



Volume 81
Issue 4 *The National Coal Issue*

Article 12

June 1979

Judicial Review of Regulations Promulgated under the Surface Mining Control and Reclamation Act of 1977--In Re Surface Mining Regulation Litigation

Joyce Fleming Ofsa
West Virginia University College of Law

David E. Godwin
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Courts Commons](#), [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Joyce F. Ofsa & David E. Godwin, *Judicial Review of Regulations Promulgated under the Surface Mining Control and Reclamation Act of 1977--In Re Surface Mining Regulation Litigation*, 81 W. Va. L. Rev. (1979).
Available at: <https://researchrepository.wvu.edu/wvlr/vol81/iss4/12>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

CASE COMMENTS

JUDICIAL REVIEW OF REGULATIONS PROMULGATED UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—

In Re Surface Mining Regulation Litigation

Congress enacted the Surface Mining Control and Reclamation Act of 1977¹ on August 3, 1977, which mandates that the environment be protected from the damaging effects of surface coal mining² and provides for a two-stage regulatory scheme³

¹ Surface Mining Control and Reclamation Act of 1977, §§ 101-908, 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978) [hereinafter referred to as the Act or the SMCRA].

² 30 U.S.C.A. § 1202 (West Supp. 1978) provides:

It is the purpose of this chapter to —

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this chapter;

(h) promote the reclamation of mined areas left without adequate reclamation prior to August 3, 1977, and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this chapter;

aimed at effectuating such environmental protection. Under the Act, surface mining operations are regulated initially by interim regulations which were issued by the Secretary of the Interior on December 13, 1977.⁴ These regulations control the industry while permanent regulatory programs are being developed and effectuated by the states, or by the Department of the Interior in the absence of state action.^{4,5}

The interim regulations promulgated by the Department of the Interior have been the subject of numerous and diverse legal challenges by a variety of plaintiffs including coal operators, the National Coal Association, the National Wildlife Association, and the states of Virginia and West Virginia, among others. In accordance with the Act, these challenges have been heard by the District Court for the District of Columbia.⁵

(j) provide a means for development of the data and analyses necessary to establish effective and reasonable regulation of surface mining operations for other minerals;

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

(l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations, in the exploration, extraction, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, minerals resources, and technology, and the establishment of an appropriate research and training center in various States; and

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

⁴ 30 U.S.C.A. § 1251 (West Supp. 1978) requires the two-stage regulatory scheme. Section 1251(a) provides that the Secretary is to promulgate interim regulations within ninety days of enactment and also provides the rulemaking process to be used in their promulgation. *Id.* Section 1251(b) provides that within one year the Secretary is to promulgate a permanent regulatory scheme and establish procedures and requirements for the preparation, submission, and approval of state programs. *Id.*

⁴ The interim regulations are found in 42 Fed. Reg. 62,639-716 (Dec. 13, 1977) (to be codified in 30 C.F.R. §§ 700, 710, 715-718, 720-723, 740, 795, and 830 (1978)), [all Federal Register citations hereinafter cited directly to the page upon which the material appears].

⁵ The jurisdiction of the District Court of the District of Columbia to hear these challenges is established in 30 U.S.C.A. § 1276(a) (West Supp. 1978). The court has issued two memorandum opinions and orders in regard to these challenges. The first opinion, *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978), decided May 3, 1978, consolidated twenty-two cases and ruled on motions for summary judgments and preliminary injunctions. The following determinations

In the August 24, 1978, opinion of *In Re Surface Mining Regulation Litigation*,⁶ the district court consolidated the twenty-four actions before it and ruled on the plaintiffs' motions for summary judgment. The court granted the motions made in regard to the

were made by the court in that opinion:

- a) that the regulations' basis and purpose statement was adequate, *Id.* at 333;
- b) that the Secretary gave due consideration to the economic impact of the regulations and that an economic impact statement was not required, *Id.* at 334;
- c) that the provisions regulating surface effects of underground mining, prime farmlands, spoil and waste disposal, and alluvial valley floors were properly included in the interim program, *Id.* at 336-38;
- d) that the Secretary was not required to include exemption and variance procedures in the regulatory scheme, *Id.* at 338-39;
- e) that the statute does not explicitly require that preexisting structures which meet the performance standards of the statute be reconstructed to meet the design criteria of the regulations and that such regulations requiring such reconstruction are enjoined, *Id.* at 339-40;
- f) that the regulation which specifies that permit revisions and renewals covered by the grandfather provision of the prime farmlands section of the statute was reasonable but that related provisions which impose performance standards on operations that are exempt from such standards under the grandfather provision are enjoined, *Id.* at 340;
- g) that the regulations concerning subsoil and topsoil handling are reasonable, *Id.* at 341;
- h) that the regulations imposing standards on dams merely impounding wastes are enjoined, *Id.* at 341;
- i) that the regulation concerning blasting was upheld, *Id.* at 342;
- j) that the regulation implementing the small operators exemption was reasonable, *Id.* at 342-43;
- k) that the regulations governing the performance standards of sedimentation ponds are enjoined until the Secretary publishes "final interim regulations," *Id.* at 343;
- l) that the regulations setting forth numerical effluent limitations on discharges from areas disturbed by surface mining operations are enjoined to the extent that the standards supersede, amend or modify the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1175 (1970), *Id.* at 343-44;
- m) that the Secretary's refusal to allow the use of the rock core drainage methods in head-of-hollow or valley fills was reasonable, *Id.* at 344-45;
- n) that the regulations which in certain situations require letters of financial commitment from third parties are reasonable, *Id.* at 345; and
- o) that the limited variances allowed by the regulations are not contrary to the mandates of the statute and that the Secretary's action in this regard was reasonable, *Id.* at 346.

The second opinion, also entitled *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978), decided August 24, 1978, is the subject of this commentary.

⁶ 456 F. Supp. 1301 (D.D.C. 1978) [hereinafter cited as *Regulation Litigation*].

regulations concerning prime farmlands⁷ and drawdown and free-board requirements for waste dams.⁸ The court upheld all of the other regulations challenged.⁹ However, certain regulations con-

⁷ Section 716.7(a)(1) defines prime farmlands, in part, as lands which have been used for the production of cultivated crops for at least five years out of twenty years preceding the date of the permit application. 42 Fed. Reg. 62,693 (1977) (to be codified in 30 C.F.R. § 716.7(a)(1)). The Secretary explained that the five out of twenty requirement was necessary to include lands used for cultivation in a long-term rotation. The court, however, enjoined the regulation remanding it to the Secretary because it was not adequately explained in the basis and purpose statement nor was it adequately supported in the administrative record. 456 F. Supp. at 1312.

⁸ The plaintiffs challenged two sections of the regulations which set standards for the construction of waste dams. These sections required that the waste dam be capable of evacuating 90% of the volume of water stored during the design precipitation event within ten days, and that there be three feet between the top of the dam and the surface of the water impounded. 42 Fed. Reg. 67,688-89 (1977) (to be codified in 30 C.F.R. §§ 715.18(b)(3)(ii), (vii)). While the defendants were able to show ample support for these requirements in their brief, it appears that the Secretary resolved some differences of opinion and made several policy judgments that were not disclosed in the basis and purpose statement. The Secretary, therefore, was required to reconsider the regulations after accepting additional comments. 456 F. Supp. at 1316-17.

⁹ The court made the following determinations in favor of the Secretary:

a) the use of terracing is to be limited and must be approved by the regulatory authority, 456 F. Supp. at 1309;

b) toxic, acid forming and combustible materials must be treated to neutralize toxicity or covered with a minimum of four feet of nontoxic and noncombustible material, *Id.* at 1309-10;

c) the Secretary's provisions regulating underground mines in the areas of valley fill underdrains, soil compaction and cover of toxic materials are proper and reasonable, *Id.* at 1312-13;

d) surface mined lands must be restored to a condition approximating that which would have existed prior to mining had the lands been properly managed (without regard to the actual condition prior to mining operations), *Id.* at 1313;

e) the definition of an aquifer was upheld, *Id.* at 1313;

f) none of the interim regulations concerning water pollution amend, supercede or repeal any of the provisions of the Federal Water Pollution Control Act, *Id.* at 1313-15;

g) road gradient requirements were upheld, *Id.* at 1315-16;

h) the decibel limit for air blasts caused by the use of explosives was upheld as established by the regulations at a 128 decibel linear peak, *Id.* at 1317;

i) maximum peak particle velocity limitations of one inch per second at the immediate location of dwellings and certain types of buildings were upheld for explosive blasts, *Id.* at 1317;

j) warrantless search provisions of the regulations as qualified by the Secretary were upheld, based primarily on the coal industry's status as a "pervasively regulated industry," *Id.* at 1317-19;

cerning buffer zones¹⁰ and head-of-hollow fills,¹¹ while being upheld and allowed to remain in force, were remanded to the Secretary for reconsideration in light of additional data and comments.

In promulgating the interim regulations, the Office of Surface Mining utilized the informal rulemaking process provided by the

k) the Secretary will be able to order the cessation of coal operations without prior notice and a hearing, *Id.* at 1319-21;

l) hearing procedures after a cessation order is issued are adequate, *Id.* at 1321-23;

m) an operator will not be allowed an extension past the ninety day period for abatement even if good cause is shown, *Id.* at 1323;

n) past corrected violations can be considered in a finding of a pattern of violations sufficient to revoke a permit, *Id.* at 1323-24;

o) regulations concerning the enforcement of the provisions of the interim regulatory program as to Indian lands were upheld, *Id.* at 1324-26;

p) a permit to mine on Indian lands means essentially "approval" by the Secretary, *Id.* at 1326; and

q) decisions of the court as to the interim regulations will apply to "overlapping" sections that are in the provisions of the Indian lands regulation, *Id.* at 1326.

¹⁰ The plaintiffs challenged the regulation which prohibits operators from disturbing land within 100 feet of an intermittent or perennial stream unless authorized by the regulatory authority to do so. 42 Fed. Reg. 62,686 (1977) (to be codified in 30 C.F.R. § 715.17(d)(3)). The court found that the Government's brief pointed to ample support in the administrative record but that the certified index in the record was deficient in that it had not listed some of the sources relied upon by the Government. The court refused to enjoin the regulation but instructed the Secretary to accept additional comments from the public concerning these sources omitted from the index and to reconsider the regulation in light of the additional comments. 456 F. Supp. at 1315.

¹¹ The plaintiffs attacked several provisions which regulate the use of valley and head-of-hollow fills for spoil disposal. 456 F. Supp. at 1310. The regulations were supported by an "ongoing study," 42 Fed. Reg. 62,647 (1977), a 1977 interim report concerning valley and head-of-hollow fills prepared by the consulting firm of Skelly and Loy. SKELLY & LOY, ENVIRONMENTAL ASSESSMENT OF SURFACE MINING METHODS, HEAD-OF-HOLLOW FILL AND MOUNTAIN REMOVAL (Interim Report 1977). The court, limited to reviewing the record before the Secretary, upheld the regulation but required the Secretary to reconsider the regulation in light of a 1978 report by Skelly and Loy which supplemented and updated the 1977 report. SKELLY & LOY, ENVIRONMENTAL ASSESSMENT OF SURFACE MINING METHODS, HEAD-OF-HOLLOW FILL AND MOUNTAIN REMOVAL (Interim Report 1978). The plaintiffs also challenged provisions concerning the construction of underdrains and the compaction of soil in valley fills. 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. §§ 715.15(b)(6), (7)). The court found these regulations to be reasonable and to be adequately supported by the record and therefore upheld them. 456 F. Supp. at 1312. The court, however, required that these regulations also be reconsidered in light of the 1978 Skelly and Loy report.

Act.¹² Under the Act, the District Court for the District of Columbia has sole jurisdiction to review this rulemaking process.¹³ The district court, pursuant to section 526(a)(1) of the Act, used the "arbitrary, capricious, or otherwise inconsistent with law" standard of review.¹⁴ This standard is a highly deferential one which presumes the agency's action to be valid and forbids the court from substituting its judgment for that of the agency.¹⁵ The standard requires that the agency's action be rationally "based upon a consideration of the relevant factors"¹⁶ and, therefore, the court must make a "searching and careful" review of the facts.¹⁷

Generally, the appropriate degree of judicial scrutiny a court should employ when reviewing administrative regulations has been described by the Circuit Court of Appeals for the District of Columbia as requiring the reviewing court to

¹² 30 U.S.C.A. § 1251(a) (West Supp. 1978) provides:

[T]he Secretary shall promulgate and publish in the Federal Register regulations covering an interim regulatory procedure for surface coal mining and reclamation operations . . . which shall be concise and written in plain, understandable language shall not be promulgated and published by the Secretary until he has —

(A) published proposed regulations in the Federal Register and afforded interested persons and State and local governments a period of not less than thirty days after such publication to submit written comments thereon;

(B) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those regulations promulgated under this section which relate to air and water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended, and the Clean Air Act, as amended; and

(C) held at least one public hearing on the proposed regulations. The date, time, and place of any hearing held on the proposed regulations shall be set out in the publication of the proposed regulations. The Secretary shall consider all comments and relevant data presented at such hearing before final promulgation and publication of the regulations.

¹³ 30 U.S.C.A. § 1276(a)(1) (West Supp. 1978).

¹⁴ *Id.* This section states in part that "[a]ny 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." This is in accord with the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

¹⁵ See *American Fed'n of State, County and Mun. Employees Local 100 v. Cleveland*, 484 F.2d 339, 346 (6th Cir. 1973). See also Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORN. L. REV. 375 (1974).

¹⁶ *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁷ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function.¹⁸

This is accomplished by reviewing the informal record which consists of all of the data before the agency at the time the agency action was taken.¹⁹

Ordinarily, upon reviewing an agency's regulations, a court will either: 1) find that the agency's regulation is reasonable and enforce it; or 2) find that the regulation is "arbitrary, capricious, or inconsistent with law" and enjoin it.²⁰ In *Regulation Litigation*, however, the district court employed an innovative procedure. As an alternative to either upholding or enjoining the regulations, the court remanded regulations for reconsideration while leaving them in force.

The court found authority for such a procedure in *Environmental Defense Fund, Inc. v. Costle*,²¹ wherein the Circuit Court of Appeals for the District of Columbia upheld regulations which were promulgated by the Environmental Protection Agency under the Safe Drinking Water Act.²² The regulations had been challenged as being too lenient in light of scientific data which had been developed and published subsequent to the regulations' promulgation. Although the *Costle* court did not utilize the new data in its review of the regulations, it remanded the administrative record to the agency to assess the new findings and to consider possible amendments to the regulations.²³ In enforcing the regulations while remanding the administrative record for reconsideration, the court relied upon the broad statutory authority of Chapter 28, section 2106 of the United States Code.²⁴

¹⁸ *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).

¹⁹ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). See also Wright, *supra* note 15, at 390.

²⁰ Administrative Procedure Act, § 2, 5 U.S.C. § 706 (1976).

²¹ 578 F.2d 337 (D.C. Cir. 1978).

²² 33 U.S.C. §§ 1151-1175 (1970).

²³ 578 F.2d 337, 346 (D.C. Cir. 1978).

²⁴ The statute provides:

Costle is a logical extension of cases which have dealt with rulemaking that concerns scientific factual questions which the scientific community has not yet answered definitively.²⁵ In *Ethyl Corp. v. Environmental Protection Agency*²⁶ the Circuit Court of Appeals for the District of Columbia held that

[t]he Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like . . . [A] conclusion so drawn—a risk assessment—may, if rational, form the basis for health-related regulations²⁷

In *Ethyl* and other cases, the courts have upheld agency regulations as reasonable and not "arbitrary, capricious, or inconsistent with law" when based upon assessments and policy judgments.²⁸ But the court in *Costle* went a step further and not only upheld the regulations but also remanded the administrative record for further consideration by the agency in light of new data. Confined to considering only the administrative record as it appeared at the time the regulation was promulgated, the court found the regulation to be reasonable. Yet, the court also recognized that the new data was significant and that the area of law was one in which knowledge and technology are rapidly expanding. The court concluded that a remand of the regulation was necessitated by the aforementioned factors to force the agency to reconsider it in light

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceeding to be had as may be just under the circumstances.

28 U.S.C. § 2106 (1976). This procedure has been held applicable to judicial review of administrative agency orders. See *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971).

²⁵ *Ethyl Corp. v. EPA*, 541 F.2d 1, 20-24 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976); *Industrial Union Dept. v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974); *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973). See also Bazelon, *Coping with Technology Through the Legal Process*, 62 CORN. L. REV. 817 (1977).

²⁶ 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1978).

²⁷ *Id.* at 28.

²⁸ See note 24 *supra*.

of the subsequent data. The court therefore ordered the agency to report to the court within sixty days regarding significant changes and to advise the court of its determinations as to whether it planned to propose amendments to the interim regulation in view of the newly acquired data.²⁹

The facts of *Regulation Litigation* and *Costle* are distinguishable. In *Costle*, the court of appeals was presented with new data not in existence at the time the challenged regulation was promulgated. In *Regulation Litigation*, however, the district court was presented with a 1978 update³⁰ of an ongoing study,³¹ which had been cited as supporting evidence for several provisions which regulate the use of valley and head-of-hollow fills for spoil disposal.³² The plaintiffs asserted that the additional facts in the 1978 update undermined the agency's basis for the regulations.³³ The district court evidently considered that any distinction between this update and the new scientific data of *Costle* was insignificant. The court found that the regulations concerning valley and head-of-hollow fills were lawful and enforceable but, as in *Costle*, determined that the revelations of the update report lent credibility to the plaintiffs' assertions and warranted a reconsideration by the agency.

In *Regulation Litigation*, the "new data" idea was not the only basis for the district court's decision to uphold the regulations while remanding them for reconsideration. In reviewing the buffer zone requirement of subsection 715.17(d)(3) of the regulations,³⁴ the district court enlarged the application of the procedure of enforcing a regulation pending reconsideration. The district court found ample support for the regulation in the administrative record, but the sources relied upon in the government's brief were not listed in the certified index.³⁵ Instead of enjoining the regulation

²⁹ 578 F.2d 337, 346 (D.C. Cir. 1978).

³⁰ See SKELLY & LOY, ENVIRONMENTAL ASSESSMENT OF SURFACE MINING METHODS, HEAD-OF-HOLLOW FILL AND MOUNTAIN REMOVAL (Interim Report 1978).

³¹ See SKELLY & LOY, ENVIRONMENTAL ASSESSMENT OF SURFACE MINING METHODS, HEAD-OF-HOLLOW FILL AND MOUNTAIN REMOVAL (Interim Report 1977).

³² 456 F. Supp. at 1310-11.

³³ *Id.* at 1310-12; see State of West Virginia Memorandum in Support of Plaintiff's Motion to Supplement the Record or in the Alternative, to Lodge Relevant Document, July 18, 1978 at 2. *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978).

³⁴ 42 Fed. Reg. 62,686 (1977).

³⁵ 456 F. Supp. at 1315.

because of this procedural defect, the court deemed it appropriate to enforce the regulation with the requirement that the agency receive additional comments and reconsider the regulation.³⁶ The district court found the regulation to be reasonable and not "arbitrary, capricious, or inconsistent with law."³⁷ It is also apparent that the court considered the presence of a variance procedure as a factor in the balancing of potential harms. With the presence of a variance procedure, the likelihood of harm resulting to the plaintiffs pending reconsideration of the regulation was minimal even if the regulation was left in force.

The court's decision with respect to the buffer zone requirement evinces a determination that the procedure of upholding regulations, while simultaneously remanding them for reconsideration, is appropriate not only in the face of new scientific data, but also when an agency has failed to comply with a required procedure in promulgating the regulation. In *Regulation Litigation* the procedural failure was the denial of the public's opportunity to comment fully on some source or data relied upon by the agency. Since the agency failed to abide by required procedure, the public was deprived of the opportunity to participate meaningfully in the rulemaking process by submitting comments to the agency. Ordinarily, such a procedural failure by the agency is fatal, and the regulation is regarded as null and void.³⁸ The district court, however, viewed the procedural failure of the agency to be merely a technicality. Considering the otherwise ample support for the regulation in the administrative record and the availability of the variance procedure to avoid potential harm to the plaintiffs, the court concluded that the procedural defect could be cured by remanding the regulation for reconsideration while allowing it to remain in force.

The court, however, did not extend the procedure of upholding the regulation while also remanding it for reconsideration when it found more than technical failures in the promulgation of a regulation. Such was the situation in the review of subsections 715.18(b)(3)(ii) and (vii) which involve drawdown and freeboard requirements for waste dams.³⁹ The court found that although the

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *Bowman Transp., Inc. v. Arkansas-Best Freight, Inc.*, 419 U.S. 281 (1974); *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976); *Associated Indus. v. United States*, 487 F.2d 342 (2d Cir. 1973).

³⁹ 42 Fed. Reg. 62,688-89 (1977).

Government's brief indicated that the regulations were reasonable and adequately supported by the administrative record, the Secretary had resolved some differences of opinion and made several policy judgments that were not disclosed in the basis and purpose statement.⁴⁰ The court determined that the agency had given only cursory discussion in the basis and purpose statement as to the drawdown and freeboard requirements and that the authorities cited by the Secretary were not as supportive as indicated.⁴¹ Because of this procedural defect and because a balancing of harms to the plaintiffs and to the environment was favorable to the plaintiffs' position, the district court enjoined enforcement of these requirements and remanded them for additional comments in light of the disclosure of the decisions and policy judgments made by the agency.⁴² Although the court considered this matter to be similar to that which it faced in reviewing the buffer zone requirement, it considered the determinative factor in the differing results to be the balancing of harm.⁴³ In these two instances, the presence or absence of a variance provision was the most significant consideration in the balancing of harm. The presence of a variance provision in the buffer zone requirements was decisive in the court's determination that there was little likelihood of harm to the industry plaintiffs if the requirements were left in force pending reconsideration. The lack of a variance provision in the drawdown and freeboard requirements meant that absolute compliance would be necessary if they were left in force. The costs that the industry plaintiffs would have incurred if the requirements were later amended were substantial when compared to the possible harm that might result to the environment and to the public if the requirements were enjoined pending reconsideration.⁴⁴

The district court has applied an innovative approach in its review of the agency's informal rulemaking. The practice of remanding a regulation for reconsideration in light of new or additional data while allowing the regulation to remain in force appears especially appropriate in surface mining, an area involving both significant environmental and economic implications and rapid

⁴⁰ 456 F. Supp. at 1316.

⁴¹ *Id.*

⁴² *Id.* at 1316-17.

⁴³ *Id.* at 1316.

⁴⁴ *Id.* at 1316 n.16. The court placed much reliance upon the fact that the Mine Enforcement and Safety Administration regulations would adequately protect the public safety and environment.

legal and technological advancements. The district court has also demonstrated its willingness to uphold regulations even when the agency has failed to follow the procedural dictates of the Act. The court employed a balancing of harms, and the result of this balancing process was given great weight by the court in its consideration of procedurally defective regulations. The buffer zone regulations were enforced, despite a technical procedural defect, in light of the presence of a variance procedure which could operate to protect the plaintiffs from harm while the regulations were being reconsidered. The drawdown and freeboard regulations, however, were enjoined because it was found that the public would not suffer significantly if the regulations were enjoined and that the plaintiffs would be put to considerable expense if the regulations were upheld but later amended.

While the court's actions are not in strict accord with the traditional rules and procedures under the Administrative Procedure Act,⁴⁵ they are authorized under the broad provision of Chapter 28, section 2106 of the United States Code.⁴⁶ The procedure of remanding a regulation for reconsideration while enforcing it is a half-measure, compromising between unqualified enforcement and injunction. The district court's use of this compromise in *Regulation Litigation* appears to be appropriate and justifiable. In the area of "new data," a court cannot properly enjoin the regulation if it is reasonably based on the "old data," so the remand for reconsideration seems to be the only appropriate alternative for a court that believes the regulations concerned may not be adequately fulfilling their purpose in light of the new information. In the area of procedurally defective regulations where the defect is relatively insignificant, it seems appropriate to allow the procedural defect to be cured by reconsideration while enforcing the regulation if the public interest is best served by such curative measure. The balancing of harms is an appropriate test to make this determination of the public interest.

The innovative procedure adopted in *Regulation Litigation* interjects the court's equitable discretion into the conventional judicial review of administrative rulemaking. This equitable discretion can be used to provide a more just resolution of disputes between conflicting interests. In order for this procedure to serve

⁴⁵ 5 U.S.C. §§ 551-559 (1976).

⁴⁶ 28 U.S.C.A. § 2106 (West Supp. 1978).

its intended purpose, however, it is incumbent upon the agency to which a regulation is remanded for reconsideration to follow through with a sincere and diligent reexamination of the regulation. This good faith reexamination is necessary because the procedure has no inherent coercive or binding effect.

Joyce Fleming Ofsa
David E. Godwin

