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# HAZARDOUS AND SOLID WASTE LAWS AND REGULATIONS: EFFECTS ON THE MINING OF COAL AND OTHER MINERALS

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## I. INTRODUCTION

In late September 1983, the Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior issued regulations<sup>1</sup> that threatened to undo exclusive OSM and state regulation of solid and hazardous wastes associated with surface coal mining. The 1983 rules would have enlarged the role of the Environmental Protection Agency (EPA) under EPA's authority as set forth in the Resource Conservation and Recovery Act. Though these rules have been remanded for additional notice and comment by the District Court for the District of Columbia,<sup>2</sup> their original promulgation in 1983 and possible reemergence in 1986 may signal erosion of the coal industry-specific regulatory scheme of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), enforced by OSM and the states. The utility of waste disposal plans in approved OSM mine permits could also be lessened. This article discusses the genesis of an EPA role with respect to coal mining waste and describes how the national solid and hazardous waste controversy—including the 1984 RCRA amendments and anticipated 1986 Superfund amendments—relates to the mining of coal and other minerals.

## II. THE STATUTORY BACKDROP

### A. SWDA and RCRA

A direct federal role in the regulation of solid and hazardous wastes began with the enactment of the Solid Waste Disposal Act (SWDA)<sup>3</sup> on October 20, 1965. Significant amendments followed in the form of the Resource Conservation and Recovery Act of 1976 (RCRA);<sup>4</sup> the Solid Waste Disposal Act Amendments of 1980 (SWDA 1980 Amendments);<sup>5</sup> and the Hazardous and Solid Waste Amend-

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<sup>1</sup> 48 Fed. Reg. 44,030 (Sept. 26, 1983) (codified at 30 C.F.R. §§ 816.89 and 822.89).

<sup>2</sup> Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C.A. §§ 6901-91) [hereinafter RCRA].

<sup>3</sup> *In Re Permanent Surface Mining Regulation Litig.*, 620 F. Supp. 1519, 1538 (D.D.C. 1985).

<sup>4</sup> Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965) (codified at 42 U.S.C. §§ 6901-91 (West Supp. 1985)) [hereinafter SWDA].

<sup>5</sup> Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980) (codified at 42 U.S.C.A. §§ 6901-91) [hereinafter SWDA 1980 Amendments].

ments Act of 1984 (HSWA).<sup>6</sup> Although both RCRA and HSWA amended SWDA, practitioners usually call the cumulative, amended statute RCRA rather than SWDA.

Regulation of wastes is divided into two broad areas by RCRA. First, Subtitle C governs the regulation of hazardous waste, which is to be administered directly by the Environmental Protection Agency.<sup>7</sup> However, it may be administered by a state if such state submits to the EPA a proposal to enforce its own hazardous waste program "in lieu" of federal Subtitle C regulation. Second, Subtitle D provides for regulation of non-hazardous solid wastes by the states,<sup>8</sup> after the state meets EPA approved minimum requirements.<sup>9</sup>

The definition of solid waste in section 1004(27) of SWDA<sup>10</sup> includes discarded material from mining. Hazardous waste is defined as a component of solid waste that, because of its quantity, concentration, or physical, chemical, or infectious characteristics, meets specified health endangering standards.<sup>11</sup> Given these definitions, solid and hazardous wastes associated with coal mining conceivably could have been regulated by EPA or the states in the wake of RCRA, but the inherent lag in EPA's rulemaking to implement RCRA (for either solid or hazardous wastes) and the advent of specific surface coal mining legislation in 1977 foreclosed EPA regulation.

## B. SMCRA

The most important regulatory scheme for surface coal mining and the surface effects of *underground* coal mining is that fostered by SMCRA.<sup>12</sup> This Act is administered by both OSM in the Department of the Interior and the states through federally-approved surface coal mining regulatory programs.<sup>13</sup> SMCRA was a culmination of nearly six years of legislative efforts, and the tortured history of the statute—including two Presidential vetoes—is well detailed elsewhere.<sup>14</sup>

Section 515 of SMCRA (environmental protection performance standards)<sup>15</sup>

<sup>6</sup> Hazardous and Solid Waste Amendments Act of 1984, Pub. L. No. 98-616, 98 Stat. 3224 (1984) (codified at 42 U.S.C.A. §§ 6901-91) [hereinafter HSWA].

<sup>7</sup> 42 U.S.C. §§ 6921-34 (1982).

<sup>8</sup> *Id.* at § 6926(b).

<sup>9</sup> 42 U.S.C. §§ 6941-6949.

<sup>10</sup> SWDA § 1004(27) (codified at 42 U.S.C. § 6903(27)).

<sup>11</sup> SWDA § 1004(5) (codified at 42 U.S.C. § 6903(5)). The health endangering standards apply when the waste characteristics:

A. may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

B. may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

<sup>12</sup> 30 U.S.C.A. § 1201 (West Supp. 1985).

<sup>13</sup> 30 U.S.C. § 1253.

<sup>14</sup> Waters, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

<sup>15</sup> SMCRA § 515 (codified at 30 U.S.C.A. § 1265 (West Supp. 1985)).

appears to cover mining waste classified as hazardous or solid waste. Section 515(b)(3)<sup>16</sup> addresses compacting to prevent leaching of toxic materials; section 515(b)(11)<sup>17</sup> specifically regulates mine waste; and section 515(b)(14)<sup>18</sup> concerns "...debris, acid-forming materials, toxic materials, or materials constituting a fire hazard." The 1977 OSM interim program regulations implementing section 515<sup>19</sup> regulated top soil, overburden, and spoil;<sup>20</sup> protection of the hydrologic system from acid-forming and toxic materials;<sup>21</sup> and sedimentation ponds and water discharges off the permit area.<sup>22</sup>

In final permanent program regulations promulgated on March 13, 1979, OSM carved out a separate category<sup>23</sup> of "noncoal wastes," consisting of (but not limited to) grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustibles generated during surface mining activities. Pursuant to the 1979 regulation, these noncoal wastes were to be "...placed and stored in a controlled manner in a designated portion of the permit area."<sup>24</sup>

In practice, noncoal (also called "nonsoil") mine wastes associated with surface coal mining areas are disposed of by placement in the mine pits, followed by appropriate covering. Wastes associated with soil are disposed of through backfilling and post-mining grading, aimed at returning the mine area to its premining natural contour.<sup>25</sup> The coal industry considers the implementation of the SMCRA standards through the states' surface coal mining regulatory programs to be the "functional equivalent" of the solid waste regulatory scheme of Subtitle D of RCRA<sup>26</sup> and the hazardous waste rules established pursuant to Subtitle C of RCRA.

The permit (or mine plan) system under section 506 of SMCRA has emerged as the device by which the operator, with state or federal oversight, tackles specific problems of reclamation, including waste disposal. In most cases, the mine plan approval process affords the operator the flexibility to: (1) identify potential coal and noncoal waste problems unique to the mine and (2) fashion suitable mitigation and disposal strategies. The mine plan, especially for western surface mines, is often a massive, complex document that includes input of hydrologists, mining engineers; biology and wildlife experts; and archaeologists and paleontologists. After undergoing the lengthy and expensive process of obtaining mine plan approval, coal operators resented the possible intrusion of EPA regulations for coal and noncoal wastes—

<sup>16</sup> SMCRA § 515(b)(3) (codified at 30 U.S.C. § 1265(b)(3)).

<sup>17</sup> SMCRA § 515(b)(11) (codified at 30 U.S.C. § 1265(b)(11)).

<sup>18</sup> SMCRA § 515(b)(14) (codified at 30 U.S.C. § 1265(b)(14)).

<sup>19</sup> 30 C.F.R. § 715 (1985).

<sup>20</sup> 30 C.F.R. § 715.14, .15 (1978).

<sup>21</sup> 30 C.F.R. § 715.17 (1978).

<sup>22</sup> 30 C.F.R. § 715.17(g) (1978).

<sup>23</sup> 30 C.F.R. § 816.89 (1985).

<sup>24</sup> 30 C.F.R. § 816.89(a) (1979).

<sup>25</sup> 30 U.S.C. § 1265(b)(1); 30 C.F.R. § 715.14 (1978).

<sup>26</sup> Brief for Petitioner Mining and Reclamation Council of America at 30. *Chemical Mfrs. Ass'n v. EPA*, 673 F.2d 507 (D.C. Cir. 1982).

rules that included the spectre of off-site disposal and lacked any custom tailoring to the surface coal industry. The elaborate mine plan system that is now at the heart of OSM and state enforcement of SMCRA may well be seriously undercut if a direct EPA role is sustained.

The other significant feature of SMCRA bearing on the national solid and hazardous waste controversy is the Abandoned Mine Reclamation Fund, established in section 401 of SMCRA<sup>27</sup> and aimed primarily at the reclamation and restoration of land and water resources adversely affected by past coal mining. This fund is financed by a producers' tax on surface and underground mined coal. In fiscal year 1984, OSM utilized \$248 million of the Fund in approving grant requests from the states for reclamation projects.

### III. HISTORY OF EPA INTRUSION INTO SMCRA REGULATION OF SURFACE COAL MINING WASTE

In 1979, EPA promulgated its first set of final rules setting solid waste criteria for the states pursuant to Subtitle D of RCRA, and these rules specifically applied to the mining industry (including coal).<sup>28</sup> In 1981, the Mining and Reclamation Council (MARC) and other industry groups challenged these regulations in *Chemical Manufacturers Association v. EPA*<sup>29</sup> in a petition for review before the District of Columbia Circuit Court of Appeals because of the apparent duplication of SMCRA and the state permitting system implementing each state's version of SMCRA regulations.

Prior to the filing of the MARC challenge, but after promulgation of the 1979 EPA solid waste rules, Congress passed the 1980 SWDA Amendments.<sup>30</sup> At that time, these amendments were perceived as confirming that (1) OSM would exclusively regulate hazardous waste associated with surface coal mining pursuant to SMCRA and (2) the EPA role would be merely to review OSM regulations to ensure that such regulations "adequately addressed" the requirements of Subtitle C of RCRA as expressed in EPA regulations. The 1980 SWDA Amendments specifically stated that:

—The Secretary of the Interior has exclusive responsibility to carry out the requirements of Subtitle C of RCRA with respect to coal mining wastes or overburden for which a surface coal mining and reclamation permit is issued or approved under SMCRA.

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<sup>27</sup> SMCRA § 401 (codified at 30 U.S.C. 1231).

<sup>28</sup> 40 C.F.R. § 257.2 (1983).

<sup>29</sup> *Chemical Mfrs. Ass'n*, 673 F.2d at 507.

<sup>30</sup> Pub. L. No. 96-482, 94 Stat. 2334 (1976).

—The Secretary shall, with the concurrence of the Administrator, promulgate such regulations as may be necessary to carry out [Subtitle C of RCRA] and shall integrate such regulation with regulations promulgated under the Surface Mining Control and Reclamation Act of 1976.<sup>31</sup>

—Notwithstanding section 3005(a) through (e) of RCRA, any permit covering any coal mining wastes or overburden which has been issued or approved under SMCRA shall be *deemed to be a permit issued* pursuant to section 3005 of RCRA.<sup>32</sup>

—Regulations promulgated by the Administrator [of EPA] under Subtitle C of RCRA shall *not* be applicable to treatment, storage, or disposal of coal mining wastes and overburden which are covered by such a permit.<sup>33</sup>

To summarize, the surface coal mining industry understood federal and state enforcement of SMCRA to be the functional equivalent of regulation under the solid waste portion of RCRA, and the 1980 SWDA Amendments were read as confirming exclusive jurisdiction of the Secretary of the Interior to enforce RCRA hazardous waste standards. No one foresaw a direct EPA role for either solid or hazardous waste regulation in surface coal mining. To be sure, the acknowledgment that the Secretary of the Interior would regulate hazardous waste associated with surface coal mining was tempered by a requirement in the 1980 SWDA Amendments that the OSM regulations bearing on mining waste would be reviewed by the EPA Administrator to ensure that the requirements of the RCRA Subtitle C regulations were “adequately addressed.”<sup>34</sup> This review role for EPA would later serve as the lynchpin for increasingly direct EPA regulation of hazardous surface coal mining waste.

In March 1982, the District of Columbia Circuit Court of Appeals, in an opinion in *Chemical Manufacturers Association v. EPA*,<sup>35</sup> rejected the MARC challenge to the 1979 EPA regulations bearing on surface coal mining waste. The court found that EPA had authority to regulate mining waste (including coal) by setting guidelines for the states, pursuant to the definition of solid waste found in section 1004(27) of RCRA and that nothing in SMCRA rescinded EPA’s authority over mining. The court’s analysis of the 1980 SWDA Amendments was confined to a single observation: “Congress knows how to repeal such authority unambiguously. In 1980 EPA authority over *hazardous* [coal] mining waste was transferred entirely to the Secretary of Interior. *EPA authority over nonhazardous mining waste was not altered.*”<sup>36</sup>

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<sup>31</sup> SWDA 1980 Amendments § 3 (codified at 42 U.S.C. § 6905(c)(2)).

<sup>32</sup> SWDA 1980 amendments § 11 (codified at 42 U.S.C. § 6925(f)).

<sup>33</sup> *Id.*

<sup>34</sup> 42 U.S.C. § 6905(c)(1).

<sup>35</sup> *Chemical Mfrs. Ass’n*, 673 F.2d at 507.

<sup>36</sup> *Id.* at 513 n.33 (citations omitted, emphasis added).

#### IV. SEPTEMBER 1983 OSM REVISION OF SURFACE COAL MINING PERFORMANCE STANDARDS

After its March 1982 victory in the *Chemical Manufacturers Association* case, EPA renewed discussions with OSM on the roles of the two agencies in regulating solid and hazardous waste associated with surface coal mining. Proposed revisions to OSM rules<sup>37</sup> in June 1982, however, made no change from the 1979 version of the regulations and did not mention input or review by EPA. Nonetheless, the final OSM rulemaking,<sup>38</sup> in September 1983, made a profound change in the law and threatened to scuttle the industry-specific regulatory framework of SMCRA and the state plans. The 1983 regulation increased the risk that noncoal wastes could not be disposed of on the permit area in the future but would instead have to be transported to a state-approved solid waste disposal area. More importantly, OSM added a new subsection in the final rules:

Notwithstanding any other provision in this chapter, any noncoal mine waste defined as "hazardous" under section 3001 of the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580, as amended) and 40 C.F.R. Part 261 shall be handled in accordance with the requirements of Subtitle C of RCRA and any implementing regulations.<sup>39</sup>

In addition to this wholesale incorporation of Subtitle C of RCRA and its implementing regulations, OSM went further in the narrative accompanying the new regulation: "As to the relationship of coal mine waste and RCRA, OSM and EPA have undertaken a joint study under Subtitle C of RCRA. Until that study is completed, OSM *has no responsibility* for regulating coal mine waste under Subtitle C or [sic] RCRA."<sup>40</sup>

Because this September 1983 version of 30 C.F.R. section 816.89 appeared to contravene the "functional equivalent" principle (regarding coal mining solid wastes) and the 1980 amendments to SWDA (regarding hazardous wastes), the National Coal Association and the American Mining Congress challenged the new rule, amidst the ongoing litigation on OSM regulations, in *In Re Permanent Surface Mining Regulation Litigation*.<sup>41</sup> The government's December 17, 1984 brief on this issue responded that section 816.89 was added "...only to clarify that where RCRA and its implementing regulations apply in the disposal of hazardous non-coal mine waste, the Secretary's rules do not interfere with such applicability." On July 15, 1985, the District of Columbia District Court stated in an opinion that it "need not spend much time detailing the statutory analysis because it concludes that the rule was promulgated without adequate notice and comment under APA" (the Administrative

<sup>37</sup> 47 Fed. Reg. 26,598 (1982).

<sup>38</sup> 48 Fed. Reg. 44,030 (1983).

<sup>39</sup> 30 C.F.R. § 816.89 (1983).

<sup>40</sup> 48 Fed. Reg. 44,027 (1983). See also 30 C.F.R. § 261.4(b)(3) (EPA rule), which excludes mining overburden returned to the mine site from the definition of hazardous waste.

<sup>41</sup> 620 F. Supp. 1519 (D.D.C. 1985).

Procedure Act). Title 30 C.F.R. sections 816.89(d) and 817.89(d) were then remanded to the Secretary for adequate notice and comment.<sup>42</sup>

#### V. THE BEVILL AMENDMENT: RCRA EXEMPTION FOR MINING WASTE UNTIL COMPLETION OF EPA STUDY

The coal industry has not been one of the primary industries upon which the governmental authorities charged with enforcing hazardous waste laws have focused, in large part because the industry is regulated on a comprehensive basis by the states and OSM under SMCRA. Outside of the regulation of non-hazardous coal mining waste that has resulted from the passage of SMCRA, Congress has had difficulty in deciding how to regulate waste produced by the rest of the mining industry.

Under section 8002(f) of RCRA, Congress charged the EPA with determining the adverse effects on the environment of solid wastes from active and abandoned surface and underground mines. Pursuant to section 8002(p) of RCRA, EPA was directed to determine the adverse effects on human health and the environment, if any, of the disposal and utilization of solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from uranium mining. The requirements set forth in these two sections of RCRA were initially addressed by EPA in the "mining waste study" which it presented to Congress on December 31, 1985.<sup>43</sup>

The Bevill Amendment, contained in section 7 of the 1980 SWDA Amendments,<sup>44</sup> specifies that mining wastes are not to be regulated under Subtitle C of RCRA (the hazardous waste management section of the Act) until at least six months after EPA completes the mining waste study. Although coal mining waste is not included in this study, many in the coal industry are concerned that the results

<sup>42</sup> *Id.* at 1538.

<sup>43</sup> See OFFICE OF SOLID WASTE, REPORT TO CONGRESS, WASTES FROM THE EXTRACTION AND BENEFICIATION OF METALLIC ORES, PHOSPHATE ROCK, ASBESTOS, OVERBURDEN FROM URANIUM MINING, AND OIL SHALE, (Dec. 31, 1985).

<sup>44</sup> SWDA 1980 Amendments, § 3001(b)(3)(A) (codified at 42 U.S.C. § 6921(b)(3)(A)) [The Bevill Amendment] reads as follows:

Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall, except as provided subparagraph (B) of this paragraph, be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subtitle until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 6982 of this section and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:

- (i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.
- (ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.
- (iii) Cement kiln dust waste.



of the study may be a harbinger of what to expect for coal. As will be seen from the discussion of *Concerned Citizens of Adamstown v. EPA*,<sup>45</sup> EPA has been under pressure to expedite the direct regulation of certain types of mining industry waste.

## VI. 1980 ENACTMENT OF SUPERFUND STATUTE

Aside from RCRA, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) is expected to have the greatest impact on industry from the standpoint of hazardous waste.<sup>46</sup>

A key part of CERCLA is the Hazardous Substance Response Trust Fund, currently financed mostly by substantial taxes on feedstock chemicals, metals, and crude oil. The purpose of the fund is to pay for the cleanup of hazardous waste sites identified by EPA and placed on the National Priorities List (NPL) as representing a significant long-term threat to human health and the environment. CERCLA also mandates significant cleanup liability for individuals associated with hazardous waste sites.<sup>47</sup>

Currently, the NPL is composed of over 850 final and proposed sites, more than a dozen of which are mining sites.<sup>48</sup> Eventually, EPA expects between 1800 and 2200 sites to be listed.<sup>49</sup> By the third quarter of 1985, cleanups were underway at sixty-nine of these sites, with engineering studies and design work underway at 379 sites.<sup>50</sup> Through enforcement actions, EPA and the states have received from private parties nearly \$480 million worth of cleanup costs at 255 sites.<sup>51</sup> EPA also has recovered from such parties over \$20 million in Superfund money spent at sites.<sup>52</sup> While EPA estimates the total cleanup costs for the 1800-2200 anticipated sites to range between \$11.7 and \$22.7 billion, the Office of Technology Assessment suggests that a \$100 billion figure may be more likely.<sup>53</sup>

Whenever owners, operators, transporters, or generators can be identified at such sites, EPA and the states seek to recover the federal and state money spent on site cleanups through CERCLA section 107 cost recovery actions against such parties.<sup>54</sup> Should EPA determine that there may be an "imminent and substantial endangerment to the public health or welfare or the environment because of an

<sup>45</sup> *Concerned Citizens of Adamstown v. EPA*, No. 84-3041, slip op. (D.D.C. Aug. 21, 1985).

<sup>46</sup> Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-57) (1982)). [hereinafter CERCLA].

<sup>47</sup> See *infra* notes 54-58 and accompanying text.

<sup>48</sup> 50 Fed. Reg. 37,950 (1985).

<sup>49</sup> EPA ENVTL. NEWS, April 10, 1985.

<sup>50</sup> EPA ENVTL. NEWS, September 5, 1985.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> *Id.*

<sup>53</sup> OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY at 8 (April 1985).

<sup>54</sup> 42 U.S.C. § 9607(a).

actual or threatened release of a hazardous substance” from a facility, the agency may decide to issue an administrative order under section 106 of CERCLA or to seek injunctive relief against the parties believed to be responsible for the release or threatened release.<sup>55</sup> Industry in general, and particularly the chemical industry which has experienced the greatest impact of such administrative orders and lawsuits to date, has not fared well in defense of section 106 and section 107 cases.<sup>56</sup>

Releases of “reportable quantities” of hazardous substances from facilities must be reported to the National Response Center under CERCLA<sup>57</sup> as soon as knowledge of such a release is acquired. Failure to make such reports subjects the owner or operator to fines of up to \$10,000 and up to one year of imprisonment.<sup>58</sup> If no reportable quantity has been established for the particular hazardous substance in question, the quantity triggering the reporting requirement is one pound of the hazardous substance under section 102(b).<sup>59</sup>

## VII. CERCLA LITIGATION AFFECTING MINING

Recent developments, in addition to those associated with the permanent surface mining regulations discussed above, suggest that hazardous waste may be emerging as a larger problem for both the coal industry and the mining industry in general.

Interpretations by EPA and the courts of the term “hazardous substance” under CERCLA have created concern in the industry.<sup>60</sup> The mining industry position has been that the language noted in the definition of the term in section 101(14)(C),

<sup>55</sup> 42 U.S.C. § 9606(a).

<sup>56</sup> See, e.g., results of motion practice in such cases as: *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1984); *United States v. NEPACCO*, No. 80-5066 CVSW-4 slip op. (W.D. Mo. filed Aug. 1, 1980); and *United States v. South Carolina Recycling & Disposal*, No. 80-1274-6 slip op. (D.S.C. Aug. 28, 1984).

<sup>57</sup> CERCLA § 103(b)(3) (codified at 42 U.S.C. § 9603(a)).

<sup>58</sup> 42 U.S.C. § 9603(b)(3) (1982).

<sup>59</sup> CERCLA § 102(b) (codified at 42 U.S.C. § 9602(b) (1982)).

<sup>60</sup> CERCLA § 101(14) (codified at 42 U.S.C. § 9601(14) (1982)), reads as follows: “Hazardous substance” means (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the *Solid Waste Disposal Act* (but not including any waste the regulation of which under the *Solid Waste Disposal Act* has been suspended by the Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the *Clean Air Act*, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

"...(but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress)..." exempts such waste from regulation. The posture EPA has taken on the meaning of the parenthetical exclusion in section 101(14)(C) is that it applies only to substances brought into the definition by subsection (C). The agency maintains that subsections (A) through (F) set out *alternative* bases for classifying a substance as a "hazardous substance" and that only petroleum and natural gas are excluded from the entire definition in section 101(14). As EPA stated in its brief in *Eagle-Picher Industries, Inc. v. EPA*, "A review of section 101(14)(C), its legislative history, and the policies underlying CERCLA demonstrates that mining wastes are not exempt from the definition of 'hazardous substance.'"<sup>61</sup>

On April 16, 1985, the District of Columbia Circuit Court of Appeals adopted EPA's interpretation of the statute by upholding the authority of the agency to include mining sites in the National Priorities List of Superfund sites.<sup>62</sup> In reaching its decision, the court rejected the petitioner's claims that mining wastes (and electric utilities' fly ash) are not "hazardous substances" within the meaning of CERCLA. Thus, releases from mining sites would clearly trigger section 106 and section 107 liability under CERCLA.<sup>63</sup> The court then noted that even assuming *arguendo* that section 101(14)(C) of CERCLA totally exempted mining wastes from the coverage of "hazardous substances," it would not be persuaded that mining wastes cannot constitute "pollutants and contaminants."<sup>64</sup> As a consequence, EPA could properly list mining sites on the NPL on the simple basis that such sites contain pollutants and contaminants. If the court had determined that mining wastes fell within the category of "pollutants and contaminants" only, however, as opposed to falling within the definition of "hazardous substances," EPA could have taken cleanup actions in such situations but no liability would have attached to those parties responsible for the release because liability under CERCLA attaches only for releases of hazardous substances.

Like the Arizona District Court in *United States v. Metate Asbestos Corp.*,<sup>65</sup> the circuit court in *Eagle-Picher* held that the parenthetical clause found in subclause (C) of the definition of "hazardous substance" only applied to that subsection.<sup>66</sup>

<sup>61</sup> Brief for Respondents filed on August 17, 1984, *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 922 (D.C. Cir. 1985).

<sup>62</sup> *Eagle-Picher Indus.*, 759 F.2d 922.

<sup>63</sup> See *supra* discussion of liability under sections 106 and 107 in part D.

<sup>64</sup> *Id.*

<sup>65</sup> *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143 (D. Ariz. 1984).

<sup>66</sup> The other district court decisions which served as a foundation for EPA prevailing in its interpretation that mining wastes are not exempt from the definition of "hazardous substance" are worth noting briefly:

—In *United States v. Union Gas Co.*, 21 Env't Rep. Cas. (BNA) 1001 (E.D. Pa. 1984), the court concluded that the coal tar constituents at issue (acenaphthene, ethylbenzene, fluoranthene, phenanthrene, pyrene, naphthalene and zylene) are hazardous substances as a result

Therefore, if a substance is "hazardous" under any other subclause in section 101(14), it is not excluded from regulation as a hazardous substance. Although the court appeared to find more persuasive the petitioner's argument that the legislative history of CERCLA shows that the subparagraph (C) exception was meant to exempt totally such wastes from the term "hazardous substance," it rejected the argument on the basis that, when a conflict between the language of the statute and its legislative history exists, the statute must control.

The petitioners in *Eagle-Picher* had claimed that virtually all mining wastes and fly ash contain at least trace amounts of substances that qualify as "hazardous substances" under one of the subparagraphs of section 101(14) (e.g., arsenic, cadmium, selenium, etc.). Thus, they argued, "EPA's interpretation would render all or virtually all mining wastes and fly ash CERCLA-covered 'hazardous substances,' with the effect of denuding the exception [to inclusion of each type of waste under the definition of "hazardous substance"] in subparagraph (C) of any efficacy whatsoever."<sup>67</sup> The court noted, however, that petitioners had "presented nothing demonstrating that Congress was of the view that all or almost all mining wastes and fly ash contain hazardous substances" or that all or virtually all such wastes do in fact contain constituents which are hazardous substances.<sup>68</sup> The court concluded that:

It is quite possible that Congress was unconvinced that enough was known about mining wastes and fly ash for EPA to decide that those substances, as a general rule, posed a threat to the environment, but at the same time Congress may have been willing to bring any mining waste and fly ash found to contain "hazardous substances" within the ambit of section 101(14).<sup>69</sup>

The EPA has recently been attempting to persuade Congress that the scope of CERCLA, from a management standpoint, is too broad and congressional guidance is needed to focus Superfund resources on chemical waste sites rather than mining sites, pesticide-contaminated aquifers, and other types of sites.<sup>70</sup> The

of CERCLA's definition of "hazardous substance," which includes hazardous substances under the *Clean Water Act*.

—In *Metate Asbestos Corp.*, 584 F. Supp. 1143, the court found asbestos to be a hazardous substance because asbestos is a hazardous substance under the *Clean Water Act* and the *Clean Air Act*.

—Related cases supporting a broad interpretation of the meaning of "hazardous substance" under CERCLA are *United States v. Wade*, No. 79-1426, Memorandum Opinion (Dec. 20, 1983) and *United States v. Carolawn Co.*, No. 83-2162-0 (D.S.C., June 15, 1984). These courts concluded that if a waste material "contains" substances identified as hazardous or toxic under the statutes specified in CERCLA's definition of "hazardous substance," then the waste material is itself a hazardous substance for purposes of CERCLA.

<sup>67</sup> *Eagle-Picher*, 759 F.2d at 928.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See section 101(b) of S.494 (proposed amendments to CERCLA), introduced in the Senate on February 22, 1985, by Mr. Stafford at the request of EPA.

agency's problem appears to be simply one of insufficient manpower and financial resources to address simultaneously cleanup of chemical waste sites and all other types of waste sites. In late 1985 and early 1986 Congress refused, however, to narrow the scope of the Act to the degree EPA desired during its consideration of legislation to reauthorize CERCLA. In light of the *Eagle-Picher* decision and the refusal of Congress to narrow the scope of Superfund in a significant manner, EPA is expected to continue to add other mining sites to the NPL in the future.<sup>71</sup>

#### VIII. IMPLEMENTATION OF RCRA 1984 AMENDMENTS AFFECTING MINING

As noted earlier, the 1984 RCRA reauthorization legislation (RCRA 1984 Amendments) will clearly bear on the mining industry. The full extent to which it will affect the coal industry depends in large part on (1) studies which may be initiated under section 8002 directed more specifically at coal and (2) the results of EPA's review (pursuant to section 1006(d) of RCRA) of any regulations applicable to the treatment, storage, or disposal of coal mining wastes or overburden promulgated by the Secretary of the Interior under SMCRA. Generally, the mining industry was successful in obtaining language in the RCRA 1984 Amendments that grants EPA authority to modify (and strongly encourages the agency to modify) the requirements placed on facilities where hazardous waste is treated, stored, or disposed. The amendment obtained by the mining industry<sup>72</sup> notes that if solid waste from mining is determined to be hazardous, and therefore subject to regulation under Subtitle C, EPA is authorized to modify the requirements of subsections (c), (d), (e), (f), (g), (o), and (u) of section 3004 and section 3005(j), in the case of landfills or surface impoundments receiving such waste, "to take into account the special characteristics of such wastes, the practical difficulties associated with implementation of such requirements, and site specific characteristics, including but not limited to the climate, geology, hydrology, and soil chemistry at the site, so long as such modified requirements assure protection of human health and the environment."<sup>73</sup>

Although the language in section 3004(x) is clearly very helpful to the mining industry, two concerns are worth noting. First, there may be a dispute as to whether cost is a factor that EPA can consider in authorizing modifications to the requirements noted. Second, performance standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities were addressed in section 3004 of RCRA prior to the adoption of the new amendments. The former section 3004 became section 3004(a) when the Act was amended.<sup>74</sup> The mining industry amendment might be interpreted as not allowing EPA to modify

<sup>71</sup> See *supra* note 44.

<sup>72</sup> 42 U.S.C.A. § 6924(x) (West Supp. 1985).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

the standards referred to in section 3004(a) since section 3004(x) does not provide the Administrator of EPA with the authority to modify the requirements in section 3004(a).

Three provisions in the RCRA 1984 Amendments will have the greatest impact on the mining industry, to the degree section 3004(x) proves to be deficient in providing needed relief. First, section 3004(d) of RCRA was amended to read that "a method of land disposal may not be determined to be protective of human health and the environment for a [containerized or free liquid] hazardous waste unless...there will be *no migration* of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous."<sup>75</sup> Second, section 3004(o)(1) of the Act was amended to read that "...the Administrator or a State shall require—(A) for each new [replacement and lateral expansion of an existing] landfill or surface impoundment...(i) the installation of two or more liners and a leachate collection system...and (ii) ground water monitoring."<sup>76</sup> Third, section 3004(u) of the Act was amended to read "...Continuing Releases at Permitted Facilities. Standards promulgated under this section shall require...corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit."<sup>77</sup>

Underground storage tanks containing other than hazardous wastes such as petroleum, including crude oil, are also addressed in the RCRA 1984 Amendments. EPA recently promulgated rules on the release, detection, prevention, and correction of underground storage tank problems, along with inspection, monitoring, and testing authority for the EPA and the states.<sup>78</sup> Provisions providing for penalties of up to \$25,000 for each day of continued noncompliance will probably ensure widespread compliance with the regulations.

Provisions in the RCRA 1984 Amendments reduce the exemption for the small quantity generator of hazardous waste from 1000 kilograms per month to 100 kilograms per month and may affect coal mining facilities with respect to storage of spent solvents and storage of polychlorinated biphenyls (PCBs) and herbicides and pesticides.<sup>79</sup> On March 24, 1985, EPA promulgated rules implementing the small quantity generator provisions contained in the legislation.<sup>80</sup> Prior to the passage of these amendments, permitting requirements applicable to facilities where hazardous waste is treated, stored, or disposed only applied if a generator handled greater than 1000 kilograms per month of hazardous waste.

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<sup>75</sup> RCRA 1984 Amendments § 201 (codified at 42 U.S.C. § 6924(d)) (emphasis added).

<sup>76</sup> RCRA 1984 Amendments § 202 (codified at 42 U.S.C. § 6924(o)(1)(A)).

<sup>77</sup> RCRA 1984 Amendments § 206 (codified at 42 U.S.C. § 6924(u)).

<sup>78</sup> 50 Fed. Reg. 21,772 (May 28, 1985); 50 Fed. Reg. 28,702 (July 15, 1985).

<sup>79</sup> RCRA 1984 Amendments § 221 (codified at 42 U.S.C. § 6921(d)).

<sup>80</sup> 51 Fed. Reg. 10,177.

On January 4, 1985, final RCRA hazardous waste rules for reuse and recycling of secondary materials were promulgated.<sup>81</sup> These regulations directly affect the mining industry, as they pertain to the mineral-bearing dusts, sludges, residuals, and other secondary materials and by-products generated by the smelting and refining (processing) of ores and minerals. Because of the mineral value of these secondary materials, they can be refined to capture the minerals or be used in various industrial processes. Such secondary materials frequently serve as feedstocks in the original processes in which they were generated, thus replacing raw materials. Industry groups have challenged EPA's determination that virtually all reuse of these secondary materials is covered by the solid or hazardous waste portions of RCRA.<sup>82</sup>

On January 11, 1985, EPA proposed, under Subtitle C of RCRA, to begin regulation of used oil burned for energy recovery in boilers and industrial furnaces.<sup>83</sup> On November 29, 1985, EPA promulgated a final rule which requires use of an invoice system for shipments of used oil plus institution of a number of record-keeping procedures.<sup>84</sup> These requirements are expected to affect coal mining operations because of the breadth of the used oils covered by the regulation. Methods currently followed for disposal of such oils at the mine sites, such as dumping the used oils in the mine pit or on the ground, will no longer be permitted under the new regulations.

#### IX. SUPERFUND REAUTHORIZATION LEGISLATION IN 1986

By April 1, 1986, the Senate and House of Representatives had each passed CERCLA reauthorization legislation, but a conference to resolve the differences in the two bills had not been completed.<sup>85</sup> Regardless of how the differences are resolved, a number of general statements can be made regarding changes which will be made in CERCLA, assuming Congress does not merely authorize continued long-term funding for the program and fail to enact substantive changes in CERCLA. A number of these changes are of interest to the mining industry.

First, site cleanups will have to meet stricter environmental standards in the future. The new legislation would remove some flexibility EPA has had up to now to set cleanup standards at a level basically determined on a site-by-site basis. Greater uniformity in site cleanup standards will be required if Congress enacts into law the type of substantive changes in CERCLA which passed the Senate and House in late 1985.

<sup>81</sup> 48 Fed. Reg. 14,472 (Jan. 4, 1985).

<sup>82</sup> American Mining Congress v. EPA, No. 85-1206 slip op. (D.D.C.) (appeal pending before United States Court of Appeals for the District of Columbia).

<sup>83</sup> 50 Fed. Reg. 1684 (Jan. 11, 1985).

<sup>84</sup> 50 Fed. Reg. 49,164 (Nov. 29, 1985).

<sup>85</sup> The Senate passed H.R. 2005, the *Superfund Improvement Act of 1985* on September 24, 1985. On December 10, 1985, the House passed the *Superfund Amendments of 1985* (the House bill was assigned the same bill number, H.R.2005, as the Senate bill). See 131 CONG. REC. H 11,597-671.

Second, Congress is making an effort to encourage private party cleanup of sites by attempting to promote more settlements. For example, greater use can be expected of the tax dollars the government will be collecting to pay for the CERCLA program to fund the "orphan share" at individual sites where the private parties have agreed to fund their share of cleanup costs.

Third, citizens would enjoy greater access to the courts at NPL sites either through filing a "citizen suit" against any person, including EPA, alleged to be in violation of CERCLA as amended, or through exercising an independent statutory right to intervene in ongoing litigation between EPA and potentially responsible parties.

Fourth, the government would be required to conduct health research and assessments, including developing "toxicological profiles" on at least 100 substances which are believed to pose "the most significant potential threat to human health." In situations where a release may present a threat, the government would conduct "health assessments" to determine the potential risk to human health posed at the waste site.

Finally, Congress would require under "community right to know" provisions much greater disclosure by owners and operators of information revealing emissions of chemicals from their facilities.

## X. MINING WASTE STUDY UNDER RCRA

On December 31, 1985, EPA submitted to Congress the mining waste study it had conducted pursuant to sections 8002(f) and (p) of RCRA. Under the 1980 SWDA Amendments, EPA is prohibited from regulating soil, overburden, and other solid wastes generated from the "extraction, beneficiation, and processing of ores and minerals" under Subtitle C of RCRA until at least six months after submission of the study to Congress (July 1986). Of course, such wastes are presently regulated as solid waste by the states under Subtitle D of RCRA or, in the case of coal, by OSM or the states under SMCRA.

For mining wastes determined to be "hazardous" as a result of the study, EPA must decide by July 1986 whether to promulgate regulations under RCRA for both (1) wastes from mining of minerals other than coal and (2) "noncoal mine wastes" such as spent solvents, PCBs, herbicides, and pesticides associated with coal mining. The OSM role is unclear after the District of Columbia Circuit Court of Appeals' remand<sup>86</sup> of the September 30, 1983 rulemaking attempt to incorporate the RCRA hazardous waste rules for soil and nonsoil (noncoal) wastes associated with surface coal mining. Conceivably, EPA and OSM will take the position that the 1980 RCRA amendment mandate—that the Secretary of the Interior has exclusive responsibility to implement the hazardous waste portion of RCRA—<sup>87</sup> is limited

<sup>86</sup> *In Re Permanent Surface Mining Regulation Litig.*, 620 F. Supp. 1519 (D.D.C. 1985).

<sup>87</sup> 42 U.S.C. § 6905(c)(2) (1982).



to soil wastes associated with coal mining, and that the noncoal wastes addressed in OSM's unsuccessful September 30, 1983 rulemaking remain an appropriate subject for EPA regulation.

There are a number of ominous conclusions and recommendations in the mining waste study which suggest that EPA is seriously considering asserting jurisdiction over various types of mining waste which may be determined to be hazardous under Subtitle C of RCRA. From the conclusions reached by the agency, it is clear that but for the mining waste exemption, EPA could find over fifty percent of mining waste generated to be potentially hazardous to human health or the environment under some circumstances.<sup>88</sup> Alternatives to current waste management practices in the mining industry, such as treatment, the use of process modification, waste utilization, recycling, better waste siting, and more off-site disposal, and the use of mitigative methods for land disposal will be expensive.

The direction in which EPA seems to be moving is perhaps best revealed in several excerpts from its recommendations:

Section 8002(f) of RCRA requires EPA to conduct a study of the adverse effects of mining wastes and to provide "recommendations for Federal...actions concerning such effects." Based on our findings from this study, we make several *preliminary* recommendations for those wastes and industry segments included in the scope of the study.

First, EPA is concerned with those wastes that have hazardous characteristics of corrosivity or EPA toxicity under current RCRA regulations. EPA intends to investigate those waste streams. During the course of this investigation EPA will assess more rigorously the need for and nature of regulatory controls. This will require further evaluation of the human health and environmental exposures mining wastes could present. EPA will assess the risks posed by various types of mining waste sites and alternative control options.

Second, EPA will continue gathering information on those waste streams that our study indicates may meet EPA's criteria for listing—dump leach waste because of its high metal concentrations and low pH, and wastes containing cyanides. Although these waste streams are potential candidates for listing as hazardous wastes, we need to gather additional information....

Finally, EPA will continue to study radioactive waste and waste with the potential to form sulfuric acid. The Agency is concerned that radioactive wastes and wastes with the potential for forming acid may pose a threat to human health and the environment, but we do not have enough information to be able to conclude that they do. We will continue to gather information to determine whether these wastes should be regulated.<sup>89</sup>

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<sup>88</sup> Report to Congress, *supra* note 43, at 6-6 and 6-7.

<sup>89</sup> *Id.* at 6-12, 6-13.

## XI. EPA'S PROPOSED REINTERPRETATION OF THE MINING WASTE EXCLUSION

In *Concerned Citizens v. EPA*,<sup>90</sup> the plaintiffs averred that EPA failed to comply with a non-discretionary duty to conduct comprehensive and detailed studies of mining wastes and solid rock from the extraction, beneficiation, and processing of ores by the statutorily-imposed deadline of October 21, 1983. Plaintiffs argued that EPA had a non-discretionary duty to:

1) Complete, publish and submit to Congress, within thirty days [of the court's issuance of the plaintiffs' proposed order], a report on the adverse environmental and health effects of mining waste pursuant to § 8002(f) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6982(f);

2) Complete, publish, and submit to Congress within thirty days [of the court's issuance of the plaintiffs' proposed order], a report on the adverse environmental and health effects of solid waste from the extraction, beneficiation, and processing of ores and minerals pursuant to § 8002(p) of RCRA, 42 U.S.C. § 6982(p);

3) Hold public hearings and allow public comment on the 8002(f) and 8002(p) studies [the mining waste study], "and either determine to promulgate regulations under subtitle C of [RCRA] for mining wastes and solid wastes from the extraction, beneficiation, and processing of ores and minerals or determine that such regulations are unwarranted within six months after submission of [the 8002(f) and 8002(p) reports] to Congress."<sup>91</sup>

Although the court granted the plaintiffs' motion for summary judgment, EPA was given until September 30, 1985 to issue a proposed rule on reinterpretation of the mining waste exclusion. On October 2, 1985, EPA published its proposal to reinterpret the mining waste exclusion and to relist several mineral processing wastes.<sup>92</sup>

In the proposed rule, EPA determined that it was "incorrect" in interpreting the mining waste exclusion as encompassing all wastes from primary smelting and refining and, therefore, proposed to reinterpret the mining waste exclusion so that red and brown muds, phosphogypsum, and primary processing slags are the only processing wastes that remain excluded from regulation under Subtitle C of RCRA.<sup>93</sup> All other wastes from processing minerals and ores would be subject to Subtitle C regulation if the wastes are hazardous.<sup>94</sup> Not surprisingly, many comments have been filed in opposition to this proposed rule by representatives of the mining industry who maintain that EPA's proposed rule directly contravenes the exclusion from regulation extended to mining waste by Congress in the Bevill Amendment.<sup>95</sup>

<sup>90</sup> *Concerned Citizens v. EPA*, No. 84-3041, slip op. (D.D.C. Aug. 21, 1985).

<sup>91</sup> *Id.* at 2.

<sup>92</sup> 50 Fed. Reg. 40,292 (Oct. 2, 1985).

<sup>93</sup> *Id.* at 40,294.

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., Comments of the American Mining Congress of January 2, 1986 (copy available from the A.M.C., 920 N Street, N.W., Washington, D.C. 20036).

## XII. CONCLUSION

The hazardous and solid wastes associated with the surface mining of coal and other minerals and ores are a regulatory target. The industry-specific regulation of surface coal mining through federal and state enforcement of SMCRA is threatened by intrusion of the EPA and by the tendency of various courts to apply RCRA and CERCLA definitions to mining. The coal industry may thus be coerced into the national controversy surrounding RCRA and CERCLA.