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# Surface Mining in Kentucky

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# Surface Mining in Kentucky

BY CAROLYN S. BRATT\*

## INTRODUCTION

In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA or the Act).<sup>1</sup> The Act, designed to protect the environment and society from the adverse effects of surface coal mining<sup>2</sup> and to insure uniform minimum nationwide regulatory standards,<sup>3</sup> established a comprehensive regulatory scheme for surface mining and reclamation operations of both federal and non-federal lands<sup>4</sup> within the United States.

The Secretary of the Interior, acting through the Office of Surface Mining and Reclamation within the Department of the Interior, is charged with administering and implementing the Act.<sup>5</sup> Implementation is divided into two stages.<sup>6</sup> During the initial, or interim phase,<sup>7</sup> all surface mining operations within a state are subject to federal enforcement of certain federally-proulgated environmental protection standards, complemented by continued state regulation.<sup>8</sup> Under the second, or permanent phase, all surface mining operations within a state are subject to

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<sup>1</sup> Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (Supp. 1980)).

<sup>2</sup> 30 U.S.C. § 1202(a) (Supp. 1980). The definition of "surface coal mining operations" includes not only the surface mining of coal by contour strip, area strip, auger or mountaintop removal methods, but also the surface effects of underground coal mining and support facilities. *Id.* § 1291(28)(A).

<sup>3</sup> *Id.* § 1201(g).

<sup>4</sup> The Act establishes separate regulatory programs for "federal lands," *id.* § 1273, and "Indian lands." *Id.* § 1300.

<sup>5</sup> *Id.* § 1211(c).

<sup>6</sup> *Id.* § 1251.

<sup>7</sup> *Id.* § 1252.

<sup>8</sup> A state may issue permits for surface mining during this phase as long as the permits require compliance with the interim program's performance standards. *Id.* § 1252(b). States are encouraged to assist in the enforcement by a reimbursement scheme for those who choose to participate. Thus, states which enforce the interim requirements of the Act in a manner satisfactory to the Secretary of Interior are reimbursed for the addi-

either federal or state enforcement of a regulatory program complying with all of the Act's environmental and performance standards.<sup>9</sup>

If a state desires to assume permanent and exclusive regulatory authority (primacy) over surface mining under the permanent phase, it must submit a proposed permanent program to the Secretary of the Interior for approval. To receive approval, the state proposal must show that the state has enacted laws and regulations embodying the environmental protection and performance standards of the Act. The state proposal also must demonstrate the state's technical and administrative ability to enforce the required standards.<sup>10</sup> Because coal is an integral part of Kentucky's economy,<sup>11</sup> it is not surprising that Kentucky sought primacy.<sup>12</sup> Kentucky's revised proposed permanent program was

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tional costs of such enforcement beyond their costs of enforcing the state programs existing prior to the Act. *Id.* § 1252(e)(4).

The 1978 Kentucky General Assembly adopted major revisions in the statutes governing surface mining in Kentucky in order to comply with the federal Act and the federal interim regulations. Act of Mar. 30, 1978, ch. 330, 1978 Ky. Acts 934. The federal interim regulations were published on December 13, 1977. 42 Fed. Reg. 62,639 (1977). The General Assembly authorized the Kentucky Department for Natural Resources and Environmental Protection [hereinafter cited as DNREP or Department] to promulgate rules and regulations for the state's interim program. See KY. REV. STAT. § 350.028(5) (Bobbs-Merrill Interim Supp. 1982) [hereinafter cited as KRS]. (The rulemaking entity is now known as the National Resources and Environmental Protection Cabinet. See note 82 *infra*.) These statutory changes and the rules and regulations promulgated by the DNREP, are located at 405 KY. ADMIN. REGS. 3:005E-:190 (1982) [hereinafter cited as KAR], became effective on May 3, 1978.

<sup>9</sup> The issuance of a permanent regulatory program by the Secretary of the Interior is the first step in implementing the permanent regulatory phase. 30 U.S.C. § 1251(b) (Supp. 1980). The permanent program must incorporate all of the Act's performance standards.

<sup>10</sup> *Id.* § 1253(b)(4). A timetable is established for submission and approval or disapproval of the state's proposal. *Id.* § 1253(b)-(c). If a state fails to submit a proposal or the proposal is disapproved, the Secretary of the Interior will be deemed the regulatory authority administering the Act in that state. *Id.* § 1254(a). Ultimately, all surface mining must be repermitted in accordance with the state or federally administered permanent regulatory program. *Id.* § 1256(a).

<sup>11</sup> For the definition of "surface coal mining operations," a definition which is obviously important to Kentucky, see note 2 *supra*.

<sup>12</sup> In order to achieve primacy, the 1980 Kentucky General Assembly made additional statutory changes in the state's surface mining laws, Act of Mar. 21, 1980, ch. 62, 1980 Ky. Acts 97 (codified at KRS §§ 350.010-.990 (Cum. Supp. 1980)), most of which became effective upon the Secretary of the Interior's approval of Kentucky's primacy pro-

approved by the Secretary of the Interior on May 18, 1982.<sup>13</sup>

## I. RECENT UNITED STATES SUPREME COURT DECISIONS

The enactment of the SMCRA and the promulgation of federal interim and permanent regulations has spawned numerous legal challenges<sup>14</sup> and proposed legislative amendments to the Act.<sup>15</sup> These legal and legislative actions, coupled with a new administration in Washington, have caused significant revisions in the federally-promulgated regulations.<sup>16</sup>

Examination of all of the nationwide legal challenges to the Act and all of the changes in federal regulations promulgated un-

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posal. Act of Mar. 21, 1980, ch. 62, § 39, 1980 Ky. Acts 125. For a discussion of state legislative actions regarding the interim program, see note 8 *supra*.

<sup>13</sup> Kentucky submitted its first proposed permanent program to the Secretary of the Interior on February 29, 1980. Originally, the proposed state programs were to be submitted by February 3, 1979. The Secretary of the Interior extended the deadline to August 3, 1979. 44 Fed. Reg. 5,324 (1979). The deadline was further extended to March 3, 1980, by the United States District Court for the District of Columbia. *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. July 25, 1979 and August 21, 1979); 44 Fed. Reg. 60,969 (1979).

Kentucky's submission included the relevant Kentucky statutes, administrative regulations and a narrative description of the DNREP plan to implement the proposed program. For the required content of state proposals, see 30 U.S.C. § 1253 (Supp. 1980).

On October 22, 1980, the Secretary of the Interior approved the plan in part and disapproved it in part. 45 Fed. Reg. 69,940-70 (1980). Under the Act, Kentucky had 60 days to submit a revised plan. See 30 U.S.C. § 1253(c) (Supp. 1980). However, the Martin County Circuit Court enjoined the Commonwealth from resubmitting its permanent program proposal. *Morris & Marshall, Inc. v. Commonwealth*, No. 80-C1-238 (Martin County, Ky. Cir. Ct. Oct. 31, 1980). The restraining order delayed implementation of either a state or federal permanent program in Kentucky. The federal and state interim program remained in effect until the restraining order dissolved on October 31, 1981. See 30 U.S.C. § 1253(d) (Supp. 1980). Kentucky resubmitted a permanent program proposal on December 30, 1981, which was approved by the Secretary of the Interior and implemented effective May 18, 1982. 47 Fed. Reg. 21,404 (1982).

<sup>14</sup> See, e.g., *Hodel v. Indiana*, 452 U.S. 314 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *In re Permanent Surface Mining Regulation Litig.*, 617 F.2d 807 (D.C. Cir. 1980); *Andrus v. P-Burg Coal Co.*, 495 F. Supp. 82 (S.D. Ind. 1980), *aff'd*, 644 F.2d 1231 (7th Cir. 1981); *Concerned Citizens, Inc. v. Andrus*, 494 F. Supp. 679 (E.D. Tenn. 1980), *appeal pending*, No. 80-1448 (6th Cir.); *In re Surface Mining Regulations*, 456 F. Supp. 1301 (D.D.C. 1978), *modified*, 627 F.2d 1346 (D.C. Cir. 1980); *Meadowlark Farms, Inc. v. Indiana Dep't of Natural Resources*, No. C80-1952 (Marion, Ind. Cir. Ct. 1980).

<sup>15</sup> See, e.g., S. 572, 97th Cong., 1st Sess. 127 CONG. REC. 1606 (1981).

<sup>16</sup> See, e.g., 46 Fed. Reg. 53,376; 52,287; 50,018; 42,082; 41,702; and 37,716 (1981).

der the Act is not within the scope of this Article. However, two recent Supreme Court decisions, *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*<sup>17</sup> and *Hodel v. Indiana*,<sup>18</sup> merit attention because they involved facial, pre-enforcement challenges to the Act. The Supreme Court not only sustained the Act's constitutionality in the face of these attacks, but also resolved issues about which the Kentucky legislature expressed reservations.<sup>19</sup>

The plaintiffs in *Virginia Surface Mining* contended that the Act violated the commerce clause of the United States Constitution because Congress intended to regulate the use of private land within the states, and private land is not subject to regulation under the commerce clause.<sup>20</sup> The Supreme Court, affirming the Virginia District Court on this point,<sup>21</sup> found that the Act

<sup>17</sup> 452 U.S. 264 (1981).

<sup>18</sup> 452 U.S. 314 (1981).

<sup>19</sup> These reservations were expressed in the following legislative preamble:

WHEREAS, many requirements imposed on the Commonwealth by the United States department of interior [sic], office of surface mining, which must be met before the state can obtain primacy are highly objectionable on constitutional and policy grounds and the state reserves its right to oppose the objectionable requirements in the future; and

WHEREAS, many of the objectionable provisions are the subject of pending litigation which the Commonwealth may elect to join and other objectionable requirements may be challenged in the courts in the future and the state may elect to join or initiate litigation challenging these objectionable requirements; and

WHEREAS, the Commonwealth of Kentucky objects particularly to the mandatory and inflexible requirement that all surface mined land must be returned to its approximate original contour with all highwalls completely covered in all circumstances, the requirement that the state's police powers must be employed to declare lands unsuitable for mining by petition process, the requirement that persons must prepay civil assessments before being allowed to challenge them and the requirements that summary cessation orders must be issued for bare failure to abate a violation not involving any danger to the health or safety of the public or environment, and if not coerced by threatened denial of primacy by the federal office of surface mining, the state would choose to address these matters by measures of its own devising . . . .

H.B. 566, Preamble ch. 62, 1980 Ky. Acts 97.

<sup>20</sup> The commerce clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." U.S. CONST. art. 1, § 8, cl. 3.

<sup>21</sup> The federal district court rejected the commerce clause challenge, as well as the

regulated the interstate commerce effects of surface mining.<sup>22</sup> It was intended to preserve the productive capacity of mined lands and to protect the public from health and safety hazards that may result from surface mining.<sup>23</sup> The Court held that these objectives, coupled with a congressional determination that uniform minimum nationwide standards were needed,<sup>24</sup> provided a rational basis for concluding that surface mining has substantial effects on interstate commerce, and further, that the means selected by Congress to regulate surface mining were reasonable and appropriate to the achievement of these goals.<sup>25</sup>

The Supreme Court, reversing the lower court ruling, held that the performance standard for "steep slope" mining did not violate the constitutional limitation on the commerce clause imposed by the tenth amendment. The Act only regulates the activities of private mine operations and does not regulate the activities of "States as States."<sup>26</sup> The Court rejected the Virginia dis-

plaintiffs' equal protection and substantive due process challenges, while sustaining the tenth amendment, just compensation and procedural due process attacks. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 483 F. Supp. 425 (W.D. Va. 1980), *aff'd in part, rev'd in part*, 452 U.S. at 264. The plaintiffs cross-appealed from the rejection of the commerce clause challenge. 452 U.S. at 274.

<sup>22</sup> 452 U.S. at 280.

<sup>23</sup> *Id.* at 277-80.

<sup>24</sup> *Id.* at 281-82.

<sup>25</sup> *Id.* at 283. One of Congress' articulated justifications for exercising its commerce clause power was that:

[M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources . . .

30 U.S.C. § 1201(c) (Supp. 1980). Congress also justified the Act by finding that "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." *Id.* § 1201(g).

<sup>26</sup> 452 U.S. at 293. To sustain a claim that a congressional exercise of the commerce power violates the tenth amendment, there must be a showing that the challenged statute

district court's finding that the "steep slope" mining provisions interfered with Virginia's ability to make "essential decisions"<sup>27</sup> and to conduct "traditional governmental functions"<sup>28</sup> associated with land use planning.

The district court also had held that the "steep slope"<sup>29</sup> mining performance standards violated the just compensation clause of the fifth amendment because of the Act's requirement that an operator perform the "economically and physically impossible"<sup>30</sup> task of restoring mined land to approximate original contour<sup>31</sup> and diminished the value of such restored land "to practically nothing."<sup>32</sup> Furthermore, according to the district court, the Act's general prohibition against mining in certain locations<sup>33</sup> constituted an unconstitutional taking.<sup>34</sup>

The Supreme Court's reversal on the taking issue was predicated on the fact that this case involved a facial challenge to these provisions with no concrete controversy concerning either the application of the Act to a particular mining operation or the Act's

regulates the "States as States," addresses matters that are indisputably "attributes of state sovereignty," and causes a direct impairment of the state's ability to "structure integral operations in areas of traditional functions." *National League of Cities v. Usery*, 426 U.S. 833, 845-54 (1976).

<sup>27</sup> 483 F. Supp. at 432.

<sup>28</sup> *Id.*

<sup>29</sup> The challenged "steep slope" provisions require operators to reclaim mined areas by covering the highwall created by the mining operations and returning the site to approximate original contour, to refrain from dumping spoil material on the downslope below the mining cut or bench and to refrain from disturbing the land above the highwall unless permitted by the regulatory authority. 30 U.S.C. § 1265(d) (Supp. 1980).

<sup>30</sup> 483 F. Supp. at 437.

<sup>31</sup> Approximate original contour is defined as follows:

that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated.

30 U.S.C. § 1291(2) (Supp. 1980).

<sup>32</sup> 483 F. Supp. at 437.

<sup>33</sup> The Act prohibits surface mining operations in national parks and forests or where they will adversely affect publicly owned parks or places that are included in the National Register of Historic Sites. 30 U.S.C. § 1272(e)(1)-(3) (Supp. 1980). It also prohibits surface mining within 100 feet of a cemetery or the right-of-way of a public road and within 300 feet of an occupied dwelling, public building, school, church, community or institutional building, or public park. *Id.* § 1272(e)(4)-(5).

<sup>34</sup> 483 F. Supp. at 437.

effect on a specific piece of land. The Court concluded that the "mere enactment" of the statutes mandating the covering of highwalls and returning of the land to approximate original contour<sup>35</sup> does not constitute a taking.<sup>36</sup> Likewise, the categorical prohibition of surface mining in particular locations<sup>37</sup> is not, upon enactment of the provision, a taking.<sup>38</sup> According to the Supreme Court, neither section of the Act, on its face, deprives land owners of their ability to make economically beneficial use of their land, because non-mining uses of the land are not prohibited by the Act.<sup>39</sup> Further, the Act provides procedures for obtaining a variance<sup>40</sup> from the approximate original contour requirement for "steep slope" mining as well as a waiver from the categorical surface mining prohibitions.<sup>41</sup> As the plaintiffs had not pursued this administrative solution to their alleged, but inchoate problem, these issues were not ripe for judicial resolution.<sup>42</sup>

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<sup>35</sup> For references to the requirements, see notes 31 & 33 *supra*.

<sup>36</sup> 452 U.S. at 294-95.

<sup>37</sup> For a listing of areas where surface mining is prohibited, see note 33 *supra*.

<sup>38</sup> 452 U.S. at 296 n.37.

<sup>39</sup> *Id.* at 296-97.

<sup>40</sup> "Steep slope" operators can obtain a variance from the approximate original contour requirement only if the mined land is shown to have a post-mining use "deemed to constitute an equal or better economic or public use" than would otherwise be possible. 30 U.S.C. § 1265(e)(3)(A) (Supp. 1980). There is a separate variance procedure for the mountaintop removal method of mining. *See id.* § 1265(c).

The district court concluded that the "steep slope" variance procedures did not provide a meaningful opportunity for administrative relief because of the statutory requirement that highwalls of reclaimed mining cuts be completely covered. 483 F. Supp. at 437. However, the Supreme Court found this conclusion premature because the plaintiffs did not identify any instance in which the statutory requirement prevented a mine operator from taking advantage of the variance procedure. 452 U.S. at 297 n.39.

<sup>41</sup> The categorical prohibition of surface mining in certain locations contained in 30 U.S.C. § 1272(e) (Supp. 1980) is subject to "valid existing rights." The Secretary of the Interior originally interpreted this language to except from these prohibitions only surface mining operations permitted prior to the effective date of the Act—August 3, 1977. 20 C.F.R. § 761.5(a)(2)(i) (1978). However, the Supreme Court noted that such a narrow interpretation is not compelled by the statutory language or legislative history of the Act. It also noted that this interpretive regulation was remanded to the Secretary for reconsideration in another case and that the Secretary did not appeal that decision. 452 U.S. at 296 n.37.

<sup>42</sup> *Id.* at 297.



Although the Court did sustain these provisions of the Act from a facial challenge, the holding does not settle the issue raised by the plaintiffs. It is still an unresolved question whether these provisions when applied to a particular piece of private property constitute an unconstitutional taking within the meaning of the just compensation clause.<sup>43</sup>

Similarly, the Court's decision does not resolve the issue of whether the Act's requirement that procedures be established for designating particular lands as unsuitable for some or all mining constitutes an unconstitutional taking.<sup>44</sup> The Court held that the plaintiffs' challenge to these statutory sections was premature because the provisions do not become effective until the Act's permanent stage is implemented and at the time the plaintiffs commenced their lawsuit, the permanent regulatory program was not in effect. Therefore, the lawsuit could only properly raise challenges to the interim regulatory program.<sup>45</sup>

The plaintiffs in *Virginia Surface Mining* also challenged certain enforcement<sup>46</sup> and penalty<sup>47</sup> provisions of the Act as violative of the due process clause of the fifth amendment. The Act directs the Secretary of the Interior to order total or partial cessation of surface mining operations whenever the Secretary, on the basis of a federal inspection, determines that the operation "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources."<sup>48</sup> If a violation is not of such a serious threat, a notice of violation first

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<sup>43</sup> The Supreme Court specifically said that "this holding does not preclude appellees or other coal mine operators from attempting to show that as applied to particular parcels of land, the Act and the Secretary's regulations effect a taking." *Id.* at 297 n.40. *See also id.* at 305-07 (Powell, J., concurring).

<sup>44</sup> *See generally* 30 U.S.C. § 1272(a), (c)-(d) (Supp. 1980).

<sup>45</sup> 452 U.S. at 294 n.36.

<sup>46</sup> 20 U.S.C. § 1271 (Supp. 1980).

<sup>47</sup> *Id.* § 1268.

<sup>48</sup> *Id.* § 1271(a)(2). If the Secretary determines a violation is not such a serious threat, a notice of violation must first be issued; if the violation is not abated within a prescribed reasonable period, the Secretary can issue a cessation order. *Id.* § 1271(a)(3). In any case, the mine operator may immediately request temporary relief from the cessation order, which request must be acted upon by the Secretary within five days of receipt. *Id.* § 1275(c). In addition, all cessation orders are subject to administrative and judicial review. *Id.* §§ 1275-76.

must be issued fixing a reasonable time for abatement of the violation.<sup>49</sup> Only if the violation is not abated within the prescribed period can the Secretary issue a total or partial cessation order. If an operator desires to contest either the existence of a violation or a cessation order, and a civil penalty has been assessed, the penalty must be prepaid.<sup>50</sup>

Although due process may require some kind of hearing before the deprivation of a property right, the Supreme Court held that the summary administrative action of immediate cessation orders is justified because it is limited to emergency-situations as defined by the Act and its implementing regulations.<sup>51</sup> The Court also held that the plaintiffs' challenge to the prepayment of civil penalties provisions was premature because the record did not contain any allegations by the plaintiffs or any findings by the district court that any plaintiff had been affected or harmed by these statutory provisions.<sup>52</sup> Absent such allegations or findings, the plaintiffs' challenge did not raise a concrete case or controversy vis-a-vis the operation of these provisions.<sup>53</sup>

In *Hodel v. Indiana*,<sup>54</sup> a companion case to *Virginia Surface Mining*,<sup>55</sup> the Supreme Court reviewed another broad constitutional attack on the SMCRA.<sup>56</sup> The primary focus of *Indiana* was a challenge to the validity of several sections of the Act known

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<sup>49</sup> *Id.* § 1271(a)(3).

<sup>50</sup> *Id.* § 1268(c). Once the escrow requirement is met, the operator receives a hearing with the right of administrative and judicial review; if the operator succeeds at the hearing (no violation found or penalty amount reduced), a refund with interest is provided. *Id.*

<sup>51</sup> 452 U.S. at 298-303.

<sup>52</sup> *Id.* at 303-04.

<sup>53</sup> *Id.*

<sup>54</sup> 452 U.S. at 314.

<sup>55</sup> 452 U.S. at 264.

<sup>56</sup> The United States District Court for the Southern District of Indiana had declared 21 sections of the Act unconstitutional and thus had permanently enjoined their enforcement. *Hodel v. Indiana*, 501 F. Supp. 452 (S.D. Ind. 1980), *rev'd*, 452 U.S. at 314.

Some of the challenged sections and the Supreme Court's disposal of the challenges were identical to those in *Virginia Surface Mining*. For example, the Court rejected the tenth amendment rationale for invalidating the Act. 452 U.S. at 330. It found premature the taking issue based on the "mere enactment" of the prime farmland provisions, *id.* at 334-35; and the provisions on procedures for designating particular lands as unsuitable for surface mining, *id.* at 335 n.20; the due process issue based on the prepayment of civil penalties was rejected as well, *id.* at 335-36. For a discussion of these points, see text accompanying notes 35-53 *supra*.

collectively as the "prime farmland" provisions. When land qualifies as "prime farmland" and has historically been used as cropland, special requirements for surface mining are imposed.<sup>57</sup> A permit to mine on "prime farmland" can be issued only if the mine operator can demonstrate its "technological capability to restore such mined area . . . to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management,"<sup>58</sup> as well as its ability to meet the "soil reconstruction standards" for prime farmland.<sup>59</sup> Upon completion of mining, the operator's performance bond is released only if a showing is made that soil productivity "has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices."<sup>60</sup>

The district court had found that the "prime farmland" provisions were beyond Congress' commerce clause power because they are "directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce."<sup>61</sup> Relying on congressional hearings concerning the decline in agricultural productivity attributable to surface mining,<sup>62</sup> the Supreme Court rejected the district court's decision and found that "Congress had a rational basis for finding that surface coal mining on prime farmland affects interstate commerce in agricultural products."<sup>63</sup> Furthermore, the Supreme Court held that these provisions advanced that legitimate goal.<sup>64</sup>

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<sup>57</sup> The term "prime farmland" is synonymous with the meaning given "by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register." 30 U.S.C. § 1291(20) (Supp. 1980).

<sup>58</sup> *Id.* § 1260(d)(1).

<sup>59</sup> *Id.* § 1265(b)(7).

<sup>60</sup> *Id.* § 1269(c)(2).

<sup>61</sup> 501 F. Supp. at 460.

<sup>62</sup> 452 U.S. at 328-29.

<sup>63</sup> *Id.* at 326. In his concurrence, Justice Rehnquist expressed his concern that language in both *Virginia Surface Mining* and *Indiana* might indicate that the Court is moving to an "effect" interstate commerce test rather than the test that the regulated activity has a "substantial effect" on interstate commerce. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. at 307-13 (Rehnquist, J., concurring).

<sup>64</sup> *Hodel v. Indiana*, 452 U.S. at 327.

The district court had similarly invalidated fifteen other provisions of the Act by theorizing that the only adverse effects on interstate commerce which could justify the Act were air and water pollution problems caused by surface mining.<sup>65</sup> It concluded that the fifteen general provisions and the "prime farmland" provisions "[were] not directed at the alleviation of water or air pollution . . . and [were] not means reasonably and plainly adapted to the legitimate end of removing any substantial and adverse effect on interstate commerce."<sup>66</sup>

The Supreme Court rejected this reasoning as based upon an unduly limited perception of the Act's goals.<sup>67</sup> Congress was concerned not only with preventing water and air pollution problems caused by surface mining, but also with preserving the productive capacity of mined lands as well as protecting the public from the health and safety hazards which may result from surface mining. In light of these broader purposes, the Court concluded that all the challenged provisions were reasonably calculated to further these legitimate goals.<sup>68</sup>

Unlike the "steep slope" provisions and the approximate original contour requirement as applied to "steep slope" mining, neither the "prime farmland" mining requirements nor the approximate original contour provisions as applied to "nonsteep slope" mining provides for any variance from the Act's mandates.<sup>69</sup> Therefore, the district court had held that the lack of variance procedures impermissibly discriminates against mining operations and states in the Midwest because significant coal reserves are located under "prime farmland" and few "steep slope" operations exist.<sup>70</sup> The district court viewed this distinction between types of mining methods as violative of the equal protection and substantive due process guarantees of the fifth amendment.<sup>71</sup>

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<sup>65</sup> 501 F. Supp. at 452.

<sup>66</sup> *Id.* at 461.

<sup>67</sup> *Id.*

<sup>68</sup> 452 U.S. at 327.

<sup>69</sup> For reference to the variance provisions, see note 40 *supra*.

<sup>70</sup> The district court believed the distinction between types of mining methods violated the fifth amendment. See 501 F. Supp. at 469.

<sup>71</sup> *Id.*

The Supreme Court found this rationale an invalid basis for holding the Act unconstitutional. The Court characterized the SMCRA as social and economic legislation which does not employ suspect classifications or impinge on fundamental rights. Thus, the legislation is imbued with a presumption of rationality.<sup>72</sup> This presumption was not overcome by any showing of arbitrariness and irrationality; rather, the Act's means are rationally related to the legitimate governmental purpose of controlling the potential adverse effects of surface mining. Even if the Act imposes greater burdens on midwestern mine operators, such a result does not sustain a claim of arbitrariness.<sup>73</sup> The distinction between "steep slope" mining and "prime farmland" mining can be sustained as rational because of the relative shortage of level land in "steep slope" areas of the country and the need to preserve the productivity of "prime farmland."<sup>74</sup>

Although the SMCRA withstood the pre-enforcement constitutional challenges presented in *Virginia Surface Mining* and *Indiana*, significant questions remain for future litigation. Both the "steep slope" and "prime farmland" provisions, as well as the permanent program's requirement for establishing procedures designating land as partially or totally unsuitable for mining, may violate the just compensation clause of the fifth amendment when applied to particular parcels of land.<sup>75</sup> In addition, when a state's permanent program becomes effective, the Act's enforcement provisions concerning prepayment of civil penalties before an operator may contest either the existence of an alleged violation or the size of the civil penalty assessed is still vulnerable to a constitutional attack under the due process clause of the fifth amendment.

## II. PRE-PRIMACY KENTUCKY CASES, ATTORNEY GENERAL OPINIONS AND ADMINISTRATIVE DECISIONS

Although Kentucky has assumed permanent and exclusive

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<sup>72</sup> 452 U.S. at 331-32.

<sup>73</sup> *Id.* at 332.

<sup>74</sup> *Id.* at 332-33.

<sup>75</sup> For a discussion of the Court's treatment of this point, see text accompanying notes 44 & 45 *supra*.

authority over surface mining within the Commonwealth, only a handful of state court decisions and attorney general opinions are reviewed in this Article. The limited amount of relevant material is due to the sweeping statutory and regulatory changes which began with the implementation of the state's interim program for surface mining on May 3, 1978.<sup>76</sup>

### A. *Kentucky Court Decisions*

In the 1959 case of *Wombles v. Commonwealth*,<sup>77</sup> Kentucky's highest court resolved whether a particular individual was an "operator" within the meaning of a statute<sup>78</sup> requiring an operator to obtain a permit in order to engage in the strip mining of coal in the Commonwealth. The *Wombles* court found that an individual who held stock in and was an intermittent employee of the corporation which performed the mining, but who did not have any management control of the corporation, was not an "operator."<sup>79</sup>

The problem of determining who is liable for violations of surface mining laws and regulations is a recurrent one for the Commonwealth.<sup>80</sup> Obviously, mere employees of a corporation are not liable for the actions of the corporation. However, use of the corporate form to insulate individuals from personal liability is a common practice which interferes with the state's ability to effectively regulate surface mining effectively. Frequently, by the time of an enforcement proceeding, the corporate operator is an insolvent shell lacking the financial and technical resources either to pay the fine assessed for the violation or to perform the

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<sup>76</sup> For further discussion of these recent changes, see notes 1-13 *supra* and accompanying text.

<sup>77</sup> 328 S.W.2d 146 (Ky. 1959).

<sup>78</sup> KRS § 350.010(6) (1977) (prior to amendment in 1978) defined "operator" as "any person, partnership, or corporation engaged in strip mining who removes or intends to remove more than one hundred tons of coal from the earth by strip mining within twelve successive calendar months." That term is now defined as "any person, partnership or corporation engaged in surface coal mining and reclamation operations." KRS § 350.010(8) (Interim Supp. 1982). The statutory changes does not affect the *Wombles* decision.

<sup>79</sup> 328 S.W.2d at 148.

<sup>80</sup> For a further discussion of this problem, see text accompanying notes 136-43 *infra*.

necessary remedial measures.<sup>81</sup>

Under its police powers, Kentucky established rules and entrusted the enforcement of those rules to the Department for Natural Resources and Environmental Protection (DNREP or the Department)<sup>82</sup> for the regulation of mining activities in order to protect the public health and safety from environmental harm caused by surface mining.<sup>83</sup> However, the extent of that power, particularly the power to deny permit applications, represents an ongoing source of litigation.

Prior to the 1980 amendments to Kentucky's surface mining statutes, Kentucky Revised Statutes (KRS) section 350.060(8) required each permit application to include a statement from the holder of the surface estate in the land to be mined manifesting his or her consent to the proposed mining activity.<sup>84</sup> This consent requirement was enacted because of the widespread use of "broad form" deeds<sup>85</sup> in Kentucky. In *Department for Natural Resources & Envtl. Protection v. No. 8 Ltd.*,<sup>86</sup> Kentucky's highest court found the requirement to be unconstitutional. Its primary purpose and effect was to change relative legal rights and economic bargaining positions of private parties under their contracts. Therefore, the consent requirement did not bear a real and substantial relationship to protecting the public health and safety from environmental harm. While eliminating the consent of the surface owner as a condition of receiving a permit to mine, the decision did not resolve the problems caused by the use of "broad form" deeds.<sup>87</sup>

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<sup>81</sup> See, e.g., *Leslie Coal & Energy Eng'g, Inc., No. 1766-111-15* (DNREP January 15, 1981).

<sup>82</sup> The Kentucky Department of Natural Resources and Environmental Protection has been renamed and is now known as the Natural Resources and Environmental Protection Cabinet. However, as the name change occurred subsequent to the cases and decisions discussed here, references will be to the DNREP or Department.

<sup>83</sup> See KRS §§ 350.028 (Interim Supp. 1982) & 350.050 (Cum. Supp. 1980).

<sup>84</sup> See *id.* § 350.060(8) (1977).

<sup>85</sup> A "broad form" deed is a thorough renunciation of surface rights. The severance of the mineral rights from the surface estate provision creates two distinct estates in the land. It does not include any limitations or prohibitions on the methods to be used to extract the minerals, although it does include a "waiver of damages" provision. In *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956), the Kentucky Court of Appeals concluded that the surface estate was subservient to the mineral estate.

<sup>86</sup> 528 S.W.2d 684 (Ky. 1975).

<sup>87</sup> Kentucky is the only state that has interpreted a "broad form" deed so as to permit

In *Department for Natural Resources v. Stearns Coal*,<sup>88</sup> the Kentucky Supreme Court again addressed the extent of the authority of DNREP to deny a permit to strip mine. On appeal, the Department argued that its denial was proper because of its determination that the applicant did not have the legal right to strip mine the land because the applicant did not have the equivalent of a "broad form" deed. The Court held that nothing in the language of KRS section 350.085, the statutory section delineating the criteria for permit denial, permitted the Department to adjudicate the validity of an applicant's claim of right to strip mine the property described in the application.<sup>89</sup> The *Stearns* decision is not altered by changes in KRS section 350.085 which became effective simultaneously with the approval of Kentucky's permanent program.<sup>90</sup>

#### B. *Attorney General Opinions*

Although an opinion issued by the Kentucky Attorney General is not legally binding or enforceable, it does provide an authoritative interpretation of a legal issue. Irrespective of changes in Kentucky's laws and regulations governing surface mining, two Attorney General opinions are of continuing vitality and interest.

The first opinion<sup>91</sup> again raises the issue of the extent of the Department's power to deny surface mining permits, as well as the subsidiary issue of the effect of issuance of a permit on other Kentucky laws. The Department inquired as to whether it had the authority to withhold a surface mining permit until it received certification that the permit complied with local planning and zoning ordinances. The Attorney General responded negatively, stating that KRS sections 350.060 and 350.085, which set out the specific criteria for issuance and denial of permit applications, contain no requirement that the applicant demonstrate

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strip mining. *Watson v. Kenlick Coal Co.*, 498 F.2d 1183, 1190 (6th Cir. 1974). See also Note, *Kentucky's Experience with the Broad Form Deed*, 63 Ky. L.J. 107 (1974-75).

<sup>88</sup> 563 S.W.2d 471 (Ky. 1978).

<sup>89</sup> *Id.* at 473.

<sup>90</sup> Act. of Mar. 21, 1980, ch. 62, § 39, 1980 Ky. Acts 125.

<sup>91</sup> 75 Ky. Op. Att'y Gen. No. 556 (August 18, 1975).



compliance with local planning and zoning ordinances, and nothing in KRS chapter 350 permits the imposition of additional requirements by DNREP.<sup>92</sup>

The Attorney General opinion made clear, however, that the issuance of a permit to engage in surface mining does not authorize the permit holder to violate any law or requirement validly imposed by another authority.<sup>93</sup> Further, a permit to surface mine is not a license to mine an area where the permit holder does not have the right to mine under applicable property law.

The second Attorney General Opinion<sup>94</sup> addressed the question of whether the Department must issue a notice of violation<sup>95</sup> to a surface mining permitholder before it can issue a notice of noncompliance<sup>96</sup> for alleged violations of the laws and regulations governing surface mining. KRS section 350.130(1) provides for the issuance of only a notice of noncompliance when any rule or regulation is not followed within the time limits set by the Department or by KRS chapter 350. The Attorney General concluded, however, that the Department has the authority to add the category of notice of violation as another step in its process of

<sup>92</sup> The Supreme Court adopted this strict construction approach in *Stearns*, 563 S.W.2d at 473.

<sup>93</sup> This position had been adopted in earlier opinions. Although 70 Ky. Op. Att'y Gen. No. 286 (May 7, 1970) states that Kentucky counties lack the authority to prohibit strip mining as a public nuisance, 66 Ky. Op. Att'y Gen. No. 95 (February 17, 1966) declares that, within the limitations imposed by law, Kentucky counties have the authority to reasonably regulate strip mining by proper planning and zoning regulations. These opinions were confirmed in 70 Ky. Op. Att'y Gen. No. 563 (August 24, 1970).

<sup>94</sup> 79 Ky. Op. Att'y Gen. No. 24 (January 4, 1979).

<sup>95</sup> 405 KAR 1:060 § 2(2) (1982) states that: "[i]f the department determines that such violations have occurred, the department shall by certified mail (return receipt requested) provide written notice to the operator that such violations have occurred and shall therein stipulate a reasonable time period for the feasible correction of such violations." *Id.*

<sup>96</sup> 405 KAR 1:060(3) (1982) states in pertinent part:

(a) If any of the requirements of KRS Chapter 350 of rules and regulations adopted pursuant thereto have not been complied with within the time limits set by the department, or by KRS Chapter 350 or regulations adopted pursuant thereto, the department shall cause a notice of noncompliance to be served upon the operator . . . .

. . . .

(c) The notice of noncompliance . . . shall specify in what respects the operator has failed to comply with KRS Chapter 350 or the regulations or orders of the department.

inspection and enforcement.<sup>97</sup> The relationship between the statutorily imposed notice of noncompliance and the administratively created notice of violation is that both are enforcement tools available to the Department after discovery of a violation. The choice of which of these enforcement tools to utilize upon the discovery of a violation is solely within the discretion of the Department.<sup>98</sup>

### C. *Administrative Decisions of DNREP*

Since May 3, 1978, the effective date of Kentucky's interim program regulating surface mining, the Secretary of the Department for Natural Resources and Environmental Protection (the Secretary) has been issuing administrative decisions in enforcement actions. Some of these decisions are examined here because attorneys practicing in this area of the law must be familiar with the Department and its decisions interpreting Kentucky's surface mining laws and regulations. However, no administrative ruling by the Department to date has reached the Kentucky Supreme Court for final review, and, because the Department does not publish or compile any index of its administrative decisions, the identification of relevant decisions may not be complete.

#### 1. *Definitions*

KRS section 350.085(3) provides, in part, that no strip mine operation shall be permitted within 300 feet of "any occupied dwelling unless waived by the owner thereof."<sup>99</sup> In *Lake Coal Co.*,<sup>100</sup> the Secretary ruled that an occupied mobile home is an occupied dwelling within the meaning of the statute. However, the Secretary ruled that the date an application for a strip mine permit is filed is the appropriate time for the determination as to whether there are any occupied dwellings within 300 feet of the proposed operation. Thus, the Secretary dismissed the petition objecting to the issuance of this permit because the occupied mo-

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<sup>97</sup> 79 Ky. Op. Att'y Gen. No. 24, at 5 (January 4, 1979).

<sup>98</sup> *Id.*

<sup>99</sup> KRS § 350.085(3) (Cum. Supp. 1980).

<sup>100</sup> No. 1667-111-15 (DNREP January 16, 1981).

bile home within the prohibited area had been moved there six months after the company filed its permit application.

This question was also at issue in *Sally Prichard*.<sup>101</sup> The petitioner claimed that his motorcycle repair shop was an "occupied dwelling" within the 300 foot limit because he spent as much as fourteen hours a day in his repair shop; customers frequented his shop; he ate meals in his shop; and that all blasting operations on the proposed permit site would occur during the same hours that petitioner and his customers were in the shop. The Secretary, however, ruled that this commercial establishment was not an "occupied dwelling" and dismissed the petition.

## 2. Performance Bonds

Before a permit can be issued, the applicant must file a bond with the Department payable to the Commonwealth with surety satisfactory to the Department.<sup>102</sup> The bond is to secure performance of the rules and regulations governing surface mining. If the operator's permit is revoked, the performance bond is forfeited.<sup>103</sup> Although a permit applicant can satisfy the bonding requirement by posting a cash bond, many applicants prefer to use commercial sureties. Following permit revocations, commercial sureties have tried to extricate themselves from liability by challenging certain Department procedures.

When a notice of noncompliance is issued, the Department may attempt to resolve the violation by entering into an agreed settlement order with the operator instead of pursuing its statutory remedies in a formal administrative hearing. In *Mideastern Construction & Coal Corp.*,<sup>104</sup> the Department had entered into such a settlement order requiring the operator to complete reclamation on the permit. The operator failed to comply with the order. Thereafter, in a formal administrative hearing, the Department sought permit revocation and bond forfeitures. The surety argued that it was released from liability because the

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<sup>101</sup> No. 2375-18 (DNREP June 10, 1981).

<sup>102</sup> KRS § 350.060(14) (Interim Supp. 1982).

<sup>103</sup> *Id.* § 350.130(1).

<sup>104</sup> No. 2279-VI-18 (DNREP May 8, 1981).

settlement order had altered its position by increasing its risk and liability. The Secretary, however, rejected this argument. A notice of noncompliance in and of itself does not represent a default in performance which gives rise to the surety's obligation to perform under the terms of the performance bond. Rather, the refusal to correct a noncompliance for failure to complete reclamation represents such a default. A settlement order to effectuate reclamation is an alternative to revoking the permit and forfeiting the performance bond, but, according to the Secretary, this alternative method does not increase the surety's risk or expose it to greater liability.

In *Mideastern Construction* and in *Leslie Coal & Energy Eng'g, Inc.*,<sup>105</sup> the sureties argued that the failure of the Department to notify the surety of noncompliances issued to its principal (the operator) relieved the surety of its responsibility on the performance bond. In both cases this argument was rejected. The Secretary ruled that although the Department normally does notify the surety, there is no statutory or regulatory requirement that the Department must notify the surety of noncompliances issued to the operator.<sup>106</sup>

Two other administrative decisions also involved a question arising from the bonding requirement. In *S & C Coal Co.*<sup>107</sup> and *J. & D. Coal Co.*,<sup>108</sup> the sureties argued that the entire performance bond could not be forfeited if not all of the permitted and bonded area was disturbed. The Secretary ruled that even though the bond is calculated on the basis of the acreage permitted, the permitted acreage is not bonded separately. Therefore, the entire bond, up to the amount necessary to complete reclamation on any portion of the permit, may be forfeited.<sup>109</sup>

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<sup>105</sup> No. 1766-111-15 (DNREP January 15, 1981).

<sup>106</sup> KRS § 350.130(1) (Interim Supp. 1982) requires only that notices of noncompliance shall be

[h]anded to the person in charge of the operation, and the operator or person engaged in coal exploration operations or sent by certified mail, return receipt requested or by registered mail, addressed to the permanent address shown on the application for a permit or if no address is shown on the application, then to the address known to the cabinet.

*Id.* (emphasis added).

<sup>107</sup> No. 1778-IV-14 (DNREP April 7, 1980).

<sup>108</sup> No. 1386-02 (DNREP December 13, 1979).

<sup>109</sup> Since these cases were decided, new regulations have been issued allowing incre-

Finally, in *Hardly Able Coal Co.*,<sup>110</sup> the Secretary issued an opinion interpreting the provision for bond forfeiture found in KRS section 350.130(1).<sup>111</sup> The statute states that upon revocation of a permit, the bond "shall then be forfeited" to the Department.<sup>112</sup> Despite the mandatory language, the Secretary ruled that the legislature intended the "shall" to be merely directive, meaning that the Department may require the bond to be forfeited. Further, bond forfeiture is justified only when reclamation must be performed by the Department. In this particular case, the Secretary did not order any further reclamation on the permit, thereby exercising his discretion not to require the bond forfeiture.<sup>113</sup>

### 3. Procedural Matters

A number of administrative decisions have focused upon issues which are procedural in nature. In *Blue River Coal Co.*,<sup>114</sup> the Secretary accepted the conclusions of a hearing officer who denied a motion by the Department for a default judgment pursuant to Kentucky Civil Rule 55.01. The hearing officer had concluded that the statutorily implemented hearing process is not an action in the Court of Justice<sup>115</sup> which is bound by the civil

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mental bonding of the permit acreage. See 405 KAR 1:051 (1982). However, these regulations further provide that

[t]he total amount of bond in effect during an operation as set pursuant to this regulation shall at all time be sufficient to reclaim the total disturbed area; provided that the total bond in effect shall be applicable to the total disturbed area and adequate to cover the cost of reclamation of the total disturbed area.

*Id.* at 1:051(4). KRS § 350.064 (Interim Supp. 1982) also specifically authorizes incremental bonding.

<sup>110</sup> No. 1603-VI-15 (DNREP August 1, 1979).

<sup>111</sup> KRS § 350.130(1) (Interim Supp. 1982).

<sup>112</sup> *Id.*

<sup>113</sup> No. 1603-VI-15. Other situations may arise in which the Secretary should exercise discretion not to require the bond forfeiture. For instance, when no mining is performed before the permit is revoked or when no further reclamation work is required, it would be inequitable to require the bond forfeiture merely because the permit is revoked.

<sup>114</sup> No. 1806-IV-05 (DNREP January 9, 1981).

<sup>115</sup> KY. CONST. § 109 defines Court of Justice as "a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court."

rules.<sup>116</sup> The ruling is especially important in that Kentucky has no general Administrative Procedures Act or other statute or regulation requiring the application of the civil rules to administrative hearings.

As in traditional civil actions, standing issues are presented from time to time in administrative hearings. In *Hardly Able Coal Co.*,<sup>117</sup> the operator, pursuant to KRS section 350.410, had been ordered to eliminate highwall and to return the land to its approximate original contour. In this enforcement proceeding, the operator raised as a defense the landowner's constitutional claims grounded in the contract clause.<sup>118</sup> The landowner, however, expressly declined to be a party to the administrative proceeding or to participate other than as a witness. Therefore, the constitutional issue was held not properly raised under either Kentucky or federal law because the party who sought to raise it (the operator) neither had interest in nor was affected by the challenged statute.<sup>119</sup> At the time the operator should have begun restoration of the land and elimination of the highwalls, it could have reclaimed pursuant either to the statute's requirement or to its contract with the landowner without any additional trouble or expense; the statutory requirements would have been met but for the landowner's objections, and the Secretary did not order any further reclamation by the operator. Therefore, the operator had no stake in the resolution of the issue of the constitutionality of the statute.<sup>120</sup>

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<sup>116</sup> Ky. R. Civ. P. 1(2) states in part: "[T]hese rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the rules."

<sup>117</sup> No. 1603-VI-15 (DNREP August 1, 1979).

<sup>118</sup> *Hardly Able* involved a contract between the landowner and mine operator requiring the operator to leave the mine site flat and not to return it to approximate original contour nor eliminate the highwalls. The contract was validly entered into prior to the adoption of KRS § 350.410 (Cum. Supp. 1980), which requires the elimination of highwalls and the return of the mined land to approximate original contour unless a variance is granted. The specific ruling by the Secretary not to require elimination of the highwall has very little precedential value because landowners and operators cannot legally contract to violate KRS § 350.410 (Cum. Supp. 1980) after May 3, 1978.

<sup>119</sup> See *United States v. Raines*, 362 U.S. 17, 22 (1959); *Holt v. Clements*, 97 S.W.2d 397, 398 (Ky. 1936).

<sup>120</sup> The operator was precluded from raising the landowner's constitutional rights

In *Appalachia-Science in the Public Interest*,<sup>121</sup> an administrative hearing was convened to resolve a controversy surrounding the Department's issuance of an "on-site" construction exemption from strip mine regulations to B & W Land Developers, Inc.<sup>122</sup> All of the petitioners, except the Kentucky Conservation Committee (KCC), established standing to challenge the Department's action under the minimum standing requirements of *Sierra Club v. Morton*.<sup>123</sup> The KCC contended that it had an absolute right to participate in the administrative proceeding without any showing of standing because of both the citizens suit provision of the federal Surface Mining Control and Reclamation Act<sup>124</sup> and the citizens complaint provisions under state law.<sup>125</sup>

The Secretary ruled that the citizens suit provision of the Act applies to the state only under the permanent program stage and not during the interim program stage. The Secretary also ruled that the federal provision expressly adopts the "injury in fact" standing requirement for "any person" invoking its procedures.<sup>126</sup> Finally, the Secretary ruled that the citizens suit procedure creates the right to assert a claim against a state agency only in federal district court, not in a state agency action.<sup>127</sup>

The Secretary also rejected KCC's contention that KRS section 350.250 provides automatic standing in state agency proceedings. The statute states:

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under the rationale of *NAACP v. Alabama*, 357 U.S. 449 (1958). The *Alabama* holding applies only when the non-party's rights would as a practical matter be impaired and if the non-party has no effective way to protect his or her rights. In the instant case DNREP did not order restoration of the landowner's property in conformity to KRS § 350.410 (Cum. Supp. 1980), and the landowner had already brought suit in Franklin Circuit Court (which was pending the results of the administrative hearing).

<sup>121</sup> No. 1598-07 (DNREP March 23, 1979).

<sup>122</sup> DNREP no longer grants "on-site" construction exemptions. DNREP Policy Memorandum No. 80-0013 (August 29, 1980). Therefore, the resolution of the validity of the exemption in this case will not be discussed.

<sup>123</sup> 405 U.S. 727 (1972).

<sup>124</sup> 30 U.S.C. § 1270 (Supp. 1980).

<sup>125</sup> KRS § 350.250 (Cum. Supp. 1980).

<sup>126</sup> The Act applies to "any person having an interest which is or may be adversely affected." 30 U.S.C. § 1270(a) (Supp. 1980).

<sup>127</sup> *Appalachia-Science in the Public Interest*, No. 1598-07.

Any citizen of this commonwealth having knowledge that any of the provisions of this chapter or regulations adopted thereunder are wilfully and deliberately not being enforced by any public officer or employe, whose duty it is to enforce such provisions . . . may bring such failure to enforce the law to the attention of such public officer or employe . . . . If such public officer or employe neglects or refuses for any unreasonable time after demand to enforce such provision, any such citizen shall have the right to bring an action of mandamus in circuit court of the county in which the operation which relates to the alleged lack of enforcement is being conducted.<sup>128</sup>

As the Secretary observed, the statute clearly confers standing on "any citizen . . . having knowledge" to institute a mandamus action against the Secretary in the appropriate circuit court. It does not, however, confer standing on "any citizen" to participate in a specific enforcement action against a regulated party before the administrative agency. It takes something more than the intervenor's status as a "citizen" to justify participation in such an action. The Secretary also ruled that KCC's standing defect was not waivable even in light of the lack of objection by any of the parties.<sup>129</sup>

#### 4. Penalties<sup>130</sup>

KRS section 350.990(1) mandates civil penalties for violations of KRS chapter 350 and its regulations.<sup>131</sup> Because these civil penalties are phrased in terms of mandatory minimum and maximum fines for the initial violation and for each day thereafter that the violation continues, the amount of the civil penalty can quickly become quite large.<sup>132</sup> Thus, it is not surprising that

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<sup>128</sup> KRS § 350.250 (Cum. Supp. 1980).

<sup>129</sup> No. 1598-07.

<sup>130</sup> Although DNREP collects civil penalties from operators who voluntarily comply with settlement or departmental orders assessing penalties, the Department has never collected a civil penalty from an operator who has chosen to defy a settlement or departmental order. Leathers, *Settling a Noncompliance: What Process Is Due?*, KY. COAL J., May 1981, at 24, col. 3.

<sup>131</sup> KRS § 350.990(1) (Interim Supp. 1982).

<sup>132</sup> See, e.g., Leslie Coal & Eng'g, Inc., No. 1766-111-15 (DNREP January 15, 1981) (civil penalty of \$2,965,300 assessed).



defendants in administrative enforcement actions seek to minimize their penalties through an assortment of arguments.

In *J. & D. Coal Co.*,<sup>133</sup> the operator contended that KRS section 350.100<sup>134</sup> (which requires an operator to commence reclamation as soon as possible after beginning strip mining and to complete its reclamation within twelve months of the expiration of the permit) and KRS section 350.130<sup>135</sup> (which directs the Department to issue notices of noncompliance for violations) acted as a time bar to the enforcement action. According to the operator, the notice of noncompliance was issued ten months after one year elapsed followed the expiration of the permit. The operator argued that these two statutory provisions require the Department to issue noncompliances no later than a short time after one year has elapsed following the permit expiration. This interpretation was rejected because it would make the combination of the two statutory provisions a statute of limitations. The Secretary determined that KRS section 350.100 merely gives the operator some flexibility in completing reclamation; it does not restrict the power of the Department to seek enforcement of the operator's reclamation obligations.

In *Blue River Coal Co.*,<sup>136</sup> 411 days had elapsed from the issuance of the notice of noncompliance for mining without a permit until the formal administrative hearing. The Secretary accepted a report of the hearing officer recommending that only the maximum penalty for a one day violation be assessed due to the Department's failure to institute enforcement procedures within a reasonable time. Because of the unreasonable delay, the report concluded, the Department was estopped from asserting its claim for the full civil penalty. However, it should be noted that this "reasonable time" rationale is not necessary to support a decision to impose only the one day maximum penalty. The same penalty could have been assessed based on the fact that the evidence (testimony of the Department's inspector) established only that the company conducted unpermitted mining activities on

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<sup>133</sup> No. 1386-02 (DNREP December 13, 1979).

<sup>134</sup> KRS § 350.100 (Cum. Supp. 1980).

<sup>135</sup> KRS § 350.130 (Interim Supp. 1982).

<sup>136</sup> No. 1806-IV-05 (DNREP January 15, 1981).

the date (one day) of the Department's inspection.

Assuming a civil penalty is properly assessed, a subsidiary question arises as to the party responsible for the payment of the penalty. In *Leslie Coal & Energy Eng'g, Inc.*,<sup>137</sup> the permit was issued to a corporate entity. The stockholders as well as the individual officers and directors of the corporation were named as respondents. The Secretary accepted the hearing officer's conclusion that the Department lacks authority, in an administrative hearing convened pursuant to KRS chapter 350, to disregard the corporate structure of an operator. To achieve that goal, the Department's remedy is to pursue the matter in circuit court as it is the proper forum for determining whether the corporate veil should be pierced and the individuals behind the corporate structure held responsible for the payment of the civil penalty.<sup>138</sup>

Kentucky's surface mining law not only provides for assessment of civil penalties against an operator who violates its mandates, but it also provides a method by which operators can be permanently barred from obtaining other surface mining permits. KRS section 350.130(3) directed the Department not to issue any "permits to or allow future operations by any operator or person who has repeatedly been in noncompliance or violation of this chapter, or who has had permits revoked or operations terminated on more than three (3) occasions."<sup>139</sup> The Department has not established any regulation nor issued any administrative interpretation defining the phrase, "who has demonstrated a pattern of willful violation."<sup>140</sup> No objective standards as to the number or type of violations are specified in the statute as criteria for making the mandated determination. In *Leslie Coal & Energy Eng'g, Inc.*<sup>141</sup> and *Titus Frederick*,<sup>142</sup> the operators were

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<sup>137</sup> No. 1766-111-15 (DNREP January 15, 1981).

<sup>138</sup> For the Secretary's determination that individual stockholders can be permanently barred from mining, see text accompanying notes 139-43 *infra*.

<sup>139</sup> KRS § 350.130(3) (1977). The pertinent part of the statute now reads: "The cabinet shall not issue any permits to or allow future operations by any operator or person who has demonstrated a pattern of willful violations of this chapter . . . ." KRS § 350.130(3) (Interim Supp. 1982).

<sup>140</sup> See KRS § 350.130(3) (1977).

<sup>141</sup> No. 1766-111-15.

<sup>142</sup> No. 1265-01 (DNREP Aug. 7, 1979).

permanently barred from receiving future permits for nine and seven major and continuing violations, respectively, which caused serious environmental damage and which were unremedied at the time of the determination. However, whether fewer violations or violations less serious in their environmental effect might similarly result in permanent barring has not been decided. Obviously, the number, severity and length of time of the violations, coupled with the presence or lack of remedial measures and the amount of environmental harm, are all factors in determining whether the operator should be permanently barred from mining. Thus, a case-by-case analysis based upon the total circumstances of the particular situation is necessary before the permanent permit bar penalty can be imposed.

*Leslie Coal* also raised the issue of whether individual stockholders in the corporate permittee could be individually barred from future mining when the corporate entity is barred. The Secretary, rejecting the conclusion of the hearing officer, held that an individual stockholder could be barred if that individual owned more than a ten percent interest in the barred corporation.<sup>143</sup> Because the Secretary did not issue an opinion delineating the reasons for her decision to bar the individual stockholders, one can only speculate as to the source from which the Department's alleged authority on this issue is derived.<sup>144</sup>

##### 5. *Responsibility for Violations and Noncompliances*

In *Leslie Coal & Energy Eng'g, Inc.*<sup>145</sup> the permittee, Leslie Coal Corporation, did not physically remove the coal from the permitted area because another company under a contract with Leslie Coal performed this task. It therefore argued that it was not legally responsible for the violations on the permitted area because the statutes and regulations apply only to the "operator"

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<sup>143</sup> No. 1766-111-15.

<sup>144</sup> It would appear that when the Secretary of DNREP rejects all or part of a hearing officer's findings of fact and conclusions of law, there is a requirement that the Secretary must then delineate what findings of fact are the basis for the conclusions of law. See *Simms v. Angel*, 513 S.W.2d 176 (Ky. 1974); *Pearl v. Marshall*, 491 S.W.2d 837 (Ky. 1973).

<sup>145</sup> No. 1766-111-15.

or person "engaged in strip mining," and further argued that because it did not physically remove the coal it was merely the "permittee" and not the "operator" within the definition of the statute.<sup>146</sup>

The Secretary rejected this argument. When all the statutory and regulatory provisions are read together, it is apparent that the term "permittee" is included within the term "operator." KRS chapter 350 uses the term "permittee" only once<sup>147</sup> and does not define it. The legislature phrased its mandates in terms of "operator" rather than "permittee" because such usage allows the application of the legislation to those who are "permittees" by virtue of their receipt of a permit as well as to those who engage in strip mining activities without first obtaining a permit. "Operator" is clearly broader in meaning than "permittee" and thus encompasses within its reach any "permittee."

In both *Leslie Coal & Energy Eng'g, Inc.*<sup>148</sup> and *R.C. Coal Co.*,<sup>149</sup> the issue of whether the original permittee has liability when a "successor operator" caused the violations was raised. "Successor operator" is a legal term of art which refers to an operator who succeeds another operator on an uncompleted operation, has been issued a permit, has posted a bond and has assumed all liability for the reclamation of the area affected by the former operator.<sup>150</sup> If an operator meets this statutory definition, then the Department may release the first operator from all liability as to the particular operation.

Leslie Coal Corp. argued that the Department forfeited its right to impose sanctions because the Department knew that others were mining the Leslie permit and yet took no action. The

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<sup>146</sup> At the time *Leslie Coal* was decided, "operator" was statutorily defined as: any person, partnership or corporation engaged in strip mining who removes or intends to remove more than two hundred fifty (250) tons of coal from the earth by strip mining within twelve (12) successive calendar months or who removes overburden for the purpose of determining the location, quality or quantity of a natural coal deposit . . . .

KRS § 350.010(6) (Cum. Supp. 1980). For the current statutory definition of operator, see note 78 *supra*.

<sup>147</sup> See KRS § 350.135(2) (Cum. Supp. 1980).

<sup>148</sup> No. 1766-111-15.

<sup>149</sup> No. 2427-111-03 (DNREP March 24, 1981).

<sup>150</sup> KRS § 350.135(1) (Cum. Supp. 1980).

R.C. Coal Co. asserted that its subcontractor had caused the violations and was thus the responsible party. In both cases, the Secretary found the relationship between the permittee and the actual person performing the mining was irrelevant to the permittee's liability; rather, KRS section 350.135 sets forth the conditions under which the Department will look to a "successor operator" to assume liability for the permit. The burden is on the original permittee to have its successor apply for a "successor operator's" permit. The Department does not have a legal duty to investigate the contractual relationship between the permittee and those actually mining the permit. In fact, third party agreements are beyond the scope of authority of hearings held under the statutory authority granted the Department by either KRS chapter 350 or chapter 224.<sup>151</sup> The sole method for transferring the permittee's responsibility for the permit to another is contained in KRS section 350.135, and that section was not followed in either case. Therefore, the original permittees were liable to the Department for any violations on their permitted areas.

Neither of these cases addressed the liability of the original permittee for violations caused by the acts of a party not associated with the permittee in any manner. For instance, if a "wildcat" miner who is a stranger, and who under cover of darkness mines on the permit of another in violation of the law, would the permittee be liable to the Department for the violations? To date, the Secretary has not addressed this particular situation. However, in *L & N Coal Co.*,<sup>152</sup> a similar problem arose. Seven years after the permittee stopped mining on the permitted area, a slide developed. Although the permit had long since expired, the performance bond was never released. The uncontroverted evidence established that the slide was not caused by the original permittee's mining; rather, it was caused by a small deep mine operated by the landowner for his own use. The Secretary accepted the report and recommendation of the hearing officer, and the Department's complaint was dismissed with prejudice. The performance bond was released because, although the per-

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<sup>151</sup> KRS § 224.083 (Cum. Supp. 1980) provides for hearings for violations of the environmental laws embodied in the chapter.

<sup>152</sup> No. 1701-IV-14 (DNREP April 17, 1980).

mittee assumes liability for damages caused by its work, it is not strictly liable for violations in the permit area caused by others.

### CONCLUSION

The public has a legitimate interest in protecting the environment and society from the adverse effects of surface mining. Similarly, the development of this country's coal reserves as an alternative energy source is a political and economic necessity. However, any attempt by the federal and state governments to mandate an appropriate balance between these concerns is circumscribed by certain constitutional limitations on governmental action as well as certain constitutional guarantees to individuals. Therefore, it is not surprising that the SMCRA already has been the focus of constitutional litigation. Moreover, the sweeping, technical nature of the Act, the interplay of federal and state legislation and case law, as well as the myriad of state and federal regulations spawned by the Act, guarantee that the regulation of surface mining will continue to be a fertile source of federal, state and administrative litigation in the future.

