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Special Student Project: Developments under the Surface Mining Control and Reclamation Act of 1977

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SPECIAL STUDENT PROJECT

DEVELOPMENTS UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977*

The Surface Mining Control and Reclamation Act of 1977¹ (SMCRA) is one of the most significant enactments ever to affect the coal mining industry. In pervasive fashion, it is intended to control virtually every environmental aspect of surface mining as well as all surface effects of underground coal mining. The responsibility for establishing a regulatory program to refine and implement the Act is vested in the United States Department of the Interior. However, as individual regulatory plans are submitted by the states and approved by the Secretary of the Interior, the Act provides for an assumption by the states of primary regulatory authority over mining activities conducted within their borders.

As of mid-1980, no state except Texas had assumed primary regulatory authority. Proposed amendments to the SMCRA, changes and uncertainties in the model regulatory program as promulgated by the Office of Surface Mining Reclamation and

* This project, a variation from the types of articles which have appeared in prior *National Coal Issues* of the *West Virginia Law Review*, is intended as a seminal effort, leading to similar undertakings in the future to cover developments in black lung compensation, coal mine health and safety, federal coal leasing, and other topics of particular impact upon the development of coal as an energy source. The assistance of the contributing authors in developing the concept and structuring the presentation is gratefully acknowledged. In addition, a special expression of appreciation is extended to Ms. Linda Hodge, of the Office of Surface Mining Reclamation and Enforcement, Washington, D.C., who graciously supplied the *West Virginia Law Review* with helpful information and slip opinions of the cases noted herein.

¹ Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. I 1977)). For an extensive analysis of the Act and early developments thereunder, see *A Symposium on the Surface Mining Control and Reclamation Act of 1977*, 81 W. VA. L. REV. 553 (1979) (comprises Issue No. 4 — the *National Coal Issue* — of that volume).

Enforcement (OSM), and challenges to OSM's authority to regulate certain aspects of coal mining have all contributed to the delay in the states' assumption of primary regulatory authority.

This Project is intended to note the significant changes and challenges to the SMCRA and to the regulations promulgated thereunder over the period beginning with the issuance of the permanent regulatory program until the present time.

I. LEGISLATION

One amendment to the SMCRA has been tendered since the Act's inception. This amendment, S. 1403,² passed by the Senate

² S. 1403 96th Cong., 1st Sess. (1979), as amended, was passed as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Surface Mining Control and Reclamation Act Amendments of 1979", and that the Surface Mining Control and Reclamation Act of 1977 (91 Stat. 445) is hereby amended as follows:

Sec. 2. Sections 502(d), 503(a), and 504(a) of the Surface Mining Control and Reclamation Act of 1977 (hereinafter referred to as "the Act") are amended as follows:

(a) in section 502(d) of the Act in the last sentence, strike the words "forty-two months" and substitute the words "fifty-four months";

(b) in section 503(a) of the Act, strike the words "eighteenth-month" and substitute the words "thirtieth-month";

(c) in section 504(a) of the Act, strike the words "thirty-four months" and substitute the words "forty-six months";

(d) in section 504(a)(1) of the Act, strike the words "eighteenth-month" and substitute the words "thirtieth month";

Sec. 3. Sections 503(a)(7) and 701(25) of the Act are amended as follows:

(a) in section 503(a)(7) of the Act, strike the phrase "regulations issued by the Secretary pursuant to";

(b) in section 701(25) of the Act, strike the phrase "and regulations issued by the Secretary pursuant to this Act".

Sec. 4. Section 523(a) of the Act is amended by striking the words "and implement" in the first sentence thereof, and by adding at the end of the subsection a new sentence as follows: "Subject to the provision of section 523(c), implementation of a Federal lands program shall occur and coincide with the implementation of a State program pursuant to section 503 or a Federal program pursuant to section 504, as appropriate."

Sec. 5. Section 502 of the Act is amended by adding a new subsection "(g)" as follows:

"(g) Notwithstanding any other provision of this section, each

on September 11, 1979, addresses the issue of state primacy. The bill, as amended, was designed to have three effects: 1) to extend the time period for the submission of state regulatory programs; 2) to delay until mid-1980 or early 1981 the implementation of a federal lands program; and 3) to eliminate the "mirror image" requirements that states' regulatory programs be virtually identical to that of OSM. Thereby, state programs could be tailored to each state's individual needs and unique features while still complying with the SMCRA.³

The proposed time period extensions apply to sections 502(d) (expanded to fifty-four months);⁴ 503(a) (expanded to thirty months);⁵ 504(a) (expanded to forty-six months);⁶ and 504(a)(1) (expanded to thirty months).⁷ The overall effect is to give a one year extension on the time limits for state submission of regulatory programs in order to comply with the SMCRA.⁸

Section four of S. 1403 deals with the implementation of a federal lands program under SMCRA section 523(a).⁹ The effect of the proposed section is to amend section 523 so as to delay the implementation of a federal lands program in a state until a state program (or a federal program in lieu of a state program) is im-

State shall, to the greatest extent possible, have principal responsibility for the inspection of mines during the period of time prior to the submittal of State plans for approval. Such responsibility shall remain with each State until such time as the Secretary disapproves the State plan. The Secretary shall furnish personnel assistance to the States in carrying out this responsibility upon request of the State regulatory agency."

³ 125 CONG. REC. S. 12,352 (daily ed. Sept. 11, 1979) (remarks of Sen. Hatfield). The legislative history of the Senate version of S. 1403 may be found at S. REP. NO. 96-271, 96th Cong., 1st Sess. (1979). The debate on the Senate floor may be found at 125 CONG. REC. S. 12,352-89 (daily ed. Sept. 11, 1979).

⁴ 30 U.S.C.A. § 1252(d) (West Supp. 1979) (permit application after implementation of permanent program — forty-two months after Aug. 3, 1977).

⁵ *Id.* § 1253(a) (submission of state program — eighteen months after Aug. 3, 1977).

⁶ *Id.* § 1254(a) (federal program implementation for non-complying state — thirty-four months after Aug. 3, 1977).

⁷ *Id.* § 1254(a)(1) (failure to submit state program — eighteen months after Aug. 3, 1977).

⁸ A seven month extension was granted for submission of state programs in *In re Permanent Surface Mining Regulation Litigation*, C.A. No. 79-1144 (D.D.C. Aug. 21, 1979) (slip op.).

⁹ 30 U.S.C.A. § 1273(a) (West Supp. 1979).

plemented, instead of the present time limit of one year after August 3, 1977.

The heart of the Senate amendments lies in sections three and five of S. 1403. These two sections address the state primacy issue. Section three amends sections 503(a)(7)¹⁰ and 701(25),¹¹ of the SMCRA by deleting references to the regulations issued by the Secretary of the Interior. Section five of S. 1403 would add a new subsection (g) to section 502 to allow the states to exercise primary authority over mine site inspections under the *initial* program.¹²

The attempt to free the states from de facto duplication of the regulations of OSM has drawn the most debate. The arguments range from the supporters' views that the "Rockefeller Amendments" (named after West Virginia governor John D. Rockefeller IV, chairman of the President's Commission on Coal) will further the purposes of the SMCRA, which are primarily concerned with state primacy, to those of the opponents of the bill, who maintain that the amendments will defeat the national scope of the SMCRA and subject the regulatory process to judicial authorship.¹³ One point is clear. The Rockefeller Amendments were proposed because of increasing state dissatisfaction with the regulations proposed by and the enforcement measures taken by OSM, especially in coal producing states.

The status of S. 1403 is presently unclear. It has passed the Senate but it remains in the House Committee under the sponsorship of Congressman Morris Udall, where it is expected to be indefinitely tabled.¹⁴ However, in light of OSM's regulatory activ-

¹⁰ *Id.* § 1253(a)(7) (submission of state programs): "rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter." (emphasis added). The portion of the subsection emphasized would be deleted.

¹¹ *Id.* § 1291(25) (definition of a state program). The same amendment is proposed here as for section 523(a)(7), *supra* note 10.

¹² *Cf.* Union Carbide Corp. v. Andrus, C.A. No. 79-2142 (S.D. W. Va. July 17, 1979) (slip op.).

¹³ 125 CONG. REC. S. 12,350-51 (daily ed. Sept. 11, 1979) (remarks of Sen. Jackson). Compare SMCRA § 101(f), with section 101(g), 30 U.S.C.A. § 1201(f), (g) (West. Supp. 1979).

¹⁴ See Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553 (1979).

ity and the litigation now in progress, the primacy fight is far from over.

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II. THE REGULATION PROGRAM

SUBCHAPTER A — GENERAL

Part 700 — *General*

Several modifications have been proposed to the two acre exemption provision of section 700.11(b) of the permanent regulations.¹⁵ First, OSM proposes to delete that portion of the section which provides that operations conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year may not be exempted from operation of the permanent regulations by use of the two acre exemption.¹⁶ Second, OSM proposes that section 700.11(b) be amended to provide that the two acre exemption provision does not apply to coal processing and preparation facilities.¹⁷ Finally, OSM proposes to add that all land disturbed by coal extraction and incident to the extraction of coal (including haul roads) and all bodies of water within the boundaries of the disturbed land will be included in the two acre calculation.¹⁸

A final rule has been issued which provides that the incorporation by reference of the definition of "Anthracite" in section 700.5 will expire on July 1, 1980, rather than on February 7, 1980.¹⁹

Part 701 — *Permanent Regulatory Program*

An amendment has been made by final rule to section 701.1(b)(3) and to various provisions of Parts 761²⁰ and 769²¹ of the permanent regulations to clarify that the postponement of operator compliance with the performance standards of Subchapter

¹⁵ 30 C.F.R. § 700.11(b) (1979).

¹⁶ 45 Fed. Reg. 8244 (1980) (to be codified in 30 C.F.R. § 700.11(b)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 45 Fed. Reg. 8240 (1980) (to be codified in 30 C.F.R. § 700.5).

²⁰ 30 C.F.R. §§ 761.1 to 761.12 (1979).

²¹ 30 C.F.R. §§ 769.1 to 769.18 (1979).

K²² for operations on federal lands²³ does not postpone the program which designates certain federal lands as unsuitable for surface mining.²⁴ On January 3, 1980, the District Court for the Western District of Virginia in *Virginia Surface Mining and Reclamation Association, Inc. v. Andrus*,²⁵ held that the unsuitable lands program of section 522 of the SMCRA²⁶ is unconstitutional.

OSM has proposed an industry-supported language change in section 701.11(e)(1)(i) and (ii) of the permanent regulations which currently provides that if certain specified findings are made, an existing structure may be exempted from meeting the design requirements of Subchapter K. This proposed language change, changing the second "may" in subsections (i) and (ii) to "shall,"²⁷ would make it clear that if the specified findings are made, the grant of an exemption by the regulatory authority would be mandatory, not discretionary.²⁸

Part 705 — *Restrictions on Financial Interests of State Employees*

OSM has proposed to amend the definition of "Employee" in section 705.5 by eliminating the exception created there for members of advisory boards or commissions established in accordance with State law or regulations to represent multiple interests.²⁹ This proposed change would subject members of boards or commissions who represent multiple interests to the financial interest restrictions of Part 705.³⁰

²² 30 C.F.R. §§ 810.1 to 828.12 (1979).

²³ See the discussion of Part 741, *infra.* at 1290.

²⁴ 30 C.F.R. § 701.1(b)(3) (1979); *id.* § 761.1; *id.* § 761.4(a)(1) and (a)(2); *id.* § 761.12(a), (b)(2), (c), (e), (f)(1) and (f)(2); *id.* § 769.7(b), (c) and (d); *id.* § 769.14(i); *id.* § 769.17(d).

²⁵ No. 78-0224-B at 25 (W. D. Va. Jan. 3, 1980) (slip op.) [hereinafter cited as *Virginia Surface Mining*].

²⁶ 30 U.S.C.A. § 1272 (West Supp. 1979).

²⁷ 45 Fed. Reg. 8244 (1980) (to be codified in 30 C.F.R. § 701.11 (e)(1)(i) and (ii)).

²⁸ 45 Fed. Reg. 8242 (1979).

²⁹ 30 C.F.R. § 705.5 (1979).

³⁰ 30 C.F.R. § 705.1 to 705.21 (1979).

Part 706 — *Restrictions on Financial Interests of Federal Employees*

There are no amendments affecting this section.

Part 707 — *Exemption for Coal Extraction Incident to Government Financed Highway or Other Construction*

There are no amendments affecting this section.

SUBCHAPTER B — INITIAL PROGRAM: REGULATIONS

Part 710 — *Initial Regulatory Program*

There are no amendments affecting this section.

Part 715 — *General Performance*

OSM has suspended, pending further modification by rulemaking,³¹ certain provisions of section 715.17 of the initial regulations which exempt an operator from meeting total suspended solids effluent limits for discharges from a disturbed area resulting from a 10-year, 24-hour precipitation event.³² The OSM comments on what requirements will continue to be enforced after the suspension should be noted.³³

Several changes have been made to section 715.17(b)(1)(v) of the initial regulations which establishes requirements for a permittee's report concerning the permittee's monitoring of surface-water discharges from a disturbed area. First, the report must now be submitted to the regulatory authority within sixty days after the end of each sixty day sample collection period, rather than within sixty days after the date of the sample collection.³⁴ Second, a permittee may now satisfy the reporting requirement by compliance with a substantially equivalent time period reporting requirement under the National Pollution Discharge Elimination System (NPDES) of the Clean Water Act.³⁵ Finally,

³¹ OSM has published notice of intent to commence rulemaking on the suspended provisions at 44 Fed. Reg. 77,456 (1979).

³² 30 C.F.R. § 717.15(a)(1) (1979); *id.* § 717.15(e)(2); *id.* § 717.15(e)(3); *id.* § 717.15(e)(4); *id.* § 717.15(e)(8).

³³ 44 Fed. Reg. 77,450-51 (1979).

³⁴ 30 C.F.R. § 715.17(b)(1)(v) (1979).

³⁵ *Id.*; 33 U.S.C.A. §§ 1251 to 1376 (West 1978).

when a sample analysis indicates a violation of a NPDES permit effluent limit, then the discharger must file a Discharge Monitoring Report, EPA Form 3320-1, with the Environmental Protection Agency.³⁶

Part 716 — *Special Performance Standards*

OSM has proposed an amendment of section 716.2 of the initial regulations to provide variances from the requirement that mined land in steep slope areas be returned to approximate original contour.³⁷ The proposed variance provision differs somewhat from the variance provision in the permanent program. OSM will be considering amendments to the permanent program regulations to conform to any adopted regulations.³⁸ In *Virginia Surface Mining and Reclamation Association, Inc. v. Andrus*,³⁹ sections 515(d) and (e)⁴⁰ of the SMCRA, which require restoration of steep slopes to approximate original contour, was declared unconstitutional as applied in Virginia⁴¹ and operation of those subsections was enjoined.⁴²

Several amendments have been proposed to section 716.7 of the initial regulations dealing with prime farmland. First, OSM has proposed that the historical use period of section 716.7(a)(1) be changed from five years or more out of twenty to five years or more out of ten.⁴³ The five in twenty historical use period was struck down in *In re Surface Mining Regulation Litigation*.⁴⁴ Second, it is proposed that the date from which the historical use period is measured be changed to the date of acquisition of the land for mining purposes.⁴⁵ Third, OSM proposes that the grandfather exemption of section 716.7(a)(2) be applied to the prime farmland performance standards as well as to the prime farmland

³⁶ 30 C.F.R. § 715.17(b)(1)(v) (1979).

³⁷ 30 C.F.R. § 716.2(e) (1979).

³⁸ 44 Fed. Reg. 61,313 (1979).

³⁹ *Virginia Surface Mining*, *supra* note 25.

⁴⁰ 30 U.S.C.A. § 1265(d), (e) (West Supp. 1979).

⁴¹ *Virginia Surface Mining*, *supra* note 25, at 25.

⁴² *Id.* at 14.

⁴³ 44 Fed. Reg. 33,627 (1979) (to be codified in 30 C.F.R. § 716.7(a)(1)).

⁴⁴ 456 F.Supp. 1301, 1312 (D.D.C. 1978). See generally Comment, 81 W. VA. L. REV. 785 (1979).

⁴⁵ 44 Fed. Reg. 33,628 (1979) (to be codified in 30 C.F.R. § 716.7(b)(2)).

permit application standards.⁴⁶ This change was mandated by the decision in *In re Surface Mining Regulation Litigation*.⁴⁷ Fourth, a proposed amendment to section 716.7(b) includes within the category of prime farmland those lands which are taken out of cropland use for more than five years in ten due to ownership circumstances which do not relate to the capability of the land to produce crops. Finally, it is proposed that the term "cropland" be substituted for the term "cultivated crops" in section 716.7(b) and (d)(1).⁴⁸

Part 717 — *Underground Mining General Performance Standards*

OSM has suspended, pending further modification by rulemaking,⁴⁹ certain provisions of section 717.17 of the initial regulations which establish design criteria for sedimentation ponds.⁵⁰ The OSM comments on what requirements will continue to be enforced after the suspension should be noted.⁵¹

Several changes in section 715.17(b)(1)(v) concerning reporting requirements for a permittee's monitoring of surface water discharges from surface mining and reclamation operations were noted earlier.⁵² The same changes were also made in section 717.17(b)(1)(v) which provides corresponding reporting requirements applicable to persons conducting underground coal mining and reclamation operations.

Part 718 — *Adoption of State Standards*

There are no amendments affecting this section.

⁴⁶ *Id.* (to be codified in 30 C.F.R. § 716.7 (a)(2)).

⁴⁷ 452 F.Supp. 327, 340 (D.D.C. 1978). For a summary of the court's determinations in that case, see Comment, 81 W. VA. L. REV. 785, 786-87 n.5 (1979).

⁴⁸ 30 C.F.R. § 716.7(b) (1979); *id.* § 716.7(d)(1).

⁴⁹ OSM has published notice of intent to commence rulemaking on the suspended provisions at 44 Fed. Reg. 77,456-57 (1979).

⁵⁰ 30 C.F.R. § 717.17(a)(3)(i) (1979); *id.* § 717.17(e)(2); *id.* § 717.17 (e)(3); *id.* § 717.17(e)(4); *id.* § 717.17(e)(8).

⁵¹ 44 Fed. Reg. 77,450-51 (1979).

⁵² See discussion at Part 715, *supra*.

Part 720 — State Enforcement Activities

There are no amendments affecting this section.

Part 721 — Federal Inspections

There are no amendments affecting this section.

Part 722 — Enforcement Procedures

Several amendments have been made to section 722.14 of the initial regulations dealing with the service of notice of violation, cessation orders and orders to show cause. First, several changes have been made in section 722.14(a)(1) with regard to the person on whom service may be made at the minesite.⁵³ Second, the new section 722.14(a)(2) now provides an alternative means of service in addition to that specified in section 722.14(a)(1).⁵⁴ Third, the regulation now provides that service will be complete upon tender or upon mailing and service will not be incomplete because of refusal to accept.⁵⁵ Finally, the new section 722.14(d) specifies to whom OSM must or may furnish a copy of the notice or order, apart from the person to whom the notice or order is issued.⁵⁶

Several revisions have been made in section 722.15 of the initial regulations dealing with the requirement of an informal public hearing after issuance of a cessation order. First, the term “minesite review” has been replaced by the term “informal public hearing.”⁵⁷ Second, the definition of mining for purposes of section 722.15 has been expanded to include “the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a minesite.”⁵⁸ Third, for purpose of clarity, sections 722.15(a) now provides that an informal public hearing will be made available after issuance of “cessation orders which requires cessation of mining,” rather than after issuance of “cessation orders.”⁵⁹ The decision in *Virginia Surface*

⁵³ 45 Fed. Reg. 2828 (1980) (to be codified in 30 C.F. R. § 722.14(a)(1)).

⁵⁴ 45 Fed. Reg. 2828 (1980) (to be codified in 30 C.F.R. § 722.14(a)(2)).

⁵⁵ 45 Fed. Reg. 2828 (1980) (to be codified in 30 C.F.R. § 722.14(a)(1) and (2)).

⁵⁶ 45 Fed. Reg. 2828 (1980) (to be codified in 30 C.F.R. § 722.14(d)).

⁵⁷ 30 C.F.R. §§ 722.15 (1979).

⁵⁸ 30 C.F.R. § 722.15(a) (1979).

⁵⁹ *Id.*

*Mining and Reclamation Association, Inc. v. Andrus*⁶⁰ declared unconstitutional and permanently enjoined the operation of section 521(a)(1) to (3)⁶¹ and section 525⁶² of the SMCRA which provide for summary issuance of cessation orders. Fourth, a provision has been added to section 722.15(b) which lists situations in which the expiration provision of section 722.15(a) will not apply.⁶³ Fifth, the original subsections (c) and (d) (now subsections (c), (d) and (e)) have been rewritten in order to clarify the provisions concerning notice of the hearing and the procedural aspect of the hearing.⁶⁴ Sixth, the new subsection (f) modifies original subsection (e) by providing that the OSM must affirm, modify or vacate the cessation order within five business days of the close of the hearing, rather than the original fifteen days.⁶⁵ Finally, a new subsection (h) has been added which deals with viewing the minesite by the person conducting the hearing.⁶⁶

OSM has proposed an amendment to section 722.16 of the initial regulations dealing with procedures governing the suspension or revocation of State permits and rights to mine, by adding a new subsection (e) which provides that when a permittee fails to abate a violation within the period set for such abatement, the Director shall review the permittee's history of violations to determine whether a pattern of violations exists and where circumstances warrant the Director shall issue an order to the permittee to show cause why the permit should not be suspended or revoked.⁶⁷

Part 723 — *Civil Penalties*

OSM has proposed to modify sections 723.12 to 723.18 of the initial regulations⁶⁸ dealing with civil penalties to conform to the

⁶⁰ Virginia Surface Mining, *supra* note 25, at 37-38.

⁶¹ 30 U.S.C.A. § 1271(a)(1) to (3) (West Supp. 1979).

⁶² *Id.* § 1275.

⁶³ 45 Fed. Reg. 2828-29 (1980) (to be codified in 30 C.F.R. § 722.15(b)).

⁶⁴ 45 Fed. Reg. 2829 (1980) (to be codified in 30 C.F.R. § 722.15(c), (d) and (e)).

⁶⁵ 45 Fed. Reg. 2829 (1980) (to be codified in 30 C.F.R. § 722.15(f)).

⁶⁶ 45 Fed. Reg. 2829 (1980) (to be codified in 30 C.F.R. § 722.15(h)).

⁶⁷ 45 Fed. Reg. 5541 (1980) (to be codified in 30 C.F.R. § 722.16(e)).

⁶⁸ 30 C.F.R. §§ 723.2 to 723.18 (1979).

corresponding permanent regulations.⁶⁹ One proposed change currently not provided for in the permanent regulations would amend section 723.15(b)(2) to provide that a penalty for failure to abate a violation may not be assessed for more than thirty days for each violation.⁷⁰ *In re Permanent Surface Mining Regulation Litigation*,⁷¹ remanded section 732.15(b)(7) of the permanent regulations to the Secretary for revision. The district court in *Virginia Surface Mining & Reclamation Association, Inc. v. Andrus*⁷² declared section 518 of the SMCRA,⁷³ which provides for the imposition of civil penalties without a prior hearing, unconstitutional and enjoined its enforcement.

Part 725 — Reimbursements to States

There are no amendments affecting this section.

SUBCHAPTER C — PERMANENT REGULATORY PROGRAM FOR NON-FEDERAL AND NON-INDIAN LANDS

Part 730 — General Requirements

There are no amendments affecting this section.

Part 731 — Submission of State Programs

Section 731.12(a) of the permanent regulations has been amended to provide that proposed state programs for implementing the permanent regulatory program must be submitted no later than March 3, 1980, rather than the original deadline of no later than August 3, 1979.⁷⁴ This date change was specifically mandated by the district court in *In re Permanent Surface Mining Regulation Litigation*.⁷⁵ Further, section 731.12(e) has been

⁶⁹ 45 Fed. Reg. 5541-44 (1980) (to be codified in 30 C.F.R. §§ 723.2 to 723.20). The corresponding permanent regulations are found at 30 C.F.R. §§ 845.1 to 845.20 (1979).

⁷⁰ 45 Fed. Reg. 5543 (1980) (to be codified in 30 C.F.R. § 723.15(b)(2)). OSM has, however, proposed to also add this provision to the permanent regulations. 45 Fed. Reg. 5544 (1980) (to be codified in 30 C.F.R. § 845.15(b)(2)).

⁷¹ No. 79-1144, at 15 (D.D.C. Feb. 20, 1980) (slip op.).

⁷² *Virginia Surface Mining*, *supra* note 25, at 37.

⁷³ 30 U.S.C.A. § 1268 (West Supp. 1979).

⁷⁴ 44 Fed. Reg. 60,969 (1979) (to be codified in 30 C.F.R. § 731.12(a)).

⁷⁵ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 13.

added to provide that state programs submitted after August 3, 1979, will be reviewed according to adjusted review schedules to be established by the Regional Director on a case-by-case basis.⁷⁶

Part 732 — Procedures and Criteria for Approval or Disapproval

Section 732.12(a)(1) of the permanent regulations has been amended to provide that a notice in the *Federal Register* of a public hearing on a proposed state program must indicate that each requestor may receive, free of charge, one copy of the proposed state statutes and regulations from the Regional Director.⁷⁷

Part 733 — Maintenance of State Programs and Substitution of Federal Program

There are no amendments affecting this section.

Part 735 — Grants for Program Development and Administration

As a result of the extension of the date for submission of state programs,⁷⁸ several changes have been necessitated in section 735 of the initial regulations which establishes financial assistance to the states in developing their programs for submission.⁷⁹ First, section 735.11(c) which limited program development grants to a maximum period of twenty-four months was deleted in order that a state may continue to receive a grant during the extended submission period.⁸⁰ Second, the new section 735.13(a)(3) establishes the amount of a grant which extends for

⁷⁶ 44 Fed. Reg. 60,969 (1979) (to be codified in 30 C.F.R. § 731.12(e)).

⁷⁷ 44 Fed. Reg. 75,302 (1979) (to be codified in 30 C.F.R. § 732.12(a)(1)).

⁷⁸ See discussion at Part 731, *supra*.

⁷⁹ 42 Fed. Reg. 62,706-710 (1977) (to be codified in 30 C.F.R. §§ 735.1 to 735.28). This cite is to the original initial regulations. In these original regulations the provisions which establish grants for program development, administration and enforcement are numbered as Part 740. However, in the amendments to the grant program found at 45 Fed. Reg. 2804 (1980), the grant program is referred to as Part 735. Original Part 740 and current Part 735 are the same substantively. The index to the Federal Register, however, does not indicate that notice of a change in Part number has been published.

⁸⁰ 45 Fed. Reg. 2804 (1980).

more than twenty-four months.⁸¹

Part 736 — *Federal Program For a State*

There are no amendments affecting this section.

SUBCHAPTER D — FEDERAL LANDS PROGRAM

Part 740 — *General Requirements*

There are no amendments affecting this section.

Part 741 — *Permits*

Section 741.11(a) of the permanent regulations has been amended to postpone the effective date of operator compliance with the permanent program on federal lands until approval of a state program or implementation of a federal program for the state in which the operation on federal lands is conducted.⁸²

Part 742 — *Bonds and Liability Insurance*

There are no amendments affecting this section.

Part 743 — *Inspection, Enforcement and Civil Penalties*

There are no amendments affecting this section.

Part 744 — *Performance Standards*

There are no amendments affecting this section.

Part 745 — *State-Federal Cooperative Agreements*

There are no amendments affecting this section.

Guidelines

On September 19, 1979, OSM published guidelines for contacts with employees and officials of the Department of Interior (DOI) during its consideration of a State's proposed program.⁸³ These guidelines apply to all contacts between employees and of-

⁸¹ *Id.* (to be codified in 30 C.F.R. § 735.15(a)(3)).

⁸² 44 Fed. Reg. 77,446 (1979) (to be codified in 30 C.F.R. § 741.11(a)).

⁸³ 44 Fed. Reg. 54,445 (1979).

officials of the DOI and the government of a state for which a program has been formally submitted and to all contacts between employees and officials of DOI and the public.⁸⁴

Cheryl Lee Davis

SUBCHAPTER F — AREAS UNSUITABLE FOR MINING

Part 760 — *General*

There are no amendments affecting this section.

Part 761 — *Areas Designated by Act of Congress*

On February 6, 1980, OSM published in the *Federal Register*⁸⁵ notice of proposed rulemaking which would affect the following sections of Part 761.

Section 522(e)(4) of the SMCRA prohibits, subject to certain exceptions, coal mining operations within one hundred feet of the outside right-of-way line of any public road. The proposed amendment to section 761.5⁸⁶ of the regulatory program would constrict the definition of public road. This narrowed definition would include only thoroughfares open to the public which have been and are being used for public vehicular travel.⁸⁷

Another proposed amendment to this section would allow state case law to establish whether one held a *valid existing right* to conduct surface mining. The present test is based on the decision in *United States v. Polino*.⁸⁸ The test formulated in this case to determine the presence of a valid existing right to conduct surface mining hinges on the express statement of that right in the deed conveying the interest to the land in question. The proposed amendment would allow state case law, where possible, to deter-

⁸⁴ 44 Fed. Reg. 54,444 (1979). The court in *In re Permanent Surface Mining Regulation Litigation* discussed the fact that these guidelines were forthcoming when it stated that some degree of formality may be appropriate during the post-submission period. Slip op. at 13-24.

⁸⁵ 45 Fed. Reg. 8241 (1980).

⁸⁶ 30 C.F.R. § 761.5 (1979).

⁸⁷ 45 Fed. Reg. 8244 (1980). Compare *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 23, where a similar attack on the definition of "public road" was considered by the court.

⁸⁸ 131 F. Supp. 772 (N.D.W. Va. 1955).

mine the existing rights appurtenant to the documents executed in that state.⁸⁹

As a result of recent litigation in the United States District Court for the District of Columbia,⁹⁰ section 761.5(a)(2)(i) has been remanded to the Secretary for revision. The National Coal Association (NCA) objected to the "all permits test" stated in this section, and the court noted that it was its belief that a good faith attempt to obtain the permits should suffice as the requirement.⁹¹ Further noted in the court's opinion is the intent of OSM to propose an amendment to portions of Subchapters F and G which would delete the limitations on surface mining operations conducted under approved state programs which will adversely affect places eligible for listing on the National Register of Historic Places.⁹²

Section 761.12(e) provides that where mining is proposed within three hundred feet of any occupied dwelling, the permit applicant must submit a liability waiver from the owner. The proposed amendments will clarify certain ambiguities in the present regulation.⁹³ These clarifications can be summarized as follows:

- (1) If a waiver was obtained prior to August 3rd, 1977, no new waiver need be obtained provided that the operator submits the document to show evidence that the pre-Act waiver was executed.
- (2) The waivers obtained after August 3rd, 1977, are effective against subsequent purchasers with actual knowledge of the existence of the waiver.⁹⁴

Part 762 — *Criteria for Designating Areas as Unsuitable for Surface Coal Mining Operations*

There are no amendments affecting this section. The validity

⁸⁹ 45 Fed. Reg. 8244 (1980). Cf. *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 17, where a similar claim was considered by the court.

⁹⁰ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71.

⁹¹ *Id.* at 20.

⁹² *Id.* at 23.

⁹³ Compare *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 21. In this case the National Coal Association objected to the requirement that the waiver be in writing. The court refused to rule on the objections of the N.C.A. since they posed only a hypothetical question.

⁹⁴ 45 Fed. Reg. 8242-43 (1980).

of sections 762.12(b) and 762.14 were recently upheld, despite various challenges by the National Coal Association, in *In re Permanent Surface Mining Regulation Litigation*.⁹⁵

Part 764—*State Processes for Designating Areas Unsuitable for Surface Coal Mining Operations*

There have been no amendments proposed which affect this section. The National Coal Association, Illinois, and Virginia recently attacked section 764.17(a), alleging that the type of hearing provided under this section was procedurally inadequate. The court upheld the validity of this provision; hence, the parties' attempt to gain a right to an adjudicative, as opposed to a legislative type hearing, failed.⁹⁶ Sections 764.13(b) and 764.23(a) were also the subject of claims in this suit; the court also affirmed the validity of these sections.⁹⁷

Part 765—*Designating Lands as Unsuitable for Surface Coal Mining Operations under a Federal Program for a State*

There are no amendments affecting this section.

Part 769—*Petition Process for Designation of Federal Lands as Unsuitable for All or Certain Types of Surface Coal Mining Operations and for Termination of Previous Designations*

There are no amendments affecting this section.

SUBCHAPTER G — SURFACE COAL MINING AND RECLAMATION OPERATIONS PERMITS AND COAL EXPLORATION SYSTEMS UNDER REGULATORY PROGRAMS

Part 770—*General Requirements for Permit and Exploration Procedure Systems under Regulatory Programs*

There are no amendments affecting this section.

⁹⁵ *Supra* note 71, at 26-27.

⁹⁶ *Id.* at 28-29.

⁹⁷ *Id.*

Part 771—General Requirements for Permit Application

There are no amendments affecting this section.

Part 776—General Requirements for Coal Exploration

There are no amendments affecting this section. The District of Columbia district court affirmed the validity of section 776.11 in *In re Permanent Surface Mining Regulation Litigation*,⁹⁸ and as a result a notice of intent to explore must still be filed for any operation removing less than two hundred fifty tons of coal. Section 776.17 also withstood the scrutiny of the district court.⁹⁹

Part 778—Surface Mining Permit Applications—Minimum Requirements for Legal, Financial Compliance, and Related Information

There are no amendments affecting this section. Section 778.16(a) was recently challenged in *In re Permanent Surface Mining Regulation Litigation*; however, the validity of this section was upheld by the court.¹⁰⁰

Part 779—Surface Mining Permit Applications—Minimum Requirements for Information on Environmental Resources

As a result of recent litigation,¹⁰¹ the term “mine plan area,” defined in section 701.5, has been suspended and remanded to the Secretary for redefinition. This suspension also affects Parts 779, 780, 783, and 784 to the extent that this term is used in those sections. The following summarizes other sections affected by the recent decision in *In re Permanent Surface Mining Regulation Litigation*:

- (1) *Section 779.14(b)(iii)-(v)*- affirmed;¹⁰²
- (2) *Sections 779.20 and 780.16*- remanded to the Secretary;¹⁰³
- (3) *Sections 779.21 and 783.21*- remanded to the Secretary.¹⁰⁴

⁹⁸ *Id.* at 33.

⁹⁹ *Id.* at 34.

¹⁰⁰ *Id.* at 36.

¹⁰¹ *Id.* at 35-36.

¹⁰² *Id.* at 37-38.

¹⁰³ *Id.* at 38-39.

¹⁰⁴ *Id.* at 39-40.

Also, on December 31, 1979, OSM published in the *Federal Register*¹⁰⁵ notice of future action with regard to the following rules:

- (1) *Sections 779.27(b)(4) and 783.27(b)(4)*- which deal with prime farmland investigation;
- (2) *Sections 783.22 and 784.15*- which deal with post-mining land uses.

Part 780—*Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operations Plan*

There are no amendments affecting this section; however, see Part 779 for sections affected by recent litigation. Also noted in Part 779 are sections on which the OSM plans future action.

Part 782—*Underground Mining Permit Applications — Minimum Requirements for Legal, Financial Compliance, and Related Information*

There are no amendments affecting this section.

Part 783—*Underground Mining Permit Applications — Minimum Requirements for Information on Environmental Resources*

There are no amendments directly affecting this section; however, see Part 779 for sections affected by recent litigation. Also noted in Part 779 are sections on which the OSM plans future action.

Part 784—*Underground Mining Permit Applications — Minimum Requirements for Reclamation and Operation Plan*

There are no amendments affecting this sections. See Part 779 for sections scheduled by the OSM for future action.

Part 785—*Requirements for Permits for Special Categories of Mining*

Section 785.19 was substantially attacked in the recent case

¹⁰⁵ 44 Fed. Reg. 77,454 (1979).

of *In re Permanent Surface Mining Regulation Litigation*.¹⁰⁶ The following summarizes the court's action with regard to this section:

- (1) The general informational requirements of the section were upheld;¹⁰⁷
- (2) Section 785.12(d)(2) was remanded "to make clear that 'water quality analyses describing seasonal variations over at least one full year' need only require an analysis from data collected over a shorter period of time or extrapolations from existing data;"¹⁰⁸
- (3) The small acreage exemption of section 785.19(e)(2) was remanded to the Secretary;¹⁰⁹ and
- (4) Section 785.19(e)(1)(ii) was remanded to the Secretary with directions "to allow negligible farmland interruption."¹¹⁰

OSM has published in the *Federal Register*¹¹¹ its intention to suspend certain rules pending the outcome of rulemaking. The following rules have to some extent been suspended:

- (1) Section 783.14(a)(1)- which deals with the required geologic description of the land to which an application for underground mining applies;
- (2) Section 785.17(a)- which deals with the prime farmland grandfather clause; and
- (3) Section 785.17(b)(3)- which relates to establishing the "moist bulk density" standard for prime farmland soil compaction.

Part 786—*Review, Public Participation, and Approval or Disapproval of Permit Applications and Permit Terms and Conditions*

There are no amendments affecting this section. There were, however, several sections attacked in the recent case of *In re Permanent Surface Mining Regulation Litigation*.¹¹² Section

¹⁰⁶ *Supra* note 71.

¹⁰⁷ *Id.* at 49.

¹⁰⁸ *Id.* at 50.

¹⁰⁹ *Id.* at 51.

¹¹⁰ *Id.* at 53.

¹¹¹ 44 Fed. Reg. 77,454 (1979). The *Federal Register* explains the extent to which these rules have been suspended and the reader should check the full scope of the suspensions.

¹¹² *Supra* note 71.

786.27(b)(2), which requires that private persons be allowed to accompany inspectors when a private citizen complaint prompted the inspection, was attacked by Virginia because it felt a similar requirement was not imposed on the states. The court ruled that the current wording of this section was sufficient to require that states comply with its substance.¹¹³ The term "willful violation," defined in section 786.5, was also challenged in this case, but the court upheld the current definition.¹¹⁴

Furthermore, OSM has proposed a rule which would revise the current definition of "irreparable damage to the environment," as defined in section 786.5. The current definition includes damage that cannot be "or has not been" corrected.¹¹⁵ The proposed definition would delete the "or has not been" phrase so that the plain meaning of the term "irreparable" would remain. OSM notes that while the revision narrows the kind of damages which can be considered irreparable for purposes of denying permits, the change should not have any effect on the overall scope of the section.¹¹⁶

Part 787—Administrative and Judicial Review of Decisions by Regulatory Authority on Permit Applications

There are no amendments affecting this section.

Part 787—Permit Reviews, Revisions, and Renewals, and Transfer, Sale, and Assignment of Rights Granted Under Permit

There are no amendments affecting this section.

SUBCHAPTER J — PERFORMANCE BONDING

The regulations pertaining to bonding, contained in the permanent regulatory program, have been the center of much conflict and change. The district court in *In re Permanent Surface Mining Regulation Litigation* recently upheld the validity of the Secretary's power to prescribe uniform permit and bonding

¹¹³ *Id.* at 13-14.

¹¹⁴ *Id.* at 40.

¹¹⁵ 45 Fed. Reg. 8243 (1980).

¹¹⁶ *Id.*

regulations.¹¹⁷

Pursuant to many of the comments received regarding the bonding requirements, several proposed amendments were published in the *Federal Register* by OSM. These amendments would affect the various bonding requirements contained in Subchapter J.¹¹⁸ The significant amendments, additions, deletions, as well as the effects of recent litigation on each of the sections in Subchapter J are summarized below.

Part 800—*General Requirements for Bonding of Surface Coal Mining and Reclamation Operations Under Regulatory Programs*

Several changes are proposed in section 800.5 as a result of changes elsewhere regarding the bonding requirements. Most notably are the changes regarding the scope of collateral bonding and self-bonding. OSM proposes to include the pledging of real or personal property by the permit applicant within the scope of collateral bonding as opposed to its current status as a form of self-bonding. This definitional change is mandated by the proposed addition of section 806.12(h)¹¹⁹ which allows the regulatory authority to accept a mortgage or perfected first-lien security interest in real or personal property located within the state where the mining is to occur as a form of collateral bonding.¹²⁰ The requirement of a "perfected first-lien security interest" may, depending on the technical construction of that phrase by OSM, preclude this form of collateral bonding in states such as West Virginia where, by statute,¹²¹ the state has a "first-lien" on real property for tax purposes.

This proposal is significant for several reasons. First, it

¹¹⁷ *Supra* note 71, at 33.

¹¹⁸ 30 C.F.R. §§ 800, 805-09 (1979).

¹¹⁹ 45 Fed. Reg. 6039 (1980). The information which must be filed with the regulatory authority regarding the pledging of real or personal property as security is set out in the proposed section.

¹²⁰ *Id.*

¹²¹ W. VA. CODE § 11A-1-2 (1974 Replacement Vol.). This section provides in part: "There shall be a lien on all real property for the taxes assessed thereon" See also, *Berrymont Land Co. v. Davis Creek Land & Coal Co.*, 119 W. Va. 186, 192 S.E. 577 (1937), where the state-created lien was held to supercede a federal lien.

removes the posting of real and personal property of the permit applicant from the stringent requirements of self-bonding¹²² and would seem to facilitate the ability of permit applicants to secure bond coverage. Secondly, it illustrates OSM's tendency to relax some of the more stringent standards for bonding contained in the present regulatory program. The re-opening of the regulations for self-bonding to the rulemaking process is an example of this trend, which is evident throughout section 800.¹²³

Proposed amendments to section 800.11 would allow, as an alternative bonding strategy, the use of cumulative bonding. Under this procedure, the permittee would file a schedule of his proposed land use and reclamation plan. The bond amount would fluctuate according to the portion of the permit area disturbed and that portion fully reclaimed.¹²⁴ This obviates the need under the present program for the duplicative process of executing a new bond on each increment of land mined. The initial bond amount would be the full cost of reclamation of the first increment of the permit area disturbed.

The addition of cumulative bonding to the arsenal of alternatives available to operators should facilitate both the realization of the goals of the SMCRA and the ability of the operators to secure adequate bonding. As noted by OSM, "[t]he key element in successfully reducing the bond amount is to attain successful reclamation in a timely manner."¹²⁵

Part 801—*Bonding Requirements for Underground Coal Mines, Coal Processing Plants, Associated Structures, and other Coal-Related Facilities and Structures*

This part of the regulatory plan is a proposed addition to the permanent regulations which would establish bonding require-

¹²² The stringent requirements for self-bonding received a great deal of critical comment and, as such, OSM has repealed those requirements as they were stated in section 806.12(b) of the permanent regulatory program. The proposed standards are set out in a new section, section 806.14, as they have been re-opened for rulemaking. 45 Fed. Reg. 6035 (1980).

¹²³ 45 Fed. Reg. 6035 (1980). See OSM's comments on the proposed amendments.

¹²⁴ A good discussion is offered by OSM as to how cumulative bonding will work. See 45 Fed. Reg. 6029 (1980).

¹²⁵ *Id.* at 6030.

ments and procedures for underground mines, coal processing plants, refuse areas, and associated structures and facilities.¹²⁶ Several of the significant aspects of the proposed rules are discussed below.

Due to the long-term nature of the facilities to which this section will apply, the proposed regulations would allow the operator to use "escrow bonding."¹²⁷ While the facility would initially have to be fully bonded to obtain the permit, an escrow account could be set up, funded by production generated collateral, which would ultimately replace the bond. One reason for the allowance of escrow bonding in this section is the apprehensiveness of most sureties to accept such long-term liability. Under the proposed section, the operator would secure a short-term bond from a surety and then ultimately, through an escrow account, provide the necessary funds for reclamation. This section does not apply to facilities whose useful life does not exceed five years, or to the coverage of *unplanned* subsidence or unforeseen mine drainage.¹²⁸

Part 805—Amount and Duration of Performance Bond

Under the present program, the extended liability period begins with the last year of augmented seeding, fertilizing, irrigation or other work. Furthermore, the present program contained in section 805.13(b) provides that "[t]he period of liability shall begin again whenever augmented seeding, fertilizing, irrigation or other work is required or conducted on the site prior to bond release,"¹²⁹ unless the post-mining land use plan provides for ongoing management.

A proposed amendment would allow such activities within the extended liability period without an accompanying extension of the liability period provided that:

¹²⁶ This section is necessitated by SMCRA § 16(d), 30 U.S.C.A. § 1216(d) (West Supp. 1979), which requires the standards relating to bonding to also apply to the surface effects of underground mines.

¹²⁷ Escrow bonding has been proposed as an addition to the general allowable forms of bonding in section 806.11. See 45 Fed. Reg. 6038 (1980), and the specific section dealing with escrow bonding in section 806.13. *Id.* at 6040.

¹²⁸ *Id.* at 6030-31.

¹²⁹ 30 C.F.R. § 805.13(b)(3) (1979).

- (1) Such practice is approved by the regulatory authority, and
- (2) Such practices are normal within the region for unmined lands having land uses similar to the approved post-mining land use of the area covered by the bond.¹³⁰

One purpose for the relaxation in this regulation is that the present regulation deters the use of good husbandry practices.

Under the present plan the bond must be held over the entire permit area if any increment of the permit area requires continued management. A proposed amendment¹³¹ would allow the regulatory authority the latitude to sever that portion requiring continued management from the original bonded area, provided certain conditions are met.¹³²

Another proposed section¹³³ would limit the liability of the permittee in the event that an approved post-mining land use is not completed. Commentators suggested, and OSM agreed, that the bond should cover only completion of the reclamation plan to the extent the operators control the outcome. The justification for this added section is that the permittee should not be responsible for the activities of the third party landowners over whom they exercise no control. There are, however, certain circumstances under which this liability limitation would not extend. These situations are set out in the proposed rule.

Proposed changes in section 805.14(a) would require notice of proposed adjustments of the bond amount be given to not only the permittee, but also to the surety and any other person with a property interest in collateral posted under Subchapter J. However, to perfect this right, persons other than the permittee must formally request such notice within a specified time. In accordance with the change in subsection (a), it is proposed that subsection (b)¹³⁴ be alerted to allow other persons involved in the

¹³⁰ 45 Fed. Reg. 6038 (1980).

¹³¹ *Id.*; see § 805.13(c).

¹³² *Id.* § 805.13(c) notes that the regulatory authority may approve the severance only if the area sought to be severed: (1) is not significant in extent in relation to the entire area under bond; and (2) is limited to a distinguishable contiguous portion of the bonded area.

¹³³ *Id.*; see § 805.13(f).

¹³⁴ The validity of this section, as it appears in the permanent regulatory program, was recently upheld in *In re Permanent Surface Mining Regulation Litiga-*

bond coverage to request a reduction in the bond amount.

Part 806—*Form, Conditions, and Terms of Performance Bonds and Liability Insurance*

A proposed amendment to this section would expand the allowable forms of bonding to include, in addition to those stated in the present regulatory program, escrow bonding and combinations of all the accepted methods. While self-bonding remains as an accepted alternative, the current requirements contained in subsection (b) have been deleted and the section has been reopened for rulemaking in newly proposed section 806.14.¹³⁵

While the proposed regulations for self-bonding retain much of the same language present in section 806.11(b), they should be read closely to detect all of the changes. Some of the significant changes are discussed below.

One of the most objected to requirements of the current program is the requirement that operators must show a net worth of six-times the total bond amount.¹³⁶ This requirement is deleted from the proposed regulations. It is argued that the interests of the regulatory authority are adequately protected by the requirement that a detailed financial statement be submitted by the applicant.¹³⁷

Many persons who submitted comments objected strongly to the requirement that the operator show ten years of continuous operations, and that a detailed financial statement be filed with the regulatory authority.¹³⁸ However, OSM refused to yield on these requirements and they remain in the proposed section.

Under the current program, the incapacity of a surety or a bank through bankruptcy, insolvency or suspension or revocation of its license immediately puts the operator in violation of section 800.11(b);¹³⁹ accordingly, the operator is required to discontinue surface mining until new bonding is approved.¹⁴⁰ A proposed

tion, *supra* note 71, at 45.

¹³⁵ 45 Fed. Reg. 6040 (1980).

¹³⁶ See § 806.11(b)(2).

¹³⁷ 45 Fed. Reg. 6035 (1980).

¹³⁸ *Id.*

¹³⁹ 44 Fed. Reg. 15,386 (1979).

¹⁴⁰ *Id.* at 15,389. See § 806.12(e)(6)(iii).

amendment¹⁴¹ to section 806.12 retreats from this unreasonable sanction and would give the operators a reasonable time, not to exceed 120 days, to secure new bonding. The operator would be allowed to continue mining during the interim period; however, the regulatory authority would make weekly inspections to ensure compliance with the proper procedures. If the operator either strays from acceptable practices, or fails to secure new bonding, a cessation order would issue against the operator.

An additional change in this section would clarify the regulations regarding the use of irrevocable letters of credit.¹⁴² Furthermore, while section 806.12(h)¹⁴³ incorporates much of the present language of section 806.11(b)(4), one addition would allow lands included in the permit area to be used as collateral for bonding purposes after Phase II of the reclamation plan has been completed.¹⁴⁴ This proposed addition should both lessen the hardships presented by the bonding requirements, and should provide incentive for the permittee to complete the reclamation plan in accordance with the schedule.

Part 807—Procedures, Criteria, and Schedule for Release of Performance Bond

As a result of recent litigation,¹⁴⁵ section 807.11(e) has been remanded to the Secretary since it fails to articulate that, in the words of the SMCRA, "the regulatory authority may arrange with the applicant. . . access to the proposed mining area for the purpose of gathering information relevant to the proceedings."¹⁴⁶

Several non-substantive amendments to section 807.12 would clarify the guidelines for partial release of liability under the bond for increments for which either Phase I or Phase II of the reclamation plan have been completed.¹⁴⁷ The one substantive change in this section concerns the definition of Phase III. In ac-

¹⁴¹ 45 Fed. Reg. 6039 (1980). See *In re Permanent Surface Mining Regulation Litigation*, *supra* note 25, at 41.

¹⁴² *Id.* See proposed § 806.12(g)(2).

¹⁴³ *Id.*

¹⁴⁴ 45 Fed. Reg. 6039 (1980). See proposed § 806.12(h).

¹⁴⁵ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 42.

¹⁴⁶ See SMCRA § 513(b), 30 U.S.C.A. § 1273(b) (West Supp. 1979).

¹⁴⁷ 45 Fed. Reg. 6041 (1980).

cordance with the changes in Section 805.13(f),¹⁴⁸ OSM proposes to amend section 807.12(e)(3) to remove the requirement that operators implement the post-mining land use. Hence, to complete Phase III, the operator need only to perform reclamation such that the land would *support* the post-mining land use.¹⁴⁹

Part 808—Performance Bond Forfeiture Criteria and Procedure

OSM proposes to add section 808.11(c)¹⁵⁰ to allow the regulatory authority to authorize the surety to complete the reclamation plan in case of forfeiture by the permittee. This change is in accordance with the proposed amendment to section 806.12(e)(4) whereby the surety could, upon the proper showing, opt to complete the reclamation plan as opposed to forfeiting the bond.¹⁵¹

It is proposed that section 808.12 be amended to clarify that "any bond deposited for an entire permit area or any increment may be forfeited to assure all aspects of reclamation of any portion of the permit area."¹⁵² The proposed addition of subsection (d) assures that the funds forfeited to the regulatory authority would be applied to the reclamation of the specific permit area covered by the bond.

Some persons submitting comments thought it necessary to clarify the fact that minor violations could not be cause for forfeiture of the bond amount since the regulations establish a separate penalty procedure for violations. OSM agreed with this view, and made it clear, through the proposed amendment to section 808.13(a)(2),¹⁵³ that for forfeiture to occur the regulatory authority must determine that it may be necessary to have someone other than the operator correct or complete the operation.

As a result of recent litigation,¹⁵⁴ section 808.14 has been re-

¹⁴⁸ See text accompanying note 133 *supra*.

¹⁴⁹ 45 Fed. Reg. 6035 (1980).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 6041. See also the discussion of the accompanying amendment *id.* at 6033.

¹⁵² *Id.* at 6036.

¹⁵³ *Id.* at 6042. But see, In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 42-43.

¹⁵⁴ In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 44.

manded to the Secretary.

Part 809—Bonding and Insurance Requirements for Anthracite Surface Coal Mining and Reclamation Operations

There are no amendments affecting this section.

Larry W. Blalock

SUBCHAPTER K — PERMANENT PROGRAM PERFORMANCE STANDARDS

Part 810—General Provisions

The general objective of Subchapter K “is to insure that coal exploration and surface coal mining and reclamation operations are conducted in manners which are compatible with the environmental, social, and esthetic needs of the Nation.”¹⁵⁵ The various objectives sought to be achieved have not been amended since the promulgation of the permanent regulatory program. However, OSM has taken under consideration a petition to amend Subchapter K and the performance standards; more particularly, amendments to the regulations concerning sediment control and surface mining operations are being considered.¹⁵⁶

Part 815—Coal Exploration

Any exploration for coal which “substantially disturbs the natural land surface” may be subject to regulation under this part.¹⁵⁷ Although the removal of more or less than 250 tons of coal subjects the operator to different criteria for regulatory approval, any coal exploration is subject to the performance standards listed under section 815.15.¹⁵⁸

No express amendments to part 815 have occurred since the promulgation of the permanent regulatory program. However, part 815 incorporates by reference amended regulations in part

¹⁵⁵ 30 C.F.R. § 810.2 (1979).

¹⁵⁶ 44 Fed. Reg. 60,226 (1979).

¹⁵⁷ 30 C.F.R. § 815.1 (1979).

¹⁵⁸ *Id.* In addition, a notice of intent to explore under 30 C.F.R. §§ 776.11, 12, 13 must be filed before any exploration can take place under part 815. The regulations dealing with the notice of intent for coal exploration of less than 250 tons (30 C.F.R. § 776.11) were upheld by the district court for the District of Columbia. *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 33.

816. Therefore, cross references should be made to part 816 in the following materials.

Part 816 — *Surface Mining Activities*

Part 817 — *Underground Mining Activities*

These two parts “set forth the minimum environmental protection performance standards to be adopted and implemented under regulatory programs for surface [and underground] mining activities.”¹⁵⁹ Because the provisions for underground mining “track” the surface mining provisions, reference will be made to part 816¹⁶⁰ unless one of the few provisions unique to underground mining has been affected.

The surface mining industry opposes many of the non-site specific regulations promulgated under the SMCRA.¹⁶¹ In response to the submission of a petition to amend Subchapter K, OSM published several suspensions of the rules contained in part 816. OSM noted that “the primary reason for the suspension of the existing OSM rainfall exemption is recognition of the fact that the record does not contain substantial data correlating suspended solids effluent quality with particular rainfall levels.”¹⁶²

OSM’s limitations on the total suspended solids contained in the effluent discharged by surface coal mining and reclamation operations have been closely related to those promulgated by the Environmental Protection Agency.¹⁶³ Recent studies have called into question OSM’s design criteria for ponds, effluent limitations and the exemptions to the limitations. Therefore the following suspensions were effected.

The permanent rules provided for an exemption to the limi-

¹⁵⁹ 30 C.F.R. § 816.1 (1979).

¹⁶⁰ To convert a part 816 surface mine citation to a part 817 underground mining citation, one merely has to interchange the suffixes of the numbers. Thus, a reference to 30 C.F.R. § 816.103—Backfilling and grading: Covering coal and acid and toxic-forming materials” means that the same amendments were made to 30 C.F.R. § 817.103, in the underground mining section.

¹⁶¹ See, *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978). See also *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71.

¹⁶² 44 Fed. Reg. 77,449 (1979).

¹⁶³ *E.g.*, 40 C.F.R. §§ 434.22(c), 25(c), 32(c), 35(b), 42(b), 46(b), as amended.

tations on the total suspended solids contained in the effluent when there was a precipitation event equal to or larger than a 10-year 24-hour precipitation event and if the facilities were designed and maintained in accordance with the requirements of part 816.¹⁶⁴ While the OSM regulated remains suspended, the EPA exemption will be substituted.¹⁶⁵

Many of the OSM design criteria for sedimentation ponds were suspended pending the final EPA studies which are scheduled for publication in the spring of 1980.

The methods for determining minimum storage volume and detention time will be suspended, but the general requirements that ponds provide a minimum sediment storage volume [30 C.F.R. § 816.46(b)] and that ponds hold the volume of water resulting from a 10 year 24-hour precipitation event (§ 816.46(c)) will be retained.¹⁶⁶

Because the permanent regulatory program has been the subject of litigation,¹⁶⁷ OSM decided to suspend certain regulations pending rulemaking and give notice of intent to publish interpretations of other rules involved in the litigation.¹⁶⁸ For instance, OSM intends to amend the revegetation standards for success in the underground mining provisions where the acreage affected is forty acres or less and the average rainfall is more than twenty-six inches.¹⁶⁹

Generally, these notices do not release the states from sub-

¹⁶⁴ 44 Fed. Reg. 77,448 (1979) (to be codified in 30 C.F.R. § 816.42).

¹⁶⁵ See note 9 *supra*. The EPA provision will be revised to read as follows:

Any overflow, increase in volume of a discharge or discharge from a bypass system caused by precipitation or snowmelt shall not be subject to the limitations set forth in paragraph (a) of this section. This exemption shall be available only if the facility is designed, constructed, and maintained to contain or treat the volume of water which would fall on the areas covered by this subpart during a 10-year 24-hour or larger precipitation event (or snowmelt of equivalent volume). The operator shall have the burden of demonstrating to the appropriate authority that the prerequisites to an exemption set forth in this subsection have been met.

¹⁶⁶ 44 Fed. Reg. 77,450 (1979). In particular, portions of 30 C.F.R. § 816.46(b), (c), (d) and (h) have been suspended.

¹⁶⁷ In re Permanent Surface Mining Regulation Litigation, *supra* note 71.

¹⁶⁸ 44 Fed. Reg. 77,454 (1979).

¹⁶⁹ 30 C.F.R. § 817.116(d) (1979).

mitting plans which are compatible with the objectives of Title V of the SMCRA. However, OSM recognized that flexibility is needed pending the outcome of the litigation; thus, the operator is temporarily able to use an alternative subdrainage system if he can ensure the structural integrity of the wastebank and the protection of ground or surface water quality.¹⁷⁰

In addition, OSM has recognized that the special precautions regarding recharge capacity of water leaving underground mines is unproductive, thus rendering unnecessary a monitoring requirement.¹⁷¹

In conjunction with the earlier notices to suspend, concerning effluent limitations for total suspended solid discharges for surface mining and reclamation operations during rainstorms and sedimentation pond design criteria, OSM noticed its intent to commence rulemaking upon new standards.¹⁷²

In response to the numerous time extensions that have taken place, OSM has had to extend "incorporations by reference" in the regulations until July 1, 1980.¹⁷³

OSM has proposed rulemaking concerning the "disposal of acid forming, toxic forming, combustible or other identified materials exposed, used, or produced during mining."¹⁷⁴ The present regulations call for covering such materials with four feet of a neutral substance;¹⁷⁵ however, it is felt that the SMCRA would allow for covering or *treating* these materials.¹⁷⁶ The permanent rules will be amended to allow for the covering or treating of the materials exposed, used, or produced during mining.

Litigation over the permanent regulatory program culminated with the issuance of an opinion early in the spring of 1980 from the United States District Court for the District of Columbia in the case of *In re Permanent Surface Mining Regula-*

¹⁷⁰ 30 C.F.R. § 816.32(a) (1979).

¹⁷¹ 30 C.F.R. § 817.52(a)(1) (1979).

¹⁷² 44 Fed. Reg. 77,456 (1979).

¹⁷³ 45 Fed. Reg. 8240 (1980) (to be codified in 30 C.F.R. §§ 816.49(a)(5), 816.65(e)(2), 816.85(c)(2)).

¹⁷⁴ 45 Fed. Reg. 8243 (1980) (to be codified in 30 C.F.R. § 816.103(a)(6)).

¹⁷⁵ See 30 C.F.R. § 816.103(a).

¹⁷⁶ SMCRA § 515(b)(14), 30 U.S.C.A. § 1265(b)(14) (West Supp. 1979).

*tion Litigation.*¹⁷⁷ The following discussion outlines the decision of the court with regard to the performance standards which are contained in part 816 and part 817.

1. Segregation of Subsoil

The court recognized that "Section 515(b) [of the SMCRA] authorizes segregation if the topsoil cannot sustain vegetation or if other strata enhance postmining revegetation."¹⁷⁸ Therefore, challenges to the subsoil provisions contained in the permanent regulations were not allowed.¹⁷⁹

2. Regulation of Explosives

The regulation of explosives under the permanent regulatory program was upheld by the court.¹⁸⁰ The court held that the "provisions demonstrate that the Secretary has promulgated national standards for explosives; however, they may be implemented and varied by the local regulatory authority in accordance with and varied by the local regulatory agency in accordance with site specific conditions." The regulations are therefore consistent with the SMCRA.¹⁸¹

3. Control of Dams Impounding Waste

Briefly, the court held that section 515(b)(10) of the SMCRA¹⁸² authorizes the protection of the hydrologic balance, and therefore the regulations concerning dams impounding wastes were proper.¹⁸³

¹⁷⁷ Treating the toxic materials is provided for in the interim regulations, upheld by court decision. See 30 C.F.R. §§ 715.14(i), 717.14(e); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1310 (D.D.C. 1978). See also *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71.

¹⁷⁸ C.A. No. 79-1144 (D.D.C. 1980) (slip op.).

¹⁷⁹ *Id.* at 54.

¹⁸⁰ 30 C.F.R. § 816.22(d) (1979).

¹⁸¹ See 30 C.F.R. §§ 816.61-67 (1979).

In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 56.

¹⁸² 30 U.S.C.A. § 1265(b)(10) (West Supp. 1979).

¹⁸³ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 56-58.

4. Cover of Hazardous Material

The court recognized that the failure of the regulations to allow the operator to treat such materials rather than just covering them with a minimum of four feet of nontoxic, noncombustible materials was improper.¹⁸⁴ OSM had anticipated this ruling and previously had initiated rulemaking.¹⁸⁵

5. Coal Operator's Use of Land After Reclamation

The court struck down the regulations that required an operator who proposes "range or pasture land for post mining land use" to actually use the land "for grazing for the last two years of bond liability."¹⁸⁶ The court noted that section 515(b)(19) of the SMCRA was unpersuasive as authority to support the government's position, and, in addition, the language in the House report on the section spoke in permissive rather than mandatory terms.¹⁸⁷ Accordingly, the court held that the regulations which required operators to actually engage in farming while the property was still under bond were impermissible. The court held that the statutory sections relied upon by the government¹⁸⁸ "direct the operator to demonstrate capability of prime farmlands to support pre-mining productivity. This capability can be demonstrated by a soil survey."¹⁸⁹

6. Period for Measuring Success

The regulations relating to the time period for which the operator would be responsible for the successful revegetation were also challenged. The court held that the regulations requiring a five or ten year responsibility period (depending upon whether the area had more or less than 26 inches of rainfall yearly should not be required to begin when the vegetation reaches ninety per-

¹⁸⁴ 30 C.F.R. § 816.103(a)(1) (1979).

¹⁸⁵ See note 25, *supra*.

¹⁸⁶ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 58; 30 C.F.R. § 816.115 (1979).

¹⁸⁷ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 59.

¹⁸⁸ SMCRA §§ 510(d)(1), 515(b)(7), 515(b)(20), 30 U.S.C.A. §§ 1260(d)(1), 1265(b)(7), 1265(b)(20) (West Supp. 1979).

¹⁸⁹ *In re Permanent Surface Mining Regulation Litigation*, *supra* note 71, at 59.

cent of the natural cover in the area.¹⁹⁰ Instead, the court suggested a middle ground—to have the liability “period begin ‘after the last year of augmented seeding, fertilizing, [and] irrigation.’”¹⁹¹

7. Restoration of Previously Mined Land.

Challenges to the requirement that land that was previously mined but unreclaimed must be restored to the “highest and best use . . . compatible with surrounding areas” were held to be unfounded.¹⁹² The court examined the legislative history of the provisions and determined that by referring to “potential utility,” rather than “low value,” the Senate report made it clear that restoration of previously mined land must be upgraded to support its utility for productive use.¹⁹³

8. Letters of Commitment for Alternate Post-mining Land Use

The court held that requirements for legally binding commitment letters regarding alternate post-mining land use¹⁹⁴ were not required by the SMCRA. The SMCRA “requires only a ‘reasonable likelihood’ or alternate use that is higher or better than previous use.”¹⁹⁵

9. Surface Owner Protection Against Subsidence

In relation to the regulations regarding subsidence (which are peculiar to the underground mining regulation standards), the court held that the regulations were consistent with the SMCRA in providing for “one of three alternatives: 1) restore the damaged structure and the land; 2) purchase the damaged structure and restore the land; or 3) compensate the owner and restore the land.”¹⁹⁶

¹⁹⁰ 30 C.F.R. § 816.116(b) (1979).

¹⁹¹ In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 61.

¹⁹² *Id.* at 61-62; 30 C.F.R. § 816.133(b)(1) (1979).

¹⁹³ In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 62.

¹⁹⁴ 30 C.F.R. § 816.133(c)(4), (c)(9)(i) (1979).

¹⁹⁵ In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 63. See SMCRA § 515(b)(2), 30 U.S.C.A. § 1265(b)(2) (West Supp. 1979).

¹⁹⁶ In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at

10. Buffer Zone for Underground Mining

Briefly, the court held that the regulations relating to such buffer zones were clearly upheld by the language and intent of the SMCRA.¹⁹⁷

Part 818 — *Concurrent Surface and Underground Mining*

There are no amendments affecting this section.

Part 819 — *Auger Mining*

There are no amendments affecting this section.

Part 820 — *Anthracite Mines in Pennsylvania*

There have been no amendments to this section, except for the extension of incorporation by reference dates to July 1, 1980.¹⁹⁸

Part 822 — *Operations in Alluvial Valley Floors*

There are no amendments affecting this section.

Part 823 — *Operations on Prime Farmlands*

As a result of pending litigation,¹⁹⁹ OSM has suspended the prime farmland grandfather clause.²⁰⁰ However, the comments to the suspension note that “[w]here the suspended regulations have explicit underpinnings in the SMCRA, States must still include corresponding statutory provisions in their program applications.”²⁰¹

The SMCRA provides the following exemption for the prime farmland standards:

63-64; 30 C.F.R. § 817.124 (1979).

¹⁹⁷ In re Permanent Surface Mining Regulation Litigation, *supra* note 71, at 65; 30 C.F.R. § 817.126 (1979).

¹⁹⁸ 45 Fed. Reg. 8240 (1980) (to be codified in 30 C.F.R. § 820.11(d)).

¹⁹⁹ See note 25, *supra*.

²⁰⁰ 30 C.F.R. § 785.17(a) and incorporated in part 823.11(a). This provision holds that the prime farmland reconstruction standards do not apply to land where mining was authorized prior to August 3, 1977.

²⁰¹ 44 Fed. Reg. 77,454 (1979).

Nothing in this subsection shall apply to any permit issued prior to the date of enactment of this Act [August 3, 1977], or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to the date of enactment of this Act.²⁰²

Thus, little will change while the litigants argue over the language of the regulatory provisions.

Part 824 — *Mountaintop Removal*

There are no amendments affecting this section.

Part 825 — *Special Bituminous Mines in Wyoming*

There are no amendments affecting this section.

Part 826 — *Steep Slope Mining*

OSM has indicated that the variance procedures contained in this part are expected to be amended. OSM has decided to add a variance procedure to the interim regulations, and language in the supplemental information to the proposed rulemaking indicates that permanent program variance procedures will be amended to comport with the new variance procedures for the interim program.²⁰³

In addition, in litigation concerning the SMCRA, the United States District Court for the Western District of Virginia held that the portions of the SMCRA dealing with steep slope mining would be permanently enjoined.²⁰⁴

Part 827 — *Coal Processing Plants and Support Facilities Not Located At or Near the Minesite or Not within the Permit Area for a Mine*

There are no amendments affecting this section.

²⁰² SMCRA § 510(d)(2); 30 U.S.C.A. § 1260(d)(2) (West Supp. 1979).

²⁰³ 44 Fed. Reg. 61,313 (1979) (to be codified in 30 C.F.R. §§ 716, 785.16(b)(2), 826.15)).

²⁰⁴ Virginia Surface Mining and Reclamation, Ass'n, Inc. v. Andrus, *supra* note 71.

Part 828 — *In Situ Processing*

There are no amendments affecting this section.

SUBCHAPTER L — INSPECTION AND ENFORCEMENT

Part 840 — *State Regulatory Authority Inspection and Enforcement*

In reference to enforcement authority, the permanent regulatory program provides that “[t]he civil and criminal penalty provisions of each State program shall contain penalties which are no less stringent than those set forth in section 518 of the Act and shall be consistent with 30 C.F.R. Part 845.”²⁰⁵

In litigation over the permanent regulatory program, the State of Virginia successfully challenged the imposition upon the states of the point system contained in Part 845.²⁰⁶ The court agreed that section 518(i) did not expressly provide for the point system, and that the “imposition of this requirement upon the states is inconsistent with the Act.”²⁰⁷ In remanding the regulation, the court further noted that the mere recitation of section 503(a)(7), without a showing of the rational relationship between the regulation and the SMCRA, “fails to meet the standard by which this court must adjudicate the regulations.”²⁰⁸

The court also held that the warrantless inspection provisions could apply either to coal explorations or to unpermitted coal mining and reclamation operations.²⁰⁹ This holding is to be expected after the court’s previous ruling on warrantless searches in the permit area proper.²¹⁰

Part 842 — *Federal Inspections*

There are no amendments affecting this section.

²⁰⁵ 30 C.F.R. § 840.13(a) (1979).

²⁰⁶ In re Permanent Surface Mining Regulation Litigation, *supra* note 25, at 15.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 65-66.

²¹⁰ See In re Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1317 (D.D.C. 1978).

Part 843 — *Federal Enforcement*

OSM propounded final rules to clarify the procedures for informal public hearings under the (interim and) permanent regulations.²¹¹ The introduction to the final rules succinctly summarizes the changes made to section 843.15 in regard to informal public hearings:

-First, subsection (b) has been rewritten to clarify how an informal public hearing may be waived or the time for holding it extended.

-Second, the second sentence of subsection (g) has been deleted. This sentence provided that no statements made or evidence introduced at an informal public hearing could be introduced in a subsequent hearing to impeach a witness. This deletion is being made because the Office has reconsidered this sentence and believes that it would result in the exclusion of a great deal of evidence.

-Third, subsection (h) has been added to indicate that the decision as to whether a minesite should be viewed during the hearing is that of the person conducting the hearing.²¹²

Subsection (a) of section 843.15 has also been amended slightly to add that “[no] hearing will be required where the condition, practice or violation in question has been abated or the hearing has been waived.”²¹³ In addition, the definition of “mining” has been expanded to include “the processing, cleaning, concentrating, preparing or loading of coal where such operations occur at a place other than at a minesite.”²¹⁴

OSM has also proposed rules regarding the provisions governing the assessment of penalties for violations of the permanent regulatory program. Under this part, OSM has proposed the addition of the following language to clarify when the suspension or revocation of permits may take place:

(f) Whenever a permittee fails to abate a violation contained in a notice of violation or a cessation order within the abatement period set in the notice or order as subsequently extended, the Director shall review the permittee’s history of

²¹¹ 45 Fed. Reg. 2626 (1980) (to be codified in 30 C.F.R. § 843.15).

²¹² 45 Fed. Reg. 2626 (1980).

²¹³ 45 Fed. Reg. 2626, 2629 (1980) (to be codified in 30 C.F.R. § 843.15(a)).

²¹⁴ *Id.*

violations to determine whether a pattern of violations exists pursuant to this section, and shall issue as appropriate an order to show cause.²¹⁵

Part 845 — *Civil Penalties*

In addition to the proposed rules cited in Part 843, OSM has proposed clarifications for the assessment of penalties for separate violations for each day.²¹⁶ Previously, an unlimited \$750 a day penalty for failure to abate was thought permissible. OSM recognized, however, that the unlimited penalty has led to an "alarmingly high" amount of total fines which "[i]ronically . . . may actually deter effective enforcement by forcing operators into bankruptcy and the ultimate abandonment of an unreclaimed site."²¹⁷ Because of the language contained in the authorizing section of the SMCRA,²¹⁸ OSM now believes the congressional intent was to subject operators to a maximum assessment period of thirty days for failure to abate penalties.²¹⁹

In addition, "penalties will begin to accumulate on the date that the Office actually reinspects the minesite and determines that the violation cited in the notice of violation or cessation order has not been abated."²²⁰ Other provisions in section 845.13(b) regarding remedies for the "oppressed" operator or stays pending rulings by the court remain unchanged.²²¹

SUBCHAPTER M — TRAINING PROGRAM FOR BLASTERS AND MEMBERS OF BLASTING CREW: CERTIFICATION OF BLASTERS

Part 850 — *Programs*

Proposed rules concerning the training and certification of blasters first appeared in the Federal Register on September 18, 1978.²²² In response to industry protests about the stringent pro-

²¹⁵ 45 Fed. Reg. 5551, 5544 (1980).

²¹⁶ *Id.* (to be codified in 30 C.F.R. § 845.15(b)).

²¹⁷ 45 Fed. Reg. 5541 (1980).

²¹⁸ SMCRA § 518(c); 30 U.S.C.A. § 1268(c) (West Supp. 1979).

²¹⁹ *Id.*

²²⁰ 45 Fed. Reg. 5541 (1980).

²²¹ *Id.* at 5544.

²²² 43 Fed. Reg. 41,934 (1978).

posed rules, OSM repropoed the rules.²²³ Although comments were closed on August 29, 1979, no further action appears to have been taken regarding this Subchapter.

Generally, the repropoed rules lessen the requirements upon the operator and recognize the immense financial burden placed upon the operator by the rules as originally propoed. The blasting rules contained in the interim program and related materials should be consulted pending final acceptance of the new blasting rules for the permanent regulatory program.²²⁴

SUBCHAPTERS N AND O — [reserved]

SUBCHAPTER P — PROTECTION OF EMPLOYEES

There are no amendments affecting this section.

SUBCHAPTER R — ABANDONED MINE LAND RECLAMATION

Parts 870 to 888

The final rules covering this Subchapter were published on October 25, 1975,²²⁵ except for part 870, which was finalized on December 13, 1977.²²⁶ Because most agency action concerning Subchapter R has been of a general nature, the different parts will not be set out separately here.²²⁷ OSM has published notice of the availability of the draft environmental impact statement.²²⁸

In order "to assist States, Indian Tribes, [the] U.S. Department of Agriculture, and OSM in interpreting and applying the general reclamation requirements for individual programs and

²²³ 44 Fed. Reg. 38,318-27 (1979).

²²⁴ See, Note, *Regulation of Blasting Practices Under the Surface Mining Control and Reclamation Act of 1977*, 81 W. VA. L. REV. 763 (1979).

²²⁵ 43 Fed. Reg. 49,932 (1978).

²²⁶ This section was originally designated as Part 837. 42 Fed. Reg. 62,713 (1977).

²²⁷ The various parts cover the following: Part 870, Abandoned Mine Reclamation Fund - Fee Collection and Coal Production Reporting; Part 872, Abandoned Mine Reclamation Funds; Part 874, General Reclamation Requirements; Part 877, Rights of Entry; Part 879, Acquisition, Management, and Disposition of Lands and Water; Part 882, Reclamation of Private Land; Part 884, State Reclamation Plans; Part 886, State Reclamation Grants; Part 888, Indian Reclamation Program.

²²⁸ 44 Fed. Reg. 63,737 (1979).

projects contained in the SMCRA and the regulations,"²²⁹ OSM published "proposed guidelines" in lieu of regulations; copies of these guidelines are available from OSM.²³⁰

The General Accounting Office has also published its confirmation that the record keeping and reporting requirements of the various parts of Subchapter R meet its approval.²³¹

SUBCHAPTER S — MINING AND MINERAL INSTITUTES

Part 890

There are no amendments affecting this section.

Lawrence W. Hancock

III. LITIGATION

UNION CARBIDE CORP. v. ANDRUS

On July 17, 1979, the United States District Court for the Southern District of West Virginia decided two consolidated cases, *Union Carbide Corp. v. Andrus*²³² and *Cannelton Industries, Inc. v. Andrus*,²³³ which challenged the manner in which the Secretary of the United States Department of Interior had implemented the interim-phase enforcement provisions of the SMCRA.²³⁴ The plaintiffs in these two cases operated surface mines, underground mines having surface impacts, or both, in West Virginia. They alleged that the Secretary's practice of issuing notices of violation and cessation orders without prior notification of the West Virginia Department of Natural Resources was contrary to the requirements of section 521(a)(1) of the SMCRA. Preliminary and permanent injunctive relief restraining the Secretary's enforcement activities without first complying with the notice provi-

²²⁹ 44 Fed. Reg. 64,254 (1979).

²³⁰ 44 Fed. Reg. 64,255 (1979).

²³¹ 44 Fed. Reg. 60,285 (1979).

²³² C.A. No. 79-2142 (S.D. W. Va. July 17, 1979) (slip op.).

²³³ C.P. No. 79-2163 (S.D. W. Va. July 17, 1979) (slip op.) These two consolidated cases are hereinafter referred to as *Union Carbide v. Andrus*.

²³⁴ Pub. L. No. 95-87, 91 Stat. 445 (1977); 30 U.S.C.A. §§ 1201 *et seq.* (West Supp. 1979). The following six sections of the SMCRA are discussed in this analysis: 101, 502, 503, 518, 521 and 526. The corresponding U.S.C.A. sections are 30 U.S.C.A. §§ 1201, 1252, 1253, 1268, 1271 and 1276 (West Supp. 1979).

sion of section 521(a)(1) was requested. The plaintiffs further sought injunctive relief with regard to the issuance of federal notices of violation and cessation orders concerning the surface effects of underground mining under section 521(a)(3), as such mining is not conducted by "permittees" under the SMCRA.

These requests placed four issues before the court: (1) whether notice to the state regulatory authority is a prerequisite to federal action under section 521(a)(1); (2) whether the plaintiffs are "permittees" under section 521(a)(1); (3) whether the defendants are equitably estopped from enforcing the interim regulatory program in West Virginia; and (4) whether the plaintiffs' mining activities are conducted on lands on which such operations are regulated by the state. In resolving these disputes, the court held that (1) notice to the state regulatory authority is not a prerequisite to federal enforcement of the interim program; (2) the plaintiffs were "permittees" under the SMCRA; (3) the defendants could not be equitably estopped from enforcing the interim program in West Virginia; and (4) the plaintiffs' mines are on lands on which such operations are subject to state regulation.

1. The Notice Requirement

The dispute concerning the necessity of notice to the state regulatory authority prior to enforcement actions by the Secretary during the interim program presented the question "whether section 521(a)(1)²³⁵ is operative during the interim phase of the

²³⁵ 30 U.S.C.A. 1271(a)(1) (West Supp. 1979). This section provides: Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environ-

Act."²³⁶ The court examined sections 502²³⁷ and 521²³⁸ and decided that Congress did not intend for section 521(a)(1) to be effective during the interim program. Instead, federal enforcement of the SMCRA, under section 521(a)(3),²³⁹ is subject to the notice requirement of section 521(a)(1) only during the permanent regulatory program.

Section 502(e) sets forth three primary characteristics of the Secretary's enforcement authority during the interim program. First, the Secretary is given the nondiscretionary duty to inspect sites without advance notice to the operator to determine compliance with the interim performance standards. These inspections must be made at least once every six months. Next, the Secretary

mental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

²³⁶ *Union Carbide v. Andrus*, *supra* note 232, at 8.

²³⁷ 30 U.S.C.A. § 1252 (West Supp. 1979).

²³⁸ 30 U.S.C.A. § 1271 (West Supp. 1979).

²³⁹ 30 U.S.C.A. § 1271(a)(3) provides in relevant part:

When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, *Federal inspection pursuant to section 502*, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation [emphasis added].

This section provides the basic enforcement mechanism for enforcement of the SMCRA when the Secretary determines that a permittee is in violation. Section 502, referred to in the quoted language, governs the interim regulatory program.

is directed to require immediate federal inspection when he has reports from not less than two consecutive state inspections evidencing violations of the interim performance standards. Third, the SMCRA provides for immediate federal inspection when the Secretary has any information which gives rise to a reasonable belief that the interim standards are being violated. In all three of these instances the Secretary is directed to implement necessary enforcement actions consistent with the enforcement provisions of the SMCRA. The enforcement provisions referred to are the notice of violation and cessation orders provisions under section 521,²⁴⁰ and the civil penalty provisions of section 518.²⁴¹ The court found a conflict between section 502(e)(2), and its requirement of immediate federal inspection and enforcement, and section 521(a)(1), which requires notice to the state regulatory authority so that it may take appropriate action prior to federal action.

The court looked to the specific enforcement provision of section 521(a)(3) to settle the conflict. That section requires the Secretary to issue a notice of violation to a permittee when a federal inspection, conducted during the interim program, uncovers a violation of the SMCRA.²⁴² The court held that "[t]he imposition of section 521(a)(1) notice requirement as a condition precedent to federal enforcement of the interim regulatory program pursuant to section 521(a)(3) is contrary to the unequivocal terms of section 521(a)(3)."²⁴³ This holding was supported by the legislative history of the SMCRA. "[T]here is no single provision in the Act or excerpt from the legislative history which synthesizes and articulates with clarity the federal-state relationship intended by Congress during the regulatory program. Indeed, the relevant materials . . . are ambiguous."²⁴⁴ However, after an examination of the statutory language and legislative history, the court concluded that section 521(a)(1) notice is not a condition precedent to federal inspection and enforcement during the interim phase. Section 521(a)(1) only requires notice by the Secretary to the ap-

²⁴⁰ 30 U.S.C.A. § 1271 (West Supp. 1979).

²⁴¹ 30 U.S.C.A. § 1268 (West Supp. 1979).

²⁴² This notice must fix a reasonable time, not more than ninety days, for the abatement of the violation. An opportunity for a public hearing must also be provided. 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979).

²⁴³ *Union Carbide v. Andrus*, *supra* note 232, at 12.

²⁴⁴ *Id.* at n. 6.

proved state regulatory authority during the permanent program.

The court next focused its attention on the jurisdictional issue raised by defendants' motions to dismiss.²⁴⁵ It noted that the plaintiffs could have presented their complaints concerning the proper interpretation of the notice requirements in section 521(a)(1) "during the Secretary's promulgation of the interim rules and, again, in conjunction with the judicial review which followed."²⁴⁶ "A party cannot circumvent the rulemaking review process established by Congress by drafting the allegations solely in terms of the Act in hope of litigating issues which in reality reach not the validity of the statute, but go towards the validity of the previously promulgated interim regulatory program."²⁴⁷ The court held that was precisely what the plaintiffs had attempted to do, and therefore granted the defendants' motions to dismiss.

Whenever actions under the interim regulations give rise to any new, initially unforeseeable perspectives on the significance or scope of the regulations, thereby creating genuine questions as to whether the regulations are consistent with the SMCRA, "Con-

²⁴⁵ *Id.* at 12.

²⁴⁶ *Id.* at 21. Judicial review is provided for in SMCRA section 526; 30 U.S.C.A. § 1276 (West Supp. 1979). 30 U.S.C.A. § 1276(a)(1) provides:

Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this Act shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary. [emphasis added].

²⁴⁷ *Union Carbide v. Andrus*, *supra* note 232, at 21.

gress has provided a mechanism for relief by an aggrieved party."²⁴⁸ The proper forum in which to seek such relief is the District Court for the District of Columbia.²⁴⁹ Because of this provision, the court found itself lacking jurisdiction to hear plaintiffs' claims.

2. "Permittees" Under the Interim Program

Each plaintiff maintained that it was not a "permittee" as that term is used in the SMCRA, and therefore the Secretary's issuance of cessation orders and notices of violation to underground mining operators was contrary to section 521(a)(3) requirements.²⁵⁰ The plaintiffs reasoned that since section 521(a)(3) limits the issuance of cessation orders to "permittees," and a "permittee" is defined as a person holding a permit to conduct mining and reclamation operations issued during the permanent phase by the state regulatory authority or the Secretary,²⁵¹ section 521(a)(3) was rendered ineffective during the interim regulatory program. "The precise question . . . is whether federal enforcement during the interim program is . . . confined to the precise terms of Section 521."²⁵² The court held that Federal enforcement was not so limited, reasoning that the only consistent construction of sections 502(e) and 521 subjects underground coal

²⁴⁸ *Id.* at 22. SMCRA section 526(a)(1), 30 U.S.C.A. § 1276(a)(1) (West Supp. 1979), requires that petitions for judicial review be filed within sixty days from the date the regulations are finally promulgated. Petitions may be received after sixty days if based solely on grounds arising after the sixtieth day.

²⁴⁹ 30 U.S.C.A. § 1276(a)(1) (West. Supp. 1979).

²⁵⁰ Section 521(a)(3), 30 U.S.C.A. § 1271(a)(3) (West Supp. 1979), provides:

When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

²⁵¹ See 30 U.S.C.A. §§ 1291(15), (18) (West Supp. 1979).

²⁵² *Union Carbide v. Andrus*, *supra* note 232, at 27.

mining operations to federal inspection and enforcement during the interim regulatory program. The court further held that the statutory definition of "permittee" is not applicable during the interim phase of the regulatory program.

The court noted that the surface impacts of underground mining operations are subject to the interim regulatory program "by the plain meaning of the Act's definitional sections."²⁵³ During the interim period, the Secretary is to fashion federal enforcement action directed at persons conducting mining and reclamation operations regulated by a state under state law, whether such operations are conducted with or without a permit.²⁵⁴ The court stated:

To read sections 502(e) and 521(a)(3) together and conclude that an operation may fall within the requirements of the interim regulatory program, yet not be subject to federal enforcement for violations of the interim requirements because the operator is not holding a permit as defined by the Act or otherwise would not only substantially limit the Secretary's enforcement authority over operations clearly within the ambit of section 502, but would be contrary to the scope of the interim regulatory program. Any other reading of these two sections renders the interim regulatory program unenforceable against a potentially significant number of surface coal mining operations. Such a construction would frustrate Congress' concern over the competitive disadvantages which would result if surface coal mining operations were held to different regulatory standards between various states.²⁵⁵

In concluding this issue, the court pointed to the duty when faced with a motion to dismiss to examine the complaint to determine whether the allegations present a claim for relief on any possible theory. The court deferred its ruling on the defendants' motions to dismiss the claim concerning the Secretary's issuances of notices to "non-permittees" because of the possibility of a constitutional challenge to the regulatory scheme of the interim program. Such a challenge could be "for failure to prescribe in plainer terms that notices of violation and cessation orders may be assessed during the interim phase against any surface coal

²⁵³ *Id.* at 24.

²⁵⁴ *Id.* at 28.

²⁵⁵ *Id.* at 29.

mining operation rather than the statutorily defined 'permittee.'²⁵⁶ Since this issue was not raised or argued by the parties, the court expressed no opinion on its merits and allowed plaintiffs to amend their complaint so as to present such a challenge.²⁵⁷

3. *Equitable Estoppel*

The plaintiffs based their assertion that OSM was equitably estopped from enforcing the interim program in West Virginia due to a letter from its Director to the Director of the West Virginia Department of Natural Resources and the language of section 101(f)²⁵⁸ of the SMCRA. The complaints alleged that this letter, referred to as the "Heine-Callaghan" letter, recognized the West Virginia Department of Natural Resources as the regulatory authority in West Virginia and further approved West Virginia's regulations as essentially in compliance with and adequate to implement the initial regulatory program. It was alleged that the West Virginia Legislative Rule-Making Review Committee relied on this letter when it approved the Department of Natural Resources' regulations.

The court dismissed this claim for two reasons. First, the complaint lacked an allegation of detrimental reliance by the plaintiffs, an essential element of equitable estoppel. Second, section 502(e) commands the Secretary to implement and enforce a federal enforcement policy until the state program is approved or a federal program is implemented. "The Act affords no basis upon which the Secretary may delegate his responsibility of enforcing the interim regulatory program to a state."²⁵⁹ The court cited *Montilla v. United States*,²⁶⁰ stating that no officer or agent of the government may estop the government from enforcing a

²⁵⁶ *Id.* at 31.

²⁵⁷ Plaintiffs so amended their complaint. At publication, this issue was still pending before the court.

²⁵⁸ SMCRA section 101(f), 30 U.S.C.A. § 1201(f) (West Supp. 1979), provides that:

[B]ecause 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 Act should rest with the States.

²⁵⁹ *Union Carbide v. Andrus*, *supra* note 232, at 34.

²⁶⁰ 457 F.2d 478 (Ct. Cl. 1972).

law unless such official is authorized to do so and is acting within the scope of his authority, as in cases involving contractual dealings with the government. Since OSM does not have the authority to delegate the duty to enforce the interim regulatory program to a state, the court held that the federal government could not be estopped by the "Heine-Callaghan" letter from enforcing the interim phase of SMCRA in West Virginia.

4. "Regulation" by a State

The last issue resolved by the court concerned paragraph X of the plaintiffs' complaints, which asserted that "West Virginia underground mining operations are not subject to the interim regulatory program because they were not operations 'on lands on which such operations are regulated by a state' at the time of enactment of the Act, section 502(e)."²⁶¹ The parties admitted this question to be a "purely legal one," relieving the plaintiffs of any requirements to exhaust their administrative remedies.

Second 502(c) provides that "all surface coal mining operations on lands on which such operations are regulated by the state shall comply with"²⁶² the interim regulatory program, on or after nine months from the date of enactment of the Act on August 3, 1977, or subsequent thereto.²⁶³ The court held that any attempt to limit section 502(c) to state regulation in effect on August 3, 1977, was unsupported, due to a lack of congressional restrictions, the plain meaning of section 502(c) and the legislative history.

The United States Supreme Court stated, in *Udall v. Tallman*,²⁶⁴ that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given by the statute by the officers or agency charged with its administration."²⁶⁵ Such interpretation need not be the only reasonable one or the one the Supreme Court would have reached had the issue been first raised in judicial proceedings; it need only be rea-

²⁶¹ *Union Carbide v. Andrus*, *supra* note 232, at 3.

²⁶² 30 U.S.C.A. § 1252(c) (West Supp. 1979).

²⁶³ See 30 C.F.R. §§ 710.3(a), 710.11(a), 715.11(a) (1978); 42 Fed. Reg. 62,642 (1977).

²⁶⁴ 380 U.S. 1 (1965).

²⁶⁵ *Id.* at 16.

sonable in itself.²⁶⁶ The court, in the present case, found no legislative history to support the contention that the Secretary's reading of section 502(c) referring to state regulation in effect on August 3, 1977, and subsequent thereto, was unreasonable. Therefore, the court held that West Virginia legislation²⁶⁷ which explicitly addressed the surface impacts of underground mining, effective March 11, 1978, was sufficient to bring West Virginia underground mining operations within the ambit of section 502(c).

Conclusion

The regulation of coal mining activities is traditionally associated with state authorities. Since the state is expected to have primary regulatory responsibility for administration of the permanent phase of the SMCRA once the federal government approves the state program, the court in the present case reasoned it would "not seem illogical that a state . . . with the experience and expertise of West Virginia (in regulating coal mine operations) be afforded a similar role during the interim phase."²⁶⁸ However, the court's analysis of the SMCRA, and its "considerable apparent inconsistencies,"²⁶⁹ showed that while both state and federal authorities have prescribed duties during the interim phase, Congress chose to vest the principle interim-enforcement responsibility in the Secretary of Interior.

The major role during the interim phase of regulation under the SMCRA is to be fulfilled by the federal government. This construction seems most consistent with Congress' design to insure that differing state regulatory standards for surface coal mine operations and reclamation do not result in competitive disadvantages in interstate commerce, and that the several states are able to "improve and maintain adequate standards on coal min-

²⁶⁶ *Id.*

²⁶⁷ Act of March 11, 1978, ch. 63, 1978 W. Va. Acts 387. This act amended W. Va. Code article 6, chapter 20, by expanding the rulemaking authority of the Director of Natural Resources and the Reclamation Commission to include the power to regulate and enforce rules regulating the surface impacts of deep mining in West Virginia in conformity with SMCRA.

²⁶⁸ *Union Carbide v. Andrus*, *supra* note 232, at 4.

²⁶⁹ *Id.*

ing operations within their borders."²⁷⁰

Allen R. Prunty

VIRGINIA SURFACE MINING & RECLAMATION ASSOCIATION, INC. v. ANDRUS

*Virginia Surface Mining & Reclamation Association, Inc. v. Andrus*²⁷¹ addressed several challenges to the Surface Mining Control and Reclamation Act of 1977.²⁷² The case, initiated by a voluntary association of coal operators, a group of sixty three members, four coal landowners, the Town of Wise, Virginia, and the Commonwealth of Virginia, asserted that SMCRA was in controversy of the commerce clause of the United States Constitution,²⁷³ constituted a violation of the states' powers under the tenth amendment, constituted a taking in violation of the fifth amendment, denied the plaintiffs equal protection of the law, and denied procedural due process in allowing pre-hearing cessation orders. The challenge was directed at the SMCRA under the initial regulatory program, and a preliminary injunction was issued February 14, 1979.²⁷⁴ The Fourth Circuit reversed the injunction pending a hearing on the request for permanent relief.²⁷⁵

The challenge focused on Subchapter V of the Act, the crucial control of environmental impact sections. The court made three preliminary findings. It first found that plaintiffs were properly before the court and that the claims against the initial program were ripe for adjudication.²⁷⁶ Second, in the most understated portion of the opinion, the court found the SMCRA to be a valid exercise of the commerce clause power by Congress.²⁷⁷ Fi-

²⁷⁰ 30 U.S.C.A. § 1201(g) (West Supp. 1979).

²⁷¹ No. 78-0224-B (W.D. Va. Jan. 3, 1980) (hereinafter cited as *Virginia Surface Mining*).

²⁷² Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 91 Stat. 445, 30 U.S.C.A. §§ 1201-1328 (West Supp. 1979) (hereinafter cited as SMCRA).

²⁷³ U.S. CONST. art. 1, § 8.

²⁷⁴ *Virginia Surface Mining*, No. 78-0244-B (W. D. Va. Feb. 14, 1979) (preliminary injunction). See Comment, 81 W. VA. L. REV. 799 (1979). This comment is in part a development of that discussion.

²⁷⁵ 30 U.S.C.A. §§ 1251-79 (West Supp. 1979).

²⁷⁶ *Virginia Surface Mining*, *supra* note 271, at 4.

²⁷⁷ *Id.* at 4-6. The commerce clause challenge was based on the reasoning that SMCRA in regulating private, non-federal lands in land use planning exceeded

nally, it dismissed the equal protection challenge.

The Tenth Amendment

In part III of the opinion, the court considered challenges based on the tenth amendment to the U.S. Constitution²⁷⁸ to section 515(d) and (e)²⁷⁹ of SMCRA. The court examined *National*

the congressional power. This challenge is buttressed by the congressional finding that primary regulatory responsibility should be in the states. 30 U.S.C.A. § 1201(f) (West Supp. 1979). The argument continues that the mining of coal is an intrastate problem; the sale and transportation of coal effects interstate commerce. *Cf. Hadacheck v. Los Angeles*, 239 U.S. 394 (1915), where the court held that a restriction on making bricks was not a restriction on mining clay; these activities were separate under the fifth amendment's taking clause. *But see* Federal Mine Safety and Health Act of 1977, P.L. 95-164, 91 Stat. 1290, 30 U.S.C.A. § 801 *et seq.* (West Supp. 1979).

Congress' answer to this contention is "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several states to improve and maintain adequate standards on coal mining operations within their borders . . ." 30 U.S.C.A. § 1201(g).

The *Virginia Surface Mining* court found commerce clause power for SMCRA because Congress had a rational basis for finding a regulatory scheme necessary to protect commerce. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

The nature of the controversy is heightened by the provisions of SMCRA requiring the states to promulgate regulatory programs similar to those of SMCRA. 30 U.S.C.A. § 1253. The penalties for not submitting an approved plan is that a federal plan will be imposed, 30 U.S.C.A. § 1254, and that no money will be available under the abandoned mine reclamation program, 30 U.S.C.A. § 1235(c), and for assistance in setting up a regulatory program. 30 U.S.C.A. § 1295. If the state does not "enforce" the approved program, OSM retains power to enforce it. 30 U.S.C.A. § 1254(b). If SMCRA was enacted in violation of the commerce clause, the effect of a state being "encouraged" to enact a mirror image of the federal program would be to wash out constitutional infirmity upon adoption. The regulations, except for federal monitoring, would be state actions.

On this issue, *Kaiser Aetna v. U.S.*, 100 S. Ct. 383 (1980) should be noted. The Court there stated that although Congress had not done so, "in light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a right of access to the [privately owned marina joined to a navigable bay] if it so chose." *Id.* at 390. (emphasis added). The Court had just upheld the right of the landowners to exclude the public under a taking argument. *Cf. National League of Cities v. Usery*, 426 U.S. 833 (1976). Further discussion of this issue is beyond the scope of this comment.

²⁷⁸ U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

²⁷⁹ 30 U.S.C.A. § 1265(d), (e) (West Supp. 1979).

*League of Cities v. Usery*²⁸⁰ and concluded it controlled the tenth amendment claim of infringement. It was, in fact, the source of the court's test: "Applying the holding of *National League of Cities*, congressional action alleged to be in contravention of the tenth amendment must be scrutinized to determine whether the legislation is directed to the states as states and usurps an 'integral governmental function.'"²⁸¹

The court questioned whether the SMCRA was directed at the states or at coal operators. It found the "pervasive effect" of SMCRA to be on state legislative authority and on state control of land within its boundaries.²⁸² Section 515, the court reasoned, interfered with essential decisions of state and local governments; the requirement that steep slope contour mining be returned to the approximate original contours deprived the state of control over economic development in land use planning.²⁸³ It considered the magnitude of economic disruption caused by the stringent requirements of the SMCRA and engaged in a balancing of interests.²⁸⁴ The court found that no harm would result to the federal government or to the environment in enjoining section 515 but, conversely, the economy of western Virginia would be drastically

²⁸⁰ 426 U.S. 833. In this case, the Court held that the provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. §§ 201-19 (West 1978) (FLSA), were inapplicable to state and local government employees, as well as inapplicable to employees of state maintained hospitals and schools, overruling *Md. v. Wirtz*, 392 U.S. 183 (1968).

The majority opinion phrased the inquiry as whether the provision of FLSA affected "functions essential to separate and independent existence." 426 U.S. at 845. Analysis rested heavily on the notion that essential state-supplied services by employees were being curtailed. See Michelman, *States' Rights and States Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172 (1977); Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities v. Usery*, 125 U. PA. L. REV. 665 (1977). It found that the state's separate and independent existence was threatened by FLSA, which would cause in its application fundamental changes in employment decisions by causing drastic budgetary reallocation.

²⁸¹ *Virginia Surface Mining* at 8.

²⁸² *Id.*

²⁸³ *Id.* at 10-11.

²⁸⁴ No balancing was acknowledged in *National League of Cities*. Justice Blackmun in his concurring opinion suggested the majority had done just that. See text at note 296, *infra*. The *Virginia Surface Mining* court stated that balancing was the appropriate test. *Virginia Surface Mining* at 13.

affected by its enforcement.²⁸⁵

The court's analysis of the effect of the SMCRA on the states "as states," illustrates the problem with that analysis in *National League of Cities*. *National League of Cities* concerned the applicability of the Fair Labor Standards Act's minimum wage to state and local governmental employees. Application of the federal act directly affected the local governments in their role as employers, in effect telling them what to pay. Even so, some question exists whether the court correctly reasoned that act applied to the state as a state rather than as an employer in the labor market.²⁸⁶ In *Virginia Surface Mining*, the court concluded that section 515 affected the states as states, passing over the end result of the SMCRA, which is, of course, the regulation of mining practices which the operator, not the state of Virginia, performs.²⁸⁷ To assert that the SMCRA affects the states and usurps part of the states' regulatory function is correct; many acts of Congress affect state regulatory decisions.²⁸⁸ But to assert that it affects the state as a state, dictating what practices a state may perform or how it may perform them, does not directly follow.

Further uncertainty exists as to whether SMCRA affects the state's ability to regulate intergovernmental functions. In this context, the court, in its opinion in *National League of Cities*, discussed the costs of implementing the Fair Labor Standards Act in California.²⁸⁹ The *Virginia Surface Mining* court made a similar comparison of the indirect effects of the SMCRA on the economy of western Virginia, both from a taxing and a private economic standpoint. The court, however, failed to mention the federal interest in the balance. It merely noted that the require-

²⁸⁵ *Id.*

²⁸⁶ 426 U.S. at 871-72 (Brennan, J., dissenting). "Can the States engage in business competing with the private sector and then come to the courts arguing that withdrawing those employees of those businesses from the private sector evades the powers of the Federal Government to regulate commerce?" *Id.* at 872.

²⁸⁷ See SMCRA § 101, 30 U.S.C.A. § 1201 (West Supp. 1979).

²⁸⁸ See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), where the Court upheld federal regulations in meat processing and flour milling and required California regulations to yield to effectuate the purposes and objectives of Congress.

²⁸⁹ The Court discussed significant economic impact of FLSA on California governments, 426 U.S. at 846-48; however, it reasoned that "particularized assessments of actual impact" was not crucial to resolution of this issue. 426 U.S. at 851. Justice Blackmun thought otherwise. See note 296, *infra*.

ments of section 515 are "not environmentally sound and [do] not serve the conservation interests of the federal government."²⁹⁰

The court's balancing seems to be not on questions of constitutionality as much as on policy.²⁹¹ Compliance with the SMCRA does not create the same situation as in *National League of Cities* where the state was told *directly* how to function in its role as an employer. The only similarity in the two cases is the eventual loss of revenue suffered by the governments — in the *National League of Cities* situation from direct interference, and in the SMCRA situation from loss of coal tax revenues. Whether this similarity is enough for the tenth amendment is doubtful.

The problem created by *National League of Cities* and illustrated in *Virginia Surface Mining* is from a new, substantive reading of the tenth amendment, heretofore viewed as having no content. Traditionally it was but "a truism that all is retained which has not been surrendered."²⁹² Under this view, if Congress had commerce clause power to regulate surface mining,²⁹³ the states had surrendered the power to Congress by the Constitution. *National League of Cities* found content in the tenth amendment for the first time.²⁹⁴ The problem in *Virginia Surface Mining* is how to read the holding of *National League of Cities*. If narrowly construed, the effect of *direct* intervention into state employer decisions is different than the SMCRA's effect on the states. If read broadly, however, the holding would not only strike the SMCRA, but would subject virtually all environmental legis-

²⁹⁰ *Virginia Surface Mining* at 13. Several questions are raised by these findings. On the state's side of the balance, the court found "this provision and the post-mining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevents the state from using its land for agricultural purposes, for construction of airports, schools, hospitals, and for other activities." *Id.* Query whether land affected by section 515, slopes of at least twenty degrees, would ever be able to be used for schools, airports and hospitals. This in most cases sounds like a complaint about regulation of mountaintop removal, § 515(c)(2), 30 U.S.C.A. § 1265(c)(2) (West Supp. 1979), not at issue in this case.

²⁹¹ 426 U.S. at 874 (Brennan, J., dissenting).

²⁹² *U.S. v. Darby*, 312 U.S. 100, 124 (1941).

²⁹³ *Virginia Surface Mining* at 4-6.

²⁹⁴ See *National League of Cities*, 426 U.S. at 857-76 (Brennan, J., dissenting).

lation to demise under the "reserved powers of the states."²⁹⁵ A formidable obstacle lies in the path of this broad interpretation. In *National League of Cities*, Justice Blackmun, concurring, stated: "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."²⁹⁶ This statement, coupled with the 5-4 vote in the case, indicates that in the case of environmental legislation, the Court would support the federal power. In this respect, subchapter V of the SMCRA appears to retain its vitality under the tenth amendment.

The Taking Issue

In part V of the opinion the court examined the claim that the requirements of section 515²⁹⁷ requiring return to approximate original contours of steep slope contour mining constituted a taking of property without just compensation under the fifth amendment of the United States Constitution. Section 522,²⁹⁸ dealing with the designation of lands unsuitable for mining, was also challenged on similar grounds. These challenges were the basis upon which the earlier preliminary injunction was issued.²⁹⁹

The court's primary focus was on *Pennsylvania Coal Co. v. Mahon*,³⁰⁰ where government action in prohibiting mining which would cause subsidence under dwelling places was found to be a taking of mineral rights. The proposed mining was from mineral rights reserved when the surface was conveyed for dwelling places to be built. The Court said that to stop the mining required con-

²⁹⁵ Cf. *D.C. v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub. nom.* *EPA v. Brown*, 431 U.S. 99 (1977), where quality control standards of a federal program were found to be in contravention of the tenth amendment where requiring enforcement with non-consenting states, with SMCRA, 30 U.S.C.A. § 1253 (West Supp. 1979).

²⁹⁶ 426 U.S. at 856 (Blackmun, J., concurring). The Virginia Surface Mining court did not agree. *Virginia Surface Mining* at 8, n.5.

²⁹⁷ 30 U.S.C.A. § 1265 (West Supp. 1979).

²⁹⁸ 30 U.S.C.A. § 1272 (West Supp. 1979).

²⁹⁹ *Virginia Surface Mining*, No. 78-0244-B (W.D. Va. Feb. 14, 1979).

³⁰⁰ 260 U.S. 393 (1922).

demnation: "For practical purposes, the right to coal consists in the right to mine it . . ." To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.³⁰¹ The diminution of value of the coal rights was viewed by the court as very significant in the taking question.

In *Virginia Surface Mining*, the findings of the court were that the approximate original contour requirement of section 515 and the unsuitable for mining designations of section 522 worked to effectively eliminate the possibility of mining the affected coal.³⁰² The court considered the three-part test of *Goldblatt v. Town of Hempstead*.³⁰³ whether the regulation is reasonable in light of the measure it is to control, the availability of less drastic controls and the loss which the owner suffers. The court concluded that in most cases, the requirement of section 515 could not be economically met or even met at all. Citing the reliance of the economy of the region on coal mining, the court found the effect of the regulations too drastic for acceptance in light of the countervailing policy of environmental protection.

Next the court focused on *Penn Central Transportation Co. v. City of New York*.³⁰⁴ In that case, New York City had declared Grand Central Station a landmark under protection of a landmark preservation act and subsequently denied Penn Central's request to build an office building onto the top of the station. The Court recognized that the restriction worked an uneven burden on the owner but nonetheless found on the facts of the case that the regulation was reasonable. Although the best use of the property was taken, the owners still enjoyed economic benefit from the station as it existed, as well as development rights transferable to other buildings as a result of the preservation act. Additionally, the entire public benefitted from the preservation of landmarks.

The *Virginia Surface Mining* court found two distinctions in *Penn Central*. One, a "reasonable return" was available on Grand

³⁰¹ *Id.* at 414.

³⁰² *Virginia Surface Mining*, *supra* note 299, at 12.

³⁰³ 369 U.S. 590 (1962). The fact that the regulation deprives the property of its most beneficial use does not make it unconstitutional. *Id.* at 592.

³⁰⁴ 438 U.S. 104 (1978).

Central Station even subjected to the restrictions, while no such return was available on coal rendered unmineable by sections 515 and 522. Second, while the present use of the station was not affected in *Penn Central*, the court concluded that present mining and plans for mining would be preempted by the SMCRA regulations.³⁰⁵ Thus, the court found the case distinguishable on its facts.

Two recent cases were considered: *Andrus v. Allard*,³⁰⁶ dealing with the regulation of ownership of certain bird parts, and *Kaiser Aetna v. United States*,³⁰⁷ dealing with the use of a marina attached to a public harbor. In *Allard*, the Court found no taking in the regulation of ownership of the bird parts acquired before the inception of the act. It concluded that although the owner of the artifacts could not sell them, he did not lose total economic benefit of ownership. He could still transport them, show them in an exhibit or donate them. A lessening of value alone was not enough to constitute a taking. No actual physical restraint was placed on the artifacts. The Court thereby distinguished *Pennsylvania Coal Co. v. Mahon* as constituting both a loss of economic benefit and a physical restraint against coal removal.³⁰⁸ *Kaiser Aetna* dealt with what the Court termed a fundamental property right—the right to exclude others.³⁰⁹ The

³⁰⁵ Except for the grandfather provision of 30 U.S.C.A. § 1272(a)(6) (West Supp. 1979).

³⁰⁶ 100 S. Ct. 318 (1979). This case dealt with regulations promulgated under the Eagle Protection Act, 16 U.S.C. § 668(a), and the Migratory Bird Treaty Act, 16 U.S.C. § 703. The regulations prohibited all but possession and transportation of parts of birds within the acts' coverage killed before the acts became effective. The regulations were challenged as a taking. The Court rejected the challenge and found the regulations reasonable.

³⁰⁷ 100 S. Ct. 383 (1979). A private lagoon in Hawaii was dredged and, with permission of the Corps of Engineers, joined with a navigable bay. The government sought to open the newly-created marina to the public. The Court said to open the marina to the public would require eminent domain proceedings.

³⁰⁸ *Andrus v. Allard*, 100 S. Ct. at 327, n.22. *But cf.* *Hadacheck v. City of Los Angeles*, 239 U.S. 394 (1915).

³⁰⁹ It is instead a case in which the owner of what once was a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, has invested substantial amounts of money in making improvements. The government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights

Court suggested another three-part test for taking cases, focusing upon the economic impact of the regulation, its interference with reasonable investment-backed expectations and the character of the government action. It found that in the balance of the three, if the public was to be allowed entrance to the marina, the government would have to pay for that right.

The *Virginia Surface Mining* court found both these cases in harmony with its finding of a taking. As *Allard* suggested, there was the loss of an economic benefit, as well as physical restrictions placed upon the coal. As *Kaiser Aetna* indicated, the interference with reasonable investment-backed decisions was absolute.

These findings indicate the trouble with precedent in the takings cases. As *Allard* teaches, “[r]esolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.”³¹⁰ Several distinctions can be made here. Foremost is the difference between mineral estate owners and fee estate owners. For mineral estate owners, *Pennsylvania Coal Co.* is very closely on point. If the coal cannot economically be mined, they own nothing. It is difficult to envision what would ever be a taking under the Constitution if this is not one. With regard to fee estate owners, however, although their rights to mine the coal have been restricted, they nonetheless retain some benefit from surface use, even on steep slopes.³¹¹ *Allard* in this view could be read as supporting the SMCRA because the fee owners still enjoy some benefits. *Kaiser Aetna* could also be supportive because the “right to exclude” is not involved, and the government has preconditioned mining on compliance. But *Kaiser Aetna’s* consideration of “reasonable investment backed expectations” cannot be ignored, and the fact that the rights to the coal were acquired to develop them into a profitable venture must be considered.

The parallel of *Penn Central* cannot be ignored. That opin-

that are commonly characterized as property—the right to exclude others. *Kaiser Aetna v. U.S.*, 100 S. Ct. at 391.

³¹⁰ *Andrus v. Allard*, 100 S. Ct. at 327.

³¹¹ *Cf. Andrus v. Allard*, where the Court discussed that the use of the artifacts was perhaps limited, but not completely destroyed. They could still be displayed or donated. Displaying the bird parts was obviously not what the owners had in mind, and the donative value is highly suspect. Nevertheless, the Court did base its decision partly on these facts.

ion contains a lengthy discussion and finding of dominating public purpose in landmark designation and preservation, even in the face of restrictions on ownership. The Court acknowledged the heavy burden placed on the landowners, but reasoned that the overriding public benefit justified the restrictions. The SMCRA has been the subject of lengthy public debate and ultimately legislative finding of such a public purpose.³¹²

Balancing of the interests is the consideration in the taking cases. The best function they serve as precedent are to factual discussions and distinctions. It is difficult to reconcile *Penn Central* with *Kaiser Aetna*; the only distinction seemingly existent is the public purpose override in *Penn Central*, although there the "right to exclude" was not involved. Sections 515 and 522 of the SMCRA serve valid public purposes—preservation of the environment and protection of the citizenry. But whether these goals rise above the inescapable fact that the owner of the mineral rights on these designated lands has essentially nothing left after their application is a hard question. The hard answer is perhaps that public purpose does not control. Distinctions such as that between mineral and fee owners are only superficial answers. Rights in different estates in land are not like rights in selling and owning bird parts; the fact that the estates can be severed and developed separately indicates not separate sticks in the bundle, but rather, it indicates separate bundles. Perhaps the direct protection of the health and safety of the public envisioned in section 522 can save it from a taking provision; section 515 does not enjoy such a distinction.

Procedural Due Process

In part VI of the opinion the Court considered challenges to sections 518, 521 and 525,³¹³ which are the enforcement provisions dealing with penalty assessments, cessation orders and subsequent hearings. At issue first was whether the authority of a field inspector to issue an immediate cessation order violated procedural due process rights of the operator under the fifth amend-

³¹² 30 U.S.C.A. § 1201 (West Supp. 1979); see Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1979 in Retrospect*, 81 W. VA. L. REV. 553 (1979).

³¹³ 30 U.S.C.A. §§ 1268, 1271(a), 1275 (West Supp. 1979).

ment.³¹⁴ A similar challenge to section 521 was made in *In Re Surface Mining Regulation Litigation*.³¹⁵ In deciding the motion for summary judgment by the industry plaintiffs, the court considered whether the initial program's application of section 521(a) violated due process. The court found that in providing for immediate relief following the order's issuance, SMCRA provided adequate protection.³¹⁶

³¹⁴ If an inspector on any federally authorized inspection determines that a condition or practice exists that is in violation of any requirement of SMCRA which causes either an imminent danger to the health or safety of the public or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources, he may immediately issue a cessation order. 30 U.S.C.A. § 1271(a)(2); 30 C.F.R. § 722.11 (1979). "Imminent danger to the health and safety of the public" is defined as a practice that can reasonably be expected to cause harm to the public outside the permit area. 30 U.S.C.A. § 1291(8). No definition of "significant imminent environmental harm" is given in SMCRA; a broad definition is in the regulations. 30 C.F.R. § 700.5 (1979) in effect makes the definition hinge on "an appreciable adverse impact not immediately reparable."

Once the order issues, section 525(a), 30 U.S.C.A. § 1275(a), gives the operator thirty days to appeal to the Secretary of the Interior. The Secretary has then thirty days to conduct a hearing and render a decision, section 525(b), 30 U.S.C.A. § 1275(b). In the interim, section 525(c), 30 U.S.C.A. § 1275(c), allows for temporary relief by the Secretary if 1) a hearing has been held locally where all concerned have had opportunity to be heard; 2) the applicant shows substantial likelihood he will prevail; and 3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm (ironically, the same test which warranted the issuance of the order, section 521(d)(2)).

Judicial review of an adverse decision by the Secretary is then available.

An informal review is also mandated by section 521(a)(5), 30 U.S.C.A. § 1271(a)(5), which requires a hearing at the minesite within thirty days of the order, with expiration of the order if the hearing is not held. OSM must render a decision based on this hearing within fifteen days. 30 C.F.R. § 722.15 (1979).

³¹⁵ 456 F. Supp. 1301, 1319-23 (D.D.C. 1978). See Case Comment, 81 W. Va. L. Rev. 785 (1979).

³¹⁶ In *Virginia Surface Mining*, the government made a plea of res judicata as to the plaintiffs Virginia Surface Mining and Reclamation Association and Commonwealth of Virginia as parties to the earlier decision in *In Re Surface Mining Regulation Litigation*. The court dismissed the plea, stating that the earlier challenge went to the issue of control of governmental action under the section, not whether due process violations had occurred. *Virginia Surface Mining*, *supra* note 299, at 29. The court also distinguished cases cited in *In Re Surface Mining Regulation Litigation* as not going as far toward a deprivation of private interests as had been demonstrated in this case under SMCRA. Since at least some of the parties, the town of Wise, Virginia, and the landowner, were not parties to *In Re Surface Mining Regulation Litigation*, the plea would not work a total bar to adjudication. Collateral estoppel might still be an issue in this case.

The *Virginia Surface Mining* court, however, disagreed with this decision. It found, based on the evidence presented, that orders had been issued under section 521(a) in a pattern of arbitrariness causing irreparable harm to the mining companies. The court attributed this to the language of the regulations which gave the inspector broad discretion in deciding what constituted "significant imminent environmental harm."³¹⁷ The due process test used to determine the propriety of a pre-hearing order was that laid out in *Mathews v. Eldridge*,³¹⁸ and consisted of three elements: 1) the private interests affected; 2) the risk of erroneous deprivation of such interests and the probable value of additional or substitute safeguards; and 3) the government's interest, including the burden of additional or substitute requirements. The court found, based on the evidence, that significant economic harm, many times irreparable, resulted from abuse of the procedure. It suggested a substitute procedure wherein OSM would apply directly to a district court for an order. The government's interest was never discussed, although the court concluded that the proceeding before a district judge would be a "relatively insubstantial burden"³¹⁹ to the government.

The three incidences of improper orders appeared to be the weightiest consideration of the decision. In all three cases the order to cease was later rescinded. By the time they were lifted, however, in one case the operator had gone bankrupt, in the second the operator incurred a substantial loss of coal in the ground due to the weather, and in the third an operation consisting of five hundred workers was down for two days. While these instances demonstrate that the cessation system can be improperly operated, they do not show that it is the system's fault which causes the loss. In fact, in two of the cases the post-order hearing caught the mistakes and corrected them exactly as it was designed to do. The finding of unconstitutionality in these cases seems to say that the system is improper because it did not see the subsequent loss. This argument fails. No pre-adjudication ces-

³¹⁷ 30 C.F.R. § 700.5 (1979). At least one author has viewed the problem as a statute narrowly drawn but a regulation drawn overly broad. Hemenway, *Selected Issues Under the Surface Mining Control and Reclamation Act of 1977*, 24 *Rocky Mtn. Min. L. Inst.* 233, 248-51 (1975).

³¹⁸ 424 U.S. 319, 335 (1976).

³¹⁹ *Virginia Surface Mining*, *supra* note 299, at 36.

sation or seizure would *ever* be allowable under this reasoning. Also, it must be remembered that procedural due process rules are shaped by the general risk inherent in the truthfinding process, not on exceptions.³²⁰

The biggest problem with the cessation order provision is the definition of "significant imminent environmental harm" in the regulations. There, under the definition of "significant"—"the harm is appreciable and not immediately reparable"³²¹ — the discretion of the inspectors to issue cessation orders seems overly broad for fifth amendment safeguards.³²²

Section 518 is clearly not a proper exercise of the police power. In order to challenge the Secretary's finding of fault and assessment of a penalty, that penalty must first be paid to the Secretary, subject to refund. The pre-hearing payment in order to get a hearing offends due process constraints.³²³

As sections 518, 521 and 525 are written, it appears that adequate due process is guaranteed. Only the regulatory definition of section 521 seems to offend the operators' general right to due process in dealing with violations.

Conclusion

The injunction issued by the court in *Virginia Surface Mining* has been stayed by Chief Justice Burger pending appeal of the decision.³²⁴ It is presumed that the government will exercise its right of appeal directly to the United States Supreme Court under 28 U.S.C. § 1252. There are at least two other challenges to the SMCRA similar to this case, *Star Coal Co. v. Andrus*³²⁵ and *State of Indiana v. Andrus*,³²⁶ which the court could consider in consolidation for a complete review of Subchapter V.

³²⁰ *Mathews v. Eldridge*, 424 U.S. at 344.

³²¹ 30 C.F.R. § 700.5 (iii) (1979).

³²² *But see* In Re Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1321, n.22 (D.D.C. 1978).

³²³ *Cf.* *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

³²⁴ *Andrus v. Virginia Surface Mining and Reclamation Association*, 48 U.S.L.W. 3601 (March 18, 1980).

³²⁵ No. 79-171-2 (S.D. Iowa Feb. 13, 1980) (Motion for Preliminary Injunction).

³²⁶ No. IP 78-500C (S.D. Ind. 1979) (pleadings stages).

The tenth amendment challenge to the SMCRA appears from the decisions to be insufficient. Likewise, the procedural due process complaint of the plaintiffs is directed not at the SMCRA, but at overeager inspectors. The problem that the Court must squarely face is the taking challenge. If the fifth amendment taking provision retains any meaning at all, the Court will have substantial trouble not finding a taking.

STAR COAL CO. v. ANDRUS

An interesting comparison to *Virginia Surface Mining and Reclamation Association v. Andrus*³²⁷ is the case of *Star Coal Co. v. Andrus*,³²⁸ in which the same basic constitutional challenges to the SMCRA were argued. The Federal district court for the Southern District of Iowa considered the propriety of a preliminary injunction to the enforcement of the SMCRA in Iowa on the grounds that the SMCRA was enacted in violation of the commerce clause and does not have a rational basis; that it contravenes the tenth amendment; that it constitutes a taking without just compensation; that it violates the equal protection, substantive due process and procedural due process guarantees of the fifth amendment; and that the imposition of a reclamation fee constitutes a bill of attainder.

The court first looked at the history and purpose of the SMCRA and noted the various stages of the initial regulatory program now in effect and the permanent programs to follow.³²⁹ In considering its jurisdiction to grant a preliminary injunction, the court determined that Star Coal's challenge to the SMCRA went directly to the constitutionality of the Act and that exhaustion of the full range of administrative remedies available was not required since neither administrative law judges nor review boards have the power to decide constitutional issues.³³⁰ The court also found, as did the court in *Virginia Surface Mining*, that the

³²⁷ No. 78-0224-B (W.D. Va. Jan. 3, 1980) (hereinafter cited as *Virginia Surface Mining*).

³²⁸ No. IP 78-500C (S.D. Iowa Feb. 13, 1980) (hereinafter cited as *Star Coal*). The discussion of this case is a continuation of the discussion of *Virginia Surface Mining*, *supra*. Therefore, the two should be read together.

³²⁹ *Star Coal*, *supra* note 328, at 2-6.

³³⁰ *Virginia Surface Mining*, *supra* note 327, at 4; see *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

constitutional issues were ripe.³³¹

The next matter addressed by the court was the proper standard for issuing a preliminary injunction under the SMCRA. Section 526(c) of the SMCRA specifically requires that, before an injunction can be issued, there must be notice and an opportunity to be heard, a showing of a substantial likelihood by the moving party that he or she will prevail, and a finding that public health and safety, as well as the environment will not be harmed.³³² A more traditional test of substantial likelihood of success and a possibility of irreparable injury has also been applied.³³³ The court noted *Virginia Surface Mining* and tentatively agreed that its interpretation of section 526(c) standards should be controlling.³³⁴ It determined that all parties had notice and opportunity to be heard and proceeded to examine the probable success on the merits of the individual claims.

As to the commerce clause challenge, the court found that Congress had commerce clause power to regulate surface mining and that the SMCRA was rationally based.³³⁵ Thus, both *Star Coal* and *Virginia Surface Mining* support the commerce clause basis of the act.

The court did not agree with *Virginia Surface Mining*, however, on the tenth amendment challenge, and found *National League of Cities v. Usery*³³⁶ distinguishable. It concluded that the SMCRA did not affect the "states as states," but rather affected private operations. Once the statute was found to be within the commerce clause, the fact that it preempts police power previ-

³³¹ *Star Coal*, *supra* note 328, at 7.

³³² SMCRA section 526(c), 30 U.S.C.A. § 1276(c) (West Supp. 1979). The standards for enjoining any order or decision of the Secretary are 1) all parties have been given notice and opportunity to be heard; 2) the person requesting such relief shows that there is substantial likelihood he will prevail on the merits; and 3) such relief will not adversely affect the public health or safety or cause significant environmental harm.

³³³ This is a more traditional test consisting mainly of two elements: 1) substantial probability of success on the merits; and 2) the possibility of irreparable injury if the relief is denied. *Star Coal*, *supra* note 328, at 8.

³³⁴ *Virginia Surface Mining & Reclamation Ass'n. v. Andrus*, 604 F.2d 312 (4th Cir. 1979), vacating No. 78-0224-B (W. D. Va. Feb. 14, 1979).

³³⁵ *Star Coal*, *supra* note 328, at 9-11.

³³⁶ 426 U.S. 833 (1976).

ously held by the state is irrelevant.³³⁷

Likewise, the taking challenges under subchapter V and the reclamation fee section 402³³⁸ were rejected. The court placed heavy emphasis on balancing the public policy interests served by requiring reclamation and the payment of a fee on coal being presently mined so that abandoned mine reclamation projects can be financed. The court distinguished *Pennsylvania Coal Co. v. Mahon*³³⁹ on this ground. Additionally, the court concluded that the congressional finding that surface mining and reclamation technology are now developed which can work in compliance "as far as practicable" with the SMCRA,³⁴⁰ rendered the taking question minimal. As a third factor, the court viewed this action of the SMCRA not as a physical invasion by government but rather as an interference "adjusting the benefits and burdens of economic life to promote the common good."³⁴¹

Star Coal challenged the congressional finding of section 101(e) in relation to the prime farmland requirements of section 510(d)(1),³⁴² mandating a topsoil reconstruction, which Star Coal claimed through the introduction of evidence, could not be accomplished twenty years after mining. The court answered this tender by stating that perhaps the regulations require a broad interpretation; nevertheless, the congressional finding of section 101(e) controlled to indicate no taking.

The court's reliance on the section 101(e) finding to the rejection of evidentiary findings may be too rigid. Great weight to congressional findings is certainly warranted given the lengthy congressional processes.³⁴³ But to disregard solid engineering studies in rigid deference may be too deferential, especially in light of the fact that Congress in enacting SMCRA wrote largely without the

³³⁷ Star Coal, *supra* note 328, at 12.

³³⁸ 30 U.S.C.A. § 1242 (West Supp. 1979).

³³⁹ 260 U.S. 393 (1922).

³⁴⁰ SMCRA section 101(e), 30 U.S.C.A. § 1201(e) (West Supp. 1979).

³⁴¹ Star Coal, *supra* note 328, at 14, *citing* Penn Central Transportation Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

³⁴² 30 U.S.C.A. § 1260(d)(1) (West Supp. 1979); *cf.* § 525, 30 U.S.C.A. § 1265 (approximate original contour for steep slopes); § 510(b), 30 U.S.C.A. § 1260(b) (alluvial valley floors).

³⁴³ *See, e.g.,* Note, 81 W. VA. L. REV. 775 (1978), for a summary of SMCRA legislative history.

benefit of stringent standards of reclamation being used at minesites, while presumably the *Star Coal* court was benefitted by such a reclamation experience.

Substantive due process and equal protection claims based on the fifth amendment were also rejected. The court found that Congress had a rational basis for discriminating between surface mining and underground mining³⁴⁴ in that findings indicate that surface mining has more adverse environmental effects than does underground mining.³⁴⁵

Finally, the court examined the procedural due process challenges to pre-hearing cessation orders of section 521³⁴⁶ and pre-hearing payment of penalties under section 518.³⁴⁷ It noted the result of similar challenges in *In re Surface Mining Regulation Litigation*³⁴⁸ and *Virginia Surface Mining*, and decided that *Virginia Surface Mining* was distinguishable as indicating abuses under section 521 as applied, but not as written.³⁴⁹ It reasoned that adequate safeguards were available in post-order hearings to protect aggrieved parties and agreed with the decision of *In Re Surface Mining* that the section was constitutional. The court did, however, make the same finding as that in *Virginia Surface Mining* that the conditions of section 518 providing for prepayment of civil penalties in order to obtain a hearing violated procedural due process.³⁵⁰

The court issued preliminary injunctions only as to one specific notice of violation and to the enforcement of section 518 prepayment of penalties. It found no substantial likelihood of success on the merits of any of the other constitutional challenges. Although this decision was only for a preliminary injunction, and thus the precedential value is not on a plane of *stare decisis*, it should not go unnoticed. It would be much more likely for the court to grant an injunction and later reverse itself than to deny

³⁴⁴ See, e.g., section 402(a), 30 U.S.C.A. § 1232(a) (West Supp. 1979) imposes a reclamation fee of \$.35 per ton on surface mined coal and \$.15 per ton on underground mined coal.

³⁴⁵ *Star Coal*, *supra* note 328, at 15-17.

³⁴⁶ 30 U.S.C.A. § 1271 (West Supp. 1979).

³⁴⁷ 30 U.S.C.A. § 1268 (West Supp. 1979).

³⁴⁸ 456 F. Supp. 1301 (D.D.C. 1978).

³⁴⁹ *Star Coal*, *supra* note 328, at 17.

³⁵⁰ *Id.* at 18-19.

an injunction and later grant one in light of the court's reliance on the substantial likelihood aspect of the section 526(c) test. The appeal of *Virginia Surface Mining*, however, may render all but the prime farmland taking issue moot.

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