actions never were a symbolic issue for large producers to nearly the same degree that they were for small producers. (Obvious reasons for this include fewer violations in areas where large mines are located and penalties which represent no economic threat to large producers.) Given these differences in their objectives and concerns, it was to be expected that fissures would appear in the union of large and small coal producers. The fissure began to emerge clearly after the change in OSM's leadership.

Small Producers

Small, economically-marginal coal producers very much wanted to see the OSM destroyed root and branch so that never again would

it be a threat to them and their operations. They were prepared to see and wanted drastic, sweeping changes in the federal regulations in order to render them meaningless. They had little to lose by such a development since the combination of higher permitting, bonding and reclamation costs, combined with a slumping coal market, had pushed many of them to the point of insolvency.

Just as they supported the organizational emasculation of the OSM, they also supported changes in the regulatory standards the states would be required to meet in their own programs (i.e., the state window). Remembering how they had mined in former times, they hoped that once the regulatory task was returned to the states, the small coal producers once again would flourish.

> [The new Interior and OSM leadership] got in trouble, because they raised expectations. I mean, if you talk to the man on the street now, you talk to the average member of the industry, they all think James Watt is going to take care of all their problems. Not all of them. Obviously, not all. But that is a common perspective . . . I hear that, that Watt is sort of looked upon, somewhat, as a savior, I suppose.

Wisely, however, the smaller coal producers have hedged their bets. Understandably perhaps, they have pressed for substantial modifications in the Small Operators' Assistance Program. First, they have pushed for a redefinition of "small operator" so that companies which mine a larger volume of coal each year would be eligible for assistance. Second, they have pressed for an

increase in the types of assistance given to small operators under the program. On the whole, then, small coal producers have pushed for severe reductions in regulatory requirements and easier access to public monies provided by the SOAP program.

Large Producers

When it became apparent to large coal producers that an increased regulatory oversight was unavoidable, their objectives shifted from defeat of regulatory legislation to construction of a regulatory program consistent with their economic interests. For the most part, this meant a program which maximized their operating flexibility. They strongly favored and pushed to achieve a program emphasizing performance as opposed to design standards. Because they employed technical experts in many areas related to mining, they had little to lose by pressing for a non-legalistic but highly technocratic regulatory process. Again and again, in contacts with the OSM they asked for flexibility in regulations. They did not oppose requirements that reclamation structures and processes be designed by "registered" professionals (e.g., engineers). In taking this position, they were quite at odds with their smaller coal producing brethern. Large coal was more willing to live with the regulations so long as the means of reaching the regulatory goals could be determined by their own technical experts.

Coupled with large coal's desire for flexibility in regulatory requirements is the need for certainty and predictability. Because of their size and capital needs, large coal must be able to plan for years ahead if they are to attract

capital and estimate profits.

Through the cumulative concessions won through litigation, and a gradual softening in the regulatory stance shown by the initial OSM leadership, large coal producers, by late 1980, were seeing the evolution of a regulatory program more to their liking. Certainly they welcomed the new leadership at the Office of Surface Mining and were hopeful of further modifications of the federal and state programs. They became increasingly concerned, however, by the actions of OSM's interim leadership.

> [T]here was quite a period of time before the Director's confirmation finally came down. And it kind of left the OSM [with] a little bit of a leadership vacuum, as to where it was really going. And the signals coming out of OSM at that point in time were not all that clear. You could read them a lot of different ways, but that didn't necessarily mean that's how it ultimately would go. And this, as it turned out, was not the way that it ultimately went. Some temporary people were in there [and they thought] "well, whatever is in [the regulations], let's start throwing it out," you know. (Laughs). Instead of sorting through the papers to make sure of it all, "well, we'll throw this out, but we won't throw that out. We keep this," and so on down the line. "We only need half of this page," and so on. Down the line, you know, "just throw the whole thing out."
>
> Q.: You didn't want that?
>
> A.: Well, I . . . want a program that will survive a

change of administration. I think what the industry needs more than anything else, they need some predictability. Of what their obligations are, and what the regulations are gonna be.

As these comments suggest, some coal producers were concerned by signs that Interior executives would move rapidly to decimate the program.

They feared that such changes would only create a backlash and, with a change in Presidential administrations, another wholesale change in the regulatory programs to which they are subjected. They neither wanted a return to the days of "shoot and shove" mining nor drastic, rapid changes in the regulations. The first posed the danger of political uncertainty if citizen opposition to strip mining intensified and the second posed the threat of economic uncertainty. This long range view was not widely shared among small coal producers.

ENVIRONMENTALISTS AND CITIZENS' GROUPS

Under the Carter administration, citizens' and environmentalist' groups had access to personnel at various levels of the Department of the Interior. Moreover, they usually could count on receiving a sympathetic hearing when they raised their concerns. This combination of access and a sympathetic hearing helps to account for the high degree of enthusiasm they displayed when the OSM was developed and began to implement the interim program.

There has been a 180 degree shift in relations between them and the OSM since the change in Presidential administrations. Now

they claim that some personnel in higher levels of Interior simply refuse to meet with them, and others are hostile and unsympathetic toward them. Relations between the agency and the environmentalist community have grown increasingly adversarial.

Environmenalists generally fear that the new administration is trying "to gut the program" and so decimate the agency that it becomes totally incapable of maintaining a credible regulatory posture. The most optimistic among them believes the Act itself is so stringent that these efforts ultimately cannot succeed; the more pessimistic almost despair at the consequences of returning responsibility for regulation to the states. Many believe that "it is too early to tell what will happen," and they have not given up their efforts to maintain a strong federal program. Environment organizations have filed numerous suits against the OSM, charging it with violations of statutes and regulations in its efforts to rewrite the permanent program regulations. Again, some seem to feel these efforts can greatly retard the pace of "regulatory reform", others seem more pessimistic about the prospects for significant impact.

THE NATURE OF OVERSIGHT

Recently the OSM released an outline of its plans for conducting oversight of state performance under the permanent regulatory program (OSM, 1982). Working with external consultants, the agency determined a sampling ratio for its independent inspections of mine sites. The inspection plan will provide 95% confidence intervals. In this, as in other aspects of the oversight plan, the agency will work closely with the states

so that the relationship will not be seen as an adversarial one. Inasmuch as the plan has not been implemented, there is no indication yet of how it will work. Agency executives -- and the states, for the most part -- seem enthusiastic about it and scoff at charges that it will accomplish little. Among this group of skeptics is a former OSM regional manager, who offered these opinions:

> The state [liaison] offices are a sop. That's all they're gonna be. I see that happening, clearly. Your OSM power -- policy's gonna be made in Washington. Power's gonna be retained in Washington.
>
> Q.: How's oversight going to work? What's your opinion about that?
>
> A.: Well, 'course I say, we didn't do the greatest job, in the sense that we kept trying to monitor [states'] performance in the interim program, to call it to people's attention . . . We were afraid of the idea of oversight in the interim program in the last administration. Believe me, oversight is gonna be a combination of liaison . . . and a goodwill mission, kind of a representative of the secretary in a state. And maybe we'll do some things, if the states ask us. And we'll process certain paper. That's what it's gonna be. It's all over. There isn't gonna be an OSM presence, the way we conceived it originally.

On March 8, 1982 the House Subcommittee on Energy and the Environment held oversight hearings on the OSM's budget for fiscal

year 1983. Following opening remarks by Subcommittee Chairman Morris Udall, and testimony by the agency's director, environmentalists testified in opposition to the agency's new policies and its projected plans for budgetary expenditures for the forthcoming year [U.S. Congress, House, 1982 (xeroxed)].

Congressman Udall summarized his reading of the current state of the Office of Surface Mining and its programs. He noted that the latter "is in a state of considerable flux and uncertainty," that many eastern states still do not have primacy, and that the number of lawsuits filed by industry and citizens' groups are continuing. He went on to express concern about the agency's failure to utilize larger amounts of the AML fund (more than $681 million in fees have been collected), the dismissal of so many of the agency's technical staff at a time when they would seem to be needed most, and the possibility that the agency may have underestimated the number of inspectors it deems necessary to conduct federal oversight.

True to the historically-scripted nature of Congressional oversight hearings, the agency's director highlighted his plans and sought to reassure the Congressman. He noted that six states by that date had obtained full primacy, another eleven states had received conditional approval of their programs, and seven states whose programs previously had been disapproved were resubmitting programs; the agency was hoping to complete this process by July 1982. The agency was continuing to work closely with the states and planned to increase the amount of grants as assistance for the administration of state programs. Along with this continued effort to defer to the states, the agency was planning to move

ahead with its efforts at reorganization and regulatory reform.

The OSM director indicated that the inspector corps would be reduced to a permanent staff of 69, which the agency estimated would be adequate to carry out its oversight responsibilities. The size of this staff was based on a statistical sampling procedure and estimates of the numbers of NOVs and COs that federal inspectors would issue during oversight.

Three representatives of environmentalist organizations offered testimony which took issue with that given by the OSM director. They charged that the agency was being reorganized and staff numbers reduced "to get OSM out of the 'hair' of the states and 'eyes' of the industry." The reduction of I&E personnel and technical staff would render the agency incapable of performing oversight and assisting the states with permit reviews. They questioned the statistics the agency employed to develop its oversight sampling estimates and charged that 69 inspectors would not be adequate to perform oversight. Further, they complained that "the reorganization of OSM has been a calculated and callous attempt to demoralize and cripple the agency." In sum, they charged that the agency had become "more concerned about the health of the coal industry than the protection of the people most affected by mining." Commenting on the reorganization of the OSM, a former regional manager referred to it as "butchery." Further, he suggested that "it's almost Carthaginian. They ought to pour salt everyplace there's been . . . an OSM office."

CHAPTER 11

SOME IMPACTS OF THE OSM REGULATORY PROGRAM

The Surface Mining Control and Reclamation Act of 1977 is a complex statute, as are the regulations which implement it. Both the interim and permanent regulatory programs imposed stringent, complex regulatory requirements on those parties who strip mine coal in the United States. Prior to 1977, a few states already had developed comprehensive regulatory programs of their own and were enforcing them rigorously. Other states had developed sound "paper programs" but failed to adequately implement them. Still other states simply made little pretense of their lack of concern for the environmental and social costs of surface coal mining. Thus, the federal regulatory program had a deep and wide-ranging impact on surface mining in America. For the first time in most states, coal operators were required to meet stringent mining performance standards and to carry out rigorous, contemporaneous reclamation. Operators' performance was monitored by inspection and enforcement personnel who were mandated to issue citations for all violations of regulations they observed. In these respects, as well as others, the federal regulatory programs surpassed any previously in existence.

Unfortunately, the complexity and comprehensiveness of the OSM program makes it extremely difficult to isolate and examine the impacts of any one portion of it. As an example, consider the inspection and enforcement program. Because the federal I&E program probably was more rigorous than any state program, we would expect it to have a demonstrable effect on mining practices

and, ultimately, on the environment. But the demonstration of effects is not a simple matter. Unfortunately, between time 1 (before the appearance of the OSM) and time 2 (after three years of federal enforcement) a number of variables in the regulatory matrix of surface mining were modified along with changes in inspection and enforcement. The simultaneous occurrence of multiple "treatments" in one or a number of time series confounds efforts to isolate the "pure" impacts of changes in I&E procedures. Further confounding the analytic problem are changes in the coal market, occurring independently of OSM and its operations, that also effect the numbers of mining companies as well as their mining and reclamation practices.

Even though it is difficult to isolate specific causes of demonstrable programmatic impacts, global impacts assuredly can be examined. We present a variety of data, some of it consisting only of opinions and field-level observations, first, to document some of the incremental costs of the OSM program and, second, to determine some of the impacts of the federal regulatory presence -- at least during the first 3-4 years of its operation.

THE STATES

The SMCRA was based on the recognition of the need for federal efforts toward improving the states' ability and resolve to regulate their surface mining industries. A number of mechanisms were incorporated in the Act to accomplish this objective. For example, as of mid-1982, the Office of Surface Mining had dispensed more than $69 million in grants to the states to assist them in improving their capabilities to assume primary regulatory

responsibility (OSM, Telephone conversation, June 7, 1982).

Quite simply, no one knows at present whether the states' regulatory performance will improve once they achieve primacy. There can be no doubt that there has been and probably will be considerable differences in the performance of individual states. Although the new leadership at Interior and in the OSM have ruled that interim program performance can not be used in evaluating states' applications for primacy, environmentalist groups have suggested that interim program performance is the best indicator of future state performance, and at least two studies of state performance have caused them concern. The first study (Johnson et al., 1980) examined inspection and enforcement by western states, and compared the states' performance with that of the Office of Surface Mining. Regrettably, the study did not examine the states' performance in the areas of permitting and bonding. The project was undertaken with two guiding assumptions. The first, was that "the most reliable basis for judgment of what [the states'] future performances are likely to be is how they have performed in the past" (Johnson et al, 1980: 2). Second, the investigators assumed that non-discretionary, full enforcement of mining regulations both is possible and desirable. This second assumption thus becomes the standard against which actual enforcement performance is compared.

To summarize briefly, the researchers selected 48 mines, located in five states in the OSM's region V. Official records were examined to analyze the performance of the OSM as well as the five state regulatory agencies. The records generally noted when inspectors had observed violations, whether citations were issued

TABLE 11-1

REGULATORY PERFORMANCE OF FIVE WESTERN STATES DURING THE INTERIM PROGRAM

State	Number of Mines	Complete Inspections (1979-80)		Violations and Notices of Violation			
		Required	Performed	Violations Observed	# of NOVs Issued	% of Violations Issued an NOV	# of NOVs Issued on Site
Colorado	18	72	34	167	102	61.7%	88
New Mexico	4	14	14	36	19	52.8	15
North Dakota	6	24	50	49	9	20.4	8
Utah	10	37	23	150	62	44.7	49
Wyoming	10	34	19	61	27	44.3	27

Adapted from: Johnson et al. (1980).

for the violations, whether violations were issued in the field (i.e., on site) or later, whether cessation orders were issued for particularly serious violations, and whether and when follow-up inspections were made to determine if cited operators had abated the violations. Both for the OSM and the five states, Table 11-1 summarizes some of the study's findings in these areas. As can be seen, there was substantial variation in the states' performances. The researchers concluded that:

> [T]he state regulatory agencies of [the five states] have failed to fully enforce the Surface Mining Control and Reclamation Act. Far from overzealous enforcement, the agencies are underregulating. In many instances they have not prevented the recurrence of the past abuses which the Act was designed to prevent . . .
>
> Our analysis . . . shows that neither the federal agency nor the five state agencies have made the required number of inspections nor taken effective enforcement action to correct many of the violations observed by inspectors at the mines (Johnson et al., 1980: 4).

The second study was conducted by the group SOCM (Save Our Cumberland Mountains, n.d.). The researchers did examine the state's (Tennessee) permitting and bonding practices, as well as inspection and enforcement. The group earlier had examined Tennessee's regulatory performance for the period 1972-77 (SOCM, 1978). Both studies utilized agency records, interviews with agency and law enforcement personnel, and court records as the principal data sources. The initial study demonstrated

convincingly that the state's regulatory performance during 1972-77 was extremely lax. This was the case on virtually every measure of agency performance, whether permitting, inspection and enforcement, prosecution of wildcat operators (a serious problem in Tennessee) or those who failed to comply with permit conditions or bond forfeitures. The study did note that in 1977 the state launched a flurry of highly-publicized enforcement actions against a group of violators. The researchers believed this was stimulated by the impending arrival of the Office of Surface Mining, and they were skeptical it would continue.

The later SOCM study, based on data collected during 1980, contains ample support for the earlier skepticism. Despite revisions of Tennessee's surface mining laws during the interim period (1977-80), enforcement continued to be weak and inconsistent.

In mid-1982, Tennessee received regulatory primacy. Environmentalist and citizens' groups remain skeptical that its capacity and willingness to regulate effectively has increased in the past two years. Admittedly, not all states have regulatory records as deficient as Tennessee's. And it remains to be seen whether the states will be willing in the future to do what they failed to do prior to 1977. Excepting state officials and the new leadership at the OSM, opinions varied among those we interviewed. A handful of respondents sounded a Cassandra-like theme, but more typical were responses such as this:

> Q.: Do you foresee any circumstances under which the regulation of surface mining will revert to conditions

even close to what they were prior to 1977?

A.: I want to say no to that. I don't think the states will be that irresponsible. I know that . . . fear is expressed by a lot of people in the environmental community, and maybe it won't revert because of their willingness to express that fear and keep everybody's level of awareness up . . . I don't know that the sky is falling in. I know that Public Law 95-87 still exists, and the citizens' rights exist as a matter of law, not as a matter of gratuity on the part of James Watt or [the new OSM leadership].

Partly responsible for this cautious optimism are efforts in some states which seem to signal a strengthened regulatory resolve. Kentucky's intensified efforts to control wildcat mining is one example.

In July 1978, Kentucky established a special unit to deal with wildcat mining. With limited fiscal, personnel and legal resources, however, the unit accomplished little. Basically, they were in the position of trying to bluff wildcat operators into compliance with the law. More recently, the state has moved to increase the unit,s resources. These renewed efforts were a response in part to a state study which estimated that in 1980 the state lost approximately $2,181,163 in coal severance taxes from an estimated 682 wildcat operations (Kentucky Bureau of Surface Mining Reclamation and Enforcement, n.d.). First, the state legislature passed new legislation giving the unit some of the enforcement tools that most observers believe are required if wildcatting is to be curbed: (1) wildcat mining was changed from

a misdemeanor to a felony, (2) jurisdiction for handling such cases was taken out of the hands of the District courts -- believed too susceptible to influence -- and lodged with the Circuit courts, and (3) state personnel were given the power to confiscate heavy equipment used in wildcat mining and to sell it at public auction (Senate Bill No. 165, 1982). There was a new sense of enthusiasm among the unit's personnel as they recently launched a more intense effort to control wildcat mine operations in Kentucky.

COAL PRODUCERS

The OSM's inspection and enforcement program was constructed and operated in hopes that it would achieve some deterrent effect on coal producers. Periodic inspections, mandatory notices of violation, and a responsive penalty assessment process were designed to impress upon coal operators the point that the federal regulators "meant business." The deterrence process, however, is more complex than the <u>direct</u> effect simply of a legal threat. Deterrence may be achieved <u>indirectly</u> as well (e.g., Zimring and Hawkins, 1973); for example, the creation of a new legal threat in time may lead members of the target group to reevaluate the <u>morality</u> of the threatened behavior quite apart from their fear of the legal penalty. Nearly all our interview data with OSM personnel suggest that the agency's program and operations achieved at least a modest deterrent effect, as well as some <u>channeling effects</u> which may, ultimately, prove to be just as important.

Reclamation Compliance Costs

The National Research Council (1981b) has reviewed existing studies and estimated some of the incremental costs of compliance with the SMCRA and the OSM's interim regulatory program. At the outset, the NRC investigators insisted on three points. First, they questioned the legitimacy of the premises embedded in studies of reclamation costs:

> Surface mining on a significant scale takes place in both the United Kingdom and in West Germany, for instance, with little or no attempt to measure "reclamation costs" as such. In each of these nations . . . restoration is considered an integral part of the mining process. In the United States, however, reclamation has only recently been considered important, and hence the tendency is to consider it as an add-on expense (National Research Council, 1981b: 178).

Second, they suggested a conservative interpretation of reclamation cost data provided by coal producers:

> [I]f the surface mining industry's reports of reclamation expenses err, current incentives make it likely that they will err on the high side, because the industry is engaged in extensive lobbying and litigation based on the argument that the 1977 federal law and the proposed regulations impose unreasonably high costs. In addition, most long-term contracts for the purchase of coal include provisions for the pass-through of reclamation and other expenses imposed by governmental regulations. Again, this provides little incentive for low estimation of reclamation expenses, although new contracts will add such incentives (1981b: 182-83).

Finally, the NRC took note of the complaint by some that occasionally the reclamation costs for land exceed its market value. Suggesting that "this is beside the point," it charged that "[c]urrent and future individuals should not be made to bear unreasonable costs in terms of destroyed landscape for the sake of current consumers of coal" (1981b: 180). One of our respondents, a regional manager, made much the same point:

> [T]o the extent that the administration can make a cost-benefit analysis, certainly nobody faults that. The problem is, just a purely economic cost-benefit analysis is difficult in all situations. You know, an economist is a person who can assign a value to pimping his mother, because he assumes everything has a value . . . And there's some kinds of decisions, you know, that just don't readily translate . . . just into dollars and cents . . . To the extent that it's the last . . . unmined mountain in Appalachia, what's the value of that, you know? Maybe it's worth everything.

Based on a review of extant studies, the Council summarized the incremental reclamation costs produced by Public Law 95-87 for a "typical" mine in each of the three U.S. coal fields. The results are presented in Table 11-2. As the data in Table 11-2 indicate, and the Council notes, [r]eclamation costs per ton fall substantially moving from east to west" (1981b: 199). In fact, mining costs in the west are only slightly affected by the

TABLE 11-2

SUMMARY OF "TYPICAL" RECLAMATION COST ESTIMATES (1978 DOLLARS)

	$/Ton		$/Acre	
	Range	Midpoint	Range	Midpoint
1. Pre-P.L. 95-87				
a. Appalachia	3.23-7.16	5.19	2,676-$14,915	9,460
b. Midwest (rowcrop)	1.40-2.73	2.07	7,000- 10,000	8,500
c. West	0.08-0.39	0.24	1,899- 8,186	5,043
2. Incremental cost with P.L. 95-87				
a. Appalachia	---	5.24	---	---
b. Midwest (rowcrop)	---	1.80	---	---
c. West	---	0.57	---	---
3. Estimated total reclamation costs with P.L. 95-87 (1+2)				
a. Appalachia	---	10.33	---	---
b. Midwest (rowcrop)	---	3.87	---	---
c. West	---	0.81	---	---

Source: National Research Council (1981b: 200)

requirements of 95-87 and the OSM regulatory program. In Appalachia, however, the picture is different. Spoil handling costs account for the lion's share of total reclamation expenditures, and spoil handling is affected by terrain and stripping ratio. Largely for these reasons, reclamation costs fall heaviest on Appalachian producers.

Large and Mid-Size Coal Producers

For two reasons, large and mid-size coal producers have not been affected by more stringent surface mining regulations nearly as much as their smaller counterparts. First, many of the former operate in the midwest and west, where the incremental costs of stringent reclamation requirements are less than in Appalachia. Second, the economies of scale make it easier for them to adapt to changed regulations and to develop, internally, new operating structures and procedures. For example, larger coal producers have their in-house professional engineering staffs, which enable them to prepare many of the studies and plans that must be submitted as part of permit applications. Further, they have been able to develop, internally, additional technical services, such as water-testing laboratories, required for the same purposes. Their in-house availability of technical expertise also enables them, on a more or less continuous basis, to develop and adopt modified , cost-effective mining technologies. In short, larger companies have the capacity to adapt to changing regulations while remaining economically competitive.

Mid-size coal producers can achieve the same results only by merger or by contracting with external consulting firms to provide

the requisite technical services. Congress anticipated that enactment of the SMCRA and implementation of the OSM's regulatory program would create a substantially heightened demand for technical personnel such as mining engineers, hydrologists, and trained blasters (U.S. Congress, House, 1977). Partly for this reason, the Act contains mechanisms for educational training of technical personnel. In the short run, however, technical personnel and services are scarce, especially in Appalachia. Clearly, establishment of the stringent, comprehensive federal interim regulatory program has spurred significant adaptive measures by mid-size coal firms -- which mine in the midwest and in Appalachia.

> I think, probably the biggest thing 95-87 required, that was really traumatic for the eastern industry, more so than the west . . . was force on them pre-planning, on a fairly massive and intensive scale. And there were a lot of problems in that. There weren't enough engineers; there weren't enough planners, or geologists, or hydrologists, or technical types to go around, to let you do all the planning that was required to meet, you know, these requirements.

Small Coal Producers

In the era of shoot'n shove surface mining, when regulation was weak or non-existent, many individuals and small mining companies moved in and out of surface mining depending upon market conditions. Such persons normally might work in the building trades or construction industry until rising prices in the spot

coal market presented an opportunity to exploit. They provided a quick startup capability in the coal industry. At the same time, operating at the economic and legal margins, they and the ad hoc "companies" they created probably were responsible for some of the most severe environmental damage caused by surface mining.

In the revised regulatory climate produced by federal intervention, many small coal producers probably have been "squeezed" out of the market. Lacking the in-house technical staff, and the economies of scale, many of them face only two options. The first, of course, is simply to go out of the mining business.

Assuming that small surface mine operators increasingly are falling by the way, a higher degree of market concentration by mid- and large coal producers should result. Although we are not aware of any systematic empirical investigations of this question, less systematic data support this trend (U.S. Congress, House, 1981: 336-66). They suggest that more stringent -- and, therefore, costly -- regulatory requirements have accelerated the concentration of coal production in the hands of the larger producers.

The second option available to the small producer is to engage in legally marginal or totally illegal operations, such as wildcatting. There are some data to suggest that, historically, a similar dynamic occurred in the Pennsylvania anthracite fields during the Great Depression (Shore et al., 1941). Once again, however, we really do not know if coal producers who formerly operated within the law have shifted to unpermitted mining. A former regional manager related what seems to be the prevailing

view of the difficulty of determining the extent of and changes in wildcat mining:

> I suspect that wildcatting, probably, is a function of the economic state of the industry as much as anything else. And to the extent that the regulations have pushed coal producers to become larger producers . . . then you certainly, probably have larger numbers of persons who either are not able to reach those levels of scale or are unwilling to . . . And there may be a pool, a larger pool of potential wildcatters, who are unable to operate legitimately within the law, but have enough knowledge to run a dozer and . . . strip off a little contour mining in the middle of the night, or over the weekend.

The same respondent suggested further that the problem of wildcatting is

> focused or highlighted in Appalachia, because in many cases it's a one industry area. And to that extent, it may be more readily apparent that . . . [if] you can't economically afford to compete, other options may not be as readily available to you . . . [It's] somewhat akin to the kind of Prohibition problems . . . [J]ust because it's against the law to wildcat is not going to stop everybody from trying to strip the coal and sell it. As long as there's a ready market.

But, leaving for a moment the special problem of wildcatting, there is little doubt that in some areas of Appalachia mine

operators, perhaps with the collusion of local politicians and regulatory personnel, have engaged in a variety of imaginative strategies to evade the letter of the law (e.g., Virginia's policy on haul roads and the two-acre exemption). The prevalence and incidence of these practices vary considerably from state to state. Because no one knows as yet whether the states will strengthen their regulatory resolve, no one knows whether such practices eventually will expand or decline.

Regardless of state responses to the federal presence, our interviews with OSM personnel suggest that coal producers gradually developed a modified awareness of their responsibilities. Typical of this perception are the comments offered by a regional manager:

> I think the general mind set of the industry, since 95-87, -- even though it's been a traumatic learning experience for them -- it's been much more acceptance of the requirements [and] the necessity . . . for regulating surface mining . . . I think there's a general acceptance on the part of the industry now that you, when you deal with spoil, it's got to be compacted. It's got to be stabilized, that you got to make sure that it doesn't slide off the side of the hill . . . I don't think anybody would justify shoveling spoil over the downslope now.

Additional support for industry's increasing sense of responsibility is found in mining companys' growing tolerance of the regulatory presence. As noted earlier, small operators were especially antagonistic toward the OSM's inspectors. However,

even this animosity eventually showed signs of erosion. This shift was acknowledged by a regional manager:

> [W]e went from situations in which inspectors were assaulted, to where people now go inspect mines . . . routinely. And while they may not be loved, they still are accepted and, that's a big jump -- from having people with their noses broken and threatening to push them off the site with a bulldozer and, you know, physical abuse.

CITIZENS AND CITIZENS' GROUPS

Prior to the SMCRA, the residents of America's coal fields generally felt powerless to confront and control the practices of mining corporations. We made no systematic effort to determine whether their feelings of powerlessness changed after the establishment of a federal regulatory presence. From the few interviews we conducted with citizens' groups, however, it is clear that the federal Office of Surface Mining gave them their first significant hearing and opportunity to contribute to the control of surface mining operations. In the context of concern for and interest in some of the largely technical impacts of regulation, this impact should not be taken lightly. Recognition of this fact is especially important today, when citizens' and environmentalist groups fear a significant erosion of their recently-won rights by the new OSM leadership.

THE ENVIRONMENT

We know of no systematic comparative investigation of the

environmental consequences of earlier programs and the more stringent federal regulatory program. In Appalachia, opinion suggests that the OSM had begun to make a significant difference. Whether this picture will change now that the new leadership has signalled a different course and given virtually all responsibility to the states is anybody's guess. The same appears to be true of the midwest.

The west may be another matter. Surface coal mining continues to expand, even though the reclamation potential of much of western surface mined land remains in question (e.g., National Research Council, 1974). The western states generally seem willing to push ahead, mine their enormous coal reserves, and to accept industry's assurances that the land can be reclaimed. Research, however, questions their reclamation performance thus far and their ability, therefore, to deliver on their promises (Wiener, 1980).

Asked about the federal program's impact on the environment, OSM employees understandably believed it has been positive. Especially among OSM field inspectors, these beliefs were widespread and represented an important source of job satisfaction. For example:

> Q.: [W]hat part of your job do you see as the most positive?
>
> A.: Cleaning up [the environment] . . . When I first started in here -- of course, I worked all over -- but I remember _____ River. [I was] down there one day when it was raining, and the damn water was chocolate-milk brown. It was a mess. And in the last two years

I've seen a hell of an improvement . . . Cleaning it up, I mean, that's probably one of the most positive things I've done.

In the mail quesionnaire completed by inspectors they were asked to evaluate their impact on reclamation practices. As a group, the inspectors believed the OSM program had improved the quality of the environment substantially during the period 1978-81. However, approximately 60 percent expressed a belief that state programs would be less effective once primacy was granted.

Similarly optimistic views of the OSM's impact, though more restrained, were expressed by the agency's regional managers. Typical were these remarks:

Q.: Did OSM's I&E program have a demonstrable impact <u>on the ground, in the field</u>?

A.: . . . Yes, it did . . . I would say it did have. Now, not <u>big</u>. Not big. But it was there. They stopped, for example, noticeably, they started controlling water better, acid water, better . . . You saw more contemporaneous reclamation, up against the pit more. I saw earlier, better revegetation . . . They started making some better landscape. Yeah, I saw some better reclamation. Now, some of the mines continued to be holdouts.

CHAPTER 12

THE OSM'S INITIAL REGULATORY STYLE: CONSTRAINTS AND CHOICES

To this point, we have presented a detailed description and analysis of the OSM's development of its initial regulatory programs. Now we summarize these materials in terms of the typological model set forth in Table 4-1. In addition, we examine some determinants of and constraints on the development of the OSM's enforced compliance style.

REGULATORY STYLES AND STRATEGIC OPTIONS

For economists, the major options in regulatory control are regulation by economic incentive versus regulation by administrative direction (Mitnick, 1980: chap. 6). Although the incentive option, a favorite scheme of academic economists, has been proposed for surface mining (National Research Council, 1981), it never has been considered seriously as a feasible political alternative in this area. Thus, the options which must be addressed in the regulation of surface mining are variants of the directive approach.

We have argued that two polar styles of enforcement may be developed by regulatory administrators: enforced compliance and negotiated compliance styles. Both are intended to induce the regulated clientele toward compliance with a given set of statutes and administrative rules. Although thinking of the two styles as polar opposites is useful for analysis and comparison, in real life it would be surprising to find an agency in which all phases of the regulatory process were in accord with one polar style.

An enforced compliance style promotes compliance through a

fully rationalized system of justice, i.e., a system in which both the goals of the system and the means of attainment are clearly specified and tightly bound to each other. Such a style, then, is almost always the consequence of a strategic plan. A negotiational style promotes compliance through a flexible, situationally attuned administrative process, i.e., a system in which the mechanisms for attaining compliance are only loosely constrained (whether or not the goals and means have been specified clearly). Such a style may reflect a strategic plan or may emerge incrementally.

Old-style regulatory agencies generally followed a negotiated compliance model. For that reason, they often were criticized for being too flexible and too accommodative, features which presumably facilitated capture (Bernstein, 1955; Friendly, 1962). It is striking that the Office of Surface Mining, from its inception until the takeover by appointees of the Reagan administration. adopted an enforced compliance style at almost every step in the regulatory process.

Relatively formal rule-making procedures are required by statute. But the OSM's rule-making process had an adversarial tone that extended beyond these strictures. Comments from the coal industry were viewed with strong skepticism and contacts with industry were avoided. The production of the regulations was dominated by an emphasis on comprehensive, detailed, and legally defensible rules.

Consequently, the regulations reflected a legalistic rather than a discretionary orientation toward the enabling statute and

the activities to be controlled. The intent was to eliminate ambiguity concerning what was necessary for compliance (cf. National Research Council, 1981a: 37-43) Each of the cases alluded to in section 5 illustrates the incorporation of enforced compliance assumptions into the regulations. The most extreme form of regulating enforced compliance is through design criteria and standards (specified means for reaching the regulatory goals), as exemplified in the sedimentation pond regulations. Although the regulations did include some discretionary elements, nearly always these were specified by the Act or by subsequent judicial decisions.

It is reasonable to assume that the OSM's enforced compliance style would have been implemented most effectively through a centralized organizational system, tightly coupled to state agencies. Although implementation nominally was decentralized through five regional offices, strict rule application was the accepted norm. Only in Region West was there significant deviation from this pattern. The federal agency was only loosely and ambiguously coupled to the state agencies. On the surface, state agencies were treated as though they were tightly coupled to the Office of Surface Mining. They were to be dependent on the federal agency for approval of their regulatory programs, i.e., the OSM took a strong enforced compliance stance regarding state primacy. Nevertheless, the desire to limit negotiated compliance led to a de-coupling of the federal and state agencies, particularly through the ex parte ruling which limited communication at certain points. The ambiguous structural relationship between the OSM and the states opened the door to

demands for negotiated compliance policies.

The OSM's implementation of the interim program was stringent by intent. Exercise of interpretive discretion by field-level inspectors was limited. Inspectors were told to "go by the book," and accommodative negotiation with operators was discouraged. In the application of sanctions, the agency's performance fell short of HQ executives' original expectations. An enforced compliance style was evident in the agency's assessment of fines, which used a point system calculated in the central office. This mode of assessment was an attempt to eliminate discretion and negotiation in sanctioning. Although the law was punitive in orientation, in practice, the fines were modest in size and collection was ineffective. Many times, fines were re-negotiated in conference hearings. The widespread reduction or elimination of fines as a reward for the abatement of violations reflected an accommodative orientation.

DETERMINANTS OF THE OSM'S REGULATORY STYLE

What accounts for the pervasiveness of the enforced compliance style in the early days at the Office of Surface Mining? We believe the agency was propelled not only by internal choice but also by external constraints. Moreover, each selection of an enforced compliance option generated a new set of constraints, both on the coal industry, and on the agency itself. Here we re-examine the underlying sources of the OSM's dominant style and strategies, its guiding ideology (cf. Kagan, 1978; Thomas, 1980), and four types of constraints (limiting or sustaining conditions): (1) the legislated mandate, (2) political

forces, (3) the state of the economy, and (4) the adequacy of organizational resources.

The Guiding Ideology

As the abrupt change in direction wrought by the new administration makes clear, agency policy may be determined primarily from the top down, by managerial intent. Policy choices often reflect underlying values and, at times, the ideologies of particular groups or classes. Such ideologies were powerful determinants of the enforced compliance style that shaped the regulatory process during the OSM's initial period, as well as the negotiated compliance style that currently is operative. Simply put, the fundamental ideologies are environmentalism and developmentalism. The latter, a variant of nineteenth century liberalism, is a set of ideas reflecting the interests of various business classes. The former is a variant of reformism, a set of ideas reflecting the interests of the new upper middle class.

A central component of reformism is the idea that social problems can be resolved and the public interest best served through the critical application of knowledge by autonomous experts. Reformism is characterized by a pervasive distrust of business. Similarly, there is a basic suspicion of any state or federal agency which seems to have been, or is likely to be, captured by industry. One of the few mechanisms available for institutionalizing these misgivings is the rule of law.

The whole thrust of the OSM's regulatory program may be interpreted as an attempt to maintain the separation of industry and state. It was assumed that a truly autonomous regulatory

process could be maintained only through the development and application of the rule of law at every point. We do not mean to say that this ideology was ever fully thought out or enunciated within the agency. But in a diffuse sense, the belief that the coal industry should be strictly controlled by autonomous experts through the rule of law and mechanisms of enforced compliance was a domain assumption found throughout the agency, from headquarters' staff to field-level inspectors.

It was this guiding commitment that led to the selection of enforced compliance strategies in constructing the regulatory program. The basic options were specified by a former official of the Department of the Interior:

> There are two ways of going. You can implement a regulatory program slowly, by committee, clawing, fighting, pushing all the way. Or, you can do the whole thing and spend your time in a more controlled retreat, defending what you've done, as opposed to continually trying to create.

The agency chose the latter strategy. Fully believing that the two enforcement styles are variants of <u>one</u> process, its executives determined that the best way to guard against an early drift toward negotiational strategies was to begin operations at the other extreme. In the words of a solicitor: "Wherever there was a chance to implement more as opposed to less, they did it."

A strong environmentalist commitment on the part of some OSM officials was an important factor in shaping the direction of the agency, but its importance should not be overstated. On the one

hand, several positions in the agency were filled on the basis of recommendations from environmentalist groups. Although these were not the top positions, their incumbents had a disproportionate impact in the selection of basic strategies. They helped set a tone for internal discussion; and the Act's mandated deadlines facilitated movement in the directions where they were willing to lead. Later, an explicit effort was made to recruit former state inspectors who had reputations for stringent enforcement. On the other hand, the vast majority of key OSM executives and managers had no previous ties with the environmentalist movement and, by any stretch of the imagination, could not be called "zealots." They were career administrators and technical experts who were "just doing their job." In this case, their job was the rigid regulation of the coal industry.

<u>Statutory Constraints</u>

For any regulatory agency, a major determinant of the consequent regulatory strategies is to be found in the language of the enabling legislation. Capture theories generally suggest that weak forms of regulation flow from discretionary and accommodative policies, a result of intended vagueness and ambiguities in the legislative mandate (Kolko, 1965; Weinstein, 1968). In direct response to such theories, the establishment of the new regulatory agencies was increasingly based on tighter, more specific legislation (Marcus, 1980). The legislative mandate for the creation of a regulatory program by the Office of Surface Mining was especially detailed and precise, even in comparison with the legislated mission of other new regulatory agencies (e.g., EPA,

OSHA). The Surface Mining Control and Reclamation Act includes 115 environmental performance standards. In addition, the Act placed exceedingly stringent deadlines on the agency and the states.

The specificity of the legislative mandate placed strong constraints on the subsequent development of the regulatory program, enabling, if not forcing, the OSM to select legalistic enforced compliance strategies. The deadlines imposed by the law were further important constraints in shaping such strategies.

When asked to discuss the agency's mission or mandate, OSM officials typically replied that it was simply to implement the law (e.g., "Our priorities were pretty well established by the Act;" "You just have to read section I of the Act and it's a pretty clear statement of the mission of the agency.") The discussion of options revolved around narrow issues, not around the basic direction of the agency.

In its details, the Act contains numerous ambiguities, but the listing of 13 purposes in section 1 clearly indicate that it was intended as a rigorous environmental protection law. For example, section 102.(c) states that it is the purpose of the Act to "assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible." In the case of many previously established regulatory agencies, the enabling legislation was unclear in specifying "firm choices between regulatory effectiveness and economic continuity" (Kagan, 1978: 66). The statement of purposes in the SMCRA makes a ritualistic bow toward assuring "that the coal supply essential to the Nation's energy requirement . . . is provided" and that a balance

be struck "between protection of the environment and agricultural productivity and the Nation's need for coal" [section 102.(f)]. Significantly, however, the preceeding statement of findings in the Act mentions only that the underground coal mining industry is "essential to the national interest" [section 101.(b)]. Nowhere is it stated that a purpose of the Act is to ensure a balance of environmental protection and surface mining development. Thus, the legal mandate for strong deterrence of environmental degradation is quite clear. This mandate is supported by extensive legislative history.

Nevertheless, there are at least two broad mandates of the Act which clearly failed to constrain the direction taken by the initial leadership at the OSM. First, there is the statement that it is the purpose of the Act to "assist the States in developing and implementing a program to achieve the purposes of this Act" [section 102.(g)]. This statement emphasizes the OSM's role as helper. But the relationship between the agency and the states is left quite ambiguous by the Act, which also stipulates that its purpose is to "establish a nationwide program" [section 102.(a)]. This statement implies that the OSM is to be an authoritative director of state programs. The agency's application of its enforced compliance style toward the states, based on an interpretation of strong federal priority, caused major problems in the development of the program. Second, the opening section on environmental protection standards indicates that regulations "shall be concise and written in plain, understandable language" [section 501.(a)]. Clearly, the bulky packages of complicated

regulations produced by the agency failed to meet this requirement.

Political Constraints

The political environment in which the Office of Surface Mining operated generated major constraints on the development of discretionary, negotiated compliance policies. Kagan's review of previous research on regulatory agencies concludes that:

> [A] regulatory program which experiences high public visibility, which is subject to objective measures of performance, which is confronted with a more balanced pressure group structure, and which has multiple sources of intelligence and advice, is more likely to maintain a relatively stringent stance (1978: 68).

All of these determining conditions apply to the OSM. The agency was forced to develop its regulatory program on the periphery of a highly charged political arena. It maintained a relatively high degree of visibility because of the relative balance of continuing oversight from concerned interest groups. The agency was never enmeshed in the traditional "iron triangle" (agency, regulated industry, and Congressional committee) of capture (Weaver, 1978). Rather, it was forced to deal with a shifting balance of interests: environmentalists, large coal, small coal, the states, Congress and the courts.

Having lost the battle for abolition of strip mining, environmentalists and citizens' groups pressured the agency toward the most stringent implementation possible. They had considerable influence in shaping OSM policies because they knew the law and

could contribute strong legal defenses for their suggested revisions of the regulations.

The coal industry, having lost the battle for complete freedom from federal regulation, pressed for flexible rules and lenient enforcement. The industry produced extensive technical comments on the proposed regulations. Relatively few revisions were based on the coal industry's technical comments. Only when the industry's position was advanced on very firm legal ground was its advice heeded. Despite its efforts, the coal industry had little success in setting limitations on the directions taken by the OSM during the Carter administration. Small coal operators, who were more seriously affected by the new regulations than large coal companies, fought the agency tooth and nail. Such vociferous hostility only rigidified the agency's position. Having lost the struggle for general, discretionary rules, the industry carried its fight to the courts and to the states.

Public Law 95-87 was a product of the failure of state regulatory control. Thus, the intent of the law, whatever its formal obeisance to states' rights, was to enforce compliance with its purposes. The states fought for relative autonomy from federal control, for greater flexibility and accommodation in formulating regulations and for negotiation between technical experts in obtaining primacy. The opposition of the states to the federal agency, which varied widely, was based on a desire to adapt the regulations to differing geologic and climatic conditions; to maintain their autonomy and self-respect; and to protect their local industry.

Congress, which had remained largely on the sidelines during

the first two years of the OSM's life, was enlisted on the side of the states. When a bill that would have sharply curtailed the agency's power over the conditions of state primacy (S.1403) passed the Senate by a substantial majority in 1979, it was clear that the agency's mandate to enforce a uniform, national law had been seriously eroded. In failing to negotiate fully with the states and by ignoring Congress, the OSM had overplayed its hand. Its leaders felt constrained to take a more conciliatory stance in negotiating primacy and cooperative agreements with the states.

Finally, the courts act as an important force in the politics of regulation. The major battles over the implementation of regulations occurred with the threat of litigation in mind. In response to this threat, the Office of Surface Mining oriented its actions toward legal defensibility. Thus, a program that was based on a stringent law and an adversarial reformist ideology took a further legalistic turn. More than one hundred tests of OSM regulations were brought in court, including a set of constitutional issues decided by the U.S. Supreme Court (Hodel v. Virginia Surface Mining and Reclamation Assn. 69 L. Ed. 2d). Because the actions of the Office of Surface Mining were successfully defended in the vast majority of these cases, the courts were a major ally in the agency's quest for autonomy. Anticipatory response to judicial decisions was a key factor in establishing the enforced compliance style throughout the agency.

The State of the Economy as Constraint

Most of the new social regulatory agencies were established during the early 1970s in the midst of a relatively prosperous

economic climate. Two earlier versions of the SMCRA were thwarted by Presidential veto. Nevertheless, the strong enforced compliance mandate of the Act reflected Congressional optimism about the state of the economy. State managers, both elected and appointed, are necessarily constrained by "business confidence" (Block, 1977). As the economy and business confidence declined during the late 1970s, the OSM felt increased pressure to relax its policies and to expand its negotiations with the states. Thus, even before the change in Presidential administrations, the agency was moving toward negotiated compliance policies on all fronts.

Resource Constraints

An obvious constraint on agency effectiveness, and a basis for capture, is an inadequate budget. Lack of start-up funds undoubtedly increased the influence of Department of Interior solicitors in shaping the direction taken by the agency. In this instance, the resource squeeze enhanced the power of those most fearful of capture. Later, insufficient resources for inspections did not seem to affect basic policy in any significant way.

Another resource constraint which is conducive to capture is lack of skilled experts in the area to be regulated (Mitnick, 1980). In formulating and implementing their programs, many agencies have been dependent on industry expertise. Office of Surface Mining employees were prevented, by the SMCRA, from having any financial interest in coal mining. Nor did the agency did attempt to recruit personnel with backgrounds in the coal industry. The absence of such people was an intended constraint

on negotiated compliance strategies. From the standpoint of the coal industry, the resulting lack of expertise was a major source of "bad" regulation (i.e., technically incompetent and unnecessarily restrictive). However, the OSM was able to draw from other federal agencies a wide range of technical experts on mining and the environment. In contrast to many captured agencies (Mitnick, 1980), OSM did not rely on the regulated industry for basic information. Generally, agency officials were satisfied with the technical quality of their personnel on the Task Force, in headquarters and in the regions. A major determinant of deference and negotiation was missing in this case. Parenthetically, since capture theory stresses the importance of career mobility from agency to the regulated industry, it is worth noting that we discovered few instances of such mobility in our study.

The most common internal criticisms of the hierarchy at OSM and in the Department of the Interior were: a lack of strong leadership in the top positions, a pervasive absence of political and communicative skills, and a poor coordination of implementation from the Washington office. These factors helped shape the directions taken by the agency. The lack of strong top leadership provided a policy vacuum that was filled by administrative and legal activists. The top leaders then failed to seek the political support needed for the emerging controversial program. In the eyes of some OSM executives, rising opposition to the stringent program could have been stifled by better communications with Congressional supporters, the White House, and state governors. In the view of others, such political

groundwork would have set limits on the development of a stringent program by revealing its lack of support.

Finally, the availability of time may shape regulatory policy. Earlier we pointed out that numerous legislated deadlines were placed on OSM and state operations. The significance of these deadlines in constraining policy options cannot be exaggerated. Tight "agency-forcing" (Ackerman and Hassler, 1981) limited the possibility of amicable negotiations with the industry and the states. The time factor, probably increased the power of the legal staff in rule-making and contributed to the enforced compliance style that permeated the surface mining regulations. In addition, the time constraints on the promulgation of the regulations contributed to the isolation of HQ staff from the regions and the states. And time limitations were a definite factor in the choice of a stringent, as opposed to an accommodative implementation policy. In the words of an OSM HQ executive:

> [The] states at that time were soon to be submitting their state programs, so it looked like the interim program would, a year or so later, be out of existence . . . So we said it was rather absurd to start an educational type of enforcement policy for the short remaining interim program period . . . We just felt there wasn't enough time to give a lot of first bites out of the apple to many operators.

CHAPTER 13

LESSONS AND POLICY IMPLICATIONS

Regulatory policies may be examined in terms of manifest and latent functions, and also dysfunctions, for the larger goals of the agency. In the case of the OSM, these goals were the deterrence of environmentally damaging surface mining activities, assurance of compliance with the requirements of the SMCRA, and the estab-lishment of regulatory autonomy. Here we summarize here some of the benefits of the enforced compliance policies of the Office of Surface Mining, examine their costs, and discuss some policy implications. We present propositional statements drawn from our analysis. These statements represent lessons that we have derived from our case study of the Office of Surface Mining. They should be viewed as hypotheses subject to further testing in comparative studies of the regulatory process, particularly in new-style agencies. On occasion, we draw on findings from studies of the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) as substantiating or modifying evidence. As compared with most old-style agencies, both of these agencies are characterized by enforced compliance styles. The EPA has favored a negotiated compliance style (cf. Marcus, 1980: 285-86) more often than the OSHA or the OSM.

BENEFITS OF ENFORCED COMPLIANCE POLICIES

1. An enforced compliance strategy is a relatively efficient basis for getting a program started. By the early establishment of specific goals, an agency is able to avoid delay stemming from extended internal negotiation concerning its mission. An enforced

compliance strategy limits the extent and duration of external negotiation and narrowly specifies the issues open to negotiation. For the Office of Surface Mining, the set of deadlines mandated by the enabling statute, together with lack of resources, was bound to produce massive confusion. The building of a new agency and the writing of new regulations necessarily entail a considerable amount of internal negotiation over an endless array of details. Given the time constraints, the agency was forced to limit the discussion of options. In the eyes of its top administrators, the agency had no basic alternatives; it did what it had to do to get the show on the road. By limiting negotiation, the OSM was able to avoid the lengthy delays that had characterized rule-making and implementation by the Environmental Protection Agency (Marcus, 1980).

2. An enforced compliance strategy maximizes immediate compliance. Negotiation in the agency's formulation of detailed rules and precise standards was strictly limited. At the level of field enforcement, inspectors were instructed to enforce the regulations to the letter. Fines were meant to be stringent and immediate. The sudden introduction of enforced compliance is a form of shock treatment. It lets the regulated party know that an agency is serious, tough, honest, and efficient. There can be little doubt that the OSM's enforced compliance strategy was effective in immediately limiting environmental damage. Field-level inspectors whom we interviewed were nearly unanimous in their belief in the efficacy of their actions. Perhaps more impressive testimony came from our interviews with coal operators,

who in providing a litany of complaints against the OSM never expressed the belief that the new federal enforcement actually increased environmental damage.

3. An enforced compliance strategy provides a strong defense against litigation. By promulgating and implementing a stringent set of rules, the Office of Surface Mining avoided litigation set in motion by environmentalists. In the case of the environmentalist complaint against failure to carry out the required number of mandated inspections, the agency settled out of court by pledging to fulfill the law. Massive litigation against the EPA and the OSHA (Marcus, 1980; Kelman, 1980) gave the OSM every reason to believe that they also would face such tests. The OSM's solicitors were aware that a detailed record of correct procedures provides an excellent legal basis for regulatory policies. In the large number of cases brought by the coal industry, the agency generally was successful in defending its policies. Careful legal construction of the rules and enforcement policies generally paid off in later court battles.

4. The institution of a stringent set of rules and enforcement policies provides an agency with a strong base from which to pull back. An enforced compliance strategy keeps the opposition extremely busy contesting and adjusting to regulations; it allows for limited accommodation at a later date. Having established its ground, the OSM pulled back, in regard to regulations (e.g., sedimentation ponds and the state window), negotiations on state primacy, and field-level discretion. It remains to be seen, but it is likely, that the base of stringent rules will have a long-term constraining effect on an

administration pledged to negotiated compliance strategies.

5. An enforced compliance strategy provides an agency with an external base of support. All regulatory agencies are faced with conflicting demands. By not attempting to make everyone happy, the agency at least enlists solid support from one party. For the Office of Surface Mining, the enforced compliance model solidified the support of environmentalist organizations. The EPA, which chose a more moderate course, received less vigorous environmentalist support (Marcus, 1980).

6. An enforced compliance strategy provides an agency with a strong sense of mission. In contrast, a negotiated compliance strategy may leave the agency's mission in doubt. In the case of the OSM, such a strategy would have appeared contradictory to the perceived legislative mandate. For the participants, the construction of a new agency is not just another day at the office; it demands a non-bureaucratic workday. The development of a sense of special purpose provided early OSM employees with the motivational ground for meeting heavy demands. The originators of the regulatory program felt that they were involved in a significant and exciting task; they still look back to that period with nostalgia. Strong enforced compliance strategies were important sources for establishing a sense of mission in other new-style agencies as well (Kelman, 1980; Marcus, 1980).

7. An enforced compliance strategy may be a source of internal cohesion within a new agency. The internalization of a sense of mission is a source of organizational solidarity. A sense of unity is extremely important as a counter to the many

controversies and debates produced by program-building. By restricting negotiations with those to be regulated, the Office of Surface Mining engendered a spirit of unification against known adversaries. This sense of cohesion developed both at HQ and in the regions, but to a more limited extent between the two. In dedication and enthusiasm, the top leadership of the second OSM administration was equal to the earlier one. But it is unlikely that the new accommodative program could have produced similar organizational elan even if the new leaders had been given complete control of staffing.

8. A strategy of enforced compliance allows a new agency to avoid a strict hierarchical pattern of control. Theories of mechanistic organization would lead one to expect that a rigidly legalistic program would be carried out by means of centralized authoritarian control (Burns and Stalker, 1961). But, for the OSM, at least initially, common values and a mandate for legalistic application of stringent rules allowed for bureaucratic decentralization. The rules themselves specified what needed to be done. With one exception -- Region West -- the regions felt themselves bound by the rules. Thus, the Office of Surface Mining was able to operate effectively through relatively autonomous regional offices. In the long run, it is not surprising to find that such autonomy could promote negotiated compliance strategies.

COSTS OF ENFORCED COMPLIANCE POLICIES

1. An enforced compliance strategy neglects the practical politics of implementation. Although the enforced compliance

policy is itself a political strategy, it is a strategy that assumes strong political and power bases and eschews coalitions. An agency which sharply limits the negotiation of compliance must operate on the basis of a strong mandate. The Office of Surface Mining assumed that it had such a mandate. Therefore, it felt that it could fairly easily withstand the political pressures of the coal industry. It would simply force the industry to comply with the Act of Congress. Although agency officials deny that they ever intended to take an adversarial position toward the states, they do acknowledge taking the states for granted. When a number of the states revolted against the agency's highhandedness, the OSM suddenly found that it had nearly lost its Congressional base of support.

There were at least two reasons for the agency's lack of political savvy. First, there was the constraint of time. The agency was under such heavy pressure to promulgate and implement the regulations that it was oblivious to the need for fine-tuned negotiations with the states and for maintaining open lines of communication with Congress. Second, whatever the beliefs of agency officials, the logic of their enforced compliance strategy placed them in an adversarial position in relation to the states. The agency, afterall, was demanding a minimally negotiated form of compliance from the states as well as from the coal industry. At the time of the states' revolt, it became clear that, although Congress might be willing to accept an enforced compliance policy for the coal industry, it desired a negotiated compliance policy for the states. The latter policy moved the agency toward a more accommodative stance with regards to the coal industry.

2. An enforced compliance strategy maximizes opposition to an agency. The long struggle to enact the SMCRA had sharply polarized the issue. The tough stance taken by the agency led the coal industry to believe that many of the battles which they had won in the making of the law were now being lost in the making of the regulations and in the strict conditions for primacy. The industry was being challenged to fight back, and it did. More importantly, the states followed suit.

3. An enforced compliance strategy escalates the level of hostility. At all stages and levels of the regulatory process, the OSM presented a single message: "Be reasonable, do it our way." The OSM managed to threaten the autonomy of state governors by usurping states' "rights" (e.g., by demanding the states revise statutes other than their mining laws), to question the professional integrity of state regulatory officials (e.g., by ignoring their claims of special knowledge of local conditions), to irritate the major coal industry officials (e.g., by keeping them at a distance from agency decision-making), and to enrage local coal operators (e.g., by enforcing against minor violations, by demanding payment of fines before a hearing, by maintaining many fines even though a violation had been abated in the appropriate time, and by ignoring site-specific mining and reclamation practices). The OSM's policies drove a few state governors and a multitude of coal operators into a frenzy of vituperation. There is a marked similarity between the OSM and the OSHA in their enforcement policies and the immediately damaging, hostile responses that these policies evoked (cf.

Kelman, 1980).

4. An enforced compliance strategy unites the opposition to a regulatory agency. A primary component of a strict legalistic policy is equal treatment of those to be controlled. Lack of a discretionary policy means that no group receives special treatment because of distinctive problems or because of lack of problems. The Office of Surface Mining had a distinct tendency to produce and implement regulations on the basis of a "worst case" mentality. That is, the agency often wrote rules in order to prevent the worst known cases of environmental degradation from recurring. The rule then was applied to all operators. Individual coal operators have little in common. Some face major difficulties in compliance, others few. Some are more willing to comply than others. This same orientation was evident in the agency's relations with the states. The states vary in environmental problems and in internal pressures to accommodate the coal industry. Through its egalitarian, universalistic policies the agencies brought together its opponents, big and small coal, east and west, states with good programs and those with poor ones. Those who felt abused because they were forced to revise environmentally sound mining practices were driven into the same camp with those who felt abused by the imposition of any controls whatsoever. Certainly, in pursuing a policy of enforced compliance, the agency ignored the ancient wisdom of "divide and conquer."

5. An enforced compliance policy maximizes litigation. If conflict between two parties is not managed by negotiation, there are few options available for its resolution other than the

courts. The OSM assumed, probably correctly, that the coal industry would test the program in court at every turn, no matter what it did. Through a spiral of mutual anticipation of the worst, this prophecy was self-fulfilled.

6. An enforced compliance strategy tends to maximize the cost of compliance. By enforcing compliance with design criteria and standards, regardless either of circumstances or whether the mine operator could meet performance standards by alternative means, the agency necessarily increased the cost of production for the operator by a greater amount than would be required through a negotiated compliance strategy. There is no sure way of determining exactly this incremental cost, which provides the coal industry with a handy tool for beating on the regulatory agency. In any event, increased operator costs may decrease the social costs of production. The arguments favoring enforced compliance through design standards are: (1) that environmental damage will necessarily be more limited than if failure-prone techniques for meeting performance standards are used, and (2) that inspections for design standards limit the costs of enforcement. There is an interesting irony here. The new social regulation is largely an attempt to control the social costs (i.e., the externalities) of production. Design standards are mechanisms by which the regulatory agency externalizes its costs back upon the externalizers. Put another way, design standards represent a strategy for the double internalization of social costs -- the social costs of production and the social costs of control.

7. In the long run, an enforced compliance style generates

internal conflict in an agency. Legalistic rules and stringent enforcement generally are favored by lawyers and central administrators. Implementation is carried out in the field by technical experts. Such experts generally wish to use discretion and negotiated compliance in their work. They turn in this direction out of professional pride in their specialized knowledge and abilities, out of recognition of viable alternatives in obtaining compliance, and often out of a sense of identification with the regulated. Generally, the OSM's regional directors went by the book but fought with HQ for more realistic, technically feasible revisions of the regulations. The majority of inspectors in all regions desired greater discretion in their enforcement activities. A central paradox of the enforced compliance model is that it is a system based on legal and technical expertise which tends to breakdown because it ignores its own technical experts.

POLICY IMPLICATIONS

An easy conclusion which might be drawn from the preceding discussion is that an extreme enforcement strategy is likely to generate costs which threaten to erode its benefits. Now we examine variations on that theme in the form of tentative policy statements derived from our analysis. We state these as correctives for an agency operating on the assumption that it has a mandate for strict enforcement policies. Our comments take the form of a conservative critique of the OSM's program, conservative in the sense that we fundamentally accept the position that the program, as initially constructed, was basically a sound and effective means of implementing the Act.

Most of the deficiencies which we discuss were brought to our attention by some of our respondents who were agency executives and managers during the Carter administration. A more complete discussion of major deficiencies in the OSM's policy implementation would include: failures of communication with the states, Congress, the regions, and with industry; insufficient flexibility in many of the regulations (generally, in over-reliance on design standards -- particularly in areas such as sedimentation ponds, permit analysis, seeding, bonding, and the point system for assessment of fines); lack of attention to the difficulties of the small operator; over-centralized and rigid assessment procedures; inability to collect fines; and insufficient discretion in the hands of the regions and the individual inspectors. We discuss some of these difficulties here.

1. In the short run, mandated early deadlines are important in establishing agency autonomy and in ensuring that an agency's mandate for action will not be side-tracked. The legislation of mandatory time-tables for regulatory agencies was initiated in a number of environmental protection laws in the early 1970s and was intended to prevent the capture of the EPA by regulated industries (Marcus, 1980). It was generally recognized that the ineffectiveness of earlier environmental laws could be traced in part to the lack of precise deadlines. The SMCRA went beyond previous environmental protection statutes in specifying deadlines for detailed rules as well as for meeting specific goals. The further specification of time-tables no doubt was based on knowledge of delays in rule-making in both the EPA and the OSHA

(cf. Kelman, 1980). Although the deadlines imposed on the EPA caused many problems, two separate studies conclude that they were partially effective (National Research Council, 1977; Marcus, 1980). Ackerman and Hassler (1981) refer to Congressional attempts to direct the actions of the new social regulatory agencies as "agenda-forcing" statutes. Clearly, time-forcing statutory deadlines are an aspect of agenda-forcing. What were the consequences of statutory time-forcing for the Office of Surface Mining?

Practically all the decisions which led the OSM to adopt a relatively extreme enforced compliance style of regulation were related to, if not forced by, the time constraints facing the agency. Although deadlines were not met and probably could not have been met, they were taken very seriously by the agency. As a consequence, the regulatory program was constructed in a pressure cooker. Whatever its deficiencies, it was a miracle of instant organization and production. In the long run, however, we believe that the statutory inclusion of mandatory deadlines is detrimental to the construction of an effective program.

Time constraints on the production of the regulations prevented the full consideration of all technical options. Flexible technical alternatives were often rejected for legal reasons; there was no time for reformulation of these suggestions. In general, the pressing deadlines placed decisive power in the hands of the attorneys, who wrote the final draft. Interested parties had little time to respond adequately to the proposed regulations -- a particularly difficult constraint for small

industry. Then, in the review of these comments, the agency had insufficient time to review any but those which were fully justified, technically and legally. Less stringent deadlines would have allowed for more detailed, face-to-face negotiation on particular details. More flexible regulations, less litigation, and less polarization of attitudes might have resulted. Because the agency was forced to give priority to "getting the job done" on time, it isolated itself and gave insufficient attention to the problem of communication with the states, with Congress, and with the coal industry. The time constraints led agency officials to neglect the political context of their activities.

2. The construction of an effective regulatory program must be based on a recognition of political forces. To rephrase Clausowitz' aphorism on war: "the regulatory process is the continuation of political struggle by other means." Regulators would like to place themselves above and beyond politics, to believe that their task is simply the application of administrative, legal and technical expertise. Both the EPA and the OSHA tried to isolate themselves from White House pressure in order to maintain their autonomy and relatively stringent regulatory postures (Marcus, 1980; Kelman, 1980). In at least one instance, the OSM also fought against interference from the executive branch. In general, however, the weakeness of the OSM political liaisons was due to neglect rather than intention. Although the Office of Surface Mining was a creature of Congress and subject to its oversight, it paid little attention to keeping the lines of communication open. Even before the OSM was established, both the OSHA and the EPA had been subjected to

Congressional attack because of their stringent enforcement policies. The OSM's failure to keep Congress informed resulted in greater opposition to a rigorous program than might have been the case otherwise. This opposition eased the way for the agency's radical change in direction under the Reagan administration.

Although some of the states would have fought the OSM under any circumstances, the support of others could have been obtained through direct contact with irate governors and an earlier extension of the primacy deadline. By securing the support of a few key states, the agency could have prevented the unification of the opposition. When states with strong programs opposed the agency's policies, it justified the opposition of states with weak programs, which in turn justified the opposition of the coal industry. By neglecting any political base other than the environmentalist community, the Office of Surface Mining permitted its opposition to snowball. A major source of the agency's problems was its failure to realize that it was involved in a game of coalitional politics.

3. Selective strategic accommodative negotiation must be a component of even the strongest enforced compliance regulatory program. Negotiation is a built-in aspect of any regulatory process. Like matter, it cannot be destroyed. In the case of the OSM, negotiation was required, for example, in the rule-making process and in the review of state programs. But in nearly every instance, these negotiations had a formal, legalistic, adversarial character. Although not required by statute, both the OSHA and the EPA often include face-to-face discussions with both state and

industry at an early point in the rule-making process (National Research Council, 1977). Many state surface mining regulatory agencies also use this procedure. A number of OSM officials, especially those in the field, would have preferred such direct negotiations. It is likely that such meetings would have aided the production of more workable regulations, at the cost, however, of some delay. It must be recognized that the enabling statute placed some serious limitations on negotiation. For example, the requirement for "best available technology" in preventing siltation limited the possibility of using more appropriate technologies to meet the statutory goals.

The agency's most striking failure to engage in accommodative negotiations was in its relations with the states. In general, the states were treated the same way as industry in the rule-making process. Negotiations were basically limited to public hearings and the formal submission of complaints and alternatives, to which the agency formally replied through the FEDERAL REGISTER. Dialogue was not an important part of the process. A symbolic component of the relationship was the ex parte solicitor's opinion which cut off any communications with the states after the end of the public comment period. In the words of a solicitor, this opinion "was legally correct, but a political disaster." Initially the states were treated in the same adversarial manner in the primacy process. The agency's lack of accommodation was motivated by a desire to ensure tough state programs. If more states had obtained approved programs and had been satisfied with them before the change in Presidential administrations, it is likely that they would have opposed a massive rewriting of the

regulations. In the long run, the tough stance toward the states may have weakened their programs. The lesson to be learned here is that in trying to win every battle, you may lose the war.

4. Flexible regulations are not necessarily bad regulations. Major complaints against the OSM's regulations included the failure to allow for variations in local conditions and the over-reliance on design standards. By the end of their tenure, most OSM executives from the Carter administration were coming to see the validity of some of these criticisms. As previously noted, the lack of flexibility in the regulations reflected a "worst case" orientation toward the law. As a Task Force member and HQ executive told us:

> We tended to write regulations, I think, sort of for the worst case. I mean, if you'll pardon, there was kind of a stated joke in the agency -- not a joke, I mean, but it tells the story: "Well, if we write the regulation this way, can we make Virginia do it?" Virginia being, probably, the worst state in the country for regulating.

To paraphrase a comment quoted earlier, "rigid regulations were environmentally sound, but politically they were a disaster."

In the long run, it seems inescapable that political support for rigid regulations could not have been maintained, even had there been no turnover in administrations. All parties agreed that compliance with the law on the basis of flexible regulations was possible. The real question was the probability of compliance, a question of trust. It is possible that the protest against inflexible rules may result in weaker rules than would

have ensued if the rules had been more flexible in the first place. As indicated in the National Research Council report on surface mining (1981b), design standards can be modified to meet local conditions in ways which are environmentally and legally sound.

Finally, it is interesting to note that Kelman (1981) found that the regulations for protecting occupational safety and health are more flexible in social democratic Sweden than in the United States. This greater flexibility is possible because of the context of a greater spirit of trust between industry and state regulators than is found in the United States. Paradoxically, the inflexibility of the OSM's rules reflected the U.S. coal industry's great potential power to subvert the regulatory process.

5. Discretion is a necessary and unavoidable component of an effective implementation program. The OSM made a bow to discretionary enforcement policies in its organizational structure, which permits some regional autonomy. Nevertheless, the regions were guided by and were expected to implement the strategy of strict enforced compliance emanating from HQ. But no guidelines were ever established for resolving the contradictory demands of regional variations and national uniformity. Only the Region West was able to develop a distinctive approach to enforcement. The ability there to regulate through the process of permit review rather than by stringent I&E procedures -- appropriate in Region West because of the presence of federal coal and the long lead time needed to plan large mines -- gradually was accepted as a viable regulatory alternative. A similar regulatory

policy would be to license coal operators and regulate by means of revocation or denial of such licenses. Unfortunately, this strategy, employed in Pennslyvania, was not provided in the SMCRA.

The regional directors chafed against the strictures of strict enforced compliance policies, and they sought more discretion and clearer guidelines for their use. Had the Washington office paid more attention to the regional directors, the regulations would have been more flexible and the implementation procedures more discretionary. It is likely that the implementation program would have aroused less hostility and been more effective if the assessment and collection of fines had been conducted at the regional level, if discretionary elimination of fines simply through abatement of the violation had been allowed, and if inspectors had been given more discretion in writing citations. Office of Surface Mining inspectors, like their counterparts in a number of other agencies (Hawkins, 1980; Kagan, 1980) believed that they could have gained compliance from operators more effectively if they had been allowed more discretion.

CONCLUSIONS

On the basis of its statutory mandate, value-laden choices, and external constraints, the early Office of Surface Mining quickly developed a regulatory style which was oriented toward gaining compliance through stringent enforcement rather than accommodative negotiation. Generally, this reform-forcing style was effective. The agency rapidly produced tough, detailed rules for limiting environmental damage from surface mining. It

enforced these rules uniformly and vigorously. It demanded rigorous state programs. There can be little doubt that the environment was improved by these actions. Many coal operators were forced to improve their mining practices and many states were pushed to strengthen their surface mining laws, regulations, and enforcement practices. The immediate beneficiaries of the OSM's actions were the residents of the coal fields. Generally, grassroot citizen groups were pleased with the OSM's policies and performance.

The costs of the regulatory program for the coal industry were sizable, especially for small Appalachian operators. However, the economic costs of regulated coal production, in large measure, are passed on to the consumer. Thus, these costs are widely diffused. Probably the most costly burden of regulation for the coal operators was the loss of autonomy in doing business -- in planning, mining, and reclamation practices. Similarly, state regulators paid the price of diminished independence. Clearly, the negotiated compliance style of Ronald Reagan's OSM executives will cut both economic and autonomy costs for coal producers and state regulators. Few would believe that the land will benefit. The question is whether the degree of environmental damage will be slight or extensive. But whatever the objective environmental costs, the immediate cost to the agency has been polarized opposition from citizens' groups and the environmentalist community.

The focus of our discussion of the costs of enforced compliance policies has been on the internal costs borne by the

OSM itself. The burden of our argument is that an extreme enforced compliance style feeds back upon itself to its own detriment.

Since the regulatory process is not conducted in a vacuum, some allowance for flexibility and negotiation is a tactical necessity for the implementation of a long-range enforced compliance strategy. The Office of Surface Mining's basic strategy was an over-reaction to the theory of incremental agency capture. In turn, it helped stimulate a counter-reaction.

Nevertheless, our emphasis on the internal costs of a strong regulatory style should not be overdrawn. Since the reaction against the OSM's early program was over-determined by external forces, no amount of ducking and weaving could have forestalled the radical reversal in the direction taken by the agency. Put differently, the actions of the initial OSM executives had little to do with the change of directions. Rather, it was ideologically based and directed from the top by a new administration. The new leadership now faces constraints to the establishment of its extreme negotiated compliance style. Among these constraints are the existence of a set of detailed regulations, now strongly incorporated in many state programs, the results of previous litigation, and employees ideologically predisposed to an enforced compliance style of regulation.

In THE POLITICS OF REGULATION, James Q. Wilson (1980) argues that regulatory agencies can be categorized in terms of the external distribution of costs and benefits. When the proposed costs are narrowly concentrated and the expected benefits are widely distributed, regulation can only emerge from "entrepre-

neurial politics." Like other new social regulatory agencies, the Office of Surface Mining originated when skilled entrepreneurs were able to mobilize resources and generate widespread public support for surface mining legislation. The direct costs were to be borne by a particular industry; the direct benefits would accrue to a very small interest group -- coal field residents. But the indirect benefits, satisfaction deriving from the prevention of environmental degradation would be widespread. Wilson does not discuss the relationship between cost-benefit distributions and the potential for agency capture, but it is reasonable to assume that agencies based on concentrated costs and dispersed benefits are capture-prone. The coal industry has a strong incentive to exercise political influence, especially at the state level. Entrepreneurs may fade and public interest may wane. The future of surface mining regulation hangs on the ability of environmentalist entrepreneurs to marshall resources for litigation and renewed political struggle. The prospect certainly is not dim. If the old-style regulatory agencies were subject to a life cyle tending toward quiescent senescence (Bernstein, 1955), it is likely that the new-style agencies such as the Office of Surface Mining will be rejuvenated periodically in periods of politically charged reform. Given large industry's need for stability and predictability, the ability to maintain a state of regulatory uncertainty may be the best weapon available to reformers.

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