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Linda E. White
Office of the Attorney General, State of Colorado

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LINDA E. WHITE*

I. REGULATION BY OBJECTIVE: GENERAL COMMENTS

At best, governmental regulations are complex, tedious to read, and difficult to apply no matter what the subject matter of the regulation. Regulations become more comprehensible, however, when the objective is known. Like the "King's Peace" the objective is best defined by the conditions which should exist when the regulations are followed.

Once such an objective is defined, some flexibility must be built into the regulatory system to address each situation. This is accomplished by promulgating regulations which are more general than specific, which are *not* conceived to address every situation the regulatory authority can imagine, but rather are sufficiently encompassing to address situations which cannot at the time be imagined.

A limitation on flexibility, however, is certainty. That is, regulations must be specific enough to prevent confusion as to what is required under the law. The ideal environmental regulations allow industry to accurately assess the economics of a proposed operation while those affected by the operation are able to assess its effect on the environment.

It is especially important that national standards be sufficiently stringent to enforce the objective expressed in the law. This is critical to the emergence of an enlightened standard of behavior as to those regulated, as well as the regulatory authority and the environmental community.

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* First Assistant Attorney General, Office of the Attorney General, State of Colorado (Head of Water Unit). B.A. 1972, M.A. (Humanities) 1976, State University of New York at Buffalo; J.D. 1976, State University of New York at Buffalo Law School.

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A stringent national standard allows for the development of what I refer to as a "corporate sensibility." Corporate sensibility may be defined as the allowance for altruistic behavior within the framework of an organization which exists solely for the generation of profit.[1] Altruistic behavior on the part of a business organization is best described as any activity not related to generating a profit, but rather to alleviating negative effects caused by the profit-generating activity. All the niceties of mitigation and reclamation fall into this category.

Corporations and other businesses can afford altruistic behavior only to the extent that the burden it creates is borne proportionately by its competitors. This is particularly true in national markets in which a competitive disadvantage (*e.g.* more stringent environmental regulations) in the state in which the corporation is doing business hinders the corporation's ability to offer its product at a competitive price in the national or international market.[2]

Lack of a national standard as to regulation and enforcement leads to a destructive process which I refer to as "environmental leveraging." State government attorneys are likely to be familiar with this concept. For example, an enforcement action is brought by the state regulatory authority to enforce an environmental law or regulation more stringent than those imposed in other states with similar resources. If the company against which enforcement is sought lacks a good defense, it may then respond with a legal argument sufficient to delay, but probably not to win in the state forum.

The company may then apply various kinds of pressure to the regulatory authority. It may convey a message in settlement negotiations, discovery responses, or by exerting political influence, that it will take its operations elsewhere if it cannot compete, and, furthermore, that the regulation sought to be enforced is a major element of its inability to compete. A threat of filing bankruptcy is not uncommon, particularly when the adequacy of a bond is an issue.

This ploy is especially effective in economically depressed areas where every job counts; and, in defense of the company's

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[1] I refer here to for-profit corporations such as those engaged in coal extraction.

[2] This situation is specifically addressed in the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)). *See* SMCRA § 101(g), 30 U.S.C. § 1201(g).

position it could have some merit in certain situations. It is difficult to be certain of the environmental effects of this situation. However, it is quite possible that stringency beyond the national standard could allow local economic pressure exerted through political influence to limit the effectiveness of enforcement actions. While federal oversight prevents this practice from completely eroding enforcement, the problems it creates for state regulatory authorities waste scarce resources which could be more constructively used elsewhere.

A national standard can provide solid environmental protection for all states while avoiding the pitfalls of state-by-state standards.

II. OBJECTIVES UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT (SMCRA)

General principles for drafting are useful only if combined with actual experience in the area to be regulated. If this approach is used, and a reasonable balancing of interests developed, litigation can often, or even usually, be avoided.

Objectives applicable to valid existing rights (VER) issues are set forth in the Surface Mining Control and Reclamation Act of 1977 (SMCRA):

> It is the purpose of the Act to—
> (a) establish a nationwide program to protect society and the environment from adverse effects of surface coal mining operations;
> (b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;
> (c) assure that surface mining operations are not conducted where reclamation as required by this act is not feasible;
> (d) assure that surface coal mining operations are so conducted as to protect the environment;
> . . .
> (f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy . . . .[3]

[3] SMCRA § 102, 30 U.S.C. § 1202 (1982).

The Office of Surface Mining Reclamation & Enforcement (OSMRE) has set forth its general objective in the discussion of its proposed VER rule:[4]

> OSMRE intends to develop rules that are compatible with SMCRA, unambiguous, reasonable to administer, and, in striking a reasonable balance between legitimate competing interests, reflective of good public policy and Congressional intent.

These objectives provide a framework on which to evaluate the proposed regulations. As in a large number of governmental regulations, the word balance appears both in the purpose set forth in the statutes,[5] and the preamble to OSMRE's 1988 proposed VER rule, quoted above.

III. MEETING THE OBJECTIVES: OPTION 1: OWNERSHIP AND AUTHORITY

Of the two options provided in the 1988 proposed VER regulation, only Option 1 meets the stated objective.

A. *Avoidance of Takings*

Fifth Amendment takings of private property are avoided to the extent possible under this option. As compared to Option 2, fewer rights to mine should be affected since, under Option 1, the right to mine need exist only at the time prohibitions become effective. Under Option 2, however, the right to mine must be enhanced by necessary permits and the additional, and usually substantial, investment required to obtain such permits.

Whether a taking of VER has occurred under Option 1 would be determined under state law. The same state law that governed the expectations of investors can be used to measure what, if any, compensable taking has occurred as a result of applying the standard in Option 1.

The complexity of making the determination of whether a taking has occurred requires that state law be applied. The problem has been recognized by the Colorado Supreme Court:

> What constitutes a taking has proved to be a problem of considerable difficulty . . . There is no set formula for deter-

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[4] 53 Fed. Reg. 52,379 (1988).

[5] SMCRA § 102, 30 U.S.C. § 1202(f) (1982)

> mining when justice and fairness require economic injuries caused by public action be compensated by the government . . . .[6]

The nuances of regulatory takings as opposed to inverse condemnation, and requirements concerning compensation can be argued within the framework of a substantial body of law which evolved in the process of addressing local conditions. There is a lengthy discussion of these issues in *The Mill v. State of Colorado*[7].

The existence of a well-developed body of law governing what constitutes ownership and authority and the conditions for determining a taking is a clear advantage of Option 1 over Option 2. The case law in existence which would be used to interpret Option 2, on the other hand, is much more limited, and would permit less flexibility for the regulatory authority to address each individual situation.

B. *Applying Option 1 in the Permitting Process*

State agencies do not usually have the authority to make determinations of property disputes. Therefore, if a state agency were confronted with an application that did not contain a clear indication of ownership and authority, or if the applicant's ownership and authority were contested by third parties, the issue would have to be decided by a state court. As a practical matter it would be necessary for the agency to obtain a stipulation extending the deadlines triggered in SMCRA by the filing of an application.[8]

The applicant would then seek a declaratory order in court, the state agency being a nominal party in the action, and the case could proceed to final decision with minimal participation by the state. The agency's action as to the ownership and authority issues would be guided by the court's decision.

Option 2, on the other hand, would place a greater burden on the state agency since the agency would make a decision prior to receiving guidance from court. In addition, because courts ordinarily defer to agency expertise in matters concerning per-

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[6] Board of County Commissioners v. Flickeringer, 687 P.2d 975 (Colo. 1984).

[7] Nos. 87CA0502, 87CA0838 (1989) (appeal pending).

[8] SMCRA § 510, 30 U.S.C. § 1260 (1988). In the absence of such a stipulation, the agency could simply deny the permit.

mitting, it would be more likely to play an active role in ensuing litigation.

In general, applying Option 1 would conserve agency resources and keep agency focus on reclamation rather than legal issues.

C. *Method of Mining*

One issue which must be addressed in Option 1 is the apparent confusion over the phrase "by the method he intends to use."[9] The mining technology to be employed should not be confused with what should be an analysis of rights connected with surface mining or underground mining. It appears that subsidence is the real concern; however, the subsidence problem must be specifically addressed. This cannot be done in the limited sense intended under the phrase "method he intends to use."

Therefore, I suggest that the phrase be clarified by adding after it "that is, either underground or surface." To simply delete the phrase might give rise to an argument that SMCRA had preempted clauses in deeds which provided for either surface or underground mining, thus expanding VER beyond original limitations.

III. COLORADO PERSPECTIVE

A. *General Concerns*

No litigation has taken place under Colorado's "all permits test" for VER. This is probably because mining in Colorado is now done primarily on public land. Few structures are likely to be affected. In addition, subsidence is less dramatic since, in general, Colorado coal seams are overlain by harder rock than seams in eastern states.

A major concern for Colorado in the development of VER regulations is the need to develop consistent regulations to govern the numerous mines extracting minerals other than coal. Case law which arises under VER regulation applicable to coal will probably be cited as controlling for subsequent cases involving other types of mines. To what extent parallel or consistent VER regulations for both coal and other minerals are

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[9] 53 Fed. Reg. 52,374, 52,377 (1988).

necessary has not been investigated or analyzed. Subsidence issues not yet addressed in federal rulemaking would probably be a major consideration as to whether parallel regulations can be considered.

B. *Water Rights*

No discussion of a Colorado perspective could be complete without mentioning water rights.

Where water rights will be impacted by mining it may well be that an economic analysis of the proposed operation's effect on water rights will be dispositive of all other issues. That is, if valuable water rights would be seriously impacted by the proposed operation it may well be uneconomic to mine. An analysis would have to be site specific and include not only the right directly affected, but also the rights of others deriving from the existing hydrologic regime. Some factors to be considered are: effect on the aquifer or stream system, altered pattern of return flows, change in place of diversion or use, and existing exchanges that could be impacted.

Water rights appear to be protected by the provisions of SMCRA Section 717[10] however, in *National Wildlife Federation v. Hodel*,[11] this protection was limited. A panel of the D.C. Circuit held that the requirement to replace affected water supplies was not applicable to underground mines.[12] This limitation leaves a major gap in water rights protection since such rights may be damaged as much by underground mines as surface mines, with the predictability of such damage being more difficult to determine before the beginning of the mining.

Again, proposed subsidence regulations will be a major factor in the economic analysis as the more subsidence is limited, the less likely it becomes that a water right will be impacted. Conversely, as subsidence is limited the taking issue becomes a greater concern, and a regulatory taking might then exist where under less stringent subsidence regulations the operation would simply have not been economically feasible.

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[10] SMCRA § 717, 30 U.S.C. § 1307 (1988).
This section deals with water rights and replacement, and requires the coal mine operator to replace the water supply under certain conditions.

[11] 839 F.2d 694 (D.C. Cir. 1988)

[12] *Id.* at 753.