

INJUSTICE IN THE FOURTH CIRCUIT: *BRAGG v. WEST VIRGINIA COAL ASSOCIATION* IS MOVING MOUNTAINS FOR INDUSTRY

INTRODUCTION

In the end, each of us yearns for justice to prevail. That is why when injustice occurs each of us finds ourselves experiencing defeat. However, defining justice can be a bit like Justice Stewart's test for hard-core pornography—"I know it when I see it."¹ The Fourth Circuit's decision in *Bragg v. West Virginia Coal Association* epitomizes just such a case—it was not only erroneous as a matter of law, but it also left millions of citizens without an effective watchdog over state agencies refusing to perform their nondiscretionary duties under the Surface Mining Control and Reclamation Act (SMCRA).² As a result, Congress should amend SMCRA, and courts should seek to distinguish SMCRA from other cooperative federalism statutes.

The story of *Bragg* begins in the small, coal-mining communities of West Virginia.³ There, a group of citizens sought federal court intervention after decades of state, and federal, agency malfeasance.⁴ Specifically, they brought suit against the Director of the West Virginia Division of Environmental Protection (DEP) for failing to perform his nondiscretionary duties under SMCRA.⁵ If the citizens had prevailed, the negative impacts resulting from mountaintop removal would have been minimized. However, the citizens in *Bragg* were not able to vindicate their federal rights against the DEP because the Fourth Circuit's holding took advantage of recent Supreme Court rulings that expanded the scope of protection afforded states by the Eleventh Amendment.⁶

Instead of deciding the case on its merits, the Fourth Circuit decided that once the federal government has approved a state's surface-mining program, state law, rather than SMCRA, controls exclusively.⁷ This interpretation was pivotal for the citizen-plaintiffs in *Bragg* in light of *Pennhurst State School & Hospital v. Halderman*, in which the Supreme Court held that federal courts do not have jurisdiction "in a suit against state

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2000).

3. See Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 69–72 (2004) (discussing the background events that culminated in the *Bragg* suits).

4. *Id.*

5. *Bragg*, 248 F.3d at 285–86.

6. *Id.* at 290–93, 296–98.

7. *Id.* at 294–95.

officials on the basis of state law.”⁸ The Fourth Circuit reasoned that Bragg could not bring the suit in the federal court against the State of West Virginia because under *Pennhurst* the claims were filed against the State Director in federal court and were not authorized by the *Ex parte Young* exception to the Eleventh Amendment.⁹ The matter was remanded to the lower court “with instructions to dismiss Bragg’s unsettled claims . . . without prejudice to any suit she may wish to pursue in West Virginia State court.”¹⁰ One year later, the United States Supreme Court denied a petition for certiorari notwithstanding a brief by the Solicitor General that argued, in part, that the Fourth Circuit’s decision was wrong as a matter of law.¹¹

The impact of *Bragg* becomes clear when one considers exactly what alternatives are available to citizens. In West Virginia, citizens can bring suit in state court against state officials for failing to perform their duties via a state citizen suit provision.¹² However, many states have not enacted equivalent citizen suit provisions. In fact, roughly half of all states do not provide any citizen suit provisions to enforce their environmental laws.¹³

Given the clear, negative implications of *Bragg*, Congress should amend the statute. An amendment offers at least two advantages: (1) it obviates the need for a grant of certiorari by the Supreme Court, which is rarely given;¹⁴ and (2) it reinforces Congress’s intent that citizens play an active role in the administration of coal-mining regulations.

However, while amending the statute presents an appealing solution, it also may be impractical given the current political climate in Washington. Therefore, courts should resist arguments seeking to expand the reasoning in *Bragg* to other cooperative federalism statutes.¹⁵ This issue bears particular relevance in the environmental context because “[s]tates are

8. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

9. *Bragg*, 248 F.3d at 298.

10. *Id.* at 300.

11. *Bragg v. W. Va. Coal Ass’n*, 534 U.S. 1113 (2002); Brief for the Federal Respondents in Opposition at 13, *Bragg*, 534 U.S. 1113 (No. 01–619).

12. W. VA. CODE ANN. § 22-3-25 (LexisNexis 2002).

13. See James R. May, *The Availability of State Environmental Citizen Suits*, NAT. RESOURCES & ENV’T, Spring 2004, at 53, 53 (citing a 1997 survey that tallied twenty-six states with citizen suit provisions for enforcement of environmental laws); *infra* Part III.A.2.c (surveying environmental state citizen suit provisions).

14. See SUPREME COURT OF THE UNITED STATES, THE JUSTICES’ CASELOAD (2005), <http://www.supremecourtus.gov/about/justicecaseload.pdf> (explaining that out of more than 7,000 petitions for certiorari, only about 100 petitions receive plenary review).

15. Two recent cases addressed this issue, one concerning Medicaid and the other addressing the Clean Air Act. The presiding court rejected the defendant’s appeal in each case. See *infra* note 226 and accompanying text.

important players in the administration of many environmental laws” such as the Clean Water Act (CWA).¹⁶ It has been noted that states commonly own, manage, or build facilities that may pollute including hazardous waste sites, prisons, hospitals, and roads.¹⁷ Cabining *Bragg*’s reasoning to SCMRA will ensure that citizens have access to federal courts for claims against state officials who fail to enforce environmental statutes.

Part I of this Note outlines the process of mountaintop removal, the history of coal mining in West Virginia, and the subsequent failure of state and federal officials to perform their statutory duties under SMCRA. Part II lays out the factual and procedural background of the *Bragg* decisions. Part III analyzes the Fourth Circuit’s decision and sets forth possible amendments to SMCRA that would effectively reverse the Fourth Circuit’s holding. Part IV concludes by distinguishing SMCRA from the CWA.

I. TECHNICAL AND LEGAL BACKGROUND

A. *Mountaintop Removal in West Virginia*

Mountaintop removal is a strip-mining technique that became widespread in the 1990s throughout central Appalachia.¹⁸ The practice likely gained popularity, in part, because it provides efficient access to low-sulfur, high-grade coal.¹⁹ The technique works by blasting away the top layer of a mountain, removing the exposed seam of coal, and then blasting away the next layer.²⁰ Coal-mine operators repeat this process until it is no longer economically beneficial to continue.²¹ Often, operators remove several hundred feet of mountaintop, leaving once rugged mountain terrain flattened and deforested.²² The earth is broken up “as it is removed, and the broken rock is referred to as ‘spoil.’”²³ According to SMCRA, an operator must “restore the approximate original contour [AOC] of the land” by putting back the excess spoil.²⁴ However, “[b]ecause the broken rock

16. Hope Babcock, *The Effect of the Supreme Court’s Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!*, 10 WIDENER L. REV. 205, 205 (2003).

17. *Id.*

18. McGinley, *supra* note 3, at 55 (quoting Rudy Abramson, *New Coal Isn’t Old Coal*, ALICIA PATTERSON FOUND. REP., <http://digbig.com/4ghra> (last visited Apr. 20, 2006)).

19. *See id.* at 57 & n.190 (describing the rise in mountaintop-removal mining in West Virginia).

20. *Id.* at 57.

21. *Id.*

22. *Id.*

23. Surface Coal Mining and Reclamation Operations, 69 Fed. Reg. 1036, 1036 (proposed Jan. 7, 2004).

24. 30 U.S.C. § 1265(b)(3) (2000).

incorporates voids and air, spoil is less dense than undisturbed rock.”²⁵ Thus, “the volume of spoil removed during mining becomes greater than the volume of rock that was in place prior to mining.”²⁶ This process is called “swelling” and the excess rock that remains after restoration is called “excess spoil” or “overburden.”²⁷ Operators frequently dump the overburden into nearby valleys, creating “valley fills.”²⁸ These fills, which can be as much as one thousand feet wide and several miles long, often bury streams.²⁹

This process is inherently devastating for the natural environment. As a result of mountaintop removal, “[a]n estimated 400 square miles of southern West Virginia mountains and ridges have been leveled and 1,000 miles of streams buried beneath debris blasted, shoved, and dumped into narrow valleys.”³⁰ Judge Haden,³¹ judge for the Southern District of West Virginia, described the ecological impacts of mountaintop removal as follows:

When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water

25. Surface Coal Mining and Reclamation Operations, 69 Fed. Reg. at 1036.

26. *Id.*

27. McGinley, *supra* note 3, at 56–57.

28. *Id.* at 57.

29. *Id.* The streams buried can be filled “with enough spoil to fill 1.1 million railroad cars, a train that would stretch from Charleston [W. Va.] to Myrtle Beach, S.C., and back a dozen times.” Ken Ward Jr., *Strip-Mining Battle Resurfaces in State*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Mar. 22, 1998, at 1A, available at <http://wvgazette.com/static/series/mining/MINE0322.html>.

30. McGinley, *supra* note 3, at 55 (quoting Abramson, *supra* note 18).

31. Judge Charles H. Haden II presided over the original *Bragg* case. *Bragg v. Robertson*, 72 F. Supp. 2d 642, 645 (S.D. W. Va. 1999). “Appointed to the federal bench by Republican President Gerald Ford, Judge Haden had family ties to the coal industry. Some in the coal industry believed that his conservative political background would bode ill for the coalfield citizen plaintiffs. Judge Haden, however, did not meet those expectations.” McGinley, *supra* note 3, at 72 n.274 (citing Rudy Abramson, *A Judge in Coal Country*, ALICIA PATTERSON FOUND. REP., <http://digbig.com/4ghrg> (last visited Apr. 20, 2006)). “Not since the late U.S. District Judge Frank Johnson desegregated Alabama buses and schools and opened state voting booths to African Americans in the 1950s and ’60s has a federal judge confronted the political and economic powers of his native state more conspicuously.” Abramson, *supra*.

quality.³²

Mountaintop removal also takes its toll on nearby communities. For example, the dynamite blasts that split the rock cause homes to shake and foundations to crack.³³ The West Virginia DEP's 2002–2003 fiscal year report indicates that it investigated 987 citizen complaints during that period.³⁴ The blasting frequently kicks dust and rock into people's communities.³⁵ Additionally, “[t]rucks full of coal rumble past some people's front porches at the rate of 20 an hour, 24 hours a day,” and “[m]ining dries up an average of 100 wells a year and contaminates water in others.”³⁶ In a 1998 case against one of West Virginia's largest coal producers, a local resident described the effects of coal mining on her and her family:

If you were inside, it interrupted your life. I[f] you were outside, it interrupted your life
I couldn't sit on my porch without getting dust on me I couldn't even walk in my grass. I couldn't get in my car. I couldn't even let my kids go out and play without the dust.³⁷

Faced with such disruptive impacts on nearby residents, one solution coal companies have implemented is the removal of entire communities.³⁸ They do so by purchasing much of the housing near the mining operation.³⁹ Thus, the problem can be eliminated if you “buy out nearby residents so there [is] no one left to complain about blasting, dust and flyrock.”⁴⁰ In response to company efforts at buyouts, Patricia Bragg, the plaintiff in

32. *Bragg v. Robertson*, 72 F. Supp. 2d 642, 661–62 (S.D. W. Va. 1999), *vacated sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

33. Penny Loeb, *Shear Madness*, U.S. NEWS & WORLD REP., Aug. 11, 1997, at 26, 29.

34. 2002–2003 W. VA. DEP'T OF ENVTL. PROT. ANNUAL REPORT 4, *available at* http://www.dep.state.wv.us/Docs/4972_Annual%20Report%2003.pdf.

35. *See* McGinley, *supra* note 3, at 93 (sharing the personal experience of one family in West Virginia).

36. Loeb, *supra* note 33, at 29.

37. Ken Ward Jr., *Buying Blair*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Nov. 22, 1998, at 1A, *available at* <http://www.wvgazette.com/static/series/mining/MINE1122.html> [hereinafter *Ward, Buying Blair*].

38. McGinley, *supra* note 3, at 79.

39. Michael Janofsky, *As Hills Fill Hollows, Some West Virginia Residents Are Fighting King Coal*, N.Y. TIMES, May 7, 1998, at A24. For example, Blair, West Virginia, has become almost extinct. *See* Ward, *Buying Blair*, *supra* note 37 (discussing the sales of Blair property). Over half of the town's 231 homes have been purchased by Arch Coal, Inc. *Id.* (citing Loeb, *supra* note 33, at 28). The houses have been left vacant and “at least two dozen have been burned down by one or more arsonists.” *Id.* (quoting Loeb, *supra* note 33, at 28).

40. Ward, *Buying Blair*, *supra* note 37.

Bragg v. West Virginia Coal Association, told a newspaper reporter, “[t]he bottom line, whether they offer you a fair price or not, is why do I have to move As an American, I can choose where I want to live. If I choose to live in a hollow, call me a hick or a hillbilly, but that’s where I want to live.”⁴¹

The problems associated with coal mining are not recent phenomena. There is a long and well-documented history illustrating the consequences of coal mining on the land and to the communities nearby.⁴² However, state regulation of the coal industry in the years prior to SMCRA was minimal because state legislators recognized that “choosing to pass laws to reduce the adverse consequences of coal mining would impose increased costs on [the state’s] own coal industry.”⁴³ The result would be that “the price of coal produced in a state forbearing regulation would be cheaper and thus more competitive in the market than coal produced in a state that imposed environmental regulatory costs on its operators.”⁴⁴ As one commentator explained, “[b]y the end of the 1960s, public concern over the adverse impacts of coal mining had grown to a crescendo of opposition. It was generally recognized that the states could not and would not impose meaningful regulation on coal companies operating within their own borders.”⁴⁵ But even on the federal level, proponents of regulation were met with stiff resistance.⁴⁶ Then in 1972, the Buffalo Creek disaster occurred, compelling congressional action.⁴⁷ At Buffalo Creek, a massive impoundment of coal waste collapsed and the resulting flood wiped out entire communities and killed over one hundred people, injuring thousands more.⁴⁸ Congress began working on legislation shortly thereafter.⁴⁹

41. Janofsky, *supra* note 39.

42. See generally McGinley, *supra* note 3 (describing, in great detail, the history of coal mining in West Virginia over the past two hundred years and its subsequent impact on communities).

43. *Id.* at 50.

44. *Id.* (citing John D Edgcomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 308 (1983)).

45. *Id.*

46. See *id.* at 50–51 (“Twice Congress passed legislation, and twice the coal industry and its state political allies succeeded in persuading President Gerald Ford to exercise his veto power.” (citing ENV’T & NATURAL RESOURCES POLICY DIV., LIBRARY OF CONGRESS, STATE SURFACE MINING LAWS: A SURVEY, A COMPARISON WITH THE PROPOSED FEDERAL LEGISLATION, AND BACKGROUND INFORMATION, S. Doc. No. 95-25, at iii, 3–9 (1977))).

47. *Id.*

48. McGinley, *supra* note 3, at 50; see GERALD M. STERN, THE BUFFALO CREEK DISASTER: HOW THE SURVIVORS OF ONE OF THE WORST DISASTERS IN COAL-MINING HISTORY BROUGHT SUIT AGAINST THE COAL COMPANY—AND WON 41–42 (1976) (“[P]eople screaming, and the roar of the water’ shattered the Buffalo Creek Valley.”); Paul J. Nyden, *Miners for Democracy: Struggle in the Coalfields* (1974) (unpublished Ph.D. dissertation, Columbia University), available at

SMCRA passed twice in Congress only to be met by vetoes from President Gerald Ford.⁵⁰ Finally, in 1977 the bill passed for a third time and was signed into effect by President Jimmy Carter.⁵¹

B. The Surface Mining Control and Reclamation Act (SMCRA)

Congress enacted SMCRA to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.”⁵² To achieve its purposes, SMCRA “establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”⁵³ It has been described as “provid[ing] a truly federalist distribution of regulatory authority for the coal-mining industry.”⁵⁴ Subchapter II of Title 30 creates the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior.⁵⁵ The Secretary of the Interior (Secretary), acting through the OSM, is charged with primary responsibility for administering and implementing the federal program by promulgating regulations and enforcing its provisions.⁵⁶

While Congress created a federal program to be administered by a federal office, it also recognized that “because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations,” States should have “primary governmental responsibility” for administering SMCRA.⁵⁷ Consequently, each State may adopt a regulatory program provided that the state program enforces the

<http://wvgazette.com/static/series/buffalocreek/NYDEN.html> (“As a huge gash opened up in the 50-foot high dam, more than 120 million gallons of water broke loose and smashed into the mountain opposite the dam, back up into the hollow a few hundred feet toward the mines, and then went crashing down the narrow valley which is only between 200 and 500 feet wide. A wave of black water between 20 and 30 feet high, filled with thousands of tons of sludge and coal waste, poured down over the 16 coal mining towns, moving at about 30 miles per hour. As the flood waters tore little homes and churches from their foundations and wrenched steel rails from wooden railroad ties, it gained tremendously in destructive force. About 45 minutes later, the flood reached the bottom of the hollow, 700 feet below the elevation of the dam which had collapsed.”).

49. H.R. REP. NO. 95-218, at 57 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 595 (explaining the purposes behind and history of SMCRA).

50. *Id.*

51. McGinley, *supra* note 3, at 51.

52. 30 U.S.C. § 1202(a) (2000).

53. *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981); *see also* H.R. REP. NO. 95-218, at 57 (describing the mechanics of the proposed bill).

54. *In re Permanent Surface Mining Regulation Litig.*, 617 F.2d 807, 808 (D.C. Cir. 1980).

55. 30 U.S.C. § 1211(a).

56. *Id.* § 1211(c).

57. *Id.* § 1201(f).

federal performance standards.⁵⁸ To do so, a State must apply for “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” on “non-Federal lands” pursuant to § 1253.⁵⁹ Under § 1253, a “State [that] wish[es] to assume permanent regulatory authority . . . must submit a proposed permanent program to the Secretary for his approval.”⁶⁰ The State must show that the required SMCRA-environmental-protection standards have been enacted into law.⁶¹ The plan must also show that the State has the requisite administrative and technical resources to enforce the regulations.⁶² This includes adequate personnel, funding, effective implementation, maintenance, and enforcement of a permit system.⁶³ No state or federal regulatory authority may approve a permit or revision application unless that authority finds “that all the requirements of this chapter and the State or Federal program have been complied with.”⁶⁴

“The Secretary’s role under SMCRA does not end once it has approved” a program and delegated it to the “primacy” state.⁶⁵ “Rather, SMCRA gives the Secretary ongoing responsibility to oversee the effectiveness of a State’s implementation of its program, and provides in certain circumstances for direct federal enforcement of state programs”⁶⁶ The House Report prompting passage of SMCRA makes explicitly clear why the lawmakers felt providing federal oversight and enforcement was important. The Report states: “For a number of predictable reasons—including insufficient funding and the tendency for State agencies to be protective of local industry—State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment.”⁶⁷

SMCRA provides several avenues of federal oversight and enforcement authority. First, SMCRA compels the Secretary to conduct periodic federal inspections of coal mines so the Secretary can adequately evaluate the State’s administration of its approved program.⁶⁸ Second, if the Secretary has any cause to believe that a person is in violation of

58. *Id.* § 1253(a); *Hodel*, 452 U.S. at 269.

59. 30 U.S.C. § 1253(a).

60. *Hodel*, 452 U.S. at 271; 30 U.S.C. § 1253(a).

61. 30 U.S.C. § 1253(b).

62. *Hodel*, 452 U.S. at 271 (citing 30 U.S.C. § 1253(a) (Supp. III 1979)).

63. 30 U.S.C. § 1253(a)(3)–(4).

64. *Id.* § 1260(b)(1).

65. Brief for the Federal Respondents in Opposition, *supra* note 11, at 4.

66. *Id.*; see 30 U.S.C. §§ 1254(b), 1267(a).

67. H.R. REP. NO. 95-218, at 129 (1977), as reprinted in 1977 U.S.C.C.A.N. 593, 661.

68. 30 U.S.C. § 1267(a).

SMCRA or any permit condition of SMCRA, the State has ten days to take appropriate action before “the Secretary shall immediately order Federal inspection of the surface coal mining operation.”⁶⁹ Third, the Secretary can also order an immediate inspection, without notifying the State, if there is an indication of an “imminent danger of significant environmental harm.”⁷⁰ Fourth, the Secretary shall “order a cessation of surface coal mining and reclamation operations” where “an imminent danger to the health or safety of the public” is found and “shall issue a notice to [a] permittee” when a violation is found but no imminent harm exists.⁷¹ Fifth, in the case that the Secretary concludes that a state “is not enforcing any part of [their regulatory] program, the Secretary may provide for the Federal enforcement . . . of that part of the State program not being enforced by such State.”⁷² Sixth, if the Secretary determines that “the State has not adequately demonstrated its capability and intent to enforce” its approved program, “[t]he Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith.”⁷³ Finally, “[t]he Secretary shall . . . implement a Federal program . . . if [a] State . . . fails to implement, enforce, or maintain its approved State program”⁷⁴

Normally, SMCRA requires that a state’s regulatory authority only grant permits to strip-mining operations if the operator agrees and has the means to restore the land to its “approximate original contour” (AOC).⁷⁵ As a strip-mining technique, mountaintop removal must also meet AOC requirements.⁷⁶ In the decade prior to the passage of SMCRA, strip mining accounted for only about ten percent of the coal obtained in West Virginia.⁷⁷ Even so, “[w]hen Congress was debating SMCRA, central

69. *Id.* § 1271(a)(1).

70. *Id.*

71. *Id.* § 1271(a)(2)–(3).

72. *Id.* § 1254(b).

73. *Id.* § 1271(b).

74. *Id.* § 1254(a)(3).

75. *See id.* § 1265(a), (b)(3) (stating that all operations are to “backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this chapter)”).

76. For a complete discussion of mountaintop removal, see *supra* Part I.A.

77. Ken Ward Jr., “*As High as God Did*”: *Law to Rebuild Mountains Falls by Wayside*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), May 3, 1998, at 1A, available at <http://wvgazette.com/static/series/mining/MINE0503.html> [hereinafter Ward, *As High as God Did*].

Appalachian coal operators and coal-state congressional representatives sought an exemption from the AOC requirement for mountaintop removal mining.⁷⁸ They argued that mining could provide flat land, which in turn would lead to greater economic development and provide much needed land for schools, airports, and hospitals.⁷⁹ In response, although it imposed stringent regulations, Congress provided an AOC exception for certain mountaintop-removal-mining operations.⁸⁰ In order for a mining operation to receive an AOC variance, it must show the relevant agency that the variance will be used for at least one of five specific categories: industrial, commercial, agricultural, residential, or public facility.⁸¹ Additionally, the applicant must prove that the proposed postmining use constitutes an “equal or better economic or public use of the affected land, as compared with premining use.”⁸² Furthermore, the applicant must assure the agency that the company has sufficiently planned a postmining land use and meets certain objective criteria.⁸³ Finally, an applicant must show that the proposed use is consistent with adjacent land uses and existing state and local land-use plans and programs, and that the proposed use will meet all other requirements of SMCRA.⁸⁴

As explained above, if an applicant does not receive an AOC variance, the applicant must restore the land to its approximate original contour. However, since 1979, AOC guidelines have allowed for the disposal of

Compare this with the nearly 1/3 that is obtained today. *Id.*

78. McGinley, *supra* note 3, at 58.

79. *Id.* at 58 & n.192. At the time of the debate, a then-West Virginia Senator argued that “[i]n the [S]tate of West Virginia, we have a need for level land We know that oftentimes surface mining can allow for the location of a school, an airport, or for housing - not one, but many homesites.” Ward, *As High as God Did*, *supra* note 77.

80. See 30 U.S.C. § 1265(c)(2)–(3) (enumerating requirements for proposed postmining land uses).

81. *Id.* § 1265(c)(3).

82. *Id.* § 1265(c)(3)(A).

83. *Id.* § 1265(c)(3)(B). Section 1265 requires that the proposed use be:

- (i) compatible with adjacent land uses;
- (ii) obtainable according to data regarding expected need and market;
- (iii) assured of investment in necessary public facilities;
- (iv) supported by commitments from public agencies where appropriate;
- (v) practicable with respect to private financial capability for completion of the proposed use;
- (vi) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and
- (vii) designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site

Id.

84. *Id.* § 1265(c)(3)(C), (E).

“excess spoil” into valleys.⁸⁵ At that time the process was called the “shoot and shove” method—aptly named to describe the technique of blasting through mountainsides and using bulldozers to simply push the rock down slope.⁸⁶ Instead, Congress intended excess spoil be trucked to disposal sites where fills would be constructed layer by layer, from the bottom up.⁸⁷ In practice, this was an expensive remedy.⁸⁸ As a result, in 1991, the OSM began allowing for valley fills or “controlled gravity transport.”⁸⁹ Now, the DEP can issue permits allowing for valley fills so long as the operator complies with the “buffer zone rule.”⁹⁰

The DEP has administered West Virginia’s program, which includes the buffer zone rule, since 1981.⁹¹ West Virginia’s rule is modeled after, but not identical to, the similar buffer zone regulation by the Department of the Interior.⁹² It provides:

No land within one hundred feet (100’) of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Secretary. The Secretary will authorize such operations only upon finding that surface mining activities will not adversely affect the water quantity and quality or other environmental resources of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.⁹³

85. Surface Coal Mining and Reclamation Operations, 44 Fed. Reg. 14,902, 15,204 (Mar. 17, 1979) (codified as amended at 30 C.F.R. § 816.72 (2005)).

86. McGinley, *supra* note 3, at 66 n.237 (quoting Office of Surface Mining, U.S. Dep’t of the Interior, Pre-Surface Mining Law Photos (Jan. 23, 2002), <http://www.osmre.gov/ocphotoz.htm>).

87. *Id.*

88. *Id.*

89. Surface Coal Mining and Reclamation Operations, 56 Fed. Reg. at 65,612, 65,614 (codified at 30 C.F.R. § 816.74(h) (2005)).

90. Bragg v. Robertson, 72 F. Supp. 2d 642, 646–47 (S.D. W. Va. 1999) (citing 30 C.F.R. § 816.57), *vacated sub nom.* Bragg v. W. Va. Coal Ass’n, 248 F.3d 275 (4th Cir. 2001).

91. Ken Ward Jr., *Mountaintop Removal Ruling Tossed: State’s Sovereign Immunity Barred Haden from Hearing Lawsuit, Appeals Panel Says*, CHARLESTON GAZETTE, Apr. 25, 2001, at 1A, available at <http://www.wvgazette.com/section/Series/Mining+the+Mountains/2002012520>; W. VA. CODE R. § 38-2-5.2. (2005).

92. Compare W. VA. CODE R. § 38-2-5.2 (West Virginia’s stream-buffer regulations), with 30 C.F.R. § 816.57 (federal stream-buffer regulations).

93. W. VA. CODE R. § 38-2-5.2.

Like many environmental statutes, SMCRA also contains a citizen suit provision.⁹⁴ The legislative history concerning SMCRA's citizen suit provision begins with the acknowledgment that "[t]he success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process."⁹⁵ In fact, Congress found citizen participation to be a "vital factor" in ensuring appropriate regulatory control over the mining industry.⁹⁶ The citizen suit provision in SMCRA reads:

[A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter—

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.⁹⁷

West Virginia created a citizen suit provision essentially identical to the one found in its federal counterpart.⁹⁸ However, in spite of these numerous federal and state regulations seeking to protect the environment and communities from the spoils of coal mining, hundreds of square miles remain destroyed and thousands of streams have been annihilated.⁹⁹

94. 30 U.S.C. § 1270(a) (2000).

95. H.R. REP. NO. 95-218, at 88 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 625.

96. *Id.* at 89.

97. 30 U.S.C. § 1270(a).

98. W. VA. CODE ANN. § 22-3-25 (LexisNexis 2002).

99. Rita Price, *Knocking Down Mountaintops*, COLUMBUS DISPATCH (Ohio), Oct. 9, 2005, at 01A. In 1999, while considering a motion for a preliminary injunction, Judge Haden accepted an offer by the plaintiffs to visit mountaintop removal mines himself. *See* *Bragg v. Robertson*, 54 F. Supp. 2d 635, 643 n.12 (S.D. W. Va. 1999) (comparing the Court's findings during a site visit to the testimony of various witnesses), *rev'd sub nom.* *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001). After flying over most of the sites in southern West Virginia Judge Haden observed that:

C. State and Federal Agency Failure

If the above-listed regulations so explicitly call for numerous planning and foresight requirements when granting a variance and strict environmental protections when allowing for valley fills, why are there so many empty meadows and desecrated streams? According to Ken Ward Jr., an award-winning investigative reporter, the DEP is largely to blame.¹⁰⁰ For his series, “Mining Mountains,” Ward obtained files from the DEP after filing a request under the West Virginia Freedom of Information Act.¹⁰¹ These files revealed that out of the thirty-four mines in West Virginia’s history to receive an AOC variance, only one included a plan for future development.¹⁰² Instead, the vast majority of plans proposed “fish and wildlife habitat.”¹⁰³ While fish and wildlife habitat is not an approved use under SMCRA, roughly one-third of all mountaintop-mining operations were issued a permit based on that proposed use.¹⁰⁴ Additionally, the West Virginia records revealed that “[s]ixty-one out of the [eighty-one] active mountaintop-removal mines permitted since 1978 did not receive [an AOC] exemption.”¹⁰⁵ This means that seventy-five percent of West Virginia’s mines were operating without a valid permit and in contravention of state and federal law. Out of all this land open for development, only “several dozen buildings, including four schools and three jails, have been built on [it] so far.”¹⁰⁶

The sites stood out among the natural wooded ridges as huge white plateaus, and the valley fills appeared as massive, artificially landscaped stair steps. Some mine sites were twenty years old, yet tree growth was stunted or non-existent. Compared to the thick hardwoods of surrounding undisturbed hills, the mine sites appeared stark and barren and enormously different from the original topography.

Id. at 646.

100. See Ward, *As High as God Did*, *supra* note 77 (criticizing DEP’s failure to mitigate extensive non-compliance with AOC regulations).

101. Ward, *As High as God Did*, *supra* note 77.

102. McGinley, *supra* note 3, at 69 n.254 (citing Ken Ward Jr., *Flattened: Most Mountaintop Mines Left as Pasture Land in State*, SUNDAY GAZETTE-MAIL (Charleston, W. Va), Aug. 9, 1998, at 1A, available at <http://www.gazette-mail.com/static/series/mining/MINE0809.html> [hereinafter Ward, *Flattened*]).

103. *Id.* at 71 (citing Ward, *Flattened*, *supra* note 102).

104. *Id.* (citing Ward, *Flattened*, *supra* note 102).

105. Ward, *As High as God Did*, *supra* note 77. This does not even include the fifty-five closed-permit sites for which DEP provided no information. *Id.*

106. Loeb, *supra* note 33, at 29.

The DEP not only failed to make the requisite findings prior to issuing an AOC variance but it also failed to enforce the buffer zone rule.¹⁰⁷ According to Judge Haden's lower court opinion, testimony given by then-permit supervisor Larry Alt made it perfectly clear that the DEP abdicated its duties under the buffer zone rule prior to 2002.¹⁰⁸ When describing the permit-application process, Alt explained:

If the company has shown that the fill is necessary during the review of the application with the spoil balance and stuff and they show that the fill will be stable, then . . . in the area of the fill, *we do not require them to make those [buffer zone variance] findings.*¹⁰⁹

Applicants seeking valley-fill permits fully acknowledged that buffer zone requirements would not be met, yet the DEP routinely issued permits without making the requisite findings.¹¹⁰

Not only did state officials fail to make their required findings, federal officials likewise failed to provide oversight. In 1998, despite more than twenty years of federal oversight, the OSM had never fully examined how well the DEP handled its variances.¹¹¹ It was in this climate of government failure that Patricia Bragg filed her claim in the District Court of West Virginia.

II. THE COURT DECISIONS

A. Bragg v. Robertson: *The District Court Holding*

Amidst the intense media coverage exposing the DEP's failures, ten citizens living near coal mines in southern West Virginia and a local environmental group filed suit against the DEP and the OSM, among others.¹¹² In their complaint they alleged that the Director of the DEP violated his nondiscretionary duty under SMCRA by issuing permits

107. Bragg v. Robertson, 72 F. Supp. 2d 642, 647 (S.D. W. Va. 1999), *vacated sub nom.* Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

108. *Id.*

109. *Id.* (emphasis added) (alteration in original).

110. *See id.* (citing surface mine permit applications that supported agency testimony that required findings were not made).

111. Ward, *As High as God Did*, *supra* note 77.

112. OFFICE OF SURFACE MINING AND RECLAMATION, DEPARTMENT OF THE INTERIOR, ANNUAL EVALUATION SUMMARY REPORT FOR THE REGULATORY AND ABANDONED MINE LAND RECLAMATION PROGRAMS ADMINISTERED BY THE STATE OF WEST VIRGINIA FOR EVALUATION YEAR 2000, at 11 (2001).

without making the findings required by state and federal law for AOC variances and the buffer zone rule.¹¹³ The parties entered into a consent decree regarding the DEP failure to enforce AOC variances and subsequently those complaints were dropped.¹¹⁴ However, the buffer zone rule was decided through summary judgment at trial.¹¹⁵ In 1999, after years of agency malfeasance, District Court Judge Haden, in *Bragg v. Robertson*, held that the Director of the DEP had a nondiscretionary duty to make the findings required under the buffer zone rule before authorizing any incursions, including valley fills, and enjoined him from issuing further permits allowing for such incursions.¹¹⁶ Judge Haden granted the injunction that “enjoin[ed] the Director from further violations of the nondiscretionary duties . . . and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal.”¹¹⁷ The district court stayed its injunction pending appeal to the Fourth Circuit.¹¹⁸

Immediately after Judge Haden’s ruling, “West Virginia’s Governor, its congressional delegation, coal industry lobbyists, and the [United Mine Workers of America (UMWA)] leadership attacked the court’s decision.”¹¹⁹ Governor Cecil Underwood (R.-W.V) said that “October 20, 1999, will go down as the bleakest day in the recent history of our state of West Virginia.”¹²⁰ The DEP made a public announcement that it would not be issuing any new permits.¹²¹ Additionally, “[c]oal companies using mountaintop removal mining shut down their mines and laid off all of their miners.”¹²² Meanwhile, “[t]he industry and the UMWA launched an

113. *Bragg*, 72 F. Supp. 2d at 660–61.

114. *Bragg v. Robertson*, 83 F. Supp. 2d 713, 722 (S.D. W. Va. 2000). Under the consent decree, among other things, the Director agreed “to propose and submit to the Legislature proposed regulations or statutory provisions allowing commercial forestry and homesteading post-mining land uses for operations receiving AOC variances.” *Id.* at 718. In fact, in January of 2004, the West Virginia legislature passed new legislation enabling regulations that not only allow for commercial forestry, but also require that forests be seeded with diverse species and in accordance with sustainable forestry practices. W. VA. CODE R. § 38-2-7.6 (2005).

115. *Bragg*, 72 F. Supp. 2d at 661.

116. *Id.* at 663.

117. *Id.*

118. *Bragg v. Robertson*, 190 F.R.D. 194, 196 (S.D. W. Va. 1999).

119. McGinley, *supra* note 3, at 74 (citing Ken Ward Jr., *Groups: Ban Affects New Permits*, CHARLESTON GAZETTE, Oct. 23, 1999, at 1A [hereinafter Ward, *Groups*]).

120. *Id.* at 74 n.284 (citing Ward, *Groups*, *supra* note 119).

121. *Id.* (citing Ken Ward Jr., *Mining Rules May Be Tossed*, CHARLESTON GAZETTE, Oct. 22, 1999, at A1).

122. *Id.* (citing Ken Ward Jr., *More Mine Closures on Way*, CHARLESTON GAZETTE, Oct. 29, 1999, at A1).

expensive television and newspaper advertising campaign throughout the state forecasting doom for the state's economy and the loss of thousands of jobs."¹²³

On appeal, the Fourth Circuit did not reach the merits of the case.¹²⁴ Instead, it found that SMCRA allows states to exclusively regulate surface coal mining on non-federal lands once the Secretary approves a state's plan, and as such, the Eleventh Amendment's grant of sovereign immunity bars suit in federal court against state officials.¹²⁵ Before further discussing the court's ruling in *Bragg*, a basic understanding of Eleventh Amendment jurisprudence is required.

B. Sovereign Immunity and the Circuit Court Holding

The text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹²⁶ While the text of the amendment seems quite clear, the Supreme Court began reading additional meaning into the words as early as 1890, in *Hans v. Louisiana*.¹²⁷ In *Hans*, the Court found that common-law principles of state sovereign immunity are embedded in the Constitution via the Eleventh Amendment, and thus citizens are barred from bringing suits in federal court against their own state unless the state consents to the suit.¹²⁸

123. *Id.*

124. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001).

125. *Id.* at 294–98.

126. U.S. CONST. amend. XI.

127. *See Hans v. Louisiana*, 134 U.S. 1, 14–17 (1890) (looking beyond "the letter" of the Eleventh Amendment to disallow suits brought by individuals against their own state in federal court without the state consenting to such suit). Much controversy exists over the Court's expansion of sovereign immunity. *See* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516–17 (1978) ("[T]he eleventh amendment is universally taken *not* to mean what it says. . . . [And] there is some dispute whether the 'extensions' of the eleventh amendment—most notably the extension to suits by a state's own citizens—are compelled by that amendment itself or instead have another source."). The controversy exists both on and off the bench. This is, in part, due to the historical basis of the Eleventh Amendment: Justice Souter explained, in a blistering dissent over an additional expansion, that the Eleventh Amendment was not written in outrage by the very notion of abrogating state immunity; rather, the purpose of the Eleventh Amendment was to bar suits at common law by Revolutionary War creditors. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 112 (1996) (Souter, J., dissenting).

128. *Hans*, 134 U.S. at 20–21. Contrast this with the words of the Eleventh Amendment, "or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Hans may have barred the citizens in *Bragg* from obtaining money damages, but the *Ex parte Young* doctrine allowed them to seek prospective injunctive relief against the DEP's Director. In 1908, the Court created an exception allowing for suit against state officials acting in their official capacity, known as the *Ex parte Young* doctrine.¹²⁹ Under the *Ex parte Young* doctrine, state officials do not enjoy immunity when an action to compel compliance with a state law has been brought in the form of prospective, injunctive, or declaratory relief for ongoing violations of federal law.¹³⁰ This is true "even if the State itself is immune from suit under the Eleventh Amendment."¹³¹ The rationale for the *Ex parte Young* doctrine is that a state official breaking the law has been "stripped of his official or representative character" and thus loses the "cloak" of sovereign immunity.¹³² The exception is also "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"¹³³

Important to the Fourth Circuit's ruling in *Bragg*, the Supreme Court further defined the scope of sovereign immunity in *Pennhurst State School & Hospital v. Halderman*, finding that regardless of the *Ex parte Young* doctrine, citizens cannot enforce state law against state officials in federal court.¹³⁴ This interpretation was necessary to avoid what the Court later described as "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."¹³⁵ The Fourth Circuit's finding—that state law governs mining operations exclusively once the Department of the Interior approves the state's plan for enforcement—effectively bars citizen access to federal courts for any suit against a state official.¹³⁶

In *Bragg*, the court explained that "[j]ust because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an

129. *Ex parte Young*, 209 U.S. 123, 167 (1908); see *Seminole Tribe of Fla.*, 517 U.S. at 73 (Souter, J., dissenting) (referring to the "doctrine of *Ex Parte Young*").

130. *Seminole Tribe of Fla.*, 517 U.S. at 73 (Souter, J., dissenting).

131. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring).

132. *Id.*

133. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160).

134. *Id.* at 106.

135. *Seminole Tribe of Fla.*, 517 U.S. at 58 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

136. See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001) ("Under SMCRA . . . Congress designed a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the State regulatory authority . . .").

exception to the Eleventh Amendment protection.”¹³⁷ Thus, the court noted, it has a duty to “evaluate the degree to which a State’s sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials, as well as the extent to which *federal*, rather than State, law must be enforced to vindicate the federal interest.”¹³⁸

In making this evaluation, the court explained that SMCRA is distinct from other cooperative federalism statutes because it provides “exclusive jurisdiction over the regulation of surface coal mining” to either the state once its program has been approved, or to the federal government if the federal government retains control, but not to both.¹³⁹ According to the Fourth Circuit, this interpretation is consistent with Congress’s intent to provide the “core standards” and to allow the States to develop more specific laws for the regulation of surface mining.¹⁴⁰ Moreover, according to the court, this interpretation continues to “vindicate the supreme authority of federal law.”¹⁴¹ It does because “[i]f West Virginia’s program no longer comports with the federal blue-print found in SMCRA, the Secretary may instigate an enforcement proceeding and revoke West Virginia’s authority to regulate surface mining.”¹⁴² The court also pointed out that “as part of its approved State program, West Virginia enacted a citizen suit provision that, parroting the language of its federal counterpart, gives affected individuals the right to sue in State court to compel the Director’s compliance with the West Virginia Act.”¹⁴³

This interpretation fails for two reasons. First, the Fourth Circuit’s decision was wrong as a matter of statutory interpretation. Second, and most importantly, it neglects Congress’s intent that citizens aid in the enforcement of SMCRA through the federal courts. The second part of this Note will explain these points in further detail and propose two potential remedies: (1) Congress should amend SMCRA; and (2) courts should limit the reach of *Bragg* by reaffirming the federal nature of other cooperative federalism statutes such as the CWA.

137. *Id.* at 293 (quoting *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 294 (4th Cir. 2001)).

138. *Id.*

139. *Id.* at 288, 293 (quoting 30 U.S.C. § 1253(a) (2000)).

140. *Id.* at 295.

141. *Id.* at 297 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)).

142. *Id.*

143. *Id.* (citing W. VA. CODE ANN. § 22-3-25 (LexisNexis 2002)).

III. ANALYSIS

A. *The Fourth Circuit's Decision Rests on a Fundamental Misunderstanding of SMCRA*

The Fourth Circuit's decision narrowly construed two words—"exclusive jurisdiction"—found in a one-hundred-page statute to conclude that following federal approval of the state program, state law governs in place of SMCRA.¹⁴⁴ In so doing, the Fourth Circuit failed to recognize the overall purpose of the Act and several other statutory provisions that evidence Congress's intent that SMCRA remain enforceable as a federal statute.

1. Statutory Interpretation

Upon petition to the Supreme Court for appeal from the Fourth Circuit's decision, the Solicitor General submitted an Opposition Brief for the Federal Respondents.¹⁴⁵ In his brief, the Solicitor General forcefully argued that the Fourth Circuit's decision was an incorrect interpretation of SMCRA.¹⁴⁶ The Solicitor General clearly explained the statutory basis for overturning the Fourth Circuit's decision.¹⁴⁷ He first pointed to several provisions in Title V of SMCRA that require a state to adopt sufficient regulations and provide the ability to "[enforce] the provisions of this chapter" of SMCRA, a federal law.¹⁴⁸ These provisions all demonstrate that the basic function of a state regulatory authority is to implement federal law.¹⁴⁹ The Solicitor General also pointed out that SMCRA precludes a state regulatory authority from issuing a permit in contravention of the state's program.¹⁵⁰ In short, "[t]he fact that a particular requirement is codified in state law does not alter the fact that *federal* law mandates that state officials adhere to that requirement, and that *federal* law is violated if a state official fails to do so."¹⁵¹

144. *Id.* at 288–89.

145. Brief for the Federal Respondents in Opposition, *supra* note 11.

146. *Id.* at 12–13. However, the Solicitor General also recommended that the Court not grant certiorari because no split existed in the circuits at that time. *Id.*

147. *Id.* at 11–21.

148. *Id.* at 13 (emphasis omitted) (quoting Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1253(a) (2000)).

149. *Id.* at 14.

150. *Id.*

151. *Id.*

Additionally, the Secretary retains significant oversight authority and has an ongoing responsibility to enforce the terms of a state program.¹⁵² These terms include the requirement that the OSM, upon adequate notice, conduct necessary federal inspections to evaluate compliance;¹⁵³ the power to immediately inspect a coal-mining operation if the Secretary has reason to believe there may be an imminent threat to the public;¹⁵⁴ the power to command cessation orders if an immediate threat to the public welfare is found;¹⁵⁵ and the power to issue notices of violation when there is no imminent threat to the public.¹⁵⁶ Further, under the section entitled “Federal enforcement of State program,” SMCRA provides that if a State fails to enforce any part of the approved program, “the Secretary may provide for the Federal enforcement . . . of that part of the State program not being enforced by such State.”¹⁵⁷ These provisions make it clear that states have a duty to enforce federal law. They depend on “Congress’s understanding that the terms of approved state programs would be federal in character and therefore could be enforced against private parties by a federal regulatory agency.”¹⁵⁸

Indeed, the citizen suit provision at issue in *Bragg* expresses Congress’s intent that SMCRA remain federal law.

The citizen suit provision . . . rests on the assumption that a state official’s alleged failure to comply with an approved state SMCRA program presents a federal question, for that provision expressly authorizes a suit in federal court . . . ‘where there is alleged a failure of the . . . appropriate State regulatory authority’ to perform a nondiscretionary duty.¹⁵⁹

Thus, as the Solicitor General aptly pointed out, “[i]f . . . a state official’s compliance with an approved state SMCRA program could never implicate an issue of federal law, it would be difficult to understand why Congress would have authorized citizen suits in federal court against state officials.”¹⁶⁰

152. *Id.* at 15.

153. 30 U.S.C. §§ 1267(a), 1271(a)(1).

154. *Id.* § 1271(a)(1).

155. *Id.* § 1271(a)(2).

156. *Id.* § 1271(a)(3).

157. *Id.* § 1254(b).

158. Brief for the Federal Respondents in Opposition, *supra* note 11, at 16.

159. *Id.* (final alteration in original) (quoting 30 U.S.C. § 1270(a)(2)).

160. *Id.* at 16–17.

This final point underscores the true misfortune of *Bragg*. The Fourth Circuit's decision was not only legally deficient, but it also completely limited citizen access to the federal courts. Congress granted federal jurisdiction to citizens in an effort to ensure that surface mining regulations were enforced.¹⁶¹ Recall, the 95th Congress, which felt that citizen participation was a "vital factor" in ensuring adequate enforcement of the regulations and that the "role played by citizens" would determine "[t]he success or failure of a national coal surface mining regulation program."¹⁶² The Fourth Circuit's interpretation of SMCRA flies in the face of clear congressional intent.

2. Access to Federal Courts

a. Evolving Environmental Jurisprudence

As illustrated by the legislative history of SMCRA and the text of a number of other federal environmental laws, citizen suits are viewed as an essential component of numerous cooperative federalism statutes.¹⁶³ Sixteen of the nation's federal environmental laws include comparable citizen suit provisions, all of which allow citizens to enforce compliance by regulated entities or to force state and federal agencies to perform mandatory duties.¹⁶⁴ Congress has consistently included citizen suit provisions in environmental statutes because, as one court put it, "the very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction."¹⁶⁵ Additionally, the provisions represent "a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the [laws will] be implemented and enforced."¹⁶⁶ One scholar notes that "[t]he majority of

161. H.R. REP. NO. 95-218, at 88-89 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 625.

162. *Id.*

163. *Id.*; *see, e.g.*, Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2000) ("[A]ny citizen may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State . . . or (2) against the Administrator . . ."); Clean Air Act (CAA) § 305, 42 U.S.C. § 7604(a) (2000) ("[A]ny person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . .) who is alleged to have violated . . . or to be in violation of (A) an emission standard or limitation under this chapter . . .").

164. May, *supra* note 13, at 53.

165. *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976).

166. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974), *modified*, *Natural Res. Def. Council, Inc. v. Train*, 5 ENVTL. L. REP. 20696 (D.C. Cir. 1975).

the legal opinions issued under the nation's principal environmental statutes that allow citizen suits derive from citizen litigation."¹⁶⁷ According to one recent accounting, "[i]n the thirty years from 1973 to 2002, citizens accounted for more than 1,500 reported federal decisions in civil environmental cases. . . . [And] from 1993 to 2002, federal courts issued opinions in an average of 110 civil environmental cases a year."¹⁶⁸ Citizen action in federal court has had a dramatic impact on the course of our nation's environmental jurisprudence.¹⁶⁹ In the Fourth Circuit, important contributions to the development of SCMRA will be lost for West Virginia and Virginia.¹⁷⁰ Additionally, the Third Circuit applied the *Bragg* reasoning and limited access to federal courts in Pennsylvania and Maryland.¹⁷¹ Coal mining in these four states accounts for approximately twenty-five percent of the coal mining completed in this country.¹⁷² Consequently, states in which coal mining accounts for a large portion of the economy will not benefit from an evolving, unified federal jurisprudence. Creating uniform federal requirements was a major purpose for Congress's creation of SMCRA.¹⁷³ Unfortunately, under the *Bragg* decision, each state can interpret the meaning of its statute as it seems best for that state, eviscerating Congress's intent.

b. State Control Over Surface Coal Mining

As this Note has demonstrated, in the years leading up to *Bragg* there was a systematic failure by both state and federal regulatory authorities to enforce the provisions mandated by SMCRA. The end result has been the destruction of hundreds of square miles of land and one thousand miles of

167. May, *supra* note 13, at 54.

168. *Id.* (citing James May, *Now More Than Ever, Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003)).

169. *See id.* ("[T]he majority of the growing jurisprudence interpreting the nation's environmental laws is attributable to federal citizen suits.")

170. While North Carolina is a member of the Fourth Circuit, the federal government administers its program. Office of Surface Mining, U.S. Dep't of the Interior, Office of Surface Mining at a Glance, <http://www.osm.gov/glance.htm> (last visited Feb. 18, 2006). South Carolina, also a member of the Fourth Circuit, possesses no coal. *Id.*

171. Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 316–17, 332 (3d Cir. 2002). Neither is there coal in New Jersey or Delaware. Office of Surface Mining, *supra* note 170.

172. *See* Tonnage Reported For Fiscal Year 2004, <http://www.osm.gov/coal/2004coal.htm> (last visited Jan. 28, 2006) (listing the total coal tonnage for the fifty states individually and combined). In 2004, 1,081,858,253.16 tons of coal was removed from the United States. *Id.* In the same year Virginia, West Virginia, Maryland, and Pennsylvania removed 251,291,452.79 tons. *Id.*

173. *See* McGinley, *supra* note 3, at 50 (discussing the need for a federal law to impose a uniform standard and end the "race to the bottom" that was beginning to occur among the states).

stream.¹⁷⁴ Unfortunately, the events leading up to *Bragg* illustrate that agency failure to enforce regulations may be the result of a far more insidious problem than the common excuses for agency inaction, such as understaffing or budgeting.¹⁷⁵ This problem has its root in pressure from outside interest groups.¹⁷⁶ As one article explained, “Theoretically, the governments adopting the standards should enforce them, but in practice governments and their regulatory agencies often come to identify with the industries or companies they regulate.”¹⁷⁷

By taking away citizen enforcement in federal courts, courts leave citizens with enforcement only through state courts. However, allowing state courts to determine whether a state regulatory agency has been doing its job is like letting the proverbial fox guard the hen house. Congress created SMCRA as a remedy for states’ failure to represent the interests of their citizens and the environment.¹⁷⁸ Prior to SMCRA, companies were able to successfully persuade states that regulating coal-mining activities was not in the states’ best interest.¹⁷⁹ Throughout the first half of this century, there was a tacit recognition that adverse environmental impacts, including coal mining, “were . . . part and parcel of . . . industrialization” and thus a state’s economic well-being.¹⁸⁰ This was based on an assumption that placing environmental restrictions on one’s own coal production would make it difficult to sell one’s coal on the open market when other states “chose to give *carte blanche* to their own coal operators.”¹⁸¹ Thus, Congress created uniform federal standards to avoid an ongoing “race to the bottom.”¹⁸² Perhaps state courts are an objective forum for determining whether a state agency has been doing its job or whether the state’s largest employer has been complying with regulations, but Congress did not intend for this to happen. Congress explicitly granted federal jurisdiction to citizens, and did so because citizens and the environment had already paid the price for 150 years of state inaction.¹⁸³

174. Price, *supra* note 99.

175. See Sarah C. Rispin, Comment, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639, 1645 (2003) (discussing how agencies may bend to interest group pressure).

176. *Id.*

177. *Id.* (quoting Richard L. Ottinger & Rebecca Williams, *Renewable Energy Sources for Development*, 32 ENVTL. L. 331, 352 (2002)).

178. McGinley, *supra* note 3, at 50.

179. *Id.*

180. *Id.* at 48.

181. *Id.* at 50.

182. *Id.*

183. See H.R. Rep. No. 95-218, at 57 (1977), reprinted in 1977 U.S.C.C.A.N. 593, 595 (explaining the purposes behind and history of SMCRA); Joel R. Burcat & Stanley R. Geary, *Surface*

c. State Citizen Suit Provisions

Recall that in making their determination, the Fourth Circuit noted that the West Virginia Act possesses a citizen suit provision essentially identical to its federal counterpart.¹⁸⁴ This provision gives affected individuals the right to seek, in state court, agency compliance with the West Virginia Act.¹⁸⁵ As a result, the Fourth Circuit found that citizen access to state courts provided adequate means of protecting “the federal interest in maintaining the State’s compliance with its own program . . . in a manner that does not offend the dignity of the State.”¹⁸⁶ But the Fourth Circuit failed to acknowledge that while West Virginia happens to provide citizens access to state courts via their own citizen suit provision, not all states do.¹⁸⁷

In the context of SMCRA, at the time most state programs were approved neither Congress nor the OSM knew they needed to ensure citizen access to state courts before granting such approval. That is because when Congress wrote SMCRA in 1977, the Supreme Court had not made its ruling in *Pennhurst*.¹⁸⁸ As a result, Congress had no reason to believe that citizens would not have access to federal courts—*Pennhurst* overruled eighty years of doctrine.¹⁸⁹ Thus, nowhere in the statute or in the regulations does the federal government require states to include an equivalent citizen suit provision in their state regulatory plan.¹⁹⁰ For example, in Kentucky, citizens can request that Kentucky’s agency conduct an inspection of a coal mine, but nowhere in the statute does a citizen have a right to bring suit in state court for enforcement against a state official for failing to do his or her job.¹⁹¹

Mining Regulation in Pennsylvania, 57 TEMP. L. Q. 1, 1 (1984) (stating that for over 150 years, miners have been taking “coal out of the lands of Pennsylvania”).

184. *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 297 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

185. *Id.* (citing W. VA. CODE ANN. § 22-3-25 (LexisNexis 2005)).

186. *Id.*

187. *See* May, *supra* note 13, at 56 (“[F]ewer than one-third [of the states] have general laws allowing both compliance and agency-forcing cases to enforce the full panoply of the state’s environmental laws.”).

188. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. §§ 1201–1328 (2000)); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

189. *See Pennhurst*, 465 U.S. at 126–27 (Stevens, J., dissenting) (“[T]he Court repudiates at least 28 cases, spanning well over a century of this Court’s jurisprudence . . .”).

190. 30 U.S.C. §§ 1201–1328.

191. 405 KY. ADMIN. REGS. 12:030 (2004). On this point the author must concede that all states relevant to the Fourth and Third Circuit do offer citizens access to state courts. MD. CODE ANN., NAT. RES. § 1-503 (LexisNexis 2005); 52 PA. STAT. ANN. § 1396.18c (West 1998); VA. CODE ANN. § 45.1-

This fact holds true for enforcement of other state environmental statutes as well. While some states allow for enforcement of all environmental laws by citizens in state courts, most do not.¹⁹² Only fifteen states allow for enforcement of environmental statutes generally.¹⁹³ Meanwhile, “[a]t least eight states allow citizens to sue to enforce compliance with media-specific state environmental laws,” such as the one in West Virginia.¹⁹⁴ But even the states that do allow for citizen enforcement often place significant additional restrictions on obtaining jurisdiction that federal courts do not.¹⁹⁵ For example, the majority of states do not allow for enforcement against agencies when they have failed to perform their nondiscretionary duties under the relevant statute.¹⁹⁶ Thus, in the majority of states, Patricia Bragg would be barred from enforcing state regulations in state court against the Director of the DEP. Instead, citizens can only enforce against parties in violation of their permit. Additionally, some states have a standing test more difficult to meet than even federal law—in Iowa, for instance, plaintiffs are required to show tort-like causation.¹⁹⁷ While *Sierra Club v. Morton* recognized aesthetic harm for purposes of federal law,¹⁹⁸ “[s]ome [state citizen suit provisions] require citizens to show injury to commercial or economic interest, which all but cuts off citizen enforcement to all except business interests.”¹⁹⁹ Finally, “the vast majority of states [providing citizens access to their courts] do not

246.1 (2002). However, before federal courts begin carving away federal jurisdiction, they must consider that doing so may bar suit in any forum.

192. May, *supra* note 13, at 55–56.

193. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; CONN. GEN. STAT. ANN. § 22a-16 (West 1995); FLA. STAT. ANN. § 403.412 (West 2002 & Supp. 2006); IND. CODE ANN. § 13-30-1-1 (LexisNexis 2000); LA. REV. STAT. ANN. § 30:2026 (2000); MD. CODE ANN., NAT. RES. § 1-503 (LexisNexis 2005); MASS. GEN. LAWS ch. 214, § 7A (2004); MICH. COMP. LAWS SERV. § 324.1701 (LexisNexis 2004); MINN. STAT. ANN. § 116B.03 (West 2005); NEV. REV. STAT ANN § 41.540 (LexisNexis 2002); N.J. STAT. ANN. § 2A:35A-4 (West 2000); N.D. CENT. CODE § 32-40-06 (1996); S.D. CODIFIED LAWS § 34A-10-1 (2004); WYO. STAT. ANN. § 35-11-904 (2005); *see also* May, *supra* note 13, at 55 (chronicling the citizen suit provisions allowed by several states).

194. May, *supra* note 13, at 55–56 (discussing state statutes that provide for citizen enforcement of media-specific environmental laws); *e.g.*, IDAHO CODE ANN. § 39-4416 (2002); N.H. REV. STAT. ANN. § 12-E:14 (2004); N.M. STAT. ANN. § 69-25A-24 (LexisNexis 2004) (repealed effective July 1, 2006); N.C. GEN. STAT. § 143-215.94FF(b) (2004); 35 PA. STAT. ANN. § 691.601(c) (West 2003); 35 PA. STAT. ANN. § 7130.508 (West 2004); VA. CODE ANN. § 45.1-246.1 (2002); W. VA. CODE ANN. § 22-3-25 (LexisNexis 2002); WIS. STAT. ANN. § 293.89 (West 2004).

195. *See* May, *supra* note 13, at 56 (“[S]ome state courts engraft onto state law a requirement for citizens to demonstrate ‘standing’ akin to that required for *federal* citizen suits to enforce *federal* laws.”).

196. *Id.*

197. *Id.* (citing *Gerst v. Marshall*, 549 N.W.2d 810, 817 (Iowa 1996)).

198. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

199. May, *supra* note 13, at 56.

allow citizens to recover fees at all.”²⁰⁰ Of the sixteen states allowing for citizen enforcement of all environmental laws, only three states—Connecticut, Massachusetts, and New Jersey—“allow for recovery of both attorney and expert fees and costs.”²⁰¹ While state citizen suits remain an important mechanism for enforcement of environmental statutes, standing alone they do not provide adequate protection. Congress intended that citizens remain vigilant in their monitoring of state and federal agencies, but citizens cannot answer Congress’s call without access to federal courts.

B. Potential Congressional Amendments to SMCRA

1. The Importance of Congressional Amendment

While the Solicitor General argued with some veracity that SMCRA remains federal law, he ultimately recommended that the Supreme Court not grant certiorari.²⁰² In making this recommendation, the Solicitor General placed particular importance on the fact that no circuit had yet decided the precise issue in *Bragg*.²⁰³ Consideration of the internal processes for granting certiorari best illustrates the importance of the Solicitor General’s recommendation. Seven thousand petitions for certiorari are received annually, and of these, only about one hundred petitions for plenary review are granted.²⁰⁴ Of the one hundred petitions granted, the Solicitor General generally weighs in favor of granting certiorari in about seventy cases.²⁰⁵ In general, the Solicitor General maintains a well-respected position with the Supreme Court and Justices take his recommendations seriously.²⁰⁶

200. *Id.*

201. *Id.*; CONN. GEN. STAT. ANN. § 22a-18(e) (West 1995); MASS. GEN. LAWS ch. 214, § 7A (2004); N.J. STAT. ANN. § 2A:35A-10 (West 2000).

202. Brief for the Federal Respondents in Opposition, *supra* note 11, at 13, 25.

203. *See id.* at 12–13 (arguing that no lower court had yet decided a similar Eleventh Amendment challenge to citizen suit provisions).

204. U.S. SUPREME COURT, THE JUSTICES’ CASELOAD (2005), <http://www.supremecourtus.gov/about/justicecaseload.pdf>.

205. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 128 (1991) (“The SG determines which cases the government will appeal, and he represents the United States in the Supreme Court. . . . His success rate for getting grants varies from about 75 to 90 percent.”).

206. *See id.* (“The SG has determined that it is in his long-run interest to have his recommendation on cert. carry great weight. Working almost as a surrogate for the Court, rather than as an unrestrained advocate for the government, he has been able to assure that his judgment will usually be honored on cert.”). It is, however, worthy of reminder that the Solicitor General maintains an executive appointed office. 28 U.S.C. § 505 (2000).

Shortly after the Supreme Court's denial of certiorari, the Third Circuit addressed a case involving similar complaints in Pennsylvania.²⁰⁷ While the Third Circuit had an opportunity to steer a different course, instead, a three-judge panel followed the *Bragg* decision and ruled that state law becomes the operative law after federal approval of a state program.²⁰⁸ After speaking with one attorney representing the plaintiffs in *Bragg*, it appears there is very little opportunity to bring suit in another circuit to create a split in the circuits.²⁰⁹ West Virginia was the only state that had, or has, buffer zone rules as strong as they were at the time of *Bragg*; and while there may be other enforceable nondiscretionary duties under SMCRA, few SMCRA citizen suits have ever been filed because so few attorneys work in this area, and the cases are difficult to develop and expensive to litigate.²¹⁰

Beyond the concerns raised by the *Bragg* attorney, Kentucky is the only state in a different circuit that engages in any significant mountaintop removal.²¹¹ Shortly after the lower court's decision in *Bragg*, the OSM finally conducted studies in West Virginia, Virginia, and Kentucky.²¹² The studies assessed how the regulatory authorities in those states had administered SMCRA programs and AOC variances.²¹³ Just as Ken Ward Jr. found, the reports from these studies show that regulating agencies issued permits without making the appropriate findings.²¹⁴ For example, much like in West Virginia, "fish and wildlife" preserve was not an authorized land use under the Kentucky program.²¹⁵ However as of 1999, twelve of thirteen AOC variances were granted for fish and wildlife preserves.²¹⁶ The OSM's solution has been to recommend changes in both the federal regulations and the state regulations governing AOC variances

207. Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 313–15 (3d Cir. 2002).

208. *Id.* at 327–28.

209. Telephone Interview with Jim Hecker, Attorney, Trial Lawyers for Public Interest, in Washington, D.C. (Nov. 16, 2004).

210. *Id.*

211. See OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, AN EVALUATION OF APPROXIMATE ORIGINAL CONTOUR AND POST-MINING LANDUSE IN KENTUCKY 3 (1999), available at <http://www.osm.gov/pdf/mtkentucky051000.pdf> (discussing how mountaintop removal mining in Kentucky is similar to that in West Virginia and Virginia).

212. Surface Coal Mining and Reclamation Operations, 69 Fed. Reg. 1036, 1038 (proposed Jan. 7, 2004) (codified as amended at 30 C.F.R. pts 780, 816, and 817).

213. *Id.*

214. See *id.* (reporting that the studies found it difficult to distinguish between mines reclaimed to AOC and mines not so reclaimed); see also *supra* Part I.C. (discussing state regulatory failure in permitting).

215. OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, DRAFT REPORT: APPROXIMATE ORIGINAL CONTOUR AND POST-MINING LANDUSE IN KENTUCKY (1999), <http://www.osm.gov/mtkydraft.htm>.

216. *Id.*

and valley fills.²¹⁷

In Kentucky, the regulatory authority has amended the state's program to reflect this policy change. The permissible alternative uses for an AOC variance have been expanded. They now include: cropland, pastureland, forestland, residential, industrial/commercial, recreation, fish and wildlife, and developed water resources.²¹⁸ In other words, just about everything. Kentucky also made changes in its valley fill regulations. The regulations governing excess fill no longer speak of water quality. They only require that the fill be stable and "[m]inimize the adverse effects of leachate and surface water run-off."²¹⁹

The proposed federal rules concerning valley fills now employ a best available technology standard.²²⁰ Specifically, they allow regulators to authorize fills if the regulator finds "that the surface mining activities will 'minimize, to the extent possible using [the best technology available], disturbances and adverse impacts on fish, wildlife, and other related environmental values.'"²²¹ This is quite a change from the previous regulations that required that the regulatory authority only issue a permit if the proposed valley fill "[would] not adversely affect the water . . . quality."²²² In justifying this change, the OSM explains that "[i]t is virtually impossible to conduct mining activities within 100 feet of an intermittent or perennial stream without causing some adverse impacts."²²³ It appears that the OSM has given up on the purpose of SMCRA, "to protect society and the environment from the adverse effects of surface coal mining operations."²²⁴ As these amended regulations indicate, it will be very difficult for any future citizen to show that the regulating agency has neglected to perform a nondiscretionary duty under either the state or federal program, thus making it virtually impossible to create a split in the circuits.

2. Suggested Amendments

Even if a citizen were to succeed in creating a split in the circuits, there is no guarantee that the Supreme Court would either grant certiorari or overturn the Third and Fourth Circuits. On the other hand, congressional

217. Surface Coal Mining and Reclamation Operations, 69 Fed. Reg. at 1038.

218. 405 KY. ADMIN. REGS. 16:210 (2004).

219. 405 KY. ADMIN. REGS. 16:130.

220. Surface Coal Mining and Reclamation Operations, 69 Fed. Reg. at 1036, 1043.

221. *Id.*

222. 30 C.F.R. § 816.57 (2005).

223. Surface Coal Mining and Reclamation Operations, 69 Fed. Reg. at 1036, 1043.

224. 30 U.S.C. § 1202(a) (2000).

amendment to SMCRA presents an immediate solution. Also, amending SMCRA provides the added benefit of reaffirming the importance of citizen access to federal courts. An amendment would assist those courts confronted with the question of whether other cooperative federalism statutes become operative as state law following federal approval. Such an amendment might take any of several forms.

Perhaps the most straightforward amendment would add an additional provision into the “Definitions” section stating:

The term “exclusive jurisdiction” as used in subchapter V of this chapter means primary enforcement authority by the states authorized to carry out section 1252 of this title. The federal enforcement authority shall continue in full force and effect with respect to violations that occur in states authorized to carry out section 1252 of this title. Nothing in this provision should, in any way, be construed to limit the power of the federal courts to hear cases against state officials for violations of any requirements defined by or approved pursuant to this chapter.

Alternatively, or in addition to the above amendment, section 1253 of SMCRA could provide that:

Each State in which there are or may be conducted surface coal mining operations on non-Federal lands and which wishes to assume primary enforcement authority over the regulation of surface coal mining and reclamation operations shall submit a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter and expressly reserves full enforcement authority by the federal government.

Amendments of this sort would unambiguously affirm congressional intent that SMCRA remain enforceable as a federal statute in federal courts. However, given the current political climate in Washington, gathering the political will for such amendments may prove impossible. In that case, considering the negative implications of *Bragg*’s conclusion, federal courts should limit their holdings.

IV. THE CWA VS. SMCRA

Many commentators have written about the possible negative implications of *Bragg* for other cooperative federalism statutes such as the CWA.²²⁵ Meanwhile, some defendants have used *Bragg* as precedent to argue against the federal enforceability of the Clean Air Act (CAA) and Medicaid.²²⁶ Because most cooperative federalism statutes seem to share a similar design, there may be some potential for overlap.²²⁷ Given the serious implications of taking federal jurisdiction away from citizens, it becomes especially important that courts not extend the reasoning in *Bragg* to other cooperative federalism statutes. While this Note asserts that SMCRA remains federal law, it is of equal importance that the holding in *Bragg* be limited to SMCRA. Thus, the final section of this paper will distinguish SMCRA from another key environmental statute: the CWA.

A. *The History and Purpose of the CWA vs. SMCRA*

In the years leading up to the 1972 Clean Water Amendments, a patchwork of state and federal law attempted to regulate water pollution.²²⁸ Before the CWA, the primary law was the 1948 Federal Water Pollution Control Act.²²⁹ Congress viewed the earlier federal act as a complete failure.²³⁰ It did so primarily for two reasons. First, the earlier control mechanism sought achievement of water quality standards rather than requiring that individual polluters minimize their effluent discharge.²³¹

225. See, e.g., Babcock, *supra* note 16, at 205 (stating that the court's Eleventh Amendment jurisprudence effectively blocks citizen suits against states, which are often the big polluters); Markus G. Puder & John A. Veil, *The Discrete Charm of Cooperative Federalism: Environmental Citizen Suits in the Balance*, 27 VT. L. REV. 81, 93 (2002) ("The *Bragg* ruling poses a serious threat to environmental litigants who have traditionally relied on the *Ex parte Young* doctrine to overcome the shielding power of Eleventh Amendment immunity." (citing Courtney E. Flora, *An Inapt Fiction: The Use of the Ex Parte Young Doctrine for Environmental Citizen Suits Against States After Seminole Tribe*, 27 ENVTL. L. 935, 964 (1997))).

226. See *Antrican v. Odom*, 290 F.3d 178, 187 (4th Cir. 2002) ("[T]he Medicaid Act is not analogous to the Surface Mining Act."); *Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 714 (E.D. Pa. 2002) (holding that the citizen suit provision in the CAA can be used against state officials under the *Ex Parte Young* doctrine).

227. See Rispin, *supra* note 175, at 1639 (describing generally how cooperative federalism statutes rely on state governmental bodies to implement local regulations based on national standards).

228. See *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-03 (1976) (discussing the problems that stemmed from federal law and states' water quality standards).

229. *Id.* at 202.

230. S. REP. NO. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674 ("From its two-year study of the Federal water pollution control program, the Committee concludes that the national effort to abate and control water pollution has been inadequate in every vital aspect . . .").

231. *Id.* at 4.

Second, the 1948 Act assigned full enforcement authority to the Governors of the states.²³² Under the 1948 legislation, federal agencies possessed limited authority, namely, “to support research in water pollution, projects in new technology, and [to provide] limited loans to assist the financing of treatment plants.”²³³

Then, “[i]n 1972, prompted by the conclusion of the Senate Committee on Public Works that ‘the Federal water pollution control program . . . [was] inadequate in every vital aspect,’ Congress enacted the [1972] Amendments.”²³⁴ These amendments effectively created what we now know as the CWA. The overall purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²³⁵ To achieve this purpose, the CWA imposes a prohibition on the discharge of pollutants into our nation’s waterways.²³⁶ The CWA provides that “[e]xcept as in compliance with [various sections] of this title, the discharge of any pollutant by any person shall be unlawful.”²³⁷ According to the legislative history, Congress enacted the CWA out of concern for the American people.²³⁸ Congress foresaw major public health impacts resulting from water pollution and wrote the CWA to solve this national crisis.²³⁹

In contrast, recall that Congress wrote SMCRA to regulate a specific industry.²⁴⁰ Historically, coal mining was an industry solely regulated by the states.²⁴¹ After the states’ systematic failure to regulate coal mining, SMCRA was established to mandate federal minimum standards.²⁴² These minimum standards effectively leveled the playing field.²⁴³ They did so by enabling states to safely regulate coal production without concern that a neighboring state would give free rein to industry.²⁴⁴ These two statutes have different purposes because they were written in response to different histories. The CWA established a nationwide program to address *national*

232. *Id.* at 2.

233. *Id.*

234. *State Water Res. Control Bd.*, 426 U.S. at 203 (alteration in original) (footnote omitted) (quoting S. REP. NO. 92-414, at 7, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674).

235. Clean Water Act § 101, 33 U.S.C. § 1251(a) (2000).

236. *Id.* § 1311(a).

237. *Id.*

238. S. REP. NO. 92-414, at 3, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3670 (discussing the Committee on Public Works’ past concern “with the effects of pollution upon public health”).

239. *Id.* at 3–4.

240. Puder & Veil, *supra* note 225, at 108.

241. *Id.* (citing Edgcomb, *supra* note 44, at 312–13).

242. McGinley, *supra* note 3, at 50–51.

243. *Id.* at 50.

244. *Id.*

concerns: our nation's water and the public's health.²⁴⁵ SMCRA provides uniform national standards for an extraordinarily *localized concern*: land reclamation and mining techniques used by coal companies.²⁴⁶

Further, while the CWA and SMCRA are similarly designed, Congress utilized a cooperative federalism structure both in the CWA and SMCRA for different reasons. SMCRA grants primacy to states' exclusive jurisdiction over the promulgation and enforcement of coal mining regulations because each state is unique and deals with specialized concerns.²⁴⁷ SMCRA states that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States."²⁴⁸ In contrast, Congress granted states limited authority under the CWA to implement specific sections of a federal law because states have historically had the authority to regulate water pollution.²⁴⁹ The CWA states:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . [A]nd implement the permit programs under sections 1342 [402] and 1344 [404] of this title.²⁵⁰

Thus, SMCRA grants states exclusive jurisdiction because individual states possess unique biological and terrestrial characteristics for coal mining.²⁵¹ In contrast, the CWA recognizes an abstract, yet traditional power of states to manage their water resources.²⁵²

245. S. REP. NO. 92-414, at 3-4, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3670-71.

246. H.R. REP. NO. 95-218, at 57-58 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 595-96.

247. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

248. Surface Mining Control and Reclamation Act of 1977 § 101(f), 30 U.S.C. § 1201(f) (2000).

249. Clean Water Act § 101(a)-(b), 33 U.S.C. § 1251(a)-(b) (2000); *see also* *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (explaining that Congress did not intend to infringe upon state powers or to shift statutorily the traditional federal-state balance in land and water regulation).

250. 33 U.S.C. § 1251(b).

251. 30 U.S.C. § 1201(f).

252. 33 U.S.C. § 1251(b), (g).

Additionally, SMCRA and the CWA differ greatly in terms of what kind of power Congress delegated. Under SMCRA, states are empowered by a wide delegation of authority over the creation and enforcement of an entire statute.²⁵³ It does so by giving a primacy state “exclusive jurisdiction over the regulation of surface coal mining” within its borders.²⁵⁴ Alternatively, the CWA grants limited authority to implement various sections of a federal statute, namely sections 402 and 404.²⁵⁵ The CWA implicitly acknowledges that the state is implementing a federal statute, whereas under SMCRA the state is enforcing a state program.²⁵⁶

B. Enforcement and Oversight Authority

Under the CWA, the Administrator retains significantly greater enforcement and oversight authority than the Secretary does under SMCRA. The CWA controls pollution through various control mechanisms such as effluent limitations, water quality standards, and ocean-discharge limits.²⁵⁷ The States may implement various control mechanisms via an approved state program. One such control mechanism is section 402, which provides for the National Pollutant Discharge Elimination System (NPDES).²⁵⁸ “Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms.”²⁵⁹ Consonant with its policy “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,”²⁶⁰ Congress provided that a State may issue NPDES permits for discharges into navigable waters within its jurisdiction upon the EPA’s approval of the State’s proposal to administer its own program.²⁶¹ However, the Administrator retains authority to review

253. 30 U.S.C. § 1253.

254. *Id.* § 1253(a). In *Bragg*, the court explained that under SMCRA, “Congress [did not] invite the States to enforce *federal* law directly. By giving States exclusive regulatory control through enforcement of *their own* approved laws, Congress intended that the federal law establishing minimum national standards would ‘drop out’ as operative law and that the State laws would become the sole operative law.” *Bragg v. W. Va Coal Ass’n*, 248 F.3d 275, 295 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

255. 33 U.S.C. §§ 1251(b), (g), 1342(b), 1344(g).

256. *See Bragg*, 248 F.3d at 294 (explaining the difference between the “statutory federalism of SMCRA” and the “cooperative regime under the Clean Water Act,” and noting that under the CWA state law is federal law, whereas under SMCRA state law is mutually exclusive of federal law).

257. 33 U.S.C. §§ 1311, 1313, 1343.

258. *Id.* § 1342(a)–(b).

259. *EPA v. Cal. ex rel State Water Res. Control Bd*, 426 U.S. 200, 205 (1976) (citing 33 U.S.C. 1311(a) (1970 & Supp. IV 1974)).

260. 33 U.S.C. § 1251(b).

261. *Id.* §§ 1251(b), 1342(b).

operation of a State's permit program.²⁶² Unless the Administrator waives review for particular classes of point sources or for a particular application, a State is required to forward a copy of each permit application to the Administrator for review.²⁶³ No permit may issue if the Administrator objects on the basis that issuance of the permit would be "outside the guidelines and requirements" of the CWA.²⁶⁴ Conversely, the Secretary does not retain such extensive oversight authority once the Secretary has approved a state program consistent with SMCRA. The Secretary may not object to issuance of a specific permit. The authority simply does not exist.

In addition to its oversight authority, the EPA retains greater independent enforcement authority under the CWA as compared to the Secretary's enforcement authority under SMCRA. Legislative history explicitly shows that Congress intended state and federal governments to share concurrent enforcement authority under the CWA: the Senate Report states, "the Committee conclude[s] that the enforcement presence of the Federal government shall be concurrent with the enforcement powers of the States."²⁶⁵ Section 309 further illustrates Congress's intent through the CWA's structure for enforcement.²⁶⁶ If the EPA obtains information indicating a party is in violation of any condition or limitation implementing the CWA, the EPA has two options for enforcement. First, the Administrator can issue notification to the party and the state in which the violation occurs.²⁶⁷ If the State has not responded after thirty days, the Administrator must either issue an order requiring such party to comply or commence a civil action against the party.²⁶⁸ This first option recognizes that while the EPA acts as a backstop, primacy states possess primary enforcement responsibility for those programs the EPA has approved. Second, the Administrator may immediately issue an order requiring compliance or bring a civil action.²⁶⁹ This option "recognizes that federal enforcement power is concurrent with that of state governments."²⁷⁰ In contrast, neither the legislative history nor the language of SMCRA

262. *See id.* § 1342(d)(1) ("Each State shall transmit to the Administrator a copy of each permit application received by [a] State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.").

263. *Id.* § 1342(d)-(e).

264. *Id.* § 1342(d)(2).

265. S. REP. NO. 92-414, at 64 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3730.

266. 33 U.S.C. § 1319.

267. *Id.* § 1319(a)(1).

268. *Id.*

269. *Id.* § 1319(a)(1), (3).

270. William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 218 (1987) (citing S. REP. NO. 92-414, at 64).

indicates intent by Congress to provide the OSM with such extensive concurrent enforcement authority.

Under SMCRA, either the state or the federal government, but not both, retains exclusive enforcement authority.²⁷¹ If the Secretary has any cause for belief that a violation of surface mining regulations is happening, the Secretary must first notify the State of any violations by an offending party.²⁷² The State then has ten days to initiate enforcement proceedings consistent with the state program.²⁷³ Unlike the Administrator's authority under the CWA, the Secretary can only invoke the Secretary's enforcement authority against the person in violation after the ten-day waiting period.²⁷⁴ If a State has initiated enforcement proceedings, the federal government has no authority to instigate additional proceedings.²⁷⁵ The only exception to the ten-day-notification rule is if there is "imminent danger of significant environmental harm," then the Secretary may act immediately without notice to the State.²⁷⁶ However, according to one OSM official, whenever the OSM inspects a site, including one allegedly in danger of causing imminent harm, it does so with the responsible state official out of respect

271. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

272. 30 U.S.C. § 1271(a)(1)(2000).

273. *Id.*

274. *Id.*; 33 U.S.C. § 1319(a)(1).

275. 30 U.S.C. § 1271(a)(1). The process of initiating concurrent federal proceedings against the same defendant for the same environmental violations for which the defendant is subject to state proceedings is known as "overfiling." Joel A. Mintz, *Enforcement "Overfiling" in the Federal Courts: Some Thoughts on the Post-Harmon Cases*, 21 VA. ENVTL. L.J. 425, 426 (2003). It is of note that section 3006(b) of RCRA contains language very similar to that found in section 504(a) of SMCRA. Compare Resource Conservation and Recovery Act (RCRA) § 3006(b), 42 U.S.C. § 6926(b) (authorizing states to carry out their own programs "in lieu of" the federal program), with SMCRA § 504(a), 30 U.S.C. § 1253(a) (granting qualifying states exclusive jurisdiction over the regulation of surface coal mining and reclamation). In RCRA, Congress authorizes states to carry out their hazardous waste programs "in lieu" of RCRA; under SMCRA a governor can obtain "exclusive jurisdiction" over the regulation of surface coal mining in her state. 42 U.S.C. § 6926(b); 30 U.S.C. § 1253(a). As a result of this language, one court has found that the EPA is foreclosed from initiating overfiling proceedings that "duplicate a state's enforcement authority." *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 901 (8th Cir. 1999). However, this decision has been met with disapproval by both commentators and courts alike. See, e.g., *United States v. Elias*, 269 F.3d 1003, 1011 (9th Cir. 2001) (finding that federal enforcement of RCRA is subordinate to, but not supplanted by, an authorized state program); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1116 (W.D. Wis. 2001) (finding no congressional intent under RCRA for a state program to totally supplant a federal program); *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1059 (D. Colo. 2000) ("If the 'in lieu of' language contained in [Section 6926(b)] reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement, Congress would have had no reason to include the second clause granting enforcement powers to authorized states." (alteration in original) (citation omitted)).

276. 30 U.S.C. § 1271(a)(1).

for the state's jurisdiction.²⁷⁷

“As a general principal, however, . . . court[s] reject[] the suggestion that state permitting authority divests federal courts of jurisdiction to hear citizen suit complaints alleging CWA violations by state officials.”²⁷⁸ Although one court in the Eastern District of Wisconsin indicated that there is potential for a *Pennhurst* bar against enforcement of state-permitting regulations against state officials in federal courts, it also recognized that federal courts have implicitly acknowledged jurisdiction by entertaining citizen actions that allege violations of the CWA's permit provisions by state officers.²⁷⁹ One such example is the Ninth Circuit's ruling in *Natural Resources Defense Council, Inc. v. California Department of Transportation*.²⁸⁰ In this case, the NRDC sought prospective, injunctive relief against the director of California's Department of Transportation for non-compliance “with a [CWA] permit that required it to control polluted stormwater runoff from roadways and maintenance yards in Southern California.”²⁸¹ The state officials asserted immunity under the Eleventh Amendment by arguing that the *Ex parte Young* exception only applied to violations of constitutional law not federal statutes.²⁸² The court held that the *Ex parte Young* exception was not limited to constitutional violations and retained subject matter jurisdiction over the matter, thereby implicitly acknowledging that violations of a state-permitting program are violations of federal law not state law.²⁸³

277. Telephone Interview with Victor Brent Virts, OSM Inspector, Virginia Office of Surface Mining, in Big Stone Gap, Va. (Nov. 23, 2004).

278. *Froebel v. Meyer*, 13 F. Supp. 2d 843, 855 (E.D. Wis. 1998).

279. *Id.*

280. *Natural Res. Def. Council, Inc. v. Cal. Dep't of Transp.*, 96 F.3d 420 (9th Cir. 1996).

281. *Id.* at 421.

282. *See id.* at 422 (“Although, as appellant points out, many of the cases applying the *Ex parte Young* doctrine address federal constitutional violations, we have held that the doctrine applies to violations of federal statutory law as well.”).

283. *Id.* at 422, 424. There are examples of other cases acknowledging the federal enforceability of the CWA. *See Comm. to Save Mokelumne River, Inc. v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309–10 (9th Cir. 1993) (finding state agency's Eleventh Amendment jurisdictional challenge to suit in federal district court to be lacking merit where plaintiff sought only prospective equitable relief “which is not barred by the Eleventh Amendment”); *Mancuso v. N.Y. State Thruway Auth.*, 909 F. Supp. 133, 135 (S.D.N.Y. 1995) (“This Court has the jurisdiction and power to enjoin NYSTA from future violation of the CWA if at trial it is found to be in violation.”); *Pa. Envtl. Def. Found. v. Mazurkiewicz*, 712 F. Supp. 1184, 1190 (M.D. Pa. 1989) (upholding plaintiff's amended complaint against state officials based on the CWA).

CONCLUSION

The Fourth Circuit failed to provide justice for the citizens of West Virginia. It erroneously interpreted the law and left citizens with very little recourse. Congress must reassert the importance of citizen enforcement against state agencies by amending the statute. However, in the meantime, courts can play an important role by limiting the reach of *Bragg*. They may do so by distinguishing SMCRA from other cooperative federalism statutes such as the CWA. The CWA remains an exemplary model of concurrent state and federal jurisdiction.²⁸⁴ When confronted with the question of whether a particular cooperative federalism statute is federal or state law, courts may look to the CWA for guidance in how to distinguish the relevant statute from SCMRA. Courts must do so or the entire premise of cooperative federalism—providing for citizen enforcement against agency inaction—will be lost.

Zoë Gamble

284. Even in *Bragg*, the Fourth Circuit recognized that the CWA was distinct from SMCRA. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293–94 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) (“[I]n contrast to other ‘cooperative federalism’ statutes, SMCRA exhibits extraordinary deference to the States. The statutory federalism of SMCRA is quite unlike the cooperative regime under the Clean Water Act [T]he Clean Water Act’s regulations ‘effectively incorporate[]’ State law into the unitary federal enforcement scheme, making State law, in certain circumstances, federal law.” (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992)) (citations omitted)).