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Strip Mining in Maryland and the Surface Mining Control and Reclamation Act

by Lawrence M. Meister

Introduction

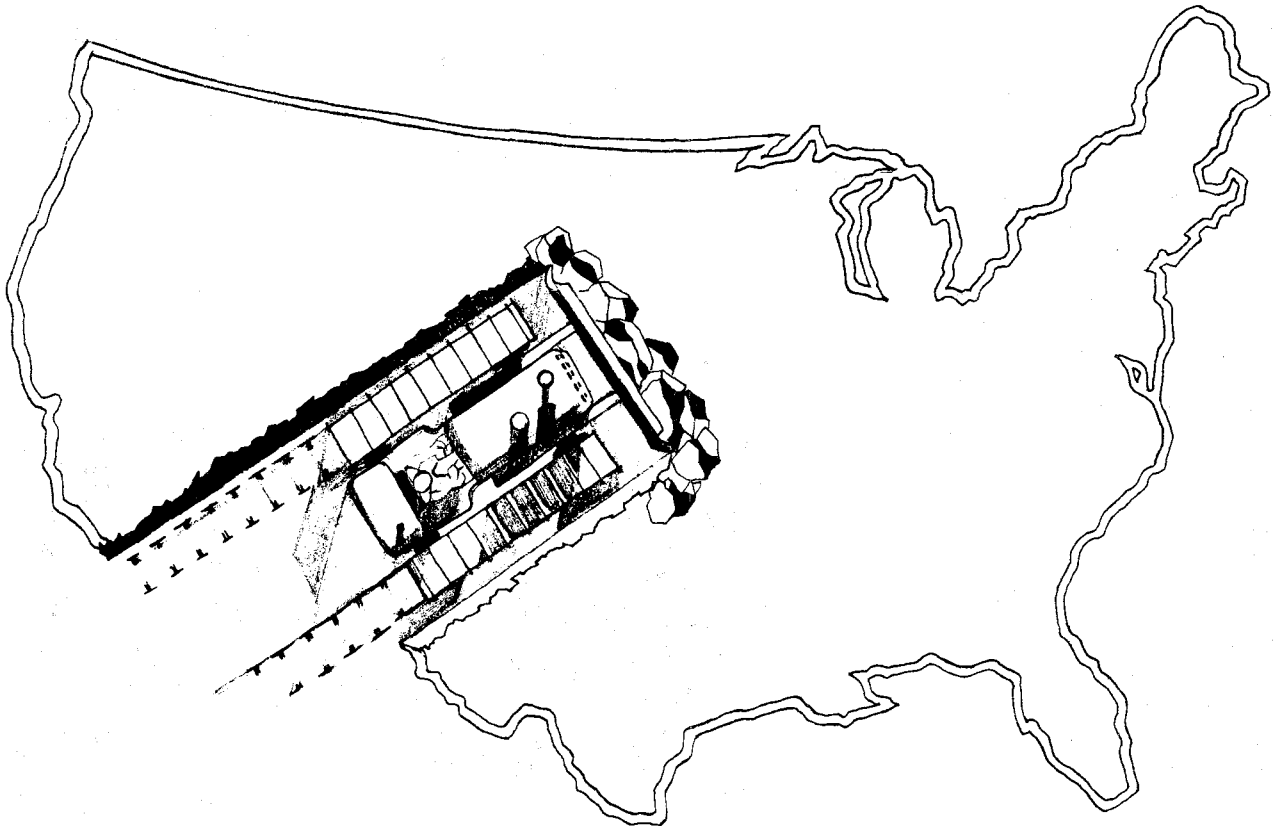
The creation of public policy in the United States often involves the conflict of competing interests. The national coal policy is no exception. While Americans recognize the value of coal as an energy resource, they also realize that there are certain environmental and social costs inherent in coal mining. In the Surface Mining Control and Reclamation Act of 1977,¹ ("SMCRA"), Congress has attempted to create a policy which allows for needed coal production, but also ensures that the environmental costs are minimized by forcing miners to reclaim the land.²

In the eight years since the law was enacted, the Act has been the subject of a great deal of debate and litigation. Neither environmentalists nor the coal industry have found the Act completely acceptable.³ Yet, with proper enforcement, the Act appears adequate to protect society from the environmental hazards of surface mining, while allowing miners the opportunity to produce a needed resource.

The Problem

Since the Arab oil embargo of 1973-1974, Americans have recognized the potential

hazards of relying extensively on foreign oil.⁴ While there are several domestic energy sources available, the United States has abundant coal reserves.⁵ In fact, current government reports indicate total identified coal resources of 1.7 trillion short tons.⁶ While coal has been an important energy source since the 1850's, it was considered unpopular due to mining accidents, air pollution, and unreclaimed land.⁷ However, when the costs of foreign oil became relatively high and Americans developed doubts about nuclear energy, coal became highly attractive as a source of energy.⁸



Congress has passed several environmental measures that have affected the coal mining industry. While the Clean Air Act⁹ and the Federal Water Pollution Control Act¹⁰ did not attempt to regulate the coal industry directly, the statutes established emissions limits which encouraged the use of cleaner fuels. The acts, have, therefore, indirectly influenced the coal market.¹¹

In the SMCRA Congress has attempted to regulate the coal strip mining industry directly, because the industry is a significant source of the problem of unreclaimed land.¹² Surface mining generally involves the removal of the layers of earth and overgrowth from above a coal reserve in order to expose the coal.¹³ Once the mining is completed the land must be reclaimed or various types of pollution can occur. These include water pollution, soil erosion, acid drainage, the destruction of wildlife habitat, and the destruction or diminishing of land.¹⁴ The SMCRA attempts to force the miners to reclaim the land contemporaneously with the mining operation.¹⁵

Although the SMCRA is a national act, it entails a tremendous amount of state cooperation. The Act encourages the states to create their own programs to regulate surface mining, but they must at least meet the minimum national standards promulgated by the Office of Surface Mining Reclamation and Enforcement of the Department of Interior.¹⁶ Once a state plan is approved by the Office of Surface Mining Reclamation and Enforcement, the Act allows the state to supervise and enforce its approved plan.¹⁷ Maryland has submitted a plan for state regulation of surface mining which has gained final approval.¹⁸

Mining in Maryland occurs only in Allegany and Garrett counties. The state has an estimated 854,900,000 tons of recoverable coal reserves.¹⁹ While the reserves are not as vast as some neighboring states,²⁰ they are an important source of Maryland's energy supply because coal is the only natural energy source produced in Maryland in significant quantities.²¹ Over two-thirds of Maryland's coal is extracted by surface mining.²²

Like most other coal mining states, Maryland has experienced the effects of strip mining pollution. Acid mine drainage from abandoned mines has lowered the pH of numerous streams, creeks, and the Potomac River.²³ Several studies have linked acid mine drainage to the acidification of Deep Creek Lake.²⁴ Numerous unreclaimed mines mar the picturesque landscape. The Maryland strip mining program is designed to prevent future mining abuses, as well as to reclaim previously abandoned mines.²⁵

The Legislative Solution

In order to solve the problems created by surface mining, the SMCRA created a thorough and complicated federal program to regulate the surface coal mining industry. The Act regulates surface mining of coal from a beginning application phase, through the mining operation, and continues until the land is reclaimed to established standards. In addition to the Act's requirements, Congress has authorized the adoption of federal regulations²⁶ and state programs,²⁷ which impose additional restrictions on surface mining operations. While the Act establishes adequate safeguards to protect the environment, it must be properly enforced in order to be effective.

Among the major provisions of the SMCRA are numerous procedural and technical requirements. In addition, the Act establishes a new organization in the Department of Interior known as the Office of Surface Mining Reclamation and Enforcement.²⁸ The Office was designed to "administer the programs for controlling surface coal mining operations which are required by this chapter. . . ." ²⁹ The Office's duties include reviewing and approving permanent state programs, investigating and inspecting surface mines, issuing orders to ensure compliance, and promulgating regulations necessary to carry out the purposes of the Act.³⁰ The Office is the most important federal organization in the surface mining area.³¹

Congress has developed a comprehensive plan to supervise the surface mining industry. Before a mining company can begin a surface coal mining operation, it must file an application for a permit.³² The application includes a filing fee³³ and requires pertinent information about the mining company, the property involved, the proposed mining process, previous permits, and the expected duration of the project.³⁴ The applicant must submit a detailed map of the mine site and the surrounding area,³⁵ a determination of probable hydrologic consequences of the surface mining,³⁶ and a proposed reclamation plan.³⁷ The reclamation plan must include a detailed description of the engineering techniques to be used in the mining and reclamation stages, a timetable for each major step of the reclamation plan, and measures that will be taken to comply with applicable air and water quality laws.³⁸ The information provided must be signed as accurate, and a false disclosure can be punished by fine or imprisonment.³⁹ Moreover, corporate directors, officers, or agents can be held personally accountable for violations of the Act.⁴⁰

Once an application for a permit is approved, the applicant must file a performance bond with the regulating body.⁴¹ The amount of the bond depends on the reclamation requirements for the particular site, and must be adequate to cover the costs of reclamation by the regulating body in the event of a forfeiture by the applicant.⁴² The bonds, in theory, provide adequate funds to reclaim the land of all the mining projects which have started since the Act became effective. If, however, an error is made in estimating the costs of reclamation, the bonds would not be sufficient to reclaim the land.

The Act provides that no permit can be issued unless the applicant has demonstrated that the follow-up land reclamation can be successfully accomplished.⁴³ If an applicant is approved and a permit is issued, the mining process can begin. If the application is denied, an aggrieved party has an administrative remedy, and can request a hearing.⁴⁴ However, the burden is on the applicant to establish that the application is in compliance with all the requirements of the federal or permanent state program.⁴⁵

After a mining operation is started the mining company must meet the environmental performance standards of the Act.⁴⁶ These technical standards are designed to encourage the mining company to consider the land use after mining, and to take timely steps to ensure that the land can be reclaimed according to the reclamation plan. The specifications establish that the company must restore the land so it is capable of supporting the same or better land uses which occurred prior to the mining operation.⁴⁷ This includes restoring the land to its approximate original contour,⁴⁸ taking precautions to maintain the original topsoil,⁴⁹ establishing water impoundments,⁵⁰ maintaining a proper hydrologic balance,⁵¹ and providing for proper disposal of mine wastes.⁵² The Act also includes special provisions for prime farmlands,⁵³ alluvial valley floors,⁵⁴ steep slope coal mining,⁵⁵ and mining on federal lands.⁵⁶ While a permit holder can apply for a variance from most of the specific requirements, the mining company must show that the variance is necessary for implementing the mining operations and that no substantial adverse environmental damage will result.⁵⁷ The mining company must continue to comply with the Act even after the mining operation is completed as the Act forces the company to assume responsibility for successful vegetation for five full years after the establishment of a permanent vegetative covering.⁵⁸

While Congress has authorized fairly rigid standards for the coal industry, the

Act requires policing in order to ensure that the environmental safeguards are actually followed. Much of the policing is accomplished by forcing the mining companies to keep records and to file reports about the particular operations.⁵⁹ The SMCRA also includes provisions which give inspectors a right of entry throughout the surface mining operation without giving prior notice. The inspectors must, however, present appropriate credentials.⁶⁰ These inspections must occur at least monthly, but on an irregular basis.⁶¹

The SMCRA gives the regulating body adequate power to enforce the Act and to sanction those who violate the regulations. Civil penalties can be assessed following an administrative hearing for violations of the Act or the permit conditions.⁶² Each day of a continual violation can be treated as a separate offense. In addition, if a violation is likely to cause imminent environmental harm to the land, air, or water resources, the authority can order the cessation of the surface mining or reclamation operation.⁶³ In the event a cessation order is issued, the violator must be fined.⁶⁴ The Act gives the United States Attorney General authority to collect these civil penalties through civil litigation.⁶⁵ The enforcement provisions, as well as the provisions requiring accurate disclosure of information, give the regulating body sufficient means to enforce the Act.

The SMCRA also provides for a remedy if the regulating body fails to properly enforce the Act. The Act gives the Secretary of the Interior extensive powers if the regulatory agency fails to properly enforce the Act.⁶⁶ These powers include taking over the enforcement of the state approved program.⁶⁷ Moreover, the statute's citizen unit provisions⁶⁸ allow persons with an interest which may be adversely affected to file a civil action against the state regulatory agency, the United States, or any other person who is alleged to be in violation of any rule, order, or permit issued under the Act, providing that the plaintiff has given the appropriate sixty day notice of a violation.⁶⁹ By allowing enforcement of the Act by the Secretary of the Interior, and by granting adversely affected persons the right to compel enforcement, the Act provides adequate remedies to protect the public from the dangers of surface mining.

In addition to thoroughly regulating the surface mining industry from application to reclamation, the Act allows the regulatory authority to designate areas that are not suitable for some or all types of surface mining.⁷⁰ This section of the Act gives the regulatory body the power to bar mining in areas where reclamation is not techno-

logically or economically feasible.⁷¹ Furthermore, mining may be prohibited if it would be incompatible with existing land use plans, would affect fragile or historic land, would adversely affect renewable resources, or affect natural hazard lands in a way that would endanger life or property.⁷² Before land can be designated as unsuitable for surface mining, a public hearing must be held.⁷³ This raises the possibility of a conflict between the coal mining industry and the community at large. In this type of situation it is likely that the combination of environmental factors and local interests would outweigh the arguments of the coal company, which are based largely on a profit motive.

In addition to controlling the pollution from mines established after August 3, 1977 when the SMCRA became effective, the Act also provides for the reclamation of previously abandoned mine sites. The Act establishes the Abandoned Mine Reclamation Fund⁷⁴ to provide money to the states to reclaim and restore land and water resources previously damaged by coal mining.⁷⁵ The fund is primarily financed by a reclamation fee on current mining operations, with surface miners paying ten cents per ton.⁷⁶ Although the reclamation fee is collected by the federal government, half of the fee is returned to the states with approved abandoned mine reclamation plans, for use in reclaiming abandoned mines.⁷⁷

While the SMCRA has provided a thorough program for the reclamation of current surface mining operations as well as the Abandoned Mine Reclamation Fund for older mines, Congress has created a few exemptions which do not have to meet the rigorous reclamation standards. These exemptions were designed to be quite narrow, and only apply to the noncommercial extraction of coal by a landowner on his own land,⁷⁸ to commercial mining where the surface mining only affected two acres or less;⁷⁹ and to the extraction of coal incidental to government financed highway or other construction.⁸⁰ While the exemptions appear to be quite narrow, they have been the source of abuse under the Act. Recent reports have shown that the two acre exception has been exploited by coal companies who have managed to develop a large tract of land through a series of two acre permits.⁸¹ While these abuses do not violate the letter of the law, they clearly violate the congressional intent embodied in the Act.

The regulatory program developed by Congress provides a thorough plan to correct the adverse consequences of strip mining. Although the Act was originally criticized by the mining industry as excessive,

reclamation is now considered a valid cost of business.⁸² While environmentalists criticize continuing abuses, the Act contains adequate environmental safeguards, providing it is properly enforced.

The Maryland Strip Mining Program

Even though Congress expressly stated that the SMCRA was not intended to supersede state laws which were consistent with the Act,⁸³ the statute has displaced the laws of numerous states governing coal mining.⁸⁴ In fact, by requiring the state programs to meet national standards and by having the Office of Surface Mining Reclamation and Enforcement approve the programs, Congress has ensured that the basic state programs are similar.⁸⁵ The Maryland Strip Mining Law, and the regulations developed to implement the law, were clearly designed to meet the federal standards.⁸⁶ Moreover, the Maryland laws regulating surface coal mining had to be modified in order to achieve unconditional federal approval.⁸⁷ Despite the national standards, the Act does allow for some state variation. For instance, the SMCRA allows states to adopt even stricter land use and environmental standards,⁸⁸ and the Act encourages states to consider their individual environmental characteristics in developing their coal policies.⁸⁹ The Maryland surface mining program has utilized the flexible provisions of the Act to create a program which meets the specific needs of the state.

The most important agency within the state of Maryland in the regulation of surface mining is the Bureau of Mines of the Department of Natural Resources. The Bureau is the state regulatory body under the SMCRA, and is authorized to make and enforce any regulations necessary to prevent, minimize, or repair damage to the land or natural resources from surface coal mining.⁹⁰ The Bureau of Mines is responsible for processing surface coal mining applications, inspecting the land, and enforcing the provisions of the Act in the state program.

Maryland has utilized its right to create stricter standards in regulating surface mining. In addition to the procedural safeguards of the SMCRA, Maryland requires mining operators to obtain an open-pit mining operator's license.⁹¹ The licensing process includes a background investigation of the applicant, and if it is found that the applicant has failed to correct a violation of the rules or regulations, a license may not be issued.⁹² A license may be suspended if the license holder repeatedly violates any of the provisions of the law.⁹³

The Maryland plan also contains an additional enforcement clause which provides that a person who mines by the open pit method without a license can be fined or imprisoned.⁹⁴ This additional licensing requirement gives the state even greater control over coal strip miners than the federal program.

Maryland also exceeds the requirements of the SMCRA by forcing miners to pay a mine reclamation surcharge to the state and local governments. The Maryland plan requires the Department of Natural Resources to assess a nine cent per ton surcharge on all coal removed by strip mining.⁹⁵ This money is deposited in the Bituminous Coal Open-Pit Mining Reclamation Fund for use in reclaiming surface mined land.⁹⁶ Coal miners must also pay a six cent per ton surcharge directly to the county where the coal is mined to be used for county purposes.⁹⁷

One of the most significant of the Maryland regulations involves steep slope strip mining. While the SMCRA allows for steep slope mining with only a few additional requirements,⁹⁸ the Maryland law creates a de facto ban on steep slope mining of coal. Maryland defines a steep slope as any slope of twenty degrees or more.⁹⁹ The Bureau of Mines will not issue a permit for surface coal mining activities on a steep slope unless: the mining operation will be conducted on a previous orphaned mine site; it is determined by the Land Reclamation Committee that that land can be reclaimed to its original contour; and the mining and reclamation operations will be conducted according to special requirements for mining on a steep slope.¹⁰⁰ These specific requirements have effectively barred steep slope mining in Maryland.

The strict steep slope mining requirements have been the subject of a great deal of debate in Maryland. The coal industry claims that the standards must be relaxed in order to permit access to thirty-eight million tons of coal.¹⁰¹ The coal companies argue that less restrictive regulations would be adequate to protect the public from environmental hazards. Environmentalists and citizens have argued that the more stringent standards are still needed. The Maryland General Assembly passed a bill¹⁰² which would have lifted the stringent requirements for steep slope mining; however, this measure was vetoed by Governor Hughes on May 28, 1985 because he was uncomfortable with the environmental risks and the regulatory framework.¹⁰³ The bill was reintroduced in the General Assembly during the special legislative session in October of 1985; however, the General Assembly sustained the Governor's veto.¹⁰⁴ While the

debate on steep slope mining is likely to continue, the Legislature's refusal to override the Governor's veto indicates that no change is likely in the near future.

Litigation

The SMCRA has been the subject of a great deal of litigation since its enactment in 1977. The interim regulations, permanent regulations, and the Act itself have been challenged in the courts. As Congress may have expected, both environmental groups and the coal industry have taken active roles in the litigation and have tried to sway the courts' decisions to favor their re-

Although the Act was originally criticized by the mining industry as excessive, reclamation is now considered a valid cost of business.

spective causes.¹⁰⁵ To date, the Act has survived all of the major constitutional challenges, but the courts have found numerous problems with the federal regulations. While the Maryland strip mining program has not been challenged, the litigation in other districts would be persuasive in interpreting the Maryland Law.

The principal case interpreting the SMCRA is *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*¹⁰⁶ In *Hodel*, an association of coal producers brought a preenforcement challenge to the constitutionality of the Act and the interim regulations. The plaintiffs alleged that the interim regulations violated the commerce clause, the equal protection and due process clauses of the fifth amendment, the tenth amendment, and the just compensation clause of the fifth amendment. The United States District Court for the Western District of Virginia rejected the commerce clause, equal protection, and substantive due process challenges, but found that the Act violated the tenth amendment, and that various provisions violated the just compensation clause and the due process clause.¹⁰⁷

The Supreme Court considered each of the constitutional challenges on appeal. While the mining association argued that the Act violated the commerce clause, the Court found that the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."¹⁰⁸ Moreover, the Court found that Congress rationally determined that the regulation of surface coal mining was necessary to protect interstate commerce from the adverse affects of surface mining which included environmental hazards and destructive interstate competition.¹⁰⁹ Since the Act's regulatory scheme was reasonably related to the goals Congress sought to accomplish, the Court concluded that the SMCRA did not violate the commerce clause.¹¹⁰

The Supreme Court next considered the lower courts' findings that the steep slope provisions¹¹¹ violated the tenth amendment. The Court noted that the district court had relied heavily on the Supreme Court's decision in *National League of Cities v. Usery*,¹¹² but found the lower courts had misapplied that decision's three prong test.¹¹³ The Supreme Court found that the steep slope provision of the SMCRA did not regulate the states as states, but was part of "a program of cooperative federalism that allows the States, within limits established by minimum federal standards, to enact and administer their own federal programs, structured to meet their own particular needs."¹¹⁴ Since the statute regulates only individual businesses subject to the dual sovereignty of the national and state governments, it was held not to violate the tenth amendment.¹¹⁵

While the district court had found that the steep slope provisions violated the just compensation clause, the Supreme Court found that no property had been taken by operation of the Act.¹¹⁶ Since the plaintiffs were challenging the statute on its face, the test for a taking was whether the statute "denied an owner economically viable use of his land. . . ."¹¹⁷ The Court found that the SMCRA survived scrutiny under the test because the Act did not, on its face, prevent the beneficial use of coal bearing land,¹¹⁸ and because the administrative remedies had not yet been exhausted so that the taking issue was not yet ripe.¹¹⁹

The district court's ruling that the provisions of the Act authorizing immediate cessation orders¹²⁰ violated the due process clause of the fifth amendment was also overturned by the Supreme Court. The

Court found that the immediate cessation orders fell within the "emergency situation exception to the normal rule that due process requires a hearing prior to the deprivation of a property right."¹²¹ The Court noted that "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action."¹²² Moreover, the Court noted that the Act afforded a prompt and adequate post deprivation hearing as well as an opportunity for judicial review.¹²³

The Supreme Court also overturned the district court's finding that the Act's civil penalty section violated due process.¹²⁴ The Act requires that if an operator is assessed a civil penalty, he must pay the amount assessed to the Secretary to be put in escrow, before the operator can have an administrative hearing or the right to judicial review.¹²⁵ The Court noted that none of the plaintiffs had been assessed a civil penalty, and therefore the issue was not yet ripe for judicial review.¹²⁶

On the same day that the Court decided *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court decided the companion case of *Hodel v. Indiana*.¹²⁷ While the suit raised broad constitutional challenges, the case primarily involved the prime farmlands provisions of the Act.¹²⁸ The district court found that the prime farmlands provisions were an unconstitutional exercise of Congress' commerce power, because they were directed at facets of coal mining which had no substantial and adverse affect on interstate commerce.¹²⁹ However, the Supreme Court found that "Congress was entitled to find that the protection of prime farmland was in the federal interest that may be addressed by commerce clause legislation."¹³⁰ The Court pointed out that the question was not "how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce."¹³¹ The Court concluded that Congress had a rational basis for its finding that coal mining on prime farmland affects interstate commerce.¹³²

The Supreme Court also overruled the district court's holding that the prime farmlands and other substantive requirements were not "reasonably related to the legitimate goal of protecting interstate commerce from adverse effects attributable to surface and coal mining."¹³³ The Court found that Congress had other legitimate concerns in addition to preventing water and air pollution, such as preserving the productive capacity of mined land and protecting the public from health and safety hazards.¹³⁴ The Court concluded that

"Congress acted reasonably in adopting the regulatory scheme contained in the Act."¹³⁵

The Court quickly dismissed the lower court's holding that twenty-one substantive provisions violated the tenth amendment. Using the same analysis as *Hodel v. Surface Mining*, the Court found that the regulations did not regulate the states as states,¹³⁶ and therefore, the Act did not violate the tenth amendment.

The lower court also had held that the substantive provisions of the Act violated both the substantive due process and the equal protection clauses of the fifth amendment of the United States Constitution. This holding was based on the fact that the Act allows variances from the reclamation of some types of mining, but did not allow a variance for prime farmland.¹³⁷ The Supreme Court, however, found that Congress had acted rationally in drawing the distinction,¹³⁸ and criticized the lower court for substituting its own policy judgment over that of Congress.¹³⁹

The Supreme Court also considered whether the mere enactment of the SMCRA constituted a taking of private property. Like *Hodel v. Surface Mining*, the Supreme Court found that the provisions merely regulate the conditions under which prime farmlands can be mined, and that, on its face, the Act did not deprive a property owner of economically beneficial uses of his property.¹⁴⁰ Similarly, as in *Hodel v. Surface Mining*, the Court found that the challenges against the Act's civil penalty provisions were premature.¹⁴¹

The Supreme Court opinions in the *Hodel* cases were important in the development of the SMCRA. The decisions affirmed Congress' broad power in controlling environmental matters affecting interstate commerce. Moreover, the decisions gave the Act needed credibility, by surviving a broad range of constitutional challenges. These decisions remain important precedent for constitutional challenges to the Act.

The issue of civil penalties, which was considered as premature by the Supreme Court in *Hodel*, has been raised again in subsequent litigation. Section 1268(c) of the Act requires the payment of civil penalties into an escrow account prior to awarding an alleged violator an administrative hearing or judicial review. In separate actions in both the Sixth¹⁴² and Seventh¹⁴³ Circuits, plaintiffs have unsuccessfully challenged the section as violative of the procedural due process rights secured by the fifth amendment. Applying the test for due process from *Mathews v. Eldridge*,¹⁴⁴ the courts found that the plaintiff's private interest was the temporary deprivation of

its money, and the risk of an erroneous deprivation was slight.¹⁴⁵ Moreover, the courts found the government's interest in prompt assessment and collection of civil penalties to ensure compliance with the Act was substantial and outweighed the private interest of the plaintiff. Considering these three factors together the courts in these two cases found that the Act's escrow requirement satisfied the demands of due process.¹⁴⁶

While the Surface Mining Control and Reclamation Act has been the subject of a great deal of litigation, the Act has withstood constitutional scrutiny. The Supreme Court decisions upholding the constitutionality of the Act have reinforced the legislative power to attack environmental problems which have an adverse affect on interstate commerce. The amount of litigation is likely to increase as Americans develop more of their great coal reserves.

Conclusion

The Surface Mining Control and Reclamation Act has drawn a delicate balance between the need for coal and the conflicting need to preserve the environment. By forcing the coal industry to internalize the costs of land reclamation, the Act protects our environment from the various forms of pollution from coal strip mining. Meanwhile, the Act allows mining companies to continue to develop one of our nation's greatest natural resources. As the struggle between environmentalists and the coal industry continues into the future, the Surface Mining Control and Reclamation Act should provide a suitable balance for the majority of citizens.

Notes

¹Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified at 30 U.S.C.A. §§ 1201-1328 (West Supp. 1985) [hereinafter cited as SMCRA].

²30 U.S.C.A. § 1202 (West Supp. 1985).

³Peterson, *Federal Strip-Mining Law Satisfies Few*, Washington Post, May 28, 1985, at A6, col. 1.

⁴Energy Information Administration, U.S. Department of Energy, Annual Outlook for U.S. Coal 1984, at 5 (1984).

⁵*Id.* at 1.

⁶*Id.* at 8.

⁷*Id.* at 3.

⁸*Id.* at 8.

⁹Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West 1983 & Supp. 1985).

¹⁰Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1376 (West 1986).

¹¹Energy Information Administration, *supra* note 4, at 10-11.

¹²30 U.S.C.A. § 101(c) (West Supp. 1985).

¹³There are three broad types of surface mining: contour, auger, and open pit. H.R. Rep. No. 94-95, 94th Cong., 1st Sess. 66-69 (1975).

¹⁴30 U.S.C.A. § 1201(c) (West Supp. 1985).

¹⁵*Id.* at § 1202 (e).

¹⁶*Id.* at § 1253 (a).

¹⁷The United States Government maintains the right to inspect mines and to enforce the Act if the

- state fails to take appropriate action. 30 U.S.C.A. § 1271 (West Supp. 1985).
- ¹⁸The Maryland plan was given conditional approval by the Office of Mine Reclamation and Enforcement. Department of the Interior, effective December 1, 1980. 45 Fed. Reg. 79, 430 (1980) (codified at 30 C.F.R. §§ 920.10, 920.11) (1981). Following the correction of 34 minor deficiencies, the conditions of approval were removed, and the Maryland plan was approved effective February 18, 1982. 30 C.F.R. § 920.10 (1985).
- ¹⁹Energy Administration, Maryland Department of Natural Resources, Energy in Maryland, at 103 (1981).
- ²⁰Pennsylvania has a demonstrated reserve base of 30,281 million short tons of coal. West Virginia has a demonstrated reserve base of 39,776 million short tons of coal. Energy Information Administration, *supra* note 4, Table 7, at 32.
- ²¹Energy Administration, *supra* note 4, at 1.
- ²²*Id.* at 105.
- ²³Maryland-EPA Region III, Environmental Agreement for Fiscal 1982, Problem 7, at 11 (August 26, 1981).
- ²⁴Maryland Power Plant Siting Program, Maryland Department of Natural Resources, Assessment of Acid Inputs to Deep Creek Lake, Garrett County, Maryland, at iii (June 1984); Maryland Power Plant Siting Program, Maryland Department of Natural Resources, Chemical Composition of Precipitation and Watershed Samples Collected at Deep Creek Lake, Garrett County, Maryland, at I-1 (August 1984).
- ²⁵MD. NAT. RES. CODE ANN. § 7-502 (1983 Repl.).
- ²⁶30 U.S.C.A. § 1211(c)(2) (West Supp. 1985).
- ²⁷*Id.* at § 1253.
- ²⁸*Id.* at § 1211.
- ²⁹*Id.* at § 1211(c)(1).
- ³⁰*Id.* at § 1211(c)(2).
- ³¹The Office of Surface Reclamation and Enforcement developed interim regulations to control surface mining until permanent state plans could be developed and approved. 30 CFR. §§ 710-725 (1985). It also developed regulations for evaluating permanent state programs and established minimum national standards for state programs. 30 C.F.R. §§ 720-732 (1985). The office has the duty to develop surface mining programs for individual states if the states refuse to submit their own program. 30 C.F.R. § 736 (1985). The office also retains important enforcement powers if the state refuses to carry out an approved program. The complete regulations are codified at 30 C.F.R. § 700-950 (1985).
- ³²30 U.S.C.A. § 1256 (West Supp. 1985).
- ³³*Id.* at § 1257(a).
- ³⁴*Id.* at § 1257(b).
- ³⁵*Id.* at § 1257(b)(9).
- ³⁶*Id.* at § 1257(b)(11).
- ³⁷*Id.* at § 1257(d).
- ³⁸*Id.* at § 1258(a).
- ³⁹*Id.* at § 1268(a).
- ⁴⁰*Id.* at § 1268(f).
- ⁴¹*Id.* at § 1259(a).
- ⁴²*Id.*
- ⁴³*Id.* at § 1260(b)(2).
- ⁴⁴*Id.* at § 1264(c).
- ⁴⁵*Id.* at § 1260(a).
- ⁴⁶*Id.* at § 1265(a).
- ⁴⁷*Id.* at § 1265(b)(2).
- ⁴⁸*Id.* at § 1265(b)(3). However, there can be exceptions. See 30 C.F.R. § 785.14 (1985).
- ⁴⁹30 U.S.C.A. § 1265(b)(5) (West Supp. 1985).
- ⁵⁰*Id.* at § 1265(b)(8).
- ⁵¹*Id.* at § 1265(b)(10).
- ⁵²*Id.* at § 1265(b)(11).
- ⁵³*Id.* at § 1260(d).
- ⁵⁴*Id.* at § 1260(b)(5)(A).
- ⁵⁵*Id.* at § 1265(d).
- ⁵⁶*Id.* at § 1273.
- ⁵⁷*Id.* at § 1265(b)(16)(A).
- ⁵⁸*Id.* at § 1265(b)(19)-(20).
- ⁵⁹*Id.* at § 1267(b)(1).
- ⁶⁰*Id.* at § 1271(b).
- ⁶¹*Id.* at § 1267(c).
- ⁶²*Id.* at § 1268(a).
- ⁶³*Id.* at § 1271(a)(2).
- ⁶⁴*Id.* at § 1268(a).
- ⁶⁵*Id.* at § 1268(d).
- ⁶⁶*Id.* at § 1271(b).
- ⁶⁷*Id.*
- ⁶⁸*Id.* at § 1270.
- ⁶⁹*Id.* at § 1270(b). However, suit may be initiated prior to sixty days if the violation complained of constitutes an imminent threat to health or safety. 30 U.S.C.A. § 1270(b)(2) (West Supp. 1985).
- ⁷⁰30 U.S.C.A. § 1272(a) (West Supp. 1985).
- ⁷¹*Id.* at § 1272(a)(2).
- ⁷²*Id.* at § 1272(a)(3).
- ⁷³*Id.* at § 1272(a)(4)(D).
- ⁷⁴*Id.* at § 1231(a).
- ⁷⁵*Id.* at § 1231(c)(1).
- ⁷⁶*Id.* at § 1232(a).
- ⁷⁷*Id.* at § 1232(g)(2).
- ⁷⁸*Id.* at § 1278(1).
- ⁷⁹*Id.* at § 1278(2).
- ⁸⁰*Id.* at § 1278(3).
- ⁸¹Peterson, *supra* note 3, at A6, col. 3.
- ⁸²McAteer, *Coal Resource Development - Toward A Rational Policy*, 86 W. VA. L. REV. 735 (1984).
- ⁸³30 U.S.C.A. § 1255(a) (West Supp. 1985).
- ⁸⁴See, Comment, *A Fifth Amendment Taking Clause Analysis of Pennsylvania's Surface Mining Conservation and Reclamation Act*, 86 DICK. L. REV. 691 (1982).
- ⁸⁵*Id.*
- ⁸⁶There are numerous references to SMCRA within the Maryland Strip Mining Law and the administrative regulations. See, e.g., MD. NAT. RES. CODE ANN. § 7-505 (1983 Repl.); Md. Admin. Code tit. 8, § 08.13.09.01 (1985).
- ⁸⁷30 C.F.R. § 920.10 (1985).
- ⁸⁸30 U.S.C.A. § 1255(b) (West Supp. 1985).
- ⁸⁹*Id.* at § 1211(c)(9).
- ⁹⁰MD. NAT. RES. CODE ANN. § 7-503 (1983 Repl.).
- ⁹¹*Id.* at § 7-504(a).
- ⁹²*Id.* at § 7-504(b).
- ⁹³*Id.* at § 7-504(c).
- ⁹⁴*Id.* at § 7-516(a).
- ⁹⁵MD. NAT. RES. CODE ANN. § 7-507.1(2)(i) (Supp. 1985).
- ⁹⁶*Id.* at § 7-507.1(1).
- ⁹⁷*Id.* at § 7-507.1(2)(i).
- ⁹⁸30 U.S.C.A. § 1265(d) (West Supp. 1985).
- ⁹⁹MD. NAT. RES. CODE ANN. § 7-505(i)(2) (1983 Repl.).
- ¹⁰⁰*Id.*
- ¹⁰¹Washington Post, May 19, 1985, at A8, col. 2.
- ¹⁰²S. 230, 1985 Session; H.D. 466, 1985 Sess.
- ¹⁰³Washington Post, May 19, 1985, at A1, col. 5.
- ¹⁰⁴Washington Post, October 18, 1985, at A14.
- ¹⁰⁵See, Bagge, *Setting National Coal Policy: Interaction Between Congress, Regulatory Agencies, and the Courts*, 86 W. VA. L. REV. 717 (1984); Rasmic, *Federal Required Restoration of Surface-Mined Property: Impasse Between the Coal Industry and the Environmentally Concerned*, 23 NAT. RESOURCES J. 335 (1983).
- ¹⁰⁶Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264 (1981).
- ¹⁰⁷*Id.*
- ¹⁰⁸*Id.* at 281 (citing United States v. Wrightwood Dairy Co., 315 U.S. 110, at 119 (1942)).
- ¹⁰⁹452 U.S. at 281.
- ¹¹⁰*Id.* at 283.
- ¹¹¹30 U.S.C.A. § 1265(d) (West Supp. 1985).
- ¹¹²National League of Cities v. Usery, 426 U.S. 833 (1976). National League of Cities has been overruled by Garcia v. San Antonio Metropolitan Transit Authority, 104 S. Ct. 3582 (1985), *reh'g denied*, 105 S. Ct. 1005 (1985).
- ¹¹³In order to show that congressional commerce power legislation violates the tenth amendment, plaintiff must show: 1) that the challenged statute regulates the States as States; 2) that the federal regulation must address matters that are indisputably attributed to state sovereignty; and 3) that the State's compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions. 452 U.S. at 287-88.
- ¹¹⁴452 U.S. at 289.
- ¹¹⁵*Id.* at 293.
- ¹¹⁶*Id.* at 294.
- ¹¹⁷*Id.* at 296 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).
- ¹¹⁸452 U.S. at 296.
- ¹¹⁹*Id.* at 297.
- ¹²⁰30 U.S.C.A. § 1271(a)(2) (West Supp. 1985).
- ¹²¹452 U.S. at 300.
- ¹²²*Id.*
- ¹²³*Id.* at 303.
- ¹²⁴*Id.*
- ¹²⁵*Id.* at 304.
- ¹²⁶*Id.*
- ¹²⁷Hodel v. Indiana, 452 U.S. 314 (1981).
- ¹²⁸30 U.S.C.A. § 1260 (West Supp. 1985).
- ¹²⁹*Id.* at 321.
- ¹³⁰*Id.* at 324.
- ¹³¹*Id.*
- ¹³²*Id.* at 326.
- ¹³³*Id.* at 327.
- ¹³⁴*Id.*
- ¹³⁵*Id.* at 329.
- ¹³⁶*Id.* at 330.
- ¹³⁷*Id.* at 331.
- ¹³⁸*Id.* at 333.
- ¹³⁹*Id.* at 333.
- ¹⁴⁰*Id.* at 335.
- ¹⁴¹*Id.* at 336.
- ¹⁴²Blackhawk Mining Co., Inc. v. Andrus, 711 F.2d 753 (6th Cir. 1983).
- ¹⁴³B&M Coal Corp. v. Office of Surface Mining Reclamation and Enforcement, 699 F.2d 381 (7th Cir. 1983).
- ¹⁴⁴Mathews v. Eldridge, 424 U.S. 319 (1976).
- ¹⁴⁵711 F.2d at 757; 699 F.2d at 385.
- ¹⁴⁶711 F.2d at 758; 699 F.2d at 386.

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