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# Surface Mining Reclamation

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# SURFACE MINING RECLAMATION

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## I. INTRODUCTION

Many of you know that the President signed a Supplemental Budget that funds both the Office of Surface Mining and the development of the full staff in the Solicitor's office, so that for the first time, we have realistic plans for implementing the bill. Jerry Simonds finished his comments with the question of whether all of the problems associated with the development and implementation of the federal coal leasing policy were a luxury which our economy could afford. I suppose that the controversy over the Surface Mining Act[1] certainly illustrates that in many people's minds, there is serious question as to whether our economy today, in a period of particularly tight energy-related resources, can afford the degree of control that this Act contemplates.

I might first of all observe that the Act was passed and was finally signed in August, 1977. On December 13, 1977, the initial regulations[2] were promulgated, and since then we have had about twenty or twenty-two lawsuits filed to set aside both the regulations and parts or all of the Act, and there are about two hundred coal companies, utilities, and petroleum companies named as plaintiffs. I am faced with a heavy litigation burden, and also with a need to be somewhat circumspect, because I have no idea whether something I say or do not say will prompt a motion for preliminary injunction tomorrow morning in the District Court of D.C. There is not one yet, but I certainly would not be surprised if that happens in the near future. What I want to do is try to briefly outline the major provisions of the law. For those of you who

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1. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 101, 91 Stat. 445 (to be codified as 30 U.S.C. § 1201).

2. 42 Fed. Reg. 62,639-716 (1977) (to be codified in 30 C.F.R. § 715).

have a detailed knowledge, I apologize for that, but I suspect many of you may not. It is a difficult, if not impossible, law to logically read and understand. Then I want to highlight a few areas where there are implications for the production of coal from a strictly regulatory perspective.

## II. General Provisions

First of all, what does the law apply to? It applies only to coal mining. It applies to both surface mining, and to the surface effects of underground mining.[3] The latter is an important not-as-yet highlighted feature of the law, but those of you who are familiar with coal mining are well aware that eventually deep mining can have serious surface impacts in terms of waste disposal, water pollution problems, and subsidence problems at least. I think in the long run, it is likely that those underground aspects of this law will prove to be as important maybe even more so, than the surface mining implications which of course have been the historical focus of the bill. Certain limited exemptions from the applicability of the bill are granted, such as the mining of coal by a landowner from his own land for his own noncommercial use,[4] coal mining affecting two acres or less, coal mining incidental to construction of highways and certain other governmental or publicly funded activities,[5] and coal mining incidental to mining of other minerals, where the coal makes up less than 16 2/3% of the total tonnage produced.[6] There are several directions in the bill for various people to undertake studies, with respect to the environmental impact of other mineral activities with particular reference to sand and gravel mining, as well as certain other studies which may affect future implementation of the Act.

I want to focus on one of the stated purposes of the law that does have an implication for production. The Act directs that surface mining not take place where reclamation, as defined in the law, is not either economically or technically feasible. It is important to note that purpose and relate it to various provisions of the law, particularly the performance standards, and draw a distinction between that approach and the approach that has been taken primarily in the Federal Water Pollu-

3. Pub. L. No. 95-87, § 516, 91 Stat. 495 (to be codified as 30 U.S.C. § 1266).
4. Pub. L. No. 95-87, § 528(2), 91 Stat. 514 (to be codified as 30 U.S.C. § 1278).
5. *Id.*
6. *Id.*

tion Control Act Amendments,[7] where the standard for performance, is the best practicable technology and the best available technology standard. What is in place? What can be used? Get it on the end of the pipe and do it. This Act says that if there is nothing in place, if you cannot reclaim and meet the environmental standards, then at least at that point in time the over-all purpose is that there should not be mining.

Title IV of the law[8] establishes a major and significant fund for the reclamation of abandoned mined lands. I will not go into detail about that fund, but merely point out that it is the major carrot established by Congress to get the states to take full responsibility in the long run for implementing all of the provisions of the law. I will describe that in a moment. It does make substantial funds available for spending by states, largely within their own discretion, if they do certain things.

The scheme which Congress set up in terms of implementing the law was the result of the normal tension between the role of the federal government and the role of the state governments. Historically, in the development of the bill, the initial approach was that the program should be largely federally run with federal permits and all the rest. There was substantial resistance from the states to that notion, so eventually an effort was made to insure that states would play a significant, if not dominant, role in the implementation of the Act.

Let me turn to the regulations[9] that were promulgated on December 13. Those regulations did a number of things. One of the major things that they did was provide detailed standards for implementations of initial performance standards which are set forth in 502(c)[10] by reference and in detail in 515(b)[11] of the Act. Those performance standards require mining companies to do such things as restore the land to a condition capable of supporting prior uses; restore approximate original contour; remove, store separately, and replace topsoil; minimize disturbance to hydrology; etc. Those were outlined in the regulations. What the law contemplates and says very directly, and what the regulations contemplate, is that, as of February 4, all new permits for surface mining in those states which issue permits affecting surface mining, which is virtually every state which has any mining of

7. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (Supp. III 1973) (amending 30 U.S.C. § 1151 (1970)).
8. Pub. L. No. 95-87, §§ 401-13, 91 Stat. 456 (to be codified as 30 U.S.C. §§ 1231-43).
9. 42 Fed. Reg. 62, 639-716 (1977) (to be codified in 30 C.F.R. § 715).
10. Pub. L. No. 95-87, § 502(C), 91 Stat. 468(to be codified as 30 U.S.C. § 1252).
11. Pub. L. No. 95-87, § 515(b), 91 Stat. 486 (to be codified as 30 U.S.C. § 1265).

coal going on in it, shall provide that the mining operation that will start up as a result of that new permit must comply with those nine performance standards.[12] It then further states that as of May 3 of this year, all existing mining operations in such states must comply with those nine performance criteria. It does not provide for a federal permit, if there is a failure to do that on the part of a state. It does not provide directly for federal enforcement against a state which does not issue such permits. A serious legal question which I will just highlight is to what extent Congress can impose a legal duty and expect the state to carry it out where there is not adequate legislative or common law authority to do so. In working with the states and the industry, we have attempted to avoid the Constitutional dilemma posed by that question. By basically working with every state in the hope that they will quickly get the legislative or regulatory authority that they need, and most states are working to do that, and in the interim insuring that the permits that they issue contain a provision directing the operator's attention to the existence of the federal law, so that even though the permit does not on its face deal with those nine interim performance standards, the mining operator must in fact comply with them. That dances a fine line between the Constitutional problem and trying to achieve a practical result.

During this period, which is called the interim program, where states are issuing these permits without the legislative authority to actually spell out the conditions that the mining operation has to meet in order to comply with the interim performance standards, there is provision for federal enforcement. There are basically three different ways federal inspection, which would be the first step in federal enforcement, can take place. The first way is that if a complaint is filed by a citizen, or from anybody,[13] the Secretary is mandated to have a federal inspection take place. Second, the Secretary is mandated to have at least two inspections of every mining operation in each year.[14] And third, if in the review of state inspection reports we see the same violations on two consecutive reports, then we are mandated to go out and conduct an inspection.[15] I think fourthly, if we perceive either that a state is issuing permits which substantially and pervasively are in violation of federal law and that mining operations in that state are substantially and pervasively in violation of the federal standards, then there is the duty

12. *Id.*
13. *Id.*
14. Pub. L. No. 95-87, § 517, 91 Stat. 498 (to be codified as 30 U.S.C. § 1267).
15. *Id.*

and the power in the Department of Interior to take steps to insure that (a) there is compliance by those operations on a case-by-case basis; and (b) the state cease issuing permits which so violate the federal law.

The enforcement mechanisms for the federal inspectors are gauged to the seriousness of the violation. If the inspector finds a violation which does not pose an imminent risk of harm to public health or safety, or an imminent threat of harm to the environment, then the inspector issues a notice of violation. This notice contains a deadline by which that violation has to be corrected, which can be no longer than 90 days. If the inspector finds a violation which is an imminent threat to public health or safety, or of significant harm to the environment, then the inspector issues a cessation order. The cessation order should contain a detailed direction to the operator with respect to what that operator must do in order to abate the violation. That can include shutting down substantial portions of the mining operation, or all of the mining operation, and shifting resources from the mining of coal into the abatement of the violation. The third explicit enforcement provision which exists is that upon a pattern of violations, the Department shall issue a rule to show cause as to why the mining permit which the operator has should not be suspended or revoked.

There are extensive provisions for appeals through the familiar administrative process from all of these various actions, but unlike many of the other environmental statutes, there is a requirement with respect to a cessation order that those appeals be handled within a thirty-day period. Those of you who are familiar with practice before federal administrative law judges and hearing boards are aware of the difficult problem that that poses. When you assume that, given six thousand mines, there is a possibility of eighteen thousand inspections a year, and an estimate of a possible average of three violations per inspection, the possibility of having thirty-day hearings becomes somewhat mind-boggling. There are also provisions for appeal from the administrative route into the district court.

The penalties that can be imposed along with the specific enforcement action are somewhat familiar to all of you. There are civil penalties, which are $5,000 a day for each day of a continuing violation.[16] Those are mandatory if a cessation order has been issued. They may also be mandatory if the violation is serious, or if there is a history of violations. There are also criminal penalties which provide for up to

16. Pub. L. No. 95-87, § 518(a), 91 Stat. 499 (to be codified as 30 U.S.C. § 1268).

one year of imprisonment and $10,000 fine.[17]

That is a very basic and quick outline of how the law works. There are specific areas that I want to touch on that may affect the production of coal. The initial program deals with several substantive issues. These are mining on prime farmlands, mining on alluvial valley floors in the west, re-vegetation in the arid west, and steep slope areas, primarily a problem in Appalachia. With regard to the first three, prime farmland, alluvial valley floors, and the re-vegetation problem in the arid west, there is a strong emphasis on a prior demonstration by the mining company that the requirements of the law can be met before any mining can take place; that in fact the productivity of the prime farmland can be restored to be equal to or greater. Separate the *A* and the *B* horizon and put them back the same way they were. Even if you do that, you must show that productivity will be the same or higher. With respect to alluvial valley floors, you must show that you can restore the hydrological function of the alluvial valley floor with respect to re-vegetation and also demonstrate that it is possible to re-vegetate.

Obviously, these requirements pose a heavy burden on the mining companies and may well be a burden which cannot be met in some areas. The steep slope situation in Appalachia poses the same type of problem, but is probably somewhat more manageable. A fifth specific provision of the law which may affect production is section 522[18] which provides for a process for designation of lands unsuitable for mining. It is a rather wide ranging concept to be implemented by the stages upon petition from citizens. There are no final rules out yet for the implementation of this provision. They will be forthcoming in the near future. But that may be a process which will set aside particularly fragile areas, which are particularly valuable from an alternative economic use perspective or from a recreational or an aesthetic perspective.

It seems to me that these kinds of specific requirements for showings and the more routine performance standards of the regulations place the heaviest burden on the mining companies. Let me turn for a minute to the question of mining on federal lands to try and illustrate that.

The regulations do apply to federal lands as a result of the December 13 regulations. The way that this happens is through the review of

17. Pub. L. No. 95-87, § 518(c), 91 Stat. 500 (to be codified as 30 U.S.C. § 1268).
18. Pub. L. No. 95-87, § 522(c), 91 Stat. 507 (to be codified as 30 U.S.C. § 1272).

mining and reclamation plans that are submitted to the U.S. Geological Survey. The plans that we have looked at, which are very few in number, that would be approved in order to allow new mining to take place on existing leases, are substantially inadequate from a viewpoint of measuring them against the surface mining law. No effort has been made on the part of the industry to take a new look at a mining plan that they might have prepared in 1975, 1976, or 1977, and see how it measures up to the requirements of the surface mining law. I suggest that for the industry to sit there and wait until the Office of Surface Mining says, "You can't mine because your mining plan is totally inadequate," is not moving the ball forward as fast as it could. If you start taking a look at those things now, and figure out where you have to go and where you have to make changes, we could gain a substantial amount of time in getting some of these plans approved. This is going to be a serious problem as we go down the path. There is a major burden on the industry to look at these things seriously and to move forward, even though you are challenging them in the court system. Because if you don't, we are going to get bogged down as badly as we are and have been in the past in the leasing policy.

Lastly, I want to turn for just a second to enforcement policy per se. The goal that we have is not to impose a massive disruption in the way mining is carried out. Obviously it is a complicated and difficult program, and it will require a cooperative approach. I have outlined what all the possible things are that can happen. In terms of our specific thinking, we anticipate that the first inspections that will be made by federal inspectors will be essentially inspections where we are coming out with the state inspector to take a quick look at the operation and get to know each other on the mine site. That is not to say that we will not take some sort of action if we find a particularly imminent hazard or significant threat to the environment. But the goal is not to come out and overnight turn every operator into a law violator. It is more to begin to get in the field, develop working knowledge with the law, and, if we have to take action in particularly serious problems, take it, but not as a matter of routine.

The second inspection will be a different kind of inspection. That will be one where we will be rigorously looking at every aspect of the operation, and expecting that substantial improvement will have been made if it was required as a result of that first examination. But at least we want to have a phased, rational way of moving in the field of enforcement policy in this first year.

The final thing I want to say on enforcement policy, however, is that there are some things which are fairly fundamental to the effective implementation of any kind of a regulatory program. Some of these include meaningful accurate, and complete reporting, going through the basic process when you have a permit, and following the basic terms of that permit, that is by mining where you are supposed to be mining. We intend to take very rigorous action in the initial period to insure that those basic benchmarks of getting everybody into the process, and getting it run on an accurate basis, are met. This is an area where we will be prepared to be very aggressive, and readily use the criminal and more rigorous sanctions that the Act does establish.

## III. CONCLUSION

The final thing I will note is that the law does provide that in August of this year we issue regulations which spell out the details of the remaining twenty-odd performance standards in section 515,[19] and also the procedures whereby a state becomes a finally approved regulatory authority. If a state becomes such an approved regulatory authority, the federal presence is substantially reduced and the state program really carried the ball. It is the goal of the Office of Surface Mining over the next two years to maximize the opportunities for the state to meet that opportunity and insure that they are really doing the majority of the work in implementing this law.

19. Pub. L. No. 95-87, § 515, 91 Stat. 486 (to be codified as 30 U.S.C. § 1265).