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Vincent P. Cardi

West Virginia University College of Law

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STRIP MINING AND THE 1971 WEST VIRGINIA SURFACE MINING AND RECLAMATION ACT

VINCENT P. CARDI*

This article will cover to a limited extent the vocabulary and physical process of strip mining,¹ and its cost to society and to people individually through direct damage to people, property, and the public environment. But the main purpose of this article is to, (1) explain the basic approach of the 1971 Surface Mining and Reclamation Act² passed by the West Virginia Legislature, (2) identify the legal questions raised by the Act, and (3) suggest interpretations and applications of the Code language that would answer some of these questions. This article will not discuss several major questions arising under the 1971 Act, such as the constitutionality of the application of the Act to existing strip mining operations,³ the constitutionality of

* A.B., Ohio State; J.D., 1967, Ohio State; LL.M., 1971 Harvard; member of the faculty at the West Virginia University College of Law since 1967, specializing in the area of Environmental Law.

¹ Since the West Virginia Code uses the term "surface mining," [see W. VA. CODE ch. 20, art. 6, § 2(k) and (1) (Michie Supp. 1972)] it might be said "surface mining" is the only proper term and "strip mining" is a derogatory one used by opponents of this method of coal mining. "Strip mining" is used here because it is the term used by most people in conversation and most commonly by the news media. See Morgantown Dominion News, Sept. 12, 1971, § B, at 5; N.Y. Times, Aug. 28, 1972, at 8. It cannot really be said that one term is more accurate than the other. To mine the coal from the "surface," the seam must first be exposed by "stripping" the soil and remaining overburden away from the top of the coal. It might be added that at least one dictionary contains the term "strip mining," [RANDOM HOUSE DICTIONARY 1408 (Unabr. 1967)] but no reference to "surface mining"; and also the United States Department of Interior uses the term "strip mining" to describe one of the five basic methods of recovering minerals from the surface. U.S. DEP'T OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 33 (1967).

² W. VA. CODE ch. 20, art. 6 (Michie Supp. 1972).

³ W. Va. Dept. Nat. Res. Regs. Ser. VII, § 3.01 (1971), provides that "[a]ny operator holding a valid surface mining permit issued prior to the effective date of these regulations, shall within 60 days after the effective date thereof, convert such permit and the bond . . . to comply with all of the provisions of Article 6, Chapter 20, . . . as amended."

The application of this section has been challenged by nine strip mining companies in a law suit filed in the West Virginia Supreme Court of Appeals. The Charleston Gazette, Apr. 26, 1972, § A, at 17. The West Virginia court refused to docket the case. Morgantown Dominion News, May 3, 1972, § A, at 1.

some of the limitations on permit areas contained in the Act,⁴ and the constitutionality of the moratorium on the issuance of new strip mining permits in twenty-two West Virginia counties.⁵ This article will not discuss the primary legal question running throughout the public debate on strip mining, *i.e.*, whether the public can constitutionally abolish strip mining without compensating the owners of mineral rights for the coal that they cannot recover by other mining methods.

I. THE STRIP MINING PROCESS

Methods used to recover minerals from, at, or near the surface are generally classified as, (1) open pit mining, (2) dredging, (3) hydraulic mining, (4) area or contour strip mining, and (5) auger mining.⁶

Open pit mining is used where the amount of overburden to be removed is proportionately small compared with the amount of minerals to be recovered. Because of this, each mine may produce an extraordinary amount of usable minerals over many years from a relatively small area of the surface. Stone quarries and sand pits are examples of open pit mines. Although they leave a gaping hole on the surface of the earth, and one out of ten is filled with water, they do a minimal amount of damage to the area. However, coal beds are comparatively thin,⁷ and the average surface coal mine has a relatively short life. Thus an open pit mine is not suited to the mining of coal.

⁴ W. VA. CODE ch. 20, art. 6, § 11 (Michie Supp. 1972).

⁵ W. VA. CODE ch. 20, art. 6A, § 1 (Michie Supp. 1972), provides: Commencing on the effective date of this section . . . and ending two years from such date, no new permits, including prospecting permits, shall be issued under the provisions of article six . . . of this chapter for the surface mining of coal in any county where no surface mining existed under lawful permit during the calendar year one thousand nine hundred seventy: Provided, however, that if in any such county any application for a permit was made prior to the first day of January, one thousand nine hundred seventy-one, such application shall be processed and granted or refused, according to the provisions of this article as if this section had not been enacted.

Although this section did lapse by its own terms on March 13, 1973, it remains as precedent for the state's right to abolish strip mining without providing compensation.

⁶ This and the following description of surface mining methods are taken generally from U.S. DEP'T OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT (1967). A very detailed reference text on the science and business of strip mining written by and for the industry is SURFACE MINING (E. Pfeider ed. 1968). Although it is a technical treatise, much of it can be understood by the layman and is helpful in gaining an understanding of strip mining operations.

⁷ The United States average is about 5.1 feet of bituminous coal and lignite strip mined in 1960. U.S. DEP'T. OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 34 (1967).

Dredging operations are used for sand, gravel, gold, and other minerals. These operations utilize clamshells, and draglines mounted on barges or on shore near the water-filled mining pit. Hydraulic mining employs a powerful jet of water to erode a bank of earth. The ore-bearing earth is then washed through containers and the desired mineral — often gold — is separated by differences in specific gravity. None of these mining methods are suitable for coal.⁸

Surface mining for coal in West Virginia accounts for ninety-eight percent of the total disturbed acreage. The remaining two percent results from mining for stone, gravel, sand, clay, and iron ore.⁹ Surface mining for coal is done almost exclusively by auger mining, and area and contour strip mining.

Area strip mining usually is practiced on relatively flat terrain. A trench, or "box cut," is made through the overburden¹⁰ to expose a portion of the coal seam, which is then removed. As this trench is cut, the overburden is dropped along the side of the trench away from the field of coal, forming a long narrow hill of loose spoil¹¹ sometimes over fifty feet high. This first cut in the soil will often extend the length of the coal seam to the limits of the operator's property. The overburden, which may range in thickness from several feet to over a hundred feet, is often removed by a giant shovel. The coal is removed with a much smaller shovel or a front end loader and dropped into the bed of a heavy truck that carries it away.

⁸ As for hydraulic mixing, the value of coal per ton does not warrant the effort and high cost of hosing down a mountainside. In addition, coal is found in solid seams and thus can be broken off in pure chunks allowing easier methods of recovery.

Recently there have been several coal dredging operations in West Virginia, one in the vicinity of the Tug River. The West Virginia Surface Mining and Reclamation Act prohibits surface mining within one hundred feet of any public stream or lake but specifically exempts dredging from this one hundred feet restriction. W. VA. CODE ch. 20, art. 6, § 11 (Michie Supp. 1972). But dredging operations are not exempt from the prohibition found in the same section against any strip mining operations that will constitute a hazard to a public stream or lake. It is hard to imagine a dredging operation that would not cause the dangers prohibited in section eleven. *Id.*

⁹ This compares with 81.5% of the total disturbed acreage in Pennsylvania, 77% in Ohio, 8.7% in Maryland and 41% of all land disturbed by surface mining nationwide. U. S. DEP'T. OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 110 (1967). There are, of course, local regions in West Virginia, particularly in the eastern panhandle where surface mining for sand and gravel causes the main disturbance to the surface.

¹⁰ "Overburden shall mean the earth, rock and other materials lying in the natural state above a mineral deposit before or after excavation." W. Va. Dep't Nat. Res. Regs. Ser. VII, § 2.31 (1971).

¹¹ "Spoil shall mean all overburden material removed or displaced by excavating equipment, blasting or other means." *Id.* § 2.40.

Once the first cut is completed, a second trench is cut parallel to the first trench. As each succeeding parallel cut is made, the spoil is deposited in the cut just previously excavated. The final parallel cut in the field leaves an open trench as deep as the thickness of the overburden plus the coal recovered, bounded on one side by the last spoil bank resting on the floor of the pit, and on the other by the undisturbed highwall.¹²

Frequently this final cut may be a mile or more from the starting point of the operation. Unless graded or leveled, the area resembles a gigantic washboard, with the crests of the spoil pile ridges fifty feet or higher, fifty to one hundred feet apart, and with side slopes varying from seventeen to thirty-nine degrees.¹³ While the rate of erosion on these spoil banks is comparable to that of contour mining, a large percentage of the sediment is retained in depressions on the site. For this reason, streams and adjoining lands are not as damaged by area strip mining as by contour strip mining. However, this does not mean that the damage is not often severe.

Contour strip mining combined with auger mining is the primary method of mining coal on the slopes and mountains of West Virginia where eighty-five percent of the land has a grade of at least one foot in three.¹⁴

Area stripping is not suited to slopes of more than ten degrees because in any given area the overburden quickly becomes too deep to profitably remove. Therefore, the machines will work to a given point on the edge of a coal seam in the mountain until the overburden becomes too thick to remove. Then the machines will begin to move along the edge of the seam around the side of the mountain following the natural contours of the land. From this comes the term "contour" stripping.¹⁵

To prepare a site for a contour strip mining operation, small bulldozers, front-end loaders, and power shovels construct an access road to the area to be stripped. They then start the stripping by mak-

¹² "Highwall shall mean the vertical or near vertical wall consisting of the exposed strata after excavating operations." *Id.* § 2.24.

¹³ U.S. DEP'T OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 34, 54 (1967).

¹⁴ H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 22 (1963).

¹⁵ "Contour surface mining shall mean the removal of overburden and the mining of a mineral that normally approaches the surface at approximately the same elevation, generally a contour bench resulting." W. Va. Dep't Nat. Res. Regs. Ser. VII, § 2.12 (1971).

ing a horizontal shelf called a "bench"¹⁶ on the side of the slope. This provides larger machines with a safe, level working area. The soil and minerals removed from the slope to make the bench are pushed or dumped over the outer edge of the emerging shelf. This loose mixture of dirt, rocks, ore, broken trees, and whatever else made up the surface (hereinafter referred to as "spoil") forms a slanting pile called a "spoilbank." The top part of the surface forms a natural extension of the bench and is called a "fill-bench."¹⁷ The outer surface of the spoilbank that slants down until it meets the original surface of the mountain at the "toe" of the spoil bank is called the "spoil slope." How solidly or precariously this spoilbank rests on the side of the mountain depends upon a number of factors, including the steepness of natural slope, the quality of the spoil mixture, the extent to which it has been compacted, the amount of water it has absorbed or can absorb, and the presence of stabilizing vegetation through natural or artificial reclamation.

After the initial bench is established, the same or larger machines begin to work on the mountainside. They move horizontally into the mountain, removing the overburden, and depositing it on the spoil bank or on the ever-widening "solid bench"¹⁸ where it is then pushed over the outer edge of the bench. As the overburden is fully removed and the coal seam exposed, the coal is dug or scraped up, deposited into large trucks,¹⁹ and carried away. This exposes more solid bench upon which the machines creep and continue their digging at the mountainside. When the overburden becomes too thick to

¹⁶ *Bench* shall mean the result of surface mining in areas where the average slope or the original ground has an inclination of more than thirty percent (30%) from the horizontal, being: (a) the leveled surface of an excavated area measured horizontally at any point in the overburden, spoil, or mineral between the base of the highwall and outer point of the original fill bench; or (b) a working base extending from the base of a highwall on which excavating equipment can set, move and operate.

Id. § 2.09.

¹⁷ "Fill bench shall mean that portion of a bench formed by spoil or overburden which has been deposited on or over the original slope." *Id.* § 2.21.

¹⁸ "Solid bench shall mean that portion of the bench surface formed by earth or rock strata which has not been removed, as distinguished from fill bench." *Id.* § 2.39.

¹⁹ The giant shovels and other new digging equipment have not been solely responsible for the upsurge in efficiency and profitability of strip mining in recent years. Huge trucks capable of carrying loads in excess of one-hundred tons have made it possible to haul spoil at a reasonable cost and coal greater distances at a cheaper cost. These huge trucks are especially valuable where reclamation requirements demand that topsoil and remaining overburden be taken away and stored during the operation and then returned after the coal is removed.

allow continued safe digging at the vertical face of the newly made highwall, or the coal-overburden ratio²⁰ makes further stripping uneconomical, or when a statutory limitation on the height of a highwall can best be met,²¹ the stripping machines cease moving into the mountain and start moving laterally around the mountain.

What is left is a combination of barren vertical cliff at right angles with a level bench bordered on the outside with a large mound of spoil. Often there will be as many as five of these earthen ribbons at different levels up the side of the mountain slope. Wind, rain, ice, and floods work on the exposed contour stripped earth the same way they work on the exposed earth in area stripping, but the effect is greatly aggravated by gravity, and the damage is different in degree and kind.²² Because of the surrounding topography, the resulting erosion and acid drainage is difficult and often impossible to contain.

Auger mining for coal means mining the "coal from an exposed vertical coal face by means of a mechanically-driven boring machine which employs an auger to cut and remove the coal."²³ This is generally done after an area is stripped of coal and the stripping operation ends against a vertical highwall.²⁴

It is most commonly practiced to recover additional tonnages after the coal overburden ratio has become such as to render further contour mining uneconomical. Augers are also used to extract coal near the outcrop that could not be recovered safely by earlier underground mining efforts. As the name implies, augering is a method of producing coal by boring horizontally into the seam, much like a carpenter

²⁰ The coal-overburden ratio is the ratio of the thickness (or depth) of the overburden to the thickness of the target coal seam. It costs a certain amount (varying with the quality of the overburden) to remove a foot of overburden. The thicker the seam of coal being taken, the greater the revenues allocable to the cost of removing that overburden. Aside from the cost considerations of the specific coal-overburden ratio, present technology allows a profitable recovery of coal seams lying at depths in excess of 185 feet. J. STACKS, STRIPPING 21 (1972).

²¹ "The highwall shall not exceed thirty feet in vertical rise from the surface of the regraded bench." W. VA. CODE ch. 20, art. 6, § 13 (Michie Supp. 1972). Thus in West Virginia contour stripping can continue even after the highwall reaches thirty feet. Before the operation is completed the bench must be regraded and built up again so that the highwall left is within the limit. At some point the cost of removing the overburden and later rebuilding the bench meets the revenues available from the recoverable coal.

²² Examples of this are landslides and wholesale subsidence.

²³ W. Va. Dep't Nat. Res. Regs. Ser. VII, § 2.06 (1971).

²⁴ U.S. DEP'T OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 35 (1967).

bores a hole in wood. The coal is extracted in the same manner that shavings are produced by the carpenter's bit. Cutting heads of some coal augers are as large as seven feet in diameter (and vary with the width of the seam being mined). By adding sections behind the cutting head, holes may be drilled in excess of 200 feet.

The auger machinery is very large and it must have a fairly wide level platform to rest upon as it drills into the side of the mountain. Therefore, in hilly terrain the contour strip mining must first be completed. The natural bench left by the operation will serve as a platform upon which the augering equipment will rest. Because "augering generally is conducted after the strip-mining phase has been completed, little land disturbance can be directly attributed to it. However it may, to some extent, induce surface subsidence and disrupt water channels when underground workings are intersected."²⁵

II. DAMAGE TO PEOPLE, PROPERTY, AND THE ENVIRONMENT CAUSED BY STRIP MINING

Unregulated strip mining and unreclaimed strip mined lands cause a variety of damages to people, property, and the environment.²⁶ The following is a discussion of these various costs that the people not benefiting from strip mining have to pay for strip mining. Of course, any discussion of the damages caused by strip mining must implicitly suggest alternatives to unregulated strip mining for coal and the changes brought about by those alternatives.²⁷

Two of these alternatives are strictly regulated stripping with stringent limitations and reclamation requirements, and abolition of strip mining. The former might bring about an expansion of deep mining, and the latter definitely would produce a major expansion of deep mining.

²⁵ *Id.*

²⁶ This is not an attempt to make an exhaustive analysis of the damages caused by strip mining. The purpose is to give the reader an idea of the kinds and extent of injuries so that the concern of the legislature, as expressed in the 1971 Surface Mining and Reclamation Act, can be better understood, and so that an attorney new to the area can better understand the interests of his endangered clients. In this regard there has been an attempt to list all of the kinds of damages caused by stripping and the interests damaged.

²⁷ The advantages of strip mining for coal are: Cheaper costs, both to the producer and consumer; faster expansion of coal recovery; recovery of some coal that cannot be recovered by deep mining; recovery of more coal in initial cuts and in area strip mining than is recovered in deep mining; and better safety records of strip mining as compared with deep mining. These advantages, like the disadvantages listed in the text, are subject to debate.

Unregulated strip mining as practiced in the United States causes, in part or in whole, various hazards and damages.²⁸ The instability of spoil slopes and the lack of vegetative cover on disturbed lands leads to a very large amount of sheet erosion that carries away topsoil from the surface. These eroded areas combine with disturbed areas, where acid bearing and other barren surface materials have prevented the re-establishment of permanent vegetation, to form strips of denuded, unproductive land. Seventy-one percent of the estimated 744,234 acres of disturbed land in West Virginia have less than seventy-five percent vegetative cover²⁹ and must be considered unproductive. The results are barren slopes, loss of much land for timber and agricultural production, and lower tax revenues.

A variety of chemical solutions are formed when rainwater runs over the exposed coal and other mineral-bearing rocks near coal seams. These acids, metal salts, and other chemical solutions are toxic to vegetation and to most forms of aquatic life. As the acid travels across the slopes with the surface water from rain, it retards vegetative growth in the soil. When it flows into the streams, it turns the water a variety of unpleasing colors, and when the pH level of the water drops below four, fish and most other living organisms are killed.³⁰

The most serious effect of high acidic content in streams and rivers is that it inhibits the natural purification process by destroying most of the bacteria and other organisms that decompose organic wastes.³¹ The result is an unhealthy river stocked daily with raw or partially treated sewage, which will not decompose because the acid has killed the needed microorganisms. Sulfuric acid from pyrites is not the only chemical solution that joins the water runoff from strip mines. Iron, manganese, aluminum, magnesium, potassium,

²⁸ The West Virginia Legislature's own list of damages include stream pollution, landslides, accumulation of stagnant water, flooding, destruction of land for agricultural purposes, destruction of aesthetic values, destruction of recreational areas, destruction of future use of the area and surrounding areas, impairment of health and property rights of others, and creation of hazards dangerous to life. W. VA. CODE ch. 20, art. 6, § 11 (Michie Supp. 1972).

²⁹ STANFORD RESEARCH INSTITUTE, A STUDY OF SURFACE COAL MINING IN WEST VIRGINIA 48 (1972) [hereinafter referred to as STANFORD REPORT].

³⁰ The symbol pH refers to a hydrogen ion concentration in gram atoms per liter. The scale ranges from one to fourteen. In this scale seven is neutral, below seven is acid and above seven is alkaline. The optimum range for plants is 4.5 to 7.5.

³¹ See generally, R. KRAKOVIC & H. WILSON, SURVIVAL AND ACTIVITY OF SEWAGE ORGANISMS IN ACID MINE WATER (1969).

and sodium all enter streams from disturbed areas at rates ranging from 2.5 to 3000 times the rates of watersheds not containing strip mines.³² Most of these substances are toxic.

Sedimentation (also referred to as siltation) causes a variety of damages. Water erosion carries clay, silt, and sand into existing streams, causing deposits in stream beds. This siltation clouds the water. This results in a decrease of photosynthesis in aquatic plants, thus decreasing plant life. This decrease in plant life decreases the conversion of carbon dioxide in the water into oxygen. This decrease in oxygen decreases the number of microorganisms that break down organic wastes (both human wastes and sewage). As a result, sewage is not decomposed and the water tends to become foul and unhealthy, ruining it for recreation and making it costly to treat for domestic use. Sedimentation changes stream channel characteristics. The channel begins to fill up, and the water velocity decreases. The resulting turbid water lessens the value of the stream for recreational purposes and adds to the expense of water treatment for industrial and domestic use. The constriction of the channel impedes navigability. If the water course is used for commercial traffic, the public, has to pay for expensive dredging to clear the channel. If the water course is used only for pleasure boating, the pleasure and the boating cease. The sheer magnitude of siltation fills reservoirs.³³ It also erodes power turbines and pumping equipment, leading to further indirect costs to the public.

The occurrence of flooding increases substantially in strip mined areas.³⁴ The barren and denuded hillsides and solid benches absorb less water than vegetated surfaces. The volume of run-off during a rainstorm is significantly increased. At the same time, the accelerated siltation from the stripped areas has constricted the channels of the streams and rivers, decreasing their in-channel capacity. The result is more water in shallower stream beds. This produces widespread flooding of downstream communities. In addition to substantial amounts of damage to property and life, flooding aggravates the

³² J. STACKS, *supra* note 20, at 42.

³³ "Several case studies in West Virginia and eastern Kentucky indicate that the rate of net sediment yield (soil movement) from individual sites is of the order of 400 to 600 tons per acre." STANFORD REPORT, *supra* note 29, at 55. Unmined areas have a net yield of about six tons per acre. *Id.*

³⁴ Flash flooding of downstream valley communities resulting from denuded slopes in the watershed was one of the five most common complaints about strip mining found in a comprehensive study of strip mining by the West Virginia League of Women Voters. W. VA. LEAGUE OF WOMEN VOTERS, LAND USE IN WEST VIRGINIA: PART I SURFACE MINING OF LAND 20 (1972).

damage to the forests, increases the erosion of the topsoil, and deposits even more sediment in the riverbed.

Although disturbance of the land causes increased surface water and flooding, there is evidence that it lowers the level of ground water. Whether present in underground cavities or porous rock, the water table is a reservoir that lowers in dry season and when it is tapped by wells, it must be replenished by rain. This is done through absorption of the rainwater as it collects and travels on the surface. If the surface is rocky or left without vegetation, the surface water runs off the land more quickly into the surface channels and less is absorbed into the ground. Although most of West Virginia is not hampered by water shortages, some individual areas might be.

Landslides and major slope subsidence block highways, dam streams, crush fences, trespass onto neighboring fields, and damage houses.³⁵ The steepness of the hill where spoil banks are created, and the loose shifting character of the spoil make the spoil banks unstable. When it rains the porous spoil absorbs the water; the added weight causes the pile to slide down the mountainside. Landslides are quite common. Contour mining has caused slides along 1,700 miles of slopes in the mountains. In one area of Eastern Kentucky, twelve percent of the spoil banks have collapsed in landslides.³⁶ The instability of the spoil banks goes deep into the piles, and vegetation or several years of natural reclamation offer no protection against this hazard.

Air pollution occurs in the form of airborne dirt particles and coal dust, fumes from burning gob piles,³⁷ and emanates from the site of the operation caused by the coal trucks on unimproved access roads. Houses in the vicinity of the operation are covered by dust. Unlike most construction sites, this unpleasantness persists for years until some sort of vegetation covers the site.

The greatest harm done by strip mine dust is caused by the coal trucks. The dirt and dust from the tires, body, and load of the truck fly from the truck as it traverses public roads — blanketing passing

³⁵ For a case of minor erosion and slides resulting in the deposit of three and one-half feet of dirt and rock on plaintiffs' backyard, see *Oresta v. Romano Bros.*, 137 W. Va. 633, 73 S.E.2d 622 (1952).

³⁶ J. STACKS, *supra* note 20, at 36.

³⁷ For a discussion of the effects of a burning gob pile (this one from deep mine wastes), see *Board of Comm'rs v. Elm Grove Mining Co.*, 122 W. Va. 442, 9 S.E.2d 813 (1940).

cars, the road, and buildings lining the road.³⁸ Each succeeding vehicle causes the dust to rise again. Damages are obvious; valuation is not.³⁹ Cars become dirty, center and border lines of the road become covered, traffic signs become covered, and the roadside becomes dirty and unsightly. The most serious damage might well be the personal injuries that result from automobile accidents that must surely be attributable to dust covered windshields and dust covered center lines, road edge border lines, and traffic signs.

Deterioration of roads resulting from continuous coal truck traffic is one of the five most common complaints about strip mining in West Virginia.⁴⁰ Coal produced in contour strip mines is usually hauled to the treating plant or shipping point in heavy trucks.⁴¹ While these trucks may be within the legal weight limits for the public highway,⁴² they still are very heavy. They often travel on back country roads that were not built for such heavy regular use. The constant

³⁸ For a case holding that roadside homeowners have a legal right to be free from having large amounts of dust thrown into their homes see *Wales Trucking v. Stallcup*, 465 S.W.2d 444 (Tex. Civ. App. 1971). In *Stallcup* the court found an otherwise legal use of a small county road by construction trucks making thirty-six trips a day past the plaintiff's property to be unreasonable in light of the purpose and normal use of the road. The court found such traffic and dust damage to be a nuisance and awarded five thousand dollars in compensable damages.

³⁹ This is a good example of the typical environmental cost that is ignored because the cost to each person is small. Let us suppose that one-half of all car owners care enough about having clean cars that they wash them every two weeks. Also suppose there is a country road traversed by five hundred cars daily. Then a strip mine opens up in the vicinity with access roads abutting this country road, and the coal trucks begin making twenty round trips a day on the road. The dirt from the huge tires and dust from the loaded trucks soon blankets the road. Five hundred cars are now covered from the dust each time they drive down the road. To keep their cars as clean as they previously were on the average day between washings, the 250 people who care about having clean cars must now wash their car every other day, or six more times every two weeks. The cheapest car wash seems to be seventy-five cents. This would cost these people a total of \$1125.00 every two weeks just to put them into the same position they were before the strip mining. This is a real cost to the public of the strip mining. Even though this hypothetical situation is exaggerated, it does illustrate the hidden costs of strip mining.

⁴⁰ LAND USE IN WEST VIRGINIA, *supra* note 34.

⁴¹ Large deep mines have direct access to rail or barge systems and usually do not need public roads for hauling. Strip mines are short term operations, working for about a year with wide variances. This would not justify the expense of laying track and also the topography of the land in West Virginia would usually make this impossible.

⁴² It would be helpful to know if these coal trucks are running within the weight limits. To truckers as well as to strip mine owners weight is money, and long distance carriers are notorious for their practice of exceeding weight limits. Weigh stations, portable scales and stiff fines are employed throughout the country to enforce these limits. It is doubtful that portable scales are often used in areas traveled by coal trucks.

truck traffic throughout the days and weeks pound these smaller roads, causing cracks, holes and chips. To say that these truck owners pay their taxes to use the road is not an adequate explanation. The point is that the other users of the road end up with their road broken primarily by the strip miner's coal trucks. The question is — are the road use taxes paid by these trucks and the strip miners sufficient to pay for the damage to the road? If not, this is another cost of stripping that is being paid by the public and not by the stripping operation.

More serious hazards posed by trucks hauling coal from strip mine sites are the damages these trucks cause other vehicles on the road, and indirectly inflict on passengers in these vehicles. It is not uncommon for chunks of coal to fall from a truck and dent a nearby car, or for a stone caught in the truck tire treads to fly up and break the windshield of a car. These projectiles not only cause property damage but also may cause an accident.

A second kind of damage is more serious although the causal relation less direct. The presence of a slow truck on a steep winding two-lane road invites other vehicles to take chances to pass. This often results in a serious accident.⁴³ A study could show the frequency of collisions brought about by attempts to pass coal trucks coming from strip mines. It is not enough to say that in law the driver of the coal truck is blameless. The point is that when there are several slow trucks on the road there are more fatal accidents. When there are not a large number of these trucks on the road (presumably when the coal is coming from deep mines) there are fewer fatal accidents. If all of this were shown by study to be true, then another cost to society of strip mining is an increase in the number of highway fatalities.

The strip mine sites pose dangers to people's health during the operations and long after the mining ceases. The unstable spoil banks,

⁴³ A regional claims adjuster for a major insurance company whose area of supervision was southern West Virginia stated that every week there were several claims made with his company under liability or collision coverage for broken windows or dented cars resulting from airborne missiles thrown from a coal truck. What was more astonishing was this insurance man's statement that at least four times over a two-year period a policy holder in his company was involved in some manner in a fatal accident where a coal truck appeared to play a major role. And this was only one insurance company. This role was usually that the truck's slow progress invited a car behind it to pass when the way was not clear.

In telling how much country residents hated the environmentally damaging coal trucks, the insurance agent related how one man on the Cabin Creek-Kanawha River coal truck route became so infuriated that he took his rifle and settling himself on a secluded hillside, sniped at the passing trucks.

the loose rocks, and the highwalls are threats to the unsuspecting and even the suspecting user of the land.⁴⁴ The highwalls are dangerous vertical cliffs, are created anywhere, and operate as traps for the unwary hunter or hiker. A hunter who gets lost in strip mining country is in serious trouble.

Refuse materials from a coal mine will, on occasion, begin to burn from spontaneous combustion owing to the combination of waste materials and the hot sun. The resulting burning gob piles cause noxious odors and poisonous fumes that cause respiratory disturbances and other physical disorders.⁴⁵

Stagnant water results from unnatural diversion of water channels caused by moving the overburden. Stagnant water is unsightly, malodorous, and unhealthy. It can become a breeding place for insects.

Whenever stripping takes place near homes or places of business there is noise pollution. The booms from blasting are joined by the shrieks and rumbles of the huge stripping machines and the roar of the coal trucks coming and going from the site. The degree of damage from this noise will certainly vary. In West Virginia, noise alone may create a nuisance.⁴⁶ People have a legally recognized right to enjoy their property free from unreasonable noises. Therefore, the deprivation of this right is a cost of strip mining.

The damages that can be caused by dynamite blasting are obvious. Blasting is needed in all strip mining operations where the overburden contains rocks that are not soft enough to remove with a power shovel. Although stripping companies are strictly liable for most damage to people and property resulting from their blasting,⁴⁷ the damage to the environment is a cost that is paid only by the public.

With blasting, the cost to the neighboring inhabitants in terms

⁴⁴ *Reed v. Januloto*, 129 W. Va. 563, 42 S.E.2d 16 (1946). A thirteen-year-old boy was playing with his friends on an active strip site after working hours, when a large rock from a stratum of sandstone fell, crushing the boy. The court found that where children are expected to play on a strip site and, in fact were known to commonly play there, they were not trespassers. The jury found the stripper liable for the boy's death.

⁴⁵ *See Board of Commr's v. Elm Grove Mining Co.*, 122 W. Va. 442, 9 S.E.2d 813 (1940).

⁴⁶ *Gunther v. E.I. Dupont De Nemours & Co.*, 157 F. Supp. 25 (N.D.W. Va. 1957).

⁴⁷ *Whitney v. Ralph Meyers Constr. Corp.*, 146 W. Va. 131, 118 S.E.2d 622 (1961).

of fear and anxiety is a cost that is rarely, if ever, mentioned. In a 1972 television documentary on strip mining, an eastern Kentucky family was interviewed about the damage that neighboring stripping had done to their property. The mother told of her fright every time the blasting began and how she would run out into the yard as the explosions sounded, gather her children together, and take them into the house where they would all lie on the floor until the blasting stopped. The cost of strip mining is surely great in those cases where neighboring families live in dread of personal injury.

A similar episode in the same program showed a spoilbank inching its way toward a neighboring farmer's fence as he watched helplessly. Actual cases of injury to people and property occur often enough to be a legitimate concern to anyone living or working in close proximity to a strip mine.⁴⁸

Even if there is no chronic apprehension of physical danger, the anxiety over whether the property value will be depreciated by the ravaged scenery or mine acid runoff is worry enough. This cost is not made any less real by pointing out that city residents have similar worries about establishment of trailer parks or drive-in restaurants in the middle of their residential neighborhoods. Certainly they do have similar worries, but that is why they ban trailer parks and zone neighborhoods as residential only.

Wildlife damage invariably accompanies strip mining.⁴⁹ The noise and dust from the operation frightens animals away, and the destruction of the trees and surface destroys their natural habitat, sometimes permanently. Highwalls cut off animals from natural grazing areas and from those higher elevations to which they naturally flee from encroaching civilization. In West Virginia, 411,000 acres have been isolated from animals by highwalls. The damage to grazing areas extend beyond those areas actually stripped or cut off by highwalls⁵⁰ The acid run-off from the disturbed surface spreads to adjacent areas and in some cases seriously retards vegetative growth.

The most serious harm to wildlife occurs to fish. Siltation smothers lower forms of aquatic life thereby removing the fish's food supply. Heavy siltation clogs their gills. In time it actually takes away their home when the channel fills up. The mine acid drainage

⁴⁸ J. STACKS, *supra* note 20, at 56.

⁴⁹ See generally J. BOCARDY & W. SPAULDING, JR., *EFFECTS OF SURFACE MINING ON FISH AND WILDLIFE IN APPALACHIA* (1968).

⁵⁰ *Id.* at 3.

often raises the acidity of the water to levels that kill off all of the fish. Even if the fish do not die, they may be useless as a food source. Studies have demonstrated that coal bears traces of mercury. One investigation of fish caught in a lake located at the edge of a highwall in Ohio revealed that the fish contained 3.2 ppm of mercury.⁵¹ The United States Food and Drug Administration's maximum permissible level for mercury in edibles is 0.5 ppm.

The concern is not for wildlife alone, but for the interests of the public in hunting and fishing, and in the state's maintenance and development of the tourist industry. When a citizen cannot go to the neighborhood stream and fish, this is a cost of strip mining and this cost or damage can be measured in dollars.

Recreational areas for the enjoyment of West Virginians and the promotion of tourism are destroyed by any significant strip mining. The ugly destruction of the otherwise beautiful scenery, the siltation of the streams so that they are sluggish and muddy, the acid damage to the color of the stream and the fish that live in it, all work to depress the area physically and psychologically. The long term economic damage done to the state and to the local communities by the curtailing of the development of tourism is serious. The money lost to those areas by this damage might, in a few decades, exceed all of the money produced by strip mining the coal.

The economic damage in the form of unemployment results from the same amount of coal being produced by strip mines with fewer miners. There are various estimates of tons produced per employee in strip mining compared to deep mining. For the sake of demonstration, let us take the conservative estimate of two tons produced by one strip miner for every one ton produced by a deep miner in the same amount of time.⁵² Put another way, it takes two deep miners to produce a ton of coal in the same period of time that one strip miner produce a ton of coal. Given the same demand for coal, deep mines supply twice as many jobs as strip mines.

Three thoughts deserve development in this economic context. First, it is a basic American idea that a more general distribution of money and goods is more equitable and desirable than the accumulation of large sums by a few. Assume that coal sells for \$9.00

⁵¹ J. STACKS, *supra* note 20, at 44.

⁵² In West Virginia in 1969, strip mines (including auger) produced 36.3 tons per day per man while deep mines produced 15.1 tons per day per man. W. VA. DEP'T OF MINES, ANNUAL REPORT 12-15 (1969).

per ton. The \$9.00 per ton can be divided in two different ways: Using strip mined coal — \$1.50 for one miner, \$4.35 for assorted costs (preparation, delivery, overhead, etc.) and \$3.15 for the strip mine owner; using deep mined coal — \$1.50 for one miner, \$1.50 for a second miner, \$4.35 for assorted costs, and \$1.65 for the deep mine owner.⁵³ When the coal is produced by the deep mining method, more people share in the money being produced by the sale of West Virginia coal.

Second, there is an idea that money produced by natural resources lying within West Virginia should stay in the state to be used for the development and enjoyment of West Virginians.⁵⁴ This desire to keep the profits resulting from the recovery of West Virginia resources in West Virginia is certainly a legitimate motivating factor for the state legislature in deciding what to do with the coal found

⁵³ These figures are hypothetical but are sufficient to demonstrate the point. One estimate of the production costs of surface mined coal compared to the costs of deep mined coal is \$3.64 and \$5.50 per ton respectively. Center for Science in the Public Interest, Newsletter, Apr. 1971, at 3. This figure is in line with other estimates.

Nor are the lower production costs passed on to the consuming public. Strip mine operators could sell their coal at the same profit margin as deep mine producers and undersell them by more than \$1.75 per ton using the above figures. However, they do not. There is not enough strip mined coal produced to satisfy the need, so deep mined coal does have a market (approximately 50%). That market is at the higher price and it is natural that the strip mine producers will raise their price to the deep mined coal price. There is some indication that the market price for coal is lowered slightly by the presence on the market of the strip mined coal, but only slightly. A study conducted by the Center for Public Policy Study found that if surface mining were abolished nationwide, the electric bill of the average American family would increase by \$1.50 a year (a similar study by the National Coal Association estimated a much higher cost).

The American answer lies not in doing away with the cheaper product, but in making the market work and, through competition, lower the sale price of coal. Certainly this is desirable from the view of the society. Although this may be the American theory, it is not the American fact in the coal market. This could be, (1) because there is not enough strippable coal to supply the market demand, or (2) because strip mining is still a developing industry and needs several more years of expansion, or (3) because increasingly strict mining law inhibit sufficient development, or (4) because the dominant business concerns which might control the stripping industry also have heavy investments in the deep mining industry and limit their development of the former to protect the latter, or (5) because of a complexity of reasons outside the control of government and industry.

⁵⁴ If the purpose of a state statute is to impede interstate commerce in order to favor their citizens over the citizens of another state, it may well be unconstitutional. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Notwithstanding this, it appears that state legislatures will, on occasion, act to favor in-state economic interests over out-of-state interests. For example, see the bill introduced in the 1973 West Virginia legislature providing for a 1½% allowance for in-state bidders on state contracts. Beyond all this, the point is being made to counter those who say that abolition or very stringent regulation will injure West Virginia interests vis-à-vis those of other states.

within the state. Since their duty is to serve the best interests of the West Virginia public, it could be said that they are duty-bound to promote the interests of West Virginia citizens over those businesses that are based out of state. Yet it appears that a large percentage of the owners of both deep and strip mines located in West Virginia are out-of-state companies.⁵⁵ To the extent this is true, the percentage of coal sales that are after-production profits will leave the state and will not be put into the state economy for the benefit of West Virginians.

We thus have the anomalous situation where the state might well gain by cutting the profit margin of its chief resource. This could be done by retarding strip mining and promoting deep mining. To illustrate the point, look again at the delivery of West Virginia coal at \$9.00 per ton. For all coal produced by companies owned by out-of-state interests: If strip mined, the \$9.00 would be split—\$1.50 for one miner, \$4.35 for assorted costs, and \$3.15 leaving West Virginia as profits to the out-of-state mine owner; if deep mined, the \$9.00 would be split—\$1.50 for one miner, \$1.50 for a second miner, \$4.35 for assorted costs, and only \$1.65 leaving West Virginia as profits to the out-of-state mine owner. Although these figures are fabricated for this illustration, the principles make sense. They point out that when coal is produced in West Virginia by companies owned from outside the state, a significantly greater amount of resulting revenues flow into the state if that coal is mined by deep mining.⁵⁶ To measure the true effect of this phenomenon, the state would do well to determine the tonnage of coal produced in this state by out-of-state owners.

Third, the larger the percentage of coal produced by deep mines, the larger the number of miners employed. This reduces the number of people forced to burden the public by enrolling on welfare, or forced to leave the state to seek work elsewhere. Both of these results are undesirable. Welfare costs the citizens of the state in actual revenues and forces the recipient into a lower standard of living. Leaving the state is a painful experience for those leaving and the

⁵⁵ Kaufman, *Poor Rich West Virginia*, THE NEW REPUBLIC, December 2, 1972, at 12.

⁵⁶ To test this theory, a detailed study of the relative costs of strip mining and deep mining would have to be made. Thus, if the assorted costs in strip mining included two dollars per ton for strip mining equipment made and manufactured by West Virginia owned companies, and deep mining machinery expenditures included outside the state, then the state economy might be better served if out-of-state owned coal is strip mined rather than deep mined.

friends and relatives left behind. Some look upon the forced exit of native West Virginians as a benefit to the state because the state cannot afford to support the present population.⁵⁷ Even if this were true, it does not mean that steps which would alleviate these personal tragedies should be ignored.

The actions suggested by these three thoughts assume that deep mine production could replace strip mine production. The Stanford Report doubts that it could, at least in the near future, due to a shortage of skilled labor, rising wages, increased health and safety regulations, and increased capital costs.⁵⁸ Yet except for the shortage of skilled labor, these problems surely can be met. The coal is there, capital can always be found to meet a passing need, and the lead time for both the training of miners and the opening of new mines can be set accordingly.

People in a community suffer when their tax revenues decline. Land made ugly and unpleasant by strip mining is no longer of value for commercial, residential, or recreational development. Land denuded of topsoil and washed with mine-acid runoff can not be used for agricultural or timber production. The result is nearly worthless land, a lowering of valuation for tax purposes, and a corresponding decrease in tax revenues. An Ohio study of the period 1918 to 1937 showed tax decreases ranging from thirteen to fifty-three percent following strip mining.⁵⁹ A good statement of what happens is as follows:

Across Ohio the story of strip mining is repeated over and over on the tax rolls. Where land once had value and could be taxed to support schools, now it is valueless and a burden to the rest of the community.

In Stark county, 10,752 of the county's 376,000 acres were stripped between 1914 and 1969.

Generally in Stark, stripped land is appraised at \$25 an acre. Marginal farmland there is appraised at \$150. Good farmland's value is from \$250 to \$450 an acre. Sandy ground goes for \$95.

Assessments in Stark are 40 pct. of the appraisal

⁵⁷ STANFORD REPORT, *supra* note 29, at 70.

⁵⁸ *Id.* at 44.

⁵⁹ See TENNESSEE VALLEY AUTHORITY, AN APPRAISAL OF COAL STRIP MINING 7 (1963).

price—thus \$10 an acre is the assessed value of stripped land.

When the auditor learns that land is about to be stripped, he automatically puts a \$600 appraisal on each acre. But often he doesn't learn the land is being stripped, and the miner is in and out before he can act.

In Harrison County, nearly one-fifth of the county has been stripped since 1914—45,523 acres out of 258,000. A spokesman for the country auditor in Cadiz said most stripped land is appraised at \$20 an acre.

Meanwhile good bottom land is appraised from \$150 to \$200. Grazing land goes from \$100 to \$125, the spokesman said. Some reclaimed land has been reappraised for as high as \$80 an acre, he added.

When land is about to be stripped, the appraisal value jumps to \$400 an acre. But as soon as the land is carved out, the figures [drop] to almost nothing.⁶⁰

This tax loss will probably last beyond the foreseeable future, until people are pushed into the area by expanding population, or until nature reclaims it, which can take decades.⁶¹

It is difficult to determine whether the greatest dollar cost of strip mining is the mine acid drainage, erosion of the topsoil, or the permanent destruction of the economic use of the land. The cost most easily perceived by the general public and probably most responsible for generating the rising opposition to strip mining is the horrible destruction of the aesthetics of the environment. It is ugly, unpleasant, foul and depressing.⁶² Stripped sites and highwalls curve for 6,563 miles throughout the once unmarred West Virginia mountains.⁶³

⁶⁰ Herzog, *Stripped Land: Taxpayers Burden*, Akron Beacon Journal, Nov. 22, 1970, § B, at 15. See also Reitze, *Old King Coal and the Merry Rapiers of Appalachia*, 22 CASE W. RES. L. REV. 650, 690 (1971).

⁶¹ STANFORD REPORT, *supra* note 29, at 59.

⁶² There are those who state that strip mined land is not ugly. Granted that beauty is a matter of taste, there are limits of variations in taste. No one dyes a fishing pond rust-brown. People do expend large sums of money to vacation to look at highwalls in Zion and Grand Canyon National Parks, but no one vacations to see highwalls in the Appalachian forests. No one, but no one, who has an economic choice builds a house in the middle of an unreclaimed stripped coal field. People who say that strip mining is not necessarily ugly and that aesthetics is in the eye of the beholder are just playing games.

⁶³ STANFORD REPORT, *supra* note 29, at 48.

Black-brown, yellow-brown, and red-brown spoil banks attach themselves to the edges of the slices in the slopes. These cancerous ropes lead to trails of brown-red water, that follow the gullies to the streams, staining the water and the rocks. The sediment in the water fills the stream bed. The clear rushing creek becomes sluggish and mucky. The dust from the barren land covers trees and lakes. Chunks of coal fallen from coal trucks clutter the edge of roads, cracked and sinking from the constant weight. The trees and houses lining the road are covered by successive layers of coal dust blown from the trucks and the road. The black-green trees, the yellow-brown hillsides, and the red-brown streams combine in a devil's fantasia. But the color is grey.

Most of the damage done by surface mining affects the off-site landowners and the general public, not the stripper. Except to the extent that the stripper is affected as a member of the general public—and this injury pales beside the great profit he makes from tearing away the trees and the land—he has no incentive but his conscience and concern for the community to decline to strip or to make an effort to reclaim the damaged land and prevent a portion of the aforementioned damages. We know to what extent businesses for profit spend money out of conscience and concern for the community.⁶⁴

The job of protecting people, property, and the public environment is left to the public. The following is a look at the public's reaction in West Virginia through an examination of the 1971 Surface Mining and Reclamation Act.

III. THE WEST VIRGINIA SURFACE MINING AND RECLAMATION ACT⁶⁵

A. The Administrative Structure

The legislature finds that, although surface mining provides much needed employment and has produced good

⁶⁴ There are real questions concerning just how much money a corporation can spend out of a desire to benefit the public. A business corporation is a business for profit. Shareholders have a right to expect all corporate decisions to relate to that end. Of course many charitable contributions can be justified as goodwill. Could a chief officer justify spending 20% of the company's gross profit on extensive reclamation if it were not required by law and other companies did not make it a standard practice? For a famous case that would probably answer no, see *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

⁶⁵ W. VA. CODE ch. 20, art. 6, §§ 1-32. (Michie 1970 replacement volume).

safety records, unregulated surface mining causes soil erosion, pyritic shales and materials, landslides, noxious materials, stream pollution and accumulation of stagnant water, increases the likelihood of floods and slides, destroys the value of some lands for agricultural purposes and some lands for recreational purposes, destroys aesthetic values, counteracts efforts for the conservation of soil, water and other natural resources, and destroys or impairs the health, safety, welfare and property rights of the citizens of West Virginia, where proper reclamation is not practiced.⁶⁶

With this statement of fact and concern, the West Virginia Legislature went on to give the Department of Natural Resources jurisdiction over all aspects of surface mining, and vested in the Director of the Department the authority to administer and enforce the provisions of the Surface Mining and Reclamation Act.⁶⁷

To aid the Director,⁶⁸ the Legislature created a Division of Reclamation within the Department of Natural Resources, which "shall administer . . . the laws . . . relating to surface mining and subject to the approval of the director . . . shall exercise all of the powers and perform all of the duties . . . vested in . . . said director."⁶⁹ The head of the division is appointed by the Director, and is known as the Chief of the Division of Reclamation.⁷⁰

The reclamation Division has jurisdiction over two distinct areas. It has within its jurisdiction and supervision all lands and areas being mined or susceptible of being mined. It also has jurisdiction and supervisory power over

The 1967 Surface Mining Act was extensively amended in 1971 and retitled the Surface Mining and Reclamation Act. No attempt is made in this article to distinguish the content of the original act from the amendments.

⁶⁶ W. VA. CODE ch. 20, art. 6, § 1 (Michie 1970 replacement volume).

⁶⁷ *Id.*

⁶⁸ As used throughout this article "Director" shall mean the Director of the Department of Natural Resources. Because the statute itself provides that the Reclamation Division shall administer the surface mining laws, the Chief of the Division is authorized to perform the functions of the Director. Thus references to the Director in both the statute and this article can mean both the Director and the Chief acting for the Division in the place of the Director. It is clear that the final authority and responsibility in these matters rests with the Director.

⁶⁹ W. VA. CODE ch. 20, art. 6, § 3 (Michie 1970 replacement volume).

⁷⁰ *Id.* The Chief must have a college degree in engineering, agriculture, forestry, or a related resource field, and four years of full-time employment in natural resources management, including two in a supervisory or administrative capacity. The present Chief has a degree in agriculture and twelve years experience in the Department of Natural Resources.

all other lands and areas of the State deforested, burned over, barren or otherwise denuded, unproductive and subject to soil erosion and waste. Included . . . shall be lands seared and denuded by chemical operations and processes, abandoned coal-mining areas, swamplands, lands and areas subject to flowage easements and backwaters from river locks and dams, and river, stream, lake and pond shore areas subject to soil erosion and waste.⁷¹

It is clear that although the Reclamation Division is concerned primarily with the regulation of strip mining and seeing to it that the strip miner reclaims the strip mined land, it is also entrusted with the care and reclamation of all barren, denuded, ravaged and unproductive land that is subject to soil erosion and waste.⁷²

The Surface Mining and Reclamation Act also created "in the department of natural resources a reclamation commission which shall be composed of the director of natural resources, serving as chairman, the chief of the division of reclamation, the chief of the water resources division and the director of the department of mines."⁷³

The Reclamation Commission [hereinafter referred to as the Commission] has the authority and, it must be assumed, the duty to:

(a) Promulgate reasonable rules and regulations, in accordance with the provisions of chapter twenty-nine-A of this Code, to implement the provisions of this article;

(b) Make investigations or inspections necessary to insure complete compliance with the provisions of this article;

(c) Conduct hearings under provisions of this article or rules and regulations adopted by the commission and for the purpose of any investigation or hearing, hereunder, the commission or any member thereof may administer oaths or affirmations, subpoena witnesses, compel their attendance, take evidence and require production

⁷¹ *Id.* "The jurisdiction and supervision exercised by the division shall be consistent with other provisions of this chapter, and the division shall cooperate with other . . . divisions of the department."

⁷² *Id.* "The Reclamation Division may have the primary duty of reclaiming even non-strip mined lands, but beyond that jurisdiction is often shared with other offices and divisions of the department."

⁷³ W. VA. CODE ch. 20, art. 6, § 6 (Michie Supp. 1972).

of any books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the inquiry;

(d) Order, through the director, the suspension or revocation of any permit for failure to comply with any of the provisions of this article or any rules and regulations adopted pursuant thereto;

(e) Order, through the director, a cease and desist order of any operation that is started without a permit as required by law;

(f) Appoint such advisory committees as may be of assistance to the commission in the development of programs and policies: Provided, that such advisory committees shall, in each instance, include members representative of the general public; and

(g) Review orders and decisions of the director.⁷⁴

The authority to formulate and promulgate rules and regulations to implement the provisions of the Surface Mining and Reclamation Act is certainly the primary duty of the Commission and, in practice, has turned out to be its only major function.

The Act became effective on March 13, 1971. It prescribes many procedures and standards to guide the strip miner [hereinafter referred to as the operator⁷⁵] in the activities of searching for and strip mining of coal. These standards are intended to provide both security to the operator and protection to the public by safeguarding streams, public roads, etc. But the legislature also found "there are wide variations regarding location and terrain conditions surrounding and arising out of the surface mining of minerals, primarily in topographical and geological condition."⁷⁶ It was obvious from this fact that more detailed standards and limitations than those set out in the statute were needed to provide satisfactory protection for the public environment and to give a standard to the operator that he could be certain of meeting. This was explicitly recognized in some parts of the statute that refer the operator to the rules and regulations of the Commission.⁷⁷

⁷⁴ *Id.*

⁷⁵ W. VA. CODE ch. 20, art. 6, § 2(h) (Michie Supp. 1972).

⁷⁶ W. VA. CODE ch. 20, art. 6, § 1 (Michie 1970 replacement volume).

⁷⁷ See W. VA. CODE ch. 20, art. 6, § 9 (Michie Supp. 1972). The Act also

There was pressure to complete the regulations from the passage of the Act.⁷⁸ After some delay, much work by the Commission, and a great deal of controversy⁷⁹ over the delay, the proposed rules and regulations were distributed by the Director on January 31, 1972,⁸⁰ with a public hearing set for March 3, 1972, to discuss the proposals. The hearing was held and there ensued a full and at times acrimonious debate over the wisdom, propriety, weakness, and strength of the draft regulations.⁸¹ Under a court order to proceed

specifically provides that "[t]he commission shall promulgate rules and regulations . . . for the effective administration of this article." W. VA. CODE ch. 20, art. 6, § 24 (Michie 1970 replacement volume).

⁷⁸ Speaking to the Public Forum on Environmental Quality in West Virginia (a one-day forum arranged by the League of Women Voters, the Isaak Walton League and Citizens for Environmental Protection, in cooperation with the Department of Natural Resources) Reclamation Chief, Ben Greene, acknowledged that the absence of the new rules hampered full enforcement of the regulations. The Morgantown Dominion News, Sept. 12, 1971, § B, at 5.

⁷⁹ On November 24, 1971, Citizens to Abolish Strip Mining, Inc., an environmental protection organization, filed suit in the West Virginia Supreme Court of Appeals against the Department of Natural Resources, seeking a court order to force the Department to promulgate rules and regulations for the enforcement of the 1971 Act. This suit also asked for the revocation of all permits issued since the new law went into effect on March 13, 1971, and for a ban on the issuance of any further permits. The Morgantown Dominion News, Nov. 25, 1971, § B, at 1.

Two months later, on January 31, 1972, the Director issued the regulations to the public and scheduled a hearing on them in early March, 1972. He explained the delay by stating that it was a "mammoth task of immediately implementing new requirements and, at the same time, preparing proposed regulations in conformity with the new amendments." He went on to say that "[s]ome of these requirements involved detailed procedures in areas in which we had little experience, such as construction of drainage systems and impoundments, and in regulation of blasting." The Morgantown Dominion News, Feb. 1, 1972, § B, at 1.

On March 7, 1972, the West Virginia court ordered the Director of the Department of Natural Resources to proceed "without undue delay to perform all proper and necessary acts in order to make such rules and regulations in all proper respects effective and operative." The Morgantown Dominion News, Mar. 8, 1972, § A at 1. This decision came after the public hearing on the then issued rules and they were subsequently promulgated on March 30, 1972.

⁸⁰ The Morgantown Dominion News, Feb. 1, 1972, § B, at 1.

⁸¹ Among the criticisms from strip mine operators were; (1) that the proposed regulations imposed harsher conditions than the law intended; (2) that the water quality control standards made the existing standards worse which were already prohibitive, restrictive and confusing; (3) that a statement by the president of the West Virginia Surface Mining and Reclamation Association that the Act itself states nothing about converting existing strip mine operations to the new restrictions under the Act and therefore the conversion provision in the proposed regulations was illegal and unconstitutional and would not be recognized by the Association.

The environmentalists were no happier. They complained; (1) that the drainage systems guidelines were not made part of the regulations themselves; (2) that the regulations contained too many conditional phrases such as "if deemed necessary" and "all reasonable measures" and non-specific words such as "materially increased" and "constantly altered;" (3) that there were

“without undue delay to perform all proper and necessary acts to make such rules and regulations in all proper respects effective and operative,” the Director filed the rules in their final form with the Secretary of State. They became effective thirty days later on May 1, 1972.⁸²

The Commission’s authority to “make investigations or inspections necessary to insure complete compliance with the provisions”⁸³ makes the Commission more than just a rule-making and decision-making body. In practice, the Chiefs of the Reclamation and Water Resources Divisions and the Director spend a substantial amount of time in the field inspecting strip mining and reclamation operations.⁸⁴

The Commission’s authority to “[o]rder, through the director, the suspension or revocation of any permit for failure to comply with [this article or the regulations]; . . . [o]rder, through the director a cease and desist order of any operation . . . without a permit . . .”⁸⁵ gives it enforcement power that parallels the same power given to the director in the first section of the Act.⁸⁶ This apparent conflict in authority is settled by a later provision of this section that gives to the Commission the authority to “review orders and decisions of the director.”⁸⁷

no regulations governing the publication of required legal notices; (4) that the regulations failed to prohibit strip mining in specifically designated areas where adverse effects could not be prevented. Some environmentalists went further and concluded “that they the [proposed regulations] are designed in the whole, and in most of their principal particulars to subvert the clear intention of the law,” and that “these new rules are so grossly deficient in so many respects that one can only surmise that the year’s delay in their issuance was spent primarily in calculating how to avoid enforcing the law.” The Morgantown Dominion News, March 4, 1972 at 1.

Both strip mining representatives and environmentalists said the regulations should be withdrawn and rewritten. *Id.*

⁸² W. VA. CODE ch. 29A, art. 3, § 4 (Michie 1971 replacement volume).

⁸³ W. VA. CODE ch. 20, art. 6, § 6(b) (Michie Supp. 1972).

⁸⁴ Whether these state officers are visiting operations as members of the Commission or in their other respective administrative capacities is not an important question. When a question of compliance arises, the observations they and their inspectors have made will naturally bear on their decisions regardless of the capacity they served while observing.

⁸⁵ W. VA. CODE ch. 20, art. 6, §§ 6(d), (e) (Michie Supp. 1972).

⁸⁶ “The legislature further finds that authority should be vested in the director of the department of natural resources to administer and enforce the provisions of this article.” W. VA. CODE ch. 20, art. 6, § 1 (Michie 1970 replacement volume).

⁸⁷ W. VA. CODE ch. 20, art. 6, § 6(g) (Michie Supp. 1972). The importance of the power of the Commission to review orders and decisions of the Director is somewhat diluted because of the four members of the Commission, one is the Director himself and two are his subordinates in the Department of Natural Resources. This is open to discussion and will be considered later in the article.

The power to "[c]onduct hearings under provisions of [the Act] or rules and regulations" would aid the Commission in the review of any orders or decisions of the Director and is accompanied by the power to administer oaths, subpoena witnesses, take evidence and require production of documents and records.⁸⁸ It appears that Commission hearings have been limited to those held to entertain comments on the draft regulations prior to their promulgation.

Finally, the Act created "a reclamation board of review consisting of five members to be appointed by the governor with the advice and consent of the senate" for staggered five-year terms.⁸⁹ The qualifications of these five members are set out by the statute, which provides that "[o]ne of the appointees to such board shall be a person, who, by reason of his previous training and experience, can be classified as one learned and experienced in modern forestry practices,"⁹⁰ in agriculture, in engineering, in water conservation problems, and one appointee who "can be classed as a representative of coal surface-mine operators."⁹¹ The public, of course, is fully protected from abuse of power by a provision allowing only three members of the same political party to serve on the Reclamation Board of Review.

The Act provides for compensation for each member; a quorum of three and three agreeing votes for effective action; election of a board chairman and vice chairman from among the members; secre-

⁸⁸ W. VA. CODE ch. 20, art. 6, § 6(c) (Michie Supp. 1972).

⁸⁹ W. VA. CODE ch. 20, art. 6, § 27 (Michie 1970 replacement volume).

⁹⁰ *Id.* The clearest meaning of this provision is that each one of the appointees to the Review Board shall fit one of these classifications. But it is certainly reasonable to interpret the Act as providing primarily for the presence on the Board of the expertise from the specified areas and not especially that each member shall represent a distinct discipline. Thus several possibilities are presented. First, each appointee shall represent one and only one of the designated areas of expertise, thus making for one forester, one agriculturalist, one engineer, etc. A second possibility is that because of experience and training in both forestry and water conservation one appointee can insure representation of two areas of expertise, thus opening one position to an appointee having no training in any of the designated areas. A third alternative is to require all five areas be represented *and* each appointee meet one of the qualifications, but these need not be one separate representative from each area, thus making possible a board consisting of one person with experience and training in forestry and water conservation, one agriculturalist, one engineer, and two representatives of the surface mining industry.

⁹¹ *Id.* It makes little sense to require, much less allow a person to sit on a quasi-judicial body who had a professional interest in one side of most controversies that will come before it. This is especially questionable when there is no corresponding provision for a representative of environmental protection organizations.

tarial assistance from the Reclamation Division; and for the removal of any member by the governor for cause.

The function of the Reclamation Board of Review [hereinafter referred to as the Review Board] is to hear and decide appeals brought by “[a]ny person claiming to be aggrieved or adversely affected by any rule and regulation or order of the reclamation commission or order of the director or by their or his failure to enter an order.”⁹²

The Review Board shall hear the appeal de novo, and any party may submit evidence. The Review Board is empowered to issue subpoenas, require the attendance of witnesses and production of records, and administer oaths.

If the Review Board finds that the regulation or order appealed from was lawful and reasonable, it shall make a written order affirming the rule. If the Review Board finds that such regulation or order was unlawful or unreasonable, it shall make a written order vacating or modifying the regulation or order.⁹³

Summarizing the administrative structure as established under the Act, strip mining is regulated by the Department of Natural Resources through the Reclamation Division, working closely with the Director of the Department. The work is done by the Chief of the Reclamation Division working with his supervisors and inspectors.⁹⁴ The larger policy decisions are made by the Director on a day to day basis, and by the Reclamation Commission when they meet to formulate, draft, and promulgate regulations, or meet to review the actions of the Director.

All of the decisions, actions, and orders of the Director and the Reclamation Commission are subject to review by the Reclamation Board of Review. Finally, the decisions of the Board are subject to judicial review by the circuit court,⁹⁵ and the Director’s action or inaction resulting in a failure to discharge the mandatory duty of protecting the environment from the harm detailed by the legislature in section eleven of the Act is specifically made “subject to a writ of

⁹² W. VA. CODE ch. 20, art. 6, § 28 (Michie 1970 replacement volume).

⁹³ *Id.*

⁹⁴ The Act provides for appointment of “the number of surface-mining reclamation supervisors and inspectors needed to carry out the purposes of” the Act. *Id.* § 4.

⁹⁵ *Id.* § 29.

mandamus, in any court of competent jurisdiction by any private citizen affected thereby."⁹⁶

B. Obtaining a Permit and the Process of Prospecting and Strip Mining for Coal Under the Act

The process of removing coal from the surface of the earth can be divided into the separate steps of prospecting for the coal; then once it is found, planning the method of removing the coal, building access roads and moving mining machinery in; removing the coal; and finally, cleaning up the site. The 1971 Act and the regulations promulgated thereunder prescribe with some degree of specificity just how these steps must be taken.

No one may use excavating equipment to prospect for coal without first obtaining a prospecting permit from the Department of Natural Resources.⁹⁷ To obtain a permit, an operator must complete, sign, and verify an application form prescribed by the Director. This application must be accompanied by a three hundred dollar fee, a topographic map showing the crop line and identifying the seams, a plan for reclaiming⁹⁸ the proposed disturbed land, and a bond of five hundred dollars per acre to insure such reclamation. If after prospecting, the applicant decides not to mine the coal, he must reclaim the excavated areas within three months. If the applicant decides that he does wish to mine the coal, he may postpone reclamation of all land included in a complete reclamation plan submitted with an application for a surface mining permit if done within three months after each prospecting excavation. The three hundred dollar prospecting fee can be credited toward the surface mining permit fee of five hundred dollars.⁹⁹

It is "unlawful for any person to engage in surface mining without first having obtained from the department of natural resources a permit."¹⁰⁰ To obtain a permit, the applicant must fill out, sign, and verify the forms prescribed by the Director. This application shall contain:¹⁰¹ An identification of the mineral; a reclamation and mining

⁹⁶ *Id.* § 11.

⁹⁷ *Id.* § 7.

⁹⁸ "Reclamation shall mean the process of converting disturbed land to a stable form for productive use." W. Va. Dep't Nat. Res. Regs. Ser. VII, § 2.34 (1971).

⁹⁹ W. VA. CODE ch. 20, art. 6, § 7 (Michie Supp. 1972).

¹⁰⁰ *Id.* § 8.

¹⁰¹ *Id.*

plan,¹⁰² which requires extensive information on the mining operation;¹⁰³ the owner of the land and mineral rights and his addresses; the source of the operators' legal right to mine the minerals; an estimate of the number of acres to be disturbed by the mining; permanent and temporary post-office addresses of the operator; any other permits now held by the operator; the names and addresses of every officer, director, partner, and owner of more than ten percent of the mining company; whether applicant, or any subsidiary or affiliate, or person controlled by or with applicant has ever had a permit revoked or bond forfeited; and names and addresses of all owners within five hundred feet of the proposed site. Accompanying this application shall be a copy of a liability insurance policy with coverage in the amount of not less than \$100,000 for personal injury and \$300,000 for property damage, a fee of \$500, a special reclamation tax of \$60 per acre,¹⁰⁴ a reclamation bond of \$600-\$1000 an acre as set by the Director,¹⁰⁵ proof that notification by registered mail was sent to all landowners within five hundred feet of the site appraising them of the application, and proof that an advertisement has been caused to be published in the county in which the site is located which "shall contain in abbreviated form the information required by this section [listed above] together with the director's statement that written protests to such application will be received by him" until at least thirty days after the first publication of this notice.¹⁰⁶

After the application is received, the Director must examine the pre-plans and notify the applicant within thirty days whether his plan is acceptable. During this time the Director is receiving written objections from "objectors," who are people owning land within five hundred feet of the proposed site, and from "protestors," who are those notified by the advertisement. Then, "after consideration of the

¹⁰² These plans are then sent to the Water Resources Division of the Department of Natural Resources.

¹⁰³ W. VA. CODE ch. 20, art. 6, § 9 (Michie Supp. 1972).

¹⁰⁴ *Id.* § 17.

¹⁰⁵ The standard bond presently required of each operator is \$750 per acre. The minimum bond is set by the statute at \$10,000. *Id.* § 16.

¹⁰⁶ The Act states that the Director shall cause this advertisement to be published, and logically he does so by requiring the applicant to publish it. *Id.* § 8. There has been some criticism of the Reclamation Commission's failure to issue a regulation prescribing in detail the necessary content of such advertisements. See note 81, *supra*. At least some advertisements fail to contain the necessary information, and to this extent the Director has failed to perform his statutorily prescribed duty. The Morgantown Dominion News, May 2, 1972, at 12. For an advertisement which does comply with the statute, see The Barbour Democrat, Nov. 8, 1972 at 5.

merits of the application and written protests, if any, the director may issue the permit."¹⁰⁷

In deciding whether to issue a permit, the Director is guided by the restrictions and concerns detailed by the legislature in section eleven and several other sections.¹⁰⁸ There is an overriding presumption that if the applicant satisfies all of the procedural and substantive requirements of the act, and there is no cause to believe the operation will violate a restriction or threaten one of the concerns alluded to above, then the applicant has a right to strip mine coal under the present law in West Virginia.

There are some situations in which a permit clearly cannot be issued. First, no permits can be issued to mine coal in those twenty-two counties where no surface mining existed during 1970.¹⁰⁹ Second, no permit can be issued to mine coal under a new lease of state owned land, unless such lease is authorized by an act of the legislature.¹¹⁰ Third, no permit can be issued to strip mine any area that is within one hundred feet of any public road, stream, lake, or other public property.¹¹¹ Fourth, no permit shall be issued to any applicant who has been affiliated with or managed or controlled by, other than as an employee, a person who has had a permit revoked or reclamation bond forfeited, except if such action occurred before July, 1971 and

¹⁰⁷ W. VA. CODE ch. 20, art. 6, § 8 (Michie Supp. 1972). There is a real problem because not only must the Director approve the pre-plans within thirty days, but he must also consider written protests, which also have at least thirty days to arrive.

This is important because the pre-plans are adequate only if they adequately protect those recognized public and private interests detailed in section eleven. *Id.* § 11. In many cases the Director can only discover those interests through a written protest by an objector or a protester, and this could come on the afternoon of the thirtieth day. At the same time the applicant has a right to receive word on the approval of his pre-plans. This leaves the Director in a difficult position if both the applicant and the protester wish to enforce their rights.

It is certainly more consistent with the statutory scheme to give priority to hearing all protests sent within thirty days, than to insure that the applicant can begin operations in thirty days.

In operation this may be the practice. Of course, the Director still has several courses of action. He can issue a permit and then suspend or revoke the permit when the new information reaches him. *Id.* He therefore must certainly have the power to approve the pre-plan, and after receiving the last minute protest, revoke his approval.

¹⁰⁸ See W. VA. CODE ch. 20, art. 6, §§ 1, 22 (Michie 1970 replacement volume), and art. 6A, § 1 (Michie Supp. 1972).

¹⁰⁹ W. VA. CODE 20, art. 6A, § 1 (Michie Supp. 1972).

¹¹⁰ W. VA. CODE ch. 20, art. 6, § 22 (Michie 1970 replacement volume). According to the Reclamation Chief, as of February 1, 1973, there were no permits outstanding on state owned land.

¹¹¹ *Id.* § 11.

such operator so affected had paid the bond and additional sums adequate to reclaim the land.¹¹²

Beyond these clear restrictions, the Director may deny a permit application properly submitted, if in his judgment and discretion the standards set out in section eleven of the Act cannot be met, nor the hazards listed therein feasibly prevented. Section eleven, in part, provides:

The legislature finds that there are certain areas in the State of West Virginia which are impossible to reclaim either by natural growth or by technological activity and that if surface mining is conducted in these certain areas such operations may naturally cause stream pollution, landslides, the accumulation of stagnant water, flooding, the destruction of land for agricultural purposes, the destruction of aesthetic values, the destruction of recreational areas and the future use of the area and surrounding areas, thereby destroying or impairing the health and property rights of others, and in general creating hazards dangerous to life and property so as to constitute an imminent and inordinate peril to the welfare of the State, and that such areas shall not be mined by the surface mining process.

Therefore, authority is hereby vested in the director to delete certain areas from all surface-mining operations.¹¹³

Among other things this section limits the Director's authority to issue strip mining permits and excludes some areas of West Virginia from strip mining due to topography, geography, and soil conditions. When he determines that a stripping operation may naturally cause an unreasonable amount of any of the listed hazards, he shall not issue a permit covering the area.

Further limitations are enumerated in the following paragraphs of section eleven:

No application for a permit shall be approved by the director if there is found on the basis of the information set forth in the application or from information available to the director and made available to the applicant that the requirements of this article or rules and regulations here-

¹¹² *Id.* § 8.

¹¹³ *Id.* § 11.

after adopted will not be observed or that there is not probable cause to believe that the proposed method of operation, backfilling, grading or reclamation of the affected area can be carried out consistent with the purpose of this article.

If the director finds that the overburden on any part of the area of land described in the application for a permit is such that experience in the State of West Virginia with a similar type of operation upon land with similar overburden shows that substantial deposition of sediment in stream beds, landslides or acid water pollution cannot feasibly be prevented, the director may delete such part of the land described in the application upon which such overburden exists.

If the director finds that the operation will constitute a hazard to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake or other public property, then he shall delete such areas from the permit application before it can be approved.

The director shall not give approval to surface mine any area which is within one hundred feet of any public road, stream, lake or other public property and shall not approve the application for a permit where the surface-mining operation will adversely affect a state, national or interstate park unless adequate screening and other measures approved by the commission are to be utilized and the permit application so provides: Provided, that the one-hundred-foot restriction aforesaid shall not include ways used for ingress and egress to and from the minerals as herein defined and the transportation of the removed minerals, nor shall it apply to the dredging and removal of minerals from the streams or watercourses of this State.

Whenever the director finds that ongoing surface-mining operations are causing or are likely to cause any of the conditions set forth in the first paragraph of this section, he may order immediate cessation of such operations and he shall take such other action or make such changes in the permit as he may deem necessary to avoid said described conditions.¹¹⁴

¹¹⁴ *Id.*

It is suggested by some that the general authorization found in the first paragraph of this section is limited by the specific authorizations in the remaining paragraphs of section eleven. Therefore, the Director cannot deny a permit (or delete areas within the permit application) in those cases where he simply finds an unreasonable risk of incurring the hazards, but can only deny a permit (or delete areas) when the specific conditions listed in section eleven exist. There are at least two reasons why this interpretation is incorrect. First, the words "the following" do not appear in the section. Nor is there a colon at the end of the first paragraph followed by a list of specific powers. The law does say:

The legislature finds that there are certain areas in the state . . . and that such areas shall not be [stripmined].

Therefore, authority is hereby vested in the director to delete certain areas from all surface-mining operations.¹¹⁵

The meaning of these words is clear. Such areas shall not be stripmined, and the Director shall exclude these areas from strip mine operations.

Second, the last paragraph of section eleven specifically invokes the first paragraph as setting out the conditions which if likely to be caused by an ongoing operation, invoke the Director's duty to take action to avoid such conditions, including stopping the operation. To state that a hazard found under the first paragraph is not cause for denial of a permit since denials are authorized only under the specific circumstances set out in the remaining paragraphs, is illogical because after the permit is granted, the Director acting under the last paragraph, can order the stripping to cease if it is likely to cause a hazard found in the first paragraph.

The conclusion is that section eleven of the Act gives the Director the power and places upon him the duty to prevent those hazards listed in the first paragraph of that section. The existence of this duty in a particular case depends upon whether, in the Director's opinion, the hazard exists in such proportion and likelihood that protective action is necessary. The question is — is the alleged threatened hazard unreasonable so as to impair rights of others? The process of determining this involves an amount of information sifting and policy making on the part of the Director, all involving an exercise of discretion.

¹¹⁵ *Id.*

Even though the statute authorizes any affected citizen to sue in mandamus to compel the Director to carry out his duty under section eleven,¹¹⁶ if the Director determines that the circumstances in the particular case do not give rise to the duty, the court is unlikely to overrule the Director's independent judgment.

Section eleven gives wide latitude to the Director (and to the Board of Review) to determine what strip mining is legal under the 1971 Act. This is not to say that his discretion is absolute.¹¹⁷ There have been several cases that give a clue to the substance of section eleven as applied by the Department. In 1968, the Director denied an application for a permit to strip an area located across the view of an overlook in Grandview State Park. Although the decision mentioned the precipitous slopes in the area in question, it was clear that the denial was based on aesthetic grounds. It was crucial that the proposed site was in the vicinity of a state park. Upon appeal, the Director's decision was upheld by the Board of Review,¹¹⁸ whose decision in turn was appealed to the Circuit Court of Fayette County where it has remained since.

In 1971, the Director revoked a permit granted to strip an area near Laurel Run, a creek that runs into the Cooper's Rock State Forest and into the Cheat River. The revocation came after a public outcry led the Governor to order the Director to revoke the permit. The Director's order cited aesthetic considerations under section eleven as the grounds for revocation. Upon appeal, the Board of Review expanded the order at the request of the Committee to Save Laurel Run¹¹⁹ to include, as grounds for revocation, the expectation

¹¹⁶ *Id.*

¹¹⁷ W. VA. CODE ch. 29A, art. 5, § 4(g) (Michie 1970 replacement volume), provides:

It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

¹¹⁸ For the decision of the Reclamation Board of Review see *Royal Sparks Mining Co. v. Samsell* (1969).

¹¹⁹ An ad hoc environmental protection group was represented before the Board by attorneys from Appalachian Research and Development, Inc.

that the proposed operation would cause acid water pollution adversely affecting Laurel Run, Coopers Rock State Forest and the West Virginia University Forest, and that the operation would destroy the recreational value and future use of the surrounding area. The Board then proceeded to hear the appeal.¹²⁰ After five days of hearings, the Board reversed the Director's order and ordered him to issue a permit. The Board ruled that no objective definition or criteria existed for establishing aesthetic values and, substituting its judgment for the judgment of the Director,¹²¹ found that the operation would not destroy aesthetic values. The Board pointed out that the site was not visible from the adjacent state road, from the main recreational portion of the state forest, or from the virgin hemlock stand and that after reclamation it would fit in with the contours of the surrounding pasture land. The Board also found that the off-site aesthetic damage from siltation or acid water would be prevented by treatment ponds described in the operation plans. The Board went on to find that the expanded grounds for denying the application were really not supported by the evidence.¹²²

Another case involved an application to strip a twenty acre site located on a tributary of White Day Creek, a popular fishing stream near Morgantown. Public opposition to this operation was so heavy that the Department received over 2,200 protests. The order of denial noted that the particular seam of coal (Kittanning) was associated with acid-producing overburden, that past experience with the seam had consistently presented problems relating to the overburden, that the plan failed to show adequate measures for treating this acidic overburden and the acid-water that is associated with the seam, and that the steepness of the slope was not shown on the pre-plan map.

¹²⁰ A series of attempted court maneuvers preceded the Board hearing. The Director, a party to the appeal before the Board, became seriously ill and the Assistant Attorney General, representing the Director, asked the Board to postpone the hearing. The Board refused, whereupon the West Virginia Supreme Court of Appeals was asked to issue a writ of prohibition to stay the hearing until the Director's recovery. The court was in vacation and the sole judge contacted refused to act on the petition unless two other judges could be found to hear it. They could not be found and the writ was not issued. At this point the Director's attorneys petitioned the Circuit Court of Preston county, the site of the operation. The judge heard arguments in his chambers, told the attorneys that he would deny the petition, and refused to docket the case. The hearing took place without the Director's presence.

¹²¹ It is doubtful whether the Review Board is authorized to substitute its decision for the decision of the Director. Something more seems to be required for a reversal. See W. VA. CODE ch. 20, art. 6, § 28 (Michie 1970 replacement volume).

¹²² The Director appealed the decision of the Review Board in the Kanawha County Circuit Court. Morgantown Dominion News Sept. 14, 1971 at 8.

The final cause given may well have been the true cause for denying the permit. The Director said "White Day Creek, the named receiving stream, is a high quality stream that is annually stocked with trout and is heavily used by the residents of Monongalia and surrounding counties. With surface mining operations, the destruction of a recreational area and the future use of the area and surrounding areas will likely result."¹²³

At least two other applications for stripping permits have been denied on the grounds that they would damage aesthetics and recreational areas, one near a national fish hatchery and a national forest,¹²⁴ and the other near fishing streams.¹²⁵ These cases indicate that those proposed strip mine operations which are most likely to be prohibited under section eleven of the Act are those in the vicinity of state parks, and those which cause a large amount of responsible opposition. In practice, the Reclamation Division has a large state map on the wall of their offices, with all of the state and national parks and forests outlined in red. Any application to strip an area near these red lines is examined with extra care.¹²⁶

Beyond its use in denying a permit to strip, section eleven is used by the Reclamation Division in both counseling operators as to proposed methods of operations, and in warning and penalizing them for ongoing practices that either vary from their proposed plan or threaten protected interests.

As for the operation of the mining itself, the Act suggests various drainage systems,¹²⁷ regulates blasting,¹²⁸ provides for concurrent reclamation,¹²⁹ and prescribes methods of revegetation.¹³⁰ The Act sets some limitations on the methods of operation,¹³¹ including limiting highwalls to thirty feet and requiring access roads to areas above highwalls at least every one-half mile. The Act provides for periodic

¹²³ Director's order denying a permit to SMA No. 433, DMR Coal Sales, Inc. May 25, 1972.

¹²⁴ Director's order denying a permit to SMA No. 397 Greer Steel Co. May 5, 1972.

¹²⁵ Director's order denying a permit to Mr. Wade Bell, Jr. Jan. 8, 1971.

¹²⁶ STANFORD REPORT, *supra* note 29, at 55.

¹²⁷ W. VA. CODE ch. 20, art. 6, §§ 9a, 14 (Michie 1970 replacement volume); W. Va. Dep't Nat. Res. Reg. § 7 (1972).

¹²⁸ W. VA. CODE ch. 20, art. 6, § 11a (Michie Supp. 1972); W. Va. Dep't Nat. Res. Reg. § 6 (1972).

¹²⁹ W. VA. CODE ch. 20, art. 6, § 12 (Michie 1970 replacement volume); W. Va. Dep't Nat. Res. Reg. § 8 (1972).

¹³⁰ W. VA. CODE ch. 20, art. 6, § 15 (Michie Supp. 1972); W. Va. Dep't Nat. Res. Reg. § 9 (1972).

¹³¹ W. VA. CODE ch. 20, art. 6, §§ 13-14 (Michie Supp. 1972).

progress reports,¹³² inspection by state inspectors every fifteen days,¹³³ penalties,¹³⁴ and provisions for revocation of the mining permit.¹³⁵ Finally the Act provides that reclamation must be completed within twelve months after the permit has expired¹³⁶ and for release of the bond if the vegetation is deemed satisfactory after two growing seasons.¹³⁷

C. Seeking Redress From an Action by a Regulatory Agent or Body Which Adversely Affects a Real Interest

A person adversely affected by action or inaction by the Director or the Commission, may have this action or lack of action reviewed by the Commission in some cases, by the Review Board, and by a circuit court.

The Reclamation Commission has the authority to “[r]eview orders and decisions of the director.”¹³⁸ Specific provision for review is provided for an applicant whose pre-plans have been rejected by the Director,¹³⁹ and it must be presumed that the Commission has the authority to reverse the Director’s decision and order him to approve the pre-plan.

The Commission has the authority to order, through the Director, the suspension or revocation of any permit for failure to comply with any part of the Act, and to order a cease and desist order for any operation that is started without a permit.¹⁴⁰ These powers strongly suggest that the Act gives the Commission the power to review and reverse any decision or order of the Director in circumstances where the Commission feels the Act is not being complied with, at least to the extent that the non-compliance can be thwarted by a suspension or revocation of a permit. Since in theory the Commission already has a procedure for hearing appeals brought up by aggrieved applicants under section nine, it might well be that any person adversely affected by stripping operations can trigger the general review power of the Commission by petitioning the Commission.

All of this becomes less important when it is realized that of

¹³² *Id.* § 21.

¹³³ *Id.* § 5.

¹³⁴ *Id.* § 30.

¹³⁵ *Id.* § 14(a).

¹³⁶ *Id.* § 12.

¹³⁷ *Id.* §§ 10, 16.

¹³⁸ *Id.* § 6.

¹³⁹ *Id.* § 9.

¹⁴⁰ *Id.* § 6(d), 6(e).

the four members of the Commission, one is the Director himself, and two of the remaining three are his subordinates in the Department.¹⁴¹ Because he works closely with these two Commission members in the daily affairs of the Department, it can be expected that they would affirm the Director's decisions. In practice, the appeals from the Director's denial of a permit have by-passed the Commission and have proceeded directly to the Board of Review.¹⁴²

Decisions, orders, or inaction by the Director or the Commission can be appealed to the Review Board by any person claiming to be aggrieved or adversely affected thereby.¹⁴³ The serious question presented by this section is — what is the measure of review of a Director's (or Commission's) decision to be applied by the Review Board in its reviewing capacity? The Act states "[t]he Board shall hear the appeal de novo and any party to the appeal may submit evidence."¹⁴⁴ The common meaning of a de novo review is that the reviewing body will hear evidence and make their own determinations of the facts, *and* make a new judgment, as if no action had taken place in the body below.¹⁴⁵ This is clearly not the case under the Act. It goes on to provide: "If upon completion of the hearing the board finds that the rule . . . or order appealed from was lawful and reasonable, it shall [be affirmed] . . . if the board finds that such rule . . . or order was unreasonable or unlawful, it shall make a written order vacating or modifying the rule . . . or order appealed from."¹⁴⁶ This clearly gives the Board something less than the authority to substitute their opinion for the opinion of the Director. The question is how much less.

The language of the Act providing for reversal if the order was *unreasonable or unlawful* is similar in substance to the language used by the West Virginia Administrative Procedure Act as a standard for

¹⁴¹ *Id.* § 6.

¹⁴² This was the case in the Grandview and Laurel Run appeals. Except for the hearings held in conjunction with the promulgation of the 1972 regulations, the Commission apparently has held no other hearings.

¹⁴³ W. VA. CODE ch. 20, art. 6, § 28 (Michie 1970 replacement volume).

¹⁴⁴ *Id.*

¹⁴⁵ *In re Bett's Estate*, 2 Ill. App. 2d 453, 119 N.E.2d 801 (1954); *In re Hayes*, 261 N.C. 616, 135 S.E.2d 645, (1964).

¹⁴⁶ W. VA. CODE ch. 20, art. 6, § 28 (Michie 1970 replacement volume). This language is different from that used in establishing the authority of the Workmen's Compensation Board. "And thereupon, after a review of the case, the board shall sustain the finding of the commission or enter such order or make such award as the commissioner should have made." W. VA. CODE ch. 23, art. 5, § 3 (Michie 1970 replacement volume). This language is held to give the appeal board the power to hear and decide the case de novo, and its findings supercede those of the Commissioner. *Hayes v. State Comp. Dir.* 149 W. Va. 220, 140 S.E.2d 443 (1965).

judicial review by courts.¹⁴⁷ Generally, in the review of administrative actions, the court will determine the administrative agency's findings were supported by substantial evidence.¹⁴⁸ If the evidence in the record is such that reasonable minds could use it to reach the conclusion reached below, then that conclusion must be affirmed. This incorporates the idea basic to review of administrative actions. An agency's decision or action can be wrong in the opinion of the reviewer, yet reasonable and lawful, because it is a possible conclusion based upon the evidence. In a choice between two possible conclusions, the legislature intended that the administrative agency be the body to choose the correct one. In other words, reasonable minds often differ on conclusions of fact and policy, and if the differing opinions are reasonable, that is having some substantial basis in the record, then that opinion of the administrative agent below must be affirmed.

Reviewing courts look at the record of the hearing held below to see if there is substantial evidence to support the agency's conclu-

¹⁴⁷ W. VA. CODE ch. 29A, art. 5, § 4 (Michie 1971 replacement volume). This section essentially provides that a reviewing court shall reverse the order of the agency if its findings, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The first four could generally mean "unlawful," and the remaining two, "unreasonable."

¹⁴⁸ "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Chief Justice Hughes speaking in *Consolidated Edison Co. v. N.L.R.B.*, 304 U.S. 197, 229 (1938). This is the most commonly accepted measure of judicial review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951); Jaffe, "Judicial Review: Substantial Evidence on the Whole Record," 64 HARV. L. REV. 1223 (1951). Some West Virginia cases have enunciated variants of the substantial evidence rule. "[A]n order of the commission based on evidence to support it is not subject to judicial interference. . . ." When the order . . . is based upon facts . . . sustained by evidence, or found from conflicting evidence, it cannot be disturbed. . . ." *Atlantic Greyhound Corp. v. Public Serv. Comm'n*, 132 W. Va. 650, 666, 667, 54 S.E.2d 169, 178 (1949). "Findings of fact by the public service commission based upon evidence to support them, generally will not be reviewed by this Court." *B. & O. R.R. Co. v. Public Serv. Comm'n*, 99 W. Va. 670, 672, 130 S.E. 131, 131 (1925). *Walk v. State Comp. Comm'r*, 134 W. Va. 233, 58 S.E.2d 791 (1950); *Burgess v. State Comp. Comm'r*, 121 W. Va. 571, 5 S.E.2d 804 (1939). The West Virginia Supreme Court of Appeals in *McGeary v. State Comp. Dir.*, 148 W. Va. 436, 439, 135 S.E.2d 345, 347 (1964), cites *Walk* and *Burgess* as holding "that an order of the appeal board . . . will not as a general rule be set aside if there is substantial evidence and circumstances to support it."

sion. In the instant situation, the Review Board is called upon to make their own record through a *de novo* hearing. This is necessary because in the usual appeal there will be no record for the Board to examine. But once the record is made at the hearing, there is little reason to depart from the usual method of review of administrative action.¹⁴⁹ That standard could be phrased in a variety of ways:

- (a) If a reasonable man using the Boards record *could* reach the same conclusion as the Director, then that conclusion must be affirmed; or,
- (b) if upon examining the Board's record, it is debatable what decision should be reached, then the Director's decision must be affirmed (if it was one of those debatable decisions); or,
- (c) if there is substantial evidence in the Board's record to support the Director's decision, then the decision must be affirmed, even though there may be substantial evidence to support an opposite or different conclusion, and even though the Board would have reached such opposite conclusion had it been empowered to make the vital decision.¹⁵⁰

This interpretation makes sense, and so construed, the statute is

¹⁴⁹ W. VA. CODE ch. 29A, art. 5, § 4 (Michie 1970 replacement volume).

¹⁵⁰ There is another difference between the review process under discussion and the judicial review of administrative action. In the usual situation, when the reviewing body looks at a "cold record," deference is paid to decisions about the credibility of witnesses. This is based on the assumption that one can tell whether a person is lying or biased from observing his demeanor as he testifies. These indicia of credibility, of course, do not appear in a written record. The Board, however, must make the initial decisions of witness credibility because the hearing is *de novo*, *i.e.*, it takes the testimony, observes the witnesses, etc. Thus when there is a contradiction or an inconsistency in the testimony, the Board must decide whom to believe. In so doing, it makes what some administrative legal scholars call the "primary inferences" of fact from the raw evidence. For example, if witness *A* says that four pounds of sulphur per acre per day will be dissolved in water draining from the proposed mine site, and witness *B* says that it will be one pound, the Board must make the primary inference from this evidence (and any other evidence that is pertinent) as to the fact—four pounds, or one pound or something in-between. A set of raw facts must be thus inferred from the evidence.

These raw or primary facts must be applied to the legislative standard for granting or denying the license to strip. This process of making secondary inferences from the record, *i.e.*, given two pounds of sulphur per acre per day discharged into a given water drainage system of such and such dimensions, can one infer a reasonable chance that the hazards proscribed by section eleven of the Act will occur? See the discussion by Judge Friendly in *N.L.R.B. v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961). See also *Saginaw Broadcasting Co. v. F.C.C.*, 96 F.2d 554 (D.C. Cir. 1938).

an intelligent approach to the needs of administrative review of the Director's actions. It provides for a full hearing so that the Review Board will have a basis upon which to exercise their review, and leaves the Director with the power to exercise reasonable and lawful discretion in running those matters that the legislature placed under his control.¹⁵¹

In the only case in which the Board reversed an order of the Director, it did not give the same meaning to the statute. In the Laurel Run case, the Board's decision strongly indicated that it was substituting its judgment for the judgment of the Director, when it said:

No objective definition or criteria exist for establishing aesthetic values and that aesthetics and beauty have a unique meaning for each individual. *The destruction of aesthetic values is ruled out (by the subjective judgment of the Board)* on the grounds that no lasting changes of a generally objectionable nature will be wrought on the landscape or imposed on Little Laurel Run or Coopers Rock State Forest by the mining operation.¹⁵²

There are several explanations for this language. A likely one is that the Board, none of whom are lawyers, did not understand the basic theory of review of administrative action, which requires more than just disagreement in order to overturn a decision. It might well take a reviewing judge to tell the Review Board that although in the hierarchy of the system they are above the Director, their judgment will not prevail unless the Director's decision is unreasonable.

A second possible explanation is that the Board found there was no basis for finding that the on-site aesthetic damage threatened harm to the state parks and forests. This explanation is supported by the findings of fact, which showed that the site could not even be seen from the traveled portions of the area.¹⁵³ Of course this could not be said for the off-site aesthetic threat from acid drainage and sedimentation.

¹⁵¹ These conflicting provisions could lead to a determination that they set up the degree of deference which the Board should pay to the decisions of the Director. Yet, because they more narrowly restrict the discretion of the Director and the Commission in their formulation and execution of Department policy, a duty which the legislature entrusted to them, this interpretation is less desirable than the broader ones discussed above.

¹⁵² Findings by the Reclamation Board of Review in *Kennedy v. Latimer*, (19—) (emphasis added).

¹⁵³ *Id.*

A third possible explanation flows from the unusual nature of the Laurel Run case itself. The revocation was not initiated by the Director but by the Governor in response to public pressure. The Governor announced that he ordered the Director to revoke the permit.¹⁵⁴ The Board might well have believed that the Director's judgment really was that the operation was acceptable and that aesthetic destruction would not result.¹⁵⁵ The Director's failure to appear at the hearing (due to illness) or to submit depositions or interrogatories in response to invitations by the Board¹⁵⁶ would not have dispelled such a belief.

The question is an important one. The responsibilities of the Director and the Commission in developing and administering a comprehensive scheme under the Act are complicated enough without being second-guessed at every appeal by a part-time Review Board. Their function is to keep the Director and the Commission within the bounds of reason and law. This is what the circuit court should make clear.

Finally, the Act provides for judicial review by the Circuit Court of Kanawha County or the county in which the operation is located and establishes the scope of the court's review:

The court may set aside any order of the reclamation board of review which is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or which is determined by the court to involve a clearly unwarranted exercise of discretion.¹⁵⁷

This section concludes by providing for an appeal to the West Virginia Supreme Court of Appeals in the manner provided for civil appeals generally.

IV. SOME PROBLEMS AND QUESTIONS

There are a number of other questions concerning the Act that warrant particular discussion. One potentially important problem is determining what role the strip mining representative can be allowed to play on the Review Board. That he will be biased in favor of strip

¹⁵⁴ *Id.*

¹⁵⁵ Ten days before the revocation, the Director and the Chief examined the permit area. Their report showed no evidence of non-compliance with either the rules or regulations or the permit. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ W. VA. CODE ch. 20, art. 6, § 29 (Michie 1970 replacement volume).

operators that appear before the Board, at least to the extent that his general views will closely correspond to those of the strip operators, is essentially authorized by the Act.¹⁵⁸ But what if he takes a very active part in the proceedings, cross-examining and cutting short the anti-strip mining witnesses and aiding the operator's witnesses in developing their case? Such partisan activity is inconsistent with the position of a judicial officer, would necessarily affect the performance of the Review Board, and might well amount to a denial of due process under the West Virginia and Federal Constitutions.¹⁵⁹ "Due process requires that a trial or hearing must be fair, unbiased and by an impartial tribunal, whether the tribunal be administrative or judicial."¹⁶⁰

If the legislature only intended that the Board contain a member whose experience mirrored that of surface mine operators and not a member to champion the interests of one of the parties, the legislature might need to clarify that intent, or balance the Board by adding an environmentalist, or better yet, change the requirements altogether and provide for a truly public review board.

A question of concern to people who live in close proximity to barren lands and old strip sites, and to attorneys who represent such people, is what guidelines the Department of Natural Resources uses in choosing which denuded areas to reclaim with monies from the special reclamation tax fund.¹⁶¹ In 1972, 3,421.54 acres were reclaimed with these funds.¹⁶² Conversations with the Reclamation Chief revealed that priority is given to those sites with severely polluted water runoff and to areas that have serious stabilization problems. Other areas that should naturally receive priority of treatment are lands near state parks, unstable lands near inhabited dwellings or public roads, and lands in the vicinity of popular recreational areas.

It would be interesting to see what could be done with the section of the Act that gives the Attorney General and the prosecuting attorney of the appropriate county power to compel compliance with, or enjoin violations of, the Act.¹⁶³ Even though all administra-

¹⁵⁸ *Id.* § 27.

¹⁵⁹ W. VA. CONST., art. 3, § 10; U.S. CONST., art. 1. The former stating: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

¹⁶⁰ State *ex rel. Ellis v. Kelly*, 145 W. Va. 70, 74, 112 S.E.2d 641, 644 (1960).

¹⁶¹ W. VA. CODE ch. 20, art. 6, § 17 (Michie Supp. 1972).

¹⁶² W. VA. DEPT NAT. RES., STATUS REPORT JULY 1, 1967—DEC. 21, 1972 (1973).

¹⁶³ W. VA. CODE ch. 20, art. 6, § 30(c) (Michie Supp. 1972).

five remedies have not been taken, it appears that the named officers can pursue the enforcement of the Act on their own initiative.¹⁶⁴

The usual problem of determining which members of the public can contest an administrative action, in this case usually a grant of a permit to strip mine, is not of great concern under the 1971 Act because of the broad description of parties who may appeal to the Board. "Any person claiming to be aggrieved or adversely affected by any rule . . . or order of the reclamation commission or order of the director or by their or his failure to enter an order may appeal."¹⁶⁵ This might well mean any member of the protesting public,¹⁶⁶ or at least any such member who has an active personal interest in the use of the land in the vicinity of the proposed operation (even if this use is for only a few days of hunting or fishing a year).¹⁶⁷

A question that the legislature should answer is what is meant by that section of the Act providing, "[a]ny operator who directly causes damage to the property of others as a result of surface mining shall be liable to them, in an amount not in excess of three times the provable amount of such damage."¹⁶⁸ The important questions are, does *directly* require something more than the proximate cause standard used in West Virginia, and, does a successful plaintiff have a right to treble damages, and if not, what guides the judge when he decides whether or not to give the treble damages.

¹⁶⁴ *But see* the grant of jurisdiction to the Director to enforce this article. *Id.* § 1.

¹⁶⁵ *Id.* § 28.

¹⁶⁶ Goodman & Lobert, 6 W. VA. ADMIN. L. BULL. No. 23 (1972).

¹⁶⁷ Whether a party has a sufficient stake in an otherwise justiciable body is what has traditionally been referred to as the question of standing to sue. There have been a great number of recent cases and writings on this question. Most of them involve standing to invoke court review of federal administrative action. Administrative Procedure Act, 5 U.S.C. § 702 (1966), which provides, "a person . . . adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." Because the federal act is similar to the 1971 Act, the following cases and writings are relevant: *Sierra Club v. Morton*, 405 U.S. 727 (1972); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Scenic Hudson v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, (1970); Jaffee, *Standing to Sue in Conservation Suits*, in *LAW AND THE ENVIRONMENT* 123 (Baldwin & Page ed. 1970).

¹⁶⁸ W. VA. CODE ch. 20, art. 6, § 30 (Michie Supp. 1972). This sentence continues with a qualification, "if and only if such damage occurs before or within one year after such operator has completed all reclamation . . . and all bonds . . . with respect to such reclamation work are released." In addition to the two issues discussed, the Act seems to provide strict liability, but then limit it to damages for property.

The use of the word *directly* seems to indicate that the cause of the alleged injury must be more immediate than those lying near the parameters of proximate cause. Yet, a look at those jurisdictions requiring cause to be *direct* for simple tort recovery reveals that the guide for determining direct cause is substantially the same as the West Virginia guide for determining proximate cause.¹⁶⁹ For example, the West Virginia Supreme Court of Appeals held that “[p]roximate cause is any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred.”¹⁷⁰ Similarly, courts in California and Illinois have held direct cause to mean the active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source.¹⁷¹ This suggests that the West Virginia court should apply the same causation rule under the Act as they do in common law tort cases (without any need to show lack of reasonable care). The policy considerations also suggest the same approach.

By using the words “not in excess of,” the section does not give a clear right to treble damages.¹⁷² In practice, courts might infer such a right without ever saying so. One gets a feeling that the legislature intended to give plaintiffs a right to the treble damages. It certainly makes little sense to provide for *up to* treble damages and then provide no guideline to the courts for deciding what cases merit the treble damages. A possible approach is to take the West Virginia guide for awarding punitive damages¹⁷³ and, because the Act specifically provides for treble damages and for liability without negligence, give the court discretionary power to grant treble damages where there is no negligence, and give the plaintiff the right to collect

¹⁶⁹ See generally, W. PROSSER, LAW OF TORTS 264-70 (4th ed. 1971); Bauer, *Confusion of the Terms “Proximate” and “Direct,”* 11 NOTRE DAME LAWYER 395 (1936).

¹⁷⁰ *Whitney v. Ralph Myers Constr. Corp.*, 146 W. Va. 130, 134, 118 S.E.2d 622, 624 (1961).

¹⁷¹ *Hinton v. State*, 124 Cal. App.2d 622, 269 P.2d 154 (1954); *Anderson v. Steinle*, 289 Ill. App. 167, 6 N.E.2d 879 (1937).

¹⁷² Several other West Virginia statutes grant a right to treble or punitive damages but they use mandatory language. W. VA. CODE ch. 37, art. 5, § 1 (Michie 1966) and ch. 61, art. 3, § 48(a) (Michie 1966).

¹⁷³ Punitive damages under West Virginia law are obtainable only for wanton or wilful misconduct. *Short v. Grange Mut. Cas. Co.*, 307 F. Supp. 768 (S.D.W. Va. 1969). They are given when, together with the compensatory damages, they will punish the defendant and in the judgment of the jury be sufficient to deter others from engaging in like course of conduct. *Spencer v. Steinbrecher*, 152 W. Va. 490, 169 S.E.2d 710 (1968).

treble damages where there is simple negligence. What is clear from this section is that it does not provide much if it does not give a right to treble damages, that it requires a closer causal relation, and that it gives in return only eradication of the burden of proving negligence.¹⁷⁴

Finally, among the several primary legal issues to arise out of the 1971 Act is whether the Director has the power and, if so, the duty to delete certain areas of West Virginia from all strip mining, either by geographical or topographical description, in advance of any particular application for permits to strip within these areas. The Stanford Report¹⁷⁵ and the present Director believe that section eleven of the Act does not give the Director the authority for area-wide deletion. The present Director believes that even if he had such power, all areas in the state (outside those specified in the statute) can be strip-mined without unreasonably threatening those hazards listed in section eleven.¹⁷⁶

It is difficult to accept that there are no land areas in the state that should be deleted in advance from all strip mining.¹⁷⁷ The legislature itself said that such lands exist in the first paragraph of section eleven: "The Legislature finds that there are certain areas in the state of West Virginia which are impossible to reclaim either by natural growth or technological activity . . . and that such areas shall not be mined by the surface-mining process."¹⁷⁸

The assertion that section eleven does not authorize the Director to delete areas in advance of application rests on the following argument: The paragraph just quoted in part (above) is introductory only and does not authorize the Director to delete such areas from stripping, even though the paragraph is part of the Act and section one gives the Director the authority to enforce all provisions of the

¹⁷⁴In a recent case involving this section of the Act, the Monongalia County Circuit Court instructed the jury that "if you believe . . . that the defendants . . . directly caused damage to the deep coal mine of the plaintiff, as a result of their surface mining . . . you may award the plaintiff additional statutory damages in an amount not in excess of three times the proveable amount of damages . . ." One objection raised by the defendant against the instruction is that the statute is penal in nature and must be strictly construed against the one asserting its benefit and the court should so instruct the jury. *J. & J. Mining v. Rail & River Mining Co.*, Civil No. 57-18 (Monongalia Cty., W. Va. Mar. 8, 1973).

¹⁷⁵STANFORD REPORT, *supra*, note 29, at 98.

¹⁷⁶Conversations with the Chief of Dep't Nat. Res., Feb. 1, 1973.

¹⁷⁷A petition was filed with the Director in 1971 asking that all stripping in the Coal River watershed be stopped and all future permits prohibited.

¹⁷⁸W. VA. CODE ch. 20, art. 6, § 11 (Michie Supp. 1972).

Act. The Director's authority arises only out of the following one-line paragraph: "Therefore, authority is hereby vested in the director to delete certain areas from all surface-mining."¹⁷⁹ This is followed by four paragraphs providing for particular situations in which action "shall" or "may" be taken, all of them involving a permit application or an ongoing permit. The word *certain* in the above quoted provision is the key word (so the argument continues), and *certain* refers only to those *permit* areas discussed in the following four paragraphs.

This construction is certainly possible. But it is a tortured one. A similar construction was rejected earlier as it related to determining in what situations the Director can refuse a permit. The clearer and more natural argument is that the word *certain* in the one-line paragraph refers to the same things referred to by the word *certain* in the first paragraph, that is "those lands impossible to reclaim." When read together in their natural order, their meaning is clear:

The Legislature finds that there are certain areas in the state of West Virginia which are impossible to reclaim . . . and that if surface mining is conducted in these certain areas such operations may naturally cause stream pollution, landslides . . . stagnant water, flooding, the destruction of aesthetic values . . . recreational areas . . . and that such areas shall not be mined by the surface mining process.

Therefore, authority is hereby vested in the director to delete certain areas from all surface-mining operations.¹⁸⁰

The Director acting alone is clearly given the power to delete areas by the specific language of the section that states "authority is hereby vested in the director to delete certain areas from all surface mining operations."¹⁸¹ This appears to be conclusive as to his power. It does seem to contradict the particular provision in the West Virginia Administrative Procedures Act which provides that every "regulation, standard, or statement of policy or interpretation of general application and future effect . . . affecting private rights . . ." is a *rule*.¹⁸² It contradicts the 1971 Surface Mining Act provision that the Commission, not the Director, shall promulgate rules,¹⁸³ and that they be done in accordance with the Administrative Procedures Act's

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² W. VA. CODE ch. 29A, art. 1, § 1(c) (Michie 1971 replacement volume).

¹⁸³ W. VA. CODE ch. 20, art. 6, § 6(a) (Michie Supp. 1972).

requirements of public notice, opportunities for the public to be heard, and publication and effective date.¹⁸⁴ Yet, the legislature evidently saw deletion of areas from strip mining to be an exception to such general practice and gave the power to the Director acting alone.

Even if it were found that the Director cannot issue an area-wide deletion order, the Director could make a public statement to all interested parties that he believed that a certain described area was impossible to reclaim sufficiently to prevent the hazards listed under section eleven, and that it was extremely unlikely that he would approve a permit to strip within the area.¹⁸⁵ The effect would be the same. Given a Director who believed there were certain areas "which are impossible to reclaim," it would be fairer to possible applicants to warn them that they are unlikely to receive a permit, before they spend substantial sums of money developing prospecting and operating plans.

V. CONCLUSION

Does the Act satisfactorily protect neighboring landowners, downstream riparian owners and users, the public at large, and future generations in their use of the land from the ravages of strip mining? Looking briefly at the damages listed earlier in this article, it can be seen that some have been specifically provided for by the Act and others tangentially affected, while still others have been completely ignored.

Those costs completely ignored by the Act include air and dust pollution, damage to public roads, hazards to people and property on public roads, noise pollution, and unemployment. Of these, noise and on-site air pollution are minor problems. Damages to roads might possibly be alleviated by enforcement of present statutes.¹⁸⁶ But it will require imaginative laws to distribute the costs of rebuilding the torn-up surfaces to those operators whose trucks tear them up. Haz-

¹⁸⁴ W. VA. CODE ch. 29A, art. 3, §§ 1-7 (Michie 1970 replacement volume).

¹⁸⁵ Precedent for this type of action was established by the Director when he issued a memorandum to field inspectors of mining and reclamation on private lands within Monongahela National Forests, including a requirement that "all regrading shall be to the original contours with no vertical highwall being exposed." STANFORD REPORT, *supra* note 29, at 97.

¹⁸⁶ Much of the damage might result from overloaded trucks in violation of the law. See W. VA. CODE ch. 17C, art. 17, §§ 8-14 (Michie 1966). The law specifically authorizes any police officer to submit vehicles to weighing examinations. *Id.* § 10.

ards to cars and people from dust and coal escaping from the beds of the trucks (as opposed to their bodies and tires) can be eliminated by enforcement of present laws.¹⁸⁷

Those costs indirectly or tangentially affected by the Act might be alleviated to some degree. Water tables will rise if reclamation retards surface runoff. Wildlife will gain if their habitats are re-established and access to areas above highwalls maintained. Tourism, however, will probably have to be written off in counties that have seen significant stripping.

The Act was written, in large part, to curb the hazards of denuded land, mine acid drainage, sedimentation, flooding, landslides, blasting, stagnant water, and the destruction of recreational areas and aesthetic values. Indirectly the Act was to prevent a decline in the tax base of the land. Judging how well the Act has succeeded in providing protection is a difficult task. It is difficult because there are few clear standards with which to judge the nature and extent of the injuries. Many of these injuries are unquantifiable. Two additional factors enlarge these difficulties. First, many statements made in the area are made by interested parties whose assessments are not particularly credible. Second, it is difficult to determine what denuded areas were produced before the essential provisions in the Act were written into law in 1967.

This is the all-important question. There are those who say the Act adequately protects the environment, while there are many who say it is clearly failing, that on many of the steep slopes of West Virginia the damage cannot be prevented, that the disturbed land cannot be reclaimed.¹⁸⁸ One of the most serious criticisms is that under the regulations, "reclamation" in practice only means greening the disturbed area with grass for several years until the bond is released, and that "reclamation" as a "process of restoring land to cultivation or use" is attempted only in the unusual situation.¹⁸⁹ If this is all true, then the legislative intent as pronounced in sections one and eleven can be met only by rewriting the regulations or by deleting such hard-to-reclaim areas from all stripping. To an untrained reader

¹⁸⁷ "No vehicle . . . shall be operated on any highway unless . . . so constructed or loaded [or covered] . . . as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping." *Id.* § 6(a).

¹⁸⁸ For a recent bibliography see, R. MUNN, *STRIP MINING, AN ANNOTATED BIBLIOGRAPHY* (1973).

¹⁸⁹ STANFORD REPORT, *supra* note 29, at 58-61; Smith, *Are Reclamation Examples Successful?*, *The Morgantown Post*, Mar. 19, 1973, at 9.

of the literature on the subject, the evidence strongly suggests that the damage is not being checked by the Act, in spite of earnest activity on the part of the Reclamation Division. The most complete and credible study, the Stanford Report (which was itself incomplete, often inconclusive, and at times unintelligible), did not find that the Act had succeeded in any large degree in preventing the ongoing damage to the land.¹⁹⁰

What does seem evident is that the present Director has not taken the Act to be a legislative mandate for preventing strip mining in those areas and circumstances where past practices and methods of operation have proved to be so damaging to the environment. Instead, the Director and the Reclamation Division have concentrated on stricter regulations and tighter enforcement of those requirements,¹⁹¹ while in the main, approving most permit applications that are technically satisfactory and make full use of those feasible and reasonable methods available in the industry to prevent undue damage to the environment.

It might be said that the Department of Natural Resources does not see itself as a representative of the public, ever vigilant and active to protect those interests listed in the introductory section of the 1971 Act. Instead, it sees itself as the public agency authorized to administer and regulate the removal and sale of strip-mined coal, to see that it is done in accordance with the detailed technical regulations, and to see that it is done without the wanton disregard of the public as was done in the past.

These two perceptions are quite different from each other. The public needs a strong and active representative in the day to day operation of strip mining to counter-balance the organized activities of the strip mine owners. The government is the one body that can serve as this representative.

The White Day Creek case demonstrated that when the environmentally concerned public takes time from their normal daily business and personal activities, they can see to it that the law is used to prohibit strip mining. But in most instances where an application

¹⁹⁰ STANFORD REPORT, *supra* note 29, at 48-63. As of October 1971, of 248,078 acres were directly disturbed by operations, of which 178,430 had less than 75% vegetative cover, including 109,119 acres technically reclaimed and released. This was almost four years after the enactment of supposedly "strict" controls.

¹⁹¹ The 1971 amendments enabled the Reclamation Division to expand from an office of five and a secretary in 1967 to thirty-two field inspectors and a helicopter. W. VA. CODE ch. 20, art. 6, § 17 (Michie Supp. 1972).

is made for strip mining, the public is busy with its daily affairs and the only parties who realize what is happening are the Department and the stripper. If the Department does not represent the public in these cases, the public will not be represented.

The conclusion is that the words of the 1971 Act are an expression of serious concern on the part of the legislature for the fate of the environment. The Act was intended to exclude strip mining from those areas and in those circumstances where mining has caused damage in the past. The words of the Act grant the power to the Director to carry out this intent. But the words failed to carefully delineate the duty so that the Director could be forced under the law to exclude strip mining in these areas.

This failure is common enough in statutory grants of administrative authority. Legislatures have to weave a carefully planned scheme to leave the administrative agency enough discretion to make the more detailed rules and regulations, but still make specific enough both the parameters and the central thrust of their duty so that the legislative intent is carried out. This failure is aided by the legal doctrine of judicial review of administrative action, which leaves administrative discretion largely unchecked by that body which often makes the decisions interpreting and applying the law to actual cases. The results is that the particular environmental, political, social, and economic views of the Director play an overwhelming role in determining what the law is during any particular period of time.

What West Virginia has is a comprehensive statute that with one set of political appointments is a law that allows strip mining with some degree of care in almost any environmental circumstances in the state. Under another set of political appointments the statute does not allow strip mining in those same environmental circumstances.¹⁹²

West Virginia has two laws. The legislature should try again and choose between the two.

¹⁹² "Political" means the Governor appoints the Director and the members of the Review Board. To drastically transform the administration of the Act there would have to be a change in the Director's philosophy and the philosophy of three members of the Board. But to say that this is "political" is not simply to say that in choosing a Governor the people choose which of the "laws" they want to apply. Stripping is of large public concern, but elections rarely turn on one issue alone, especially one of such substance.