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Special Legal Problems With Other Environmental Laws Under SMCRA

STEPHEN G. ALLEN*

INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) or Act¹ establishes the most comprehensive regulatory scheme for surface coal mining and the surface effects of underground coal mining ever enacted; but it is far from the only environmental statute that applies to these activities. The purpose of this article is to explore the impacts upon mining activities from the potential areas of tension between SMCRA and other environmental statutes, and to suggest ways to avoid potential conflict. Some environmental statutes have clear conflicts with SMCRA requirements while others simply add independent requirements. As an aid to the SMCRA practitioner, the author has attempted to identify some, but certainly not all, of the other environmental laws that have an impact upon SMCRA-regulated operations.

As a comprehensive regulatory statute covering a specific industry and its effect upon several resources, SMCRA regulatory policy has the potential for creating an uneasy tension between its own demands and those imposed by other environmental statutes which focus upon the protection of a single

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¹ Surface Mining Control and Reclamation Act of 1977 [hereinafter cited as SMCRA], Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

resource. SMCRA was intended to be a multi-media environmental protection law,² but at the same time the Act itself states that it must *not* "be construed as superseding, amending, modifying or repealing" other environmental laws and regulations.³ Those other environmental laws include the National Environmental Policy Act,⁴ the Federal Water Pollution Control Act⁵ (and the state laws enacted pursuant thereto or other federal laws relating to preservation of water quality), the Clean Air Act,⁶ the Solid Waste Disposal Act,⁷ the Refuse Act of 1899,⁸ and the Fish and Wildlife Coordination Act of 1934.⁹

These statutes and other recent environmental laws focus on specific media and the use or disposal of specific substances. Although SMCRA is clearly an environmental statute, the regulatory program which implements SMCRA has brought about many operational changes in surface coal mining as well. Some of these changes have had their own unforeseen environmental impacts and must be addressed.

As concern about the environment has grown, so have the number of environmental statutes and regulations. Other environmental laws which were noted in the Act when it was passed in 1977 have been significantly amended. One can no longer serve merely as a "SMCRA lawyer" to a coal company client, but instead must act as a knowledgeable, environmental attorney. In order to avoid traps for the unwary, one must be familiar with the environmental impacts of surface coal mining and the scope of protections afforded by other environmental laws.

I. DESCRIPTION OF SURFACE MINING IMPACTS REGULATED UNDER SMCRA

Coal is mined either by surface or underground methods, depending on the conditions present. Underground mining gen-

² See, e.g., SMCRA § 102(a), (d), (m), 30 U.S.C. § 1202(a), (d), (m) (1988).

³ SMCRA § 702, 30 U.S.C. § 1292(a) (1988). Congress was quick to add that, while not modifying these other environmental laws, "[t]o the greatest extent practicable each Federal agency shall cooperate with the Secretary and the States in carrying out the provisions of this Act." 30 U.S.C. § 1292(c).

⁴ 42 U.S.C. §§ 4321-4370a (1988).

⁵ 33 U.S.C. §§ 1251-1387 (1988).

⁶ 42 U.S.C. §§ 7401-7642 (1988).

⁷ 42 U.S.C. §§ 6901-6992k (1988).

⁸ 33 U.S.C. § 407 (1988).

⁹ 16 U.S.C. §§ 661-668ee (1988).

erally employs either the room-and-pillar or the longwall method, while surface mining techniques include the area, open-pit, contour, and auger methods. These extraction techniques, as well as coal's preparation for market, produce various environmental impacts and wastes.

Typical wastes from coal mining and preparation include: acid mine drainage; coal preparation reject, coal fines and coal waste; leachate from coal refuse ponds and waste piles; sediment from mining operations; fugitive dusts and equipment emissions; and waste oils, fluids and products from machinery.¹⁰

The following discussion briefly describes some of the impacts from mining operations.

A. Direct Impacts on Surface Water/Groundwater

The impact of surface mining on water quality is fairly well documented. The emphasis in the past tended to be on surface water quality rather than on the quality of groundwater. The major problems with water quality caused by surface mining are acid mine drainage, sedimentation, and degradation of underground water supplies. The acid drainage problem is considerably worse in the northern one-third of the Appalachian coal field than in the southern two-thirds. This is probably due to a greater exposure of sulphuritic material per ton of coal mined in the north.¹¹

If the coal mined is below the water table, the flow of groundwater into the surface mine pit or underground mine will be, more or less, continuous. Consequently, these areas require continuous drainage. This drainage will most likely have come into contact with any exposed pyritic material, and often will exhibit acid mine drainage characteristics. Frequently, abandoned deep mine workings are encountered during surface mining, and the result might be a sudden flow of large volumes of water into the pit. This water may be seriously polluted.

Rainfall will result in the accumulation of quantities of water in the pit, as well as runoff from the many disturbed and exposed areas of overburden and mine spoils. Inevitably, such accumu-

¹⁰ S.M. Cassidy, Ed., *Elements of Practical Coal Mining*, The American Institute of Mining, Metallurgical, and Petroleum Engineers, Inc. 514-518 (1973).

¹¹ J. E. Biesecker & J. R. George, *Stream Quality in Appalachia as Related to Coal Mine Drainage, 1965*, United States Geological Survey Circular 526 (1966).

lation or runoff will carry heavy sediment loads. Moreover, as much as ten percent of the total area affected by surface mining consists of coal haul roads.¹² These haul roads necessarily extend beyond the actual mine area—especially in steep slope areas—and they tend to intercept clean runoff and contaminate it with sediment, as well as any road-conditioning agents.

B. Direct Impacts on Air/Waste Management

Coal mining operations—especially surface mining and coal preparation activities—invariably produce some fugitive dust. Airborne dust, as an environmental pollutant, is often created by heavy equipment during working cycles of overburden excavation, handling, and storage. Land clearing operations also tend to produce dust, with wind erosion continuing after these operations have ceased. Surface facilities such as haul roads and dump areas are especially susceptible to fugitive dust because they are so heavily used.

Coal preparation plants and coal loading facilities involve intensive coal handling operations which produce high concentrations of airborne dust. While airborne coal dust is a strictly-regulated occupational hazard, it is also an environmental pollutant.

Most of the mobile equipment used in and around surface mines is powered by internal combustion engines. Emissions from these engines generate airborne pollutants, especially when the equipment is not well-maintained.

Lubricating fluids, which require periodic changing, are an integral part of most machinery. These lubricants often contain hazardous components such as lead or cadmium. Used motor oil is often generated in large quantities at mine sites, and large amounts of coal preparation media are often used in the cleaning plants. Moreover, numerous types of solvents and other industrial chemicals are employed in and around both surface and underground mines.

Batteries are routinely maintained and replaced in mobile equipment at surface mines and must be disposed of or traded for new battery products. Underground mines rely heavily on battery-operated equipment, and these large industrial-type cells

¹² J. Toby Tourbier and Richard Westmacott, *A Handbook for Small Surface Coal Mine Operators*, University of Delaware Water Resources Center 46 (1980).

must be maintained in top condition for efficient operation. Proper battery maintenance includes additions and removal of fluids.

C. Direct Impacts on Soil

In surface mining, soil and overburden material are removed to expose the coal. The soil and overburden material must be disposed of in spoil storage areas, such as head-of-hollow fills, or relocated onto mined-out areas. SMCRA requires that topsoil be segregated, temporarily stored, and replaced on all sites for which topsoil substitute waivers are not allowed.

Most surface mine facilities, including equipment shops and explosives and fuel storage areas, are constructed on replaced overburden soil. The mining industry, which is by far the largest consumer of industrial explosives, uses hundreds of millions of pounds of ammonium nitrate fuel-oil blasting agents each year.¹³ With large-volume diesel refueling of heavy equipment, the potential for spillage is high. Large equipment accidents also pose a danger of relatively large spills of fuel, oil, and other fluids at the mine site.

D. Some Indirect Impacts Via Particular Operations Conducted at the Mine Site

While landfill space becomes critically scarce and the social utility of surface mining continues to be attacked, operators have observed the many synergies which exist between mining and waste disposal. Many view waste disposal as a logical extension of the mining excavation and as a business opportunity for post-mining land use. Electric utilities have begun looking to their coal suppliers for transport and disposal of the combustion ash those utilities generate. Waste disposal at mine sites creates all the potential problems that would exist at sites designed specifically for the waste itself.

Underground mines and preparation plants, as well as many large surface mines, use electricity at the mine site. Electrical power requirements often call for high voltage transmission and distribution equipment. Electrical transformers must be employed at the site before the electrical power can be used effi-

¹³ *Blaster's Handbook*, E.I. duPont de Nemours & Co., Inc. 55 (1977).

ciently. A mine will routinely use many transformers, some of which might contain polychlorinated biphenyls (PCBs), a heavily regulated substance.

II. OTHER ENVIRONMENTAL LAWS IMPLICATED BY OPERATIONS REGULATED UNDER SMCRA

A. *Environmental Statutes*

1. *Clean Water Statutes*

a. *Federal Clean Water Act*

The Federal Clean Water Act of 1972 (FCWA)¹⁴ is principally concerned with the protection of surface water quality. The Act established a national pollutant discharge elimination system (NPDES) permit scheme to regulate the discharge of pollutants from point sources into navigable waters of the United States.¹⁵ In reality, virtually all surface waters are covered by the program.

SMCRA addressed surface water protection in section 515(b)(10), as part of the Act's environmental protection performance standards requiring an operator to

minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation . . .

conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow, or runoff outside the permit area, but in no event shall

¹⁴ Federal Clean Water Act [hereinafter FCWA], Pub. L. No. 92-500, 86 Stat. 814 (codified at 33 U.S.C. §§ 1251-1387 (1988)).

¹⁵ FCWA § 402, 33 U.S.C. § 1342 (1988). Point source is defined as any "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." FCWA § 502, 33 U.S.C. § 1362(14) (1988).

contributions be in excess of requirements set by applicable State or Federal law¹⁶

The Office of Surface Mining (OSM) has promulgated regulations which implement the water quality provisions of SMCRA: “[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434.”¹⁷

Part 434 sets out, in detail, point source limitations and effluent standards for coal mining and reclamation operations, including coal preparation plants.¹⁸ The Administrator of EPA must concur in writing with those aspects of a state primacy program which relate to water quality standards promulgated under the FCWA, before such a program will be approved by the Secretary of the Interior.¹⁹ Thus, approved state programs must be at least as strict as the limits set out in Part 434.

Although SMCRA was written so as to apply existing federal or state water-quality laws, it appears that the drafters of SMCRA made a judgment that the Act’s primary water pollution control would be achieved through settling basins or “sedimentation ponds.”²⁰ While the Act placed great importance on reducing suspended solids, it referred only generically to “treating drainage to reduce toxic content” and contained only general preventive measures to avoid water quality degradation by causes other than siltation.²¹

A persistent tension was created by SMCRA’s cookbook approach to sedimentation control—which most operators have adopted to meet other water-quality effluent standards—and the requirements of Part 434.²² Settling ponds are an effective method of reducing metals and other toxic pollutants, but operators often believe that SMCRA requires nothing more. While the

¹⁶ SMCRA § 515(b)(10), 30 U.S.C. § 1265(b)(10) (1988).

¹⁷ 30 C.F.R. § 816.42 (1991). Equivalent underground mining water quality protections are at 30 C.F.R. § 817.42 (1991).

¹⁸ See 40 C.F.R. §§ 434.10-.65 (1989).

¹⁹ 30 C.F.R. § 732.13(b) (1991).

²⁰ SMCRA § 515(b)(10)(B), 30 U.S.C. § 1265(b)(10)(B) (1988).

²¹ See SMCRA § 515(b)(10), 30 U.S.C. § 1265(b)(10) (1988).

²² See 40 C.F.R. §§ 434.10-.65 (1989).

emphasis on design and construction of sedimentation ponds under SMCRA might leave one with that impression, such is not the case. Operators must comply with the physical design requirements of SMCRA but also be mindful of the comprehensive requirements in Part 434 that are intended to be achieved through SMCRA's selection of sedimentation ponds as the primary surface water quality pollution control mechanism.

b. Wetlands

"Wetlands" are extensively regulated under section 404 of the Clean Water Act.²³ These areas are characterized by specific soils, hydrology, and vegetation.²⁴ Section 404 requires permits for the discharge of dredged or fill material into the waters of the United States.²⁵ These "404 permits" are issued by the United States Army Corps of Engineers²⁶ (COE) or by a state if that state has an approved program.²⁷

Since wetlands must be protected and strict mitigation and replacement criteria apply,²⁸ surface mining operators are in a unique position to create extensive wetlands. SMCRA encourages enhancement measures during mining and reclamation operations, using the best technology currently available.²⁹ Wetlands are specifically targeted for restoration and enhancement.³⁰ If a reclamation plan does not include a wetlands enhancement program, the operator must explain why enhancement is not applicable.³¹

Apart from the raging battle over the "correct" level of protection to be given wetlands, narrow wetlands protection measures prevent much from being done in that area. However, OSM has recognized this "conflict/opportunity" and has proposed to initiate a rulemaking which would make it easier to

²³ FCWA § 404, 33 U.S.C. § 1344 (1988).

²⁴ See *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, January 1989. A new version of the *Manual* is currently being promulgated. See 55 Fed. Reg. 14997 (Apr. 20, 1990); 55 Fed. Reg. 30279 (July 25, 1990); 55 Fed. Reg. 33349 (Aug. 15, 1990).

²⁵ FCWA § 404(a), 33 U.S.C. § 1344(a) (1988).

²⁶ 33 C.F.R. §§ 320.2(f), 323.1 (1991).

²⁷ FCWA § 404(g), 33 U.S.C. § 1344(g) (1988). Pennsylvania enforces wetlands protection through 25 PA. CODE Chapter 105.

²⁸ See 33 C.F.R. § 320.4(b) (1991).

²⁹ 30 C.F.R. § 780.16(b) (1991).

³⁰ 30 C.F.R. § 780.16(b)(3)(ii) (1991).

³¹ 30 C.F.R. § 780.16(b)(3)(ii) (1991).

construct wetlands on the mining site and leave them as part of post-mining land use.³²

c. Storm Water Regulations

On November 16, 1990, EPA published its final NPDES Permit Application Regulations for Storm Water Discharges.³³ The Storm Water Regulations are the most recent chapter in an ongoing debate over the extent to which point source discharges of storm water should be regulated under the NPDES Program. Uncontrolled runoff which emanates from an area generally and not from "any discernible, confined and discrete conveyance" is not subject to EPA's permitting authority.³⁴ Nevertheless, EPA construes its jurisdiction very broadly and has argued that gullies or other "channels" created by erosion are "point sources."³⁵ Responding to numerous requests to delay the implementation of the storm water permit requirements, the Agency proposed an extension of the deadline for filing applications under this new program until October, 1992.³⁶

Section 402(l)(2) of the FCWA expressly exempts from the NPDES Program point source discharges of storm water from mining operations composed entirely of flows which are not contaminated with, or which do not come in contact with, "any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of operations."³⁷ This very broadly-worded exemption was a recognition

³² 57 Fed. Reg. 16900 (April 27, 1992). Additionally, the rule would add a definition of "wetland" and would also establish standards for wetland success where they had been artificially created. *Id.*

³³ 55 Fed. Reg. 47990 (Nov. 16, 1990), 40 C.F.R. §§ 124.51-128 (1991). These regulations addressed requirements—including deadlines—for three types of application procedures for storm water discharges associated with industrial activity: individual permit applications, group applications and general permits.

³⁴ *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

³⁵ *Id.* When rainfall runoff exits a facility via an actual "defined channel," even if naturally created by erosion and not man made, a point source is probably present. *Sierra Club v. Alston Const. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980).

³⁶ 56 Fed. Reg. 56548 (Nov. 5, 1991). This extension also included the following technical amendment: "[f]acilities with existing NPDES permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992, shall submit a new application in accordance with 40 C.F.R. §§ 122.21 and 122.26(c) (Form 1, Form 2F and other applicable Forms) 180 days *before* the expiration of such permit." 56 Fed. Reg. at 56551.

³⁷ FCWA § 402(l)(2), 33 U.S.C. § 1342(l)(2) (1988). *See also* 55 Fed. Reg. 47900, 48032 (Nov. 16, 1990). Reclaimed areas with final bond.

by Congress of the effectiveness of the extensive hydrologic balance and reclamation permitting and performance requirements of SMCRA that require coal mine operators to properly manage all storm water, to collect and treat all surface water coming into contact with areas disturbed during mining, and to reclaim the mine site.³⁸

Given the language of section 402(l)(2)³⁹ and SMCRA's requirements, one could have envisioned EPA granting coal producers a reasonably broad exemption from the requirements of section 402(p)(2)(B) of the FCWA, which requires NPDES permitting of point source discharges of storm water associated with industrial activity.⁴⁰ EPA, however, chose not to do so.

(i) Impact on Existing Operators

Rather than broadly exempt the coal mining industry from the requirements of the Storm Water Regulations, EPA elected to include coal mining facilities within its regulatory definition of "industrial activity."⁴¹ However, in the preamble to the Storm Water Regulations, EPA stated that if no storm water comes into contact with section 402(l)(2) materials⁴² then there is no obligation to file for a permit.⁴³ The Storm Water Regulations further exclude from the definition of "industrial activity" areas of coal mining operations for which the SMCRA-approved regulatory agency has released all primacy performance bonds. Nevertheless, there may be some areas of existing, active operations which are not exempt including pre-primacy or interim program sites.⁴⁴

For example, current SMCRA requirements do not expressly require that runoff be collected and treated from areas that are

³⁸ See, e.g., 30 C.F.R. § 816.45(b)(4) (1991) (requiring surface mine operators to direct all runoff away from disturbed areas); 30 C.F.R. § 816.46(b) (1991) (By requiring all surface drainage from the disturbed area to be collected and passed through sedimentation ponds, this regulation mandates compliance with the permit requirements of the NPDES Program and its effluent guidelines for the coal industry.).

³⁹ FCWA § 402(l)(2), 33 U.S.C. § 1342(l)(2) (1988).

⁴⁰ FCWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B) (1988).

⁴¹ 40 C.F.R. § 122.26(b)(14)(iii) (1991).

⁴² See *supra* note 37 and accompanying text.

⁴³ 40 C.F.R. § 122.26(a)(2) (1991).

⁴⁴ 40 C.F.R. § 122.26(b)(14) (1991).

not disturbed.⁴⁵ Roads constructed in accordance with SMCRA's performance standards are also excluded from the definition of "disturbed area" for purposes of the collection and treatment of surface runoff.⁴⁶

In general, operators will be required to determine whether, in those areas where they are currently not required to collect and treat runoff, they have any "point sources" of storm water that have been in contact with any section 402(l)(2) materials. One obvious example is point source discharges of runoff from areas "disturbed" by haul roads. Other examples include point sources of runoff from equipment storage areas, transportation areas, and similar areas to the extent runoff is not currently collected and treated. If such point sources do exist, the operator must either file for a "group application"⁴⁷ or an individual application by the deadlines specified in the Regulations.

(ii) Impact on "Inactive" Operations

The Storm Water Regulations define "industrial activity" as including not only active, but also "inactive" mining operations. "Inactive" operations are defined by EPA simply as "mining sites that are not being actively mined, but which have an identifiable owner/operator."⁴⁸ The only "inactive" mining operations expressly excluded from this definition are such sites that have had all SMCRA-imposed performance bonds released and any site for which no "identifiable owner/operator" can be located.

This broad definition includes: (i) sites that were reclaimed after the effective date of SMCRA's Initial Program Regulations but before SMCRA's bonding requirements were imposed in a particular jurisdiction; (ii) sites that were pre-SMCRA sites otherwise reclaimed under pre-existing state reclamation laws, some of which might have been as effective—from a performance

⁴⁵ Under SMCRA, "disturbed area" is defined as "an area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste or noncoal waste is placed by surface coal mining operations" 30 C.F.R. § 701.5 (1991).

⁴⁶ 30 C.F.R. § 816.46(a)(2)(i) (1991).

⁴⁷ The Storm Water Regulations provide that an operator may file a single application for a group of similar "discharges," at least in those states where EPA administers the NPDES Program or in delegated states which allow for "general permits." 40 C.F.R. § 122.26(c)(2) (1991).

⁴⁸ 40 C.F.R. § 122.26(b)(14)(iii) (1991).

standpoint—as the requirements of SMCRA; and (iii) sites that are completely “unregulated” sites. EPA’s decision to include point source discharges of storm water runoff from “inactive” mining operations within the coverage of the Storm Water Regulations raises several significant legal and policy issues that conflict with previous SMCRA/FCWA policy choices.⁴⁹

While industry lost its challenge in *American Mining Congress v. EPA*, other provisions of the FCWA and SMCRA support the view that EPA has exceeded its authority. For example, in 1987, Congress also amended the FCWA to expressly encourage the re-mining of pre-SMCRA “inactive” mining sites as a means of encouraging the remediation of contaminated storm water runoff from such sites. One of the more fiercely debated provisions of the 1987 Water Quality Amendments was a proposed amendment that would enable coal operators to re-mine “abandoned mine lands” without incurring the risk that they would be required to meet current effluent standards for the collection and treatment of contaminated storm water runoff and pre-existing acid mine drainage.⁵⁰ In its final, enacted form, the amendment provides that operators wishing to mine lands with pre-existing discharges can receive a relaxation of applicable effluent limitations.⁵¹

In circumstances where re-mining activities are authorized, a significant amount of the water the operator collects and treats will often be storm water runoff from “inactive” operations. If Congress understood section 402(p)(2)(B) as authorizing EPA to regulate storm water runoff from pre-existing inactive mining operations, it is difficult to understand why it saw the need to also enact provisions designed to encourage the re-mining of

⁴⁹ Several mining associations initiated a challenge in 1991 to EPA’s decision to regulate “inactive” mining operations. *American Mining Congress v. EPA*, No. 91-70176 (9th Cir. 1991). In this case, which was just decided on May 27, 1992, the plaintiffs failed to convince the Court that EPA’s action in regulating these type of operations was invalid. The Court held that: (1) since the statute was silent on regulation of storm water discharges from inactive mines, the Court determined EPA’s interpretation was reasonable; (2) EPA’s rule did not impermissibly impose a retroactive compliance liability; (3) EPA was not required to consider the economic impact upon industry; (4) EPA acted reasonably when it chose not to exclude from the definition of “inactive” mining operation those sites reclaimed to standards equivalent to those of SMCRA Permanent Program standards.

⁵⁰ For a discussion on the development of this amendment see Thomas C. Reed, “Remining Previously Mined Lands—The Most Effective Form of Reclamation,” 7 *Min. L. Inst.*, 8-1, 8-4 (1986-87).

⁵¹ 33 U.S.C. § 1311(p) (1988).

“inactive” sites to assure some improvement in the quality of runoff from such areas. In addition, some effort must be made to reconcile EPA’s decision to regulate “inactive” operations under the FCWA with the existence of SMCRA’s Abandoned Mine Lands Program,⁵² which authorizes the use of federal monies to reclaim lands and waters “for which there is no continuing reclamation responsibility under state or other federal laws.”⁵³ The fact that in 1977 Congress recognized many “inactive” mining operations were not subject to any reclamation requirements that would remediate conditions associated with storm water runoff emanating from such sites, and that it set up a mechanism to do so, makes it even more difficult to understand why, ten years later, Congress can be said to have intended to impose a “federal reclamation requirement” pursuant to section 402(p)(2)(B) of the FCWA without clearly so stating such an intent.⁵⁴

Even after the decision in *American Mining Congress* upholding EPA’s construction of section 402(p)(2)(B), the agency’s decision to use “bond release” as the basis for distinguishing among “inactive” mining operations covered by the Storm Water Regulations and those not so covered raises other questions. EPA’s stated justification for excluding some “inactive” sites from the permitting requirements of the Storm Water Regulations was its apparent confidence that areas reclaimed pursuant to requirements “similar” to SMCRA’s were reclaimed in a way which minimized the potential for storm water to come into contact with Section 402(1)(2) materials.⁵⁵ Therefore, it would seem the logical inquiry should not be whether an area had a SMCRA Permanent Program bond release granted, but whether the area was effectively reclaimed.

That the inquiry should be whether the area was effectively reclaimed is particularly true for “inactive” mining areas which were reclaimed after the effective date of the Initial Program Regulations but before adoption of a permanent program for

⁵² Subchapter IV of SMCRA, 30 U.S.C. §§ 1231-1243 (1988).

⁵³ 30 U.S.C. § 1234 (1990).

⁵⁴ Although the Storm Water Regulations do not impose “reclamation” obligations as such, the most effective way to handle storm water runoff from “inactive” operations will probably be to reclaim those areas. Consequently, as a practical matter, EPA’s decision to make the Storm Water Regulations applicable to “inactive” mining operations can be viewed as an effort by that agency to impose a reclamation requirement.

⁵⁵ 55 Fed. Reg. 48033 (Nov. 16, 1990).

the jurisdiction where the site was located.⁵⁶ Until final regulatory standards could be adopted, the coal industry was required to comply with the Initial Program Regulations.⁵⁷ Following the promulgation of final Permanent Program Regulations, the Initial Program Regulations remained in effect until a state was delegated the authority to administer a program for regulating coal mining or until OSM promulgated a federal program for such state.⁵⁸

For at least several years, mining operations were conducted under the requirements of the Initial Program Regulations, which did not require performance bonds to be posted and released in accordance with any federal standards. Instead, pending approval of a permanent program for a state, state law controlled all bonding requirements.⁵⁹ Although during the Initial Program operators were not required to secure SMCRA bonds, they were nevertheless required to meet reclamation standards which were equivalent to those ultimately adopted as part of a Permanent Program.⁶⁰ Because the standards for reclamation have been essentially the same since the promulgation of the Initial Program Regulations in December of 1977, there is really no basis for distinguishing between "inactive" sites reclaimed after that date.⁶¹

One might reach the same conclusion with respect to other "inactive" operations reclaimed at any time before 1977, if the state within which the operation was located had effective reclamation laws in place. Since EPA is justified in regulating any "inactive" site, rather than making all pre-SMCRA "inactive" mine sites potential candidates for NPDES permits under the

⁵⁶ SMCRA established a two-tiered regulatory program. See generally Macleod and Means, "The Federal Threat to State Primacy and Effective Reclamation Under the Surface Mining Act," 2 *Eastern Min. L. Inst.* 5-1 (1981).

⁵⁷ 30 C.F.R. Parts 710-725 (1991).

⁵⁸ SMCRA § 503, 30 U.S.C. § 1253 (1988).

⁵⁹ See generally 30 C.F.R. Part 715 (1991).

⁶⁰ A comparison of the provisions of 30 C.F.R. Part 715, which set forth how mining operations were to be reclaimed during the Initial Program, with the reclamation requirements of the Permanent Program set forth in 30 C.F.R. Part 816 (surface mines) and Part 817 (underground mines), reveals no significant differences between the reclamation performance standards of the two programs.

⁶¹ The Court in *American Mining Congress* held that EPA's distinction between the Interim and Permanent Program Regulations was sufficient to warrant exemption of one while not the other. The Court cited the difference in bonding liability periods—none under the Interim and five to ten years under the Permanent—in upholding EPA's regulations against industry's challenge. Slip Op. at 16.

Storm Water Regulations, a reasonable alternative would be to allow each state director or regional administrator to include only those "inactive" sites determined to have never been reclaimed, or those reclaimed at a time when the laws in effect were insufficiently stringent to have effectively avoided the potential for discharges of contaminated storm water.⁶²

For those coal operators currently in compliance with the requirements of SMCRA and the FCWA, the Storm Water Regulations may impose only a slight additional regulatory obligation. For operators who either owned or operated "pre-SMCRA" mining sites, and for owners of "inactive" sites who never operated a mine, the extent to which the Storm Water Regulations will impose a substantial new regulatory obligation must await the resolution of certain litigation and further rule-making activity. However, until such challenges to the Storm Water Regulations are resolved, there is little doubt considerable confusion will exist as to the obligations of the mining industry under these regulations.

d. In-Stream Treatment Facilities

SMCRA requires all excess spoil be disposed of in a manner which assures maximum stability.⁶³ Operators must also divert runoff away from disturbed areas, including areas where spoil has been deposited, and collect and treat it in sedimentation or treatment ponds.⁶⁴

In the mountainous areas of the Appalachian Region where mining occurs on steep slopes, these disposal requirements often dictate excess spoil be deposited, and treatment ponds be constructed, in low-lying areas where it is common for streams to be flowing. In most, but not all cases, in-stream treatment ponds are constructed downstream of these fill areas, which are often referred to as "valley fills" or "head-of-hollow fills."

SMCRA expressly authorizes the construction and use of "valley fills" for the disposal of excess spoil, subject to specific design criteria,⁶⁵ and the states have generally authorized the construction and use of in-stream treatment ponds in steep-slope

⁶² See 33 U.S.C. § 1342(p)(2)(E) (1988), which allows such an approach.

⁶³ 30 C.F.R. § 816.71 (1991).

⁶⁴ 30 C.F.R. § 816.46 (1991).

⁶⁵ 30 C.F.R. § 816.72 (1991).

mining areas. Nevertheless, there has been confusion since the enactment of SMCRA over the extent to which one must obtain additional approvals from other agencies before constructing such in-stream facilities.

Since the in-stream construction of valley fills and treatment ponds involves the "discharge" of "fill material," it is clear that a 404(a) Permit must be obtained from the agency authorized to issue such permits before commencing in-stream coal mining activities. EPA has also asserted jurisdiction over the construction and use of in-stream coal mining facilities. EPA's basis for this assertion of jurisdiction is premised upon several sections of the FCWA.

While EPA does not have the power to issue permits regulating the "discharge of fill material," it does have the power to issue, or review a state's issuance of, permits regulating the "discharge of pollutants." Consequently, to the extent the material used to construct in-stream facilities is characterized as a "pollutant" and not "fill material," EPA believes it has the authority to regulate such activities under section 402 of the FCWA.⁶⁶

Furthermore, EPA does have authority over activities otherwise subject to the COE's section 404(a) jurisdiction, or subject to the jurisdiction delegated to a state agency. Section 404(b) of the FCWA⁶⁷ authorizes EPA to adopt "guidelines" which must be used by any agency authorized to issue 404(a) permits. Section 404(c) of the FCWA⁶⁸ also affords EPA the power to "veto" any 404(a) permit the issuing authority has granted, provided certain procedural safeguards are followed.

The FCWA further requires that before any federal permit or license to conduct any activity in navigable waters can be issued, the applicant must provide the licensing or permitting authority with a certification from the state in which the discharge originates, ensuring the applicant will comply with various state water quality standards.⁶⁹ Therefore, in states where the COE is the authorized 404(a) permitting authority, the applicant for a permit authorizing the construction of in-stream coal mining facilities must also obtain a "401(a) Certification"

⁶⁶ 33 U.S.C. § 1342 (1988).

⁶⁷ 33 U.S.C. § 1344(b) (1988).

⁶⁸ 33 U.S.C. § 1344(c) (1988).

⁶⁹ 33 U.S.C. § 1341(a)(1) (1988).

from the appropriate state agency with jurisdiction over water quality protection.

For a number of years after the enactment of SMCRA, coal operators were authorized to construct and use in-stream facilities with little problem. As noted previously, SMCRA expressly authorizes the construction of valley and head-of-hollow fills. In addition, the COE has issued Nationwide Permit 21,⁷⁰ which covers all "discharges associated with surface coal mining activities provided they were authorized by . . . Title V of [SMCRA],"⁷¹ and which made it relatively easy for operators to obtain a 404(a) Permit to construct in-stream facilities.⁷²

Beginning in the late 1980s, EPA Region III, which has NPDES Permit oversight authority over several Appalachian Region States, adopted a policy which purported to give EPA Region III considerable jurisdiction over the construction and use of in-stream coal mining facilities. This policy, known as the "1987 Policy," provided that unless certain conditions were met, EPA would exercise its authority under the FCWA to object to NPDES permits which authorize the use of in-stream treatment ponds.⁷³ The practical effect of the 1987 Policy was that mining activities could be precluded if the operator could not meet SMCRA's requirements concerning the placement and disposal of fill and the control of runoff, as well as the FCWA's NPDES Permit requirements.

Following the issuance of the 1987 Policy, various industry groups in West Virginia filed suit against the Administrator of EPA, challenging EPA Region III's claim of jurisdiction over the construction of in-stream coal mining facilities.⁷⁴ The District Court for the Southern District of West Virginia, after disposing of a difficult question over its own jurisdiction to hear the case,

⁷⁰ A Nationwide Permit is a "permit by rule" which authorizes specific activities to be conducted without the need for the submission of site-specific individual permit applications.

⁷¹ 33 C.F.R. § 330.5(a)(21) (1991).

⁷² In states where the COE is authorized to issue 404(a) Permits, a state law "full" permit may also have to be obtained.

⁷³ An NPDES permit must be obtained to operate any treatment pond, including an in-stream treatment pond. Under the FCWA, once NPDES permit issuance authority has been granted to a state, EPA continues to have review power and can object to a state's decision to issue an NPDES permit. 33 U.S.C. § 1342(d) (1988). By invoking this power, EPA is able to effectively preclude or further regulate industrial activities when it believes environmental harm will result.

⁷⁴ *West Virginia Coal Ass'n. v. Reilly*, C.A. No. 87-0834 (S.D. W.Va.).

concluded it had the power to decide only the issue of whether EPA had "clearly exceeded" its authority under the FCWA by adopting and implementing the policy relating to in-stream coal mining facilities.⁷⁵ The district court then proceeded to dispose of the plaintiffs' various contentions.

The court first rejected the plaintiffs' claims that EPA's actions were inconsistent with SMCRA, because EPA had expressly approved SMCRA's regulations authorizing the construction and use of in-stream facilities. The court stated that "[SMCRA's] regulations are targeted at stability of reclamation efforts and address the quality of water leaving the fills only incidentally."⁷⁶

Next, the district court addressed the claim that the COE, and not EPA, had jurisdiction over in-stream coal mining activities. The court reviewed the COE's definition of "fill material," which excludes from that definition "any pollutant discharged into the water primarily to dispose of waste,"⁷⁷ and examined a Memorandum of Agreement between the COE and EPA which sought to define their respective section 404 jurisdictions.⁷⁸ The court concluded EPA had jurisdiction over in-stream coal mining facilities because the "primary purpose of the fills and treatment ponds is to dispose of waste or spoil and treat sediment-laden water, not to create dry land such as is needed for construction of buildings or land development"⁷⁹

Finally, the district court rejected the claim that EPA had no "jurisdiction" to regulate waters above the ponds because it had suspended a portion of its definition of "Waters of the United States,"⁸⁰ which suggested *any* waste treatment system designed to meet the requirements of the FCWA was not a "jurisdictional water." The court determined it should defer to EPA's explanation of its regulations; that is, all impoundments of waters of the United States remain "jurisdictional waters."⁸¹ The district court then entered an order dismissing the complaint.

⁷⁵ West Virginia Coal Ass'n. v. Reilly, 728 F. Supp. 1276, 1284 (S.D. W.Va. 1989).

⁷⁶ Reilly, 728 F. Supp. at 1285.

⁷⁷ 33 C.F.R. § 323.2(e) (1991).

⁷⁸ This MOA is set forth at 51 Fed. Reg. 8871 (March 14, 1986) and provides that EPA shall have jurisdiction over "fill material" if the discharge is in "liquid, semi-liquid, or suspended form."

⁷⁹ Reilly, 728 F. Supp. at 1287.

⁸⁰ 40 C.F.R. § 122.3(t) (1979); see also 45 Fed. Reg. 48620 (July 21, 1980).

⁸¹ Reilly, 728 F. Supp. at 1289-1290.

Recently, the United States Court of Appeals for the Fourth Circuit affirmed the district court's order.⁸²

During the course of the proceedings in *Reilly*, EPA issued a revised Policy for In-stream Treatment and Filling by the Coal Industry (1988 Policy).⁸³ It is the 1988 Policy which is currently in place and which guides EPA's actions concerning in-stream treatment facilities.⁸⁴

The 1988 Policy is somewhat more flexible than the 1987 Policy in that, for example, it does not completely preclude the use of perennial streams as locations for in-stream facilities. Also, the 1988 Policy (1) recognizes the COE does have jurisdiction over the construction of valley fills and in-stream treatment ponds; and (2) seeks mainly to assure such facilities are sited in a manner which minimizes environmental impacts.⁸⁵

The 1988 Policy has the same potential to prevent mining activity in steep-slope areas as did the 1987 Policy. Furthermore, after *Reilly*, EPA's "jurisdiction" over in-stream facilities is, for the time being, sufficiently established so the Agency could certainly take an even more restrictive view of in-stream facilities than that currently embodied in the 1988 Policy. But for now, at least, it appears as if EPA will be content to apply the 1988 Policy. This means operators in steep-slope areas will be required to carefully determine whether there exists any alternative to the use of in-stream facilities. If there is no alternative, the operators will be required to conduct biological stream surveys and, possibly, to determine the feasibility of providing "mitigation" prior to applying for a mining permit.

2. *Clean Air Act*

The Clean Air Act Amendments of 1990⁸⁶ embody the most massive and costly piece of environmental legislation ever en-

⁸² *West Virginia Coal Ass'n v. Reilly*, 932 F.2d 964 (4th Cir. 1991). The court of appeals' opinion was not released for publication and is not, therefore, binding precedent in the Fourth Circuit. The entire opinion of the court of appeals is reported at 1991 US APP LEXIS 9401.

⁸³ The district court considered both the 1987 Policy and the 1988 Policy in its opinion. *Reilly*, 728 F. Supp. at 1290.

⁸⁴ Telephone conversation with Daniel Sweeney, Acting Section Chief, General Permits Section, EPA Region III (June 1991).

⁸⁵ In *Reilly*, EPA conceded that the COE did have jurisdiction over the construction of in-stream facilities, and the 1988 Policy states that Nationwide Permit 21 "applies to most stream filling operations associated with the coal mining industry, including in-stream treatment pond construction and disposal of waste spoil material."

⁸⁶ The 1990 Clean Air Act Amendments ("1990 Amendments") will be codified throughout 42 U.S.C. §§ 7401 *et seq.*

acted by Congress. Of those Amendments, eleven titles of which encompass over 700 pages, four major provisions have an impact on the coal industry: Title I - Non-Attainment (fugitive dust); Title III - Air Toxics (coal, coke emissions); Title IV - Acid Deposition Control (acid-rain controls); and Title VIII - Miscellaneous Provisions.

While the acid-rain provisions were given the most public attention by the coal mining industry, other less-publicized provisions may have a more immediate impact. The coal industry suffered a reversal in the final hours of debate on the fugitive dust provision of Title I. The industry had secured favorable language providing for an exemption from PSD (prevention of significant deterioration) increment consumption requirements; however, that language was dropped at the last minute. Surface coal mine fugitive emissions will now be regulated, with surface mine development constrained where additional increments are not available.⁸⁷

The only environmental protection performance standard in SMCRA which directly addresses air pollution is the section 515(b)(4) goal to "stabilize and protect all surface areas including spoil piles affected by the surface coal mining and reclamation operation to *effectively control erosion and attendant air and water pollution.*"⁸⁸ However, the Federal Clean Air Act (FCAA) is expressly applicable to surface mine operations regulated under SMCRA.⁸⁹ It is currently unclear how the permit system established by Title V⁹⁰ will affect a SMCRA permit or whether it will at all.

The coal industry achieved a measure of success by having the visibility provisions of Title VIII limited to the point where EPA will merely conduct "studies."⁹¹ Such visibility restrictions could have seriously affected mining operations in Class I areas.

1. *Resource Conservation and Recovery Act*

a. *Solid/Hazardous Wastes*

The Resource Conservation and Recovery Act (RCRA)⁹² provides authority for EPA to regulate solid waste disposal and is

⁸⁷ 1990 Amendments at § 166(f).

⁸⁸ SMCRA § 515(b)(4), 30 U.S.C. § 1265(b)(4) (1988) (emphasis added).

⁸⁹ See SMCRA §§ 702(a)(4), 713(a), 30 U.S.C. §§ 1291(a)(4), 1303(a) (1988).

⁹⁰ 1990 Amendments at §§ 501-507.

⁹¹ 1990 Amendments at § 817.

⁹² Resource Conservation and Recovery Act [hereinafter RCRA], Pub. L. No. 89-272, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6092k (1988)).

most widely known as the nation's chief statute controlling the generation, treatment, storage, or disposal of hazardous waste. EPA has promulgated regulations implementing RCRA's hazardous waste provisions at 40 C.F.R. Parts 260-272. Under RCRA, hazardous wastes are a subset of solid waste and are addressed in Subtitle C of the Act. Subtitle D of RCRA establishes "a framework for Federal, State, and local government cooperation in controlling the management of nonhazardous solid waste."⁹³

Mine wastes are addressed in SMCRA under environmental protection performance standards.⁹⁴ SMCRA standards cover mine wastes in general, compaction to prevent leaching of toxic materials, handling of acid- and toxic-forming materials, materials constituting a fire hazard, and standards and criteria for coal mine waste piles.⁹⁵ OSM has promulgated regulations which implement each of these performance standards.⁹⁶

Congress has temporarily excluded certain mining wastes from regulation as hazardous wastes pursuant to the 1980 Bevill Amendment to RCRA. This Amendment specifically excludes from RCRA regulation wastes produced "from the extraction, beneficiation and processing of ores and minerals."⁹⁷ This provision has been broadly interpreted by EPA to include coal mining waste.⁹⁸ Congress mandated the Bevill Amendment wastes be studied prior to determining whether regulation of them as hazardous wastes is appropriate.⁹⁹ EPA submitted its first report to Congress on the Bevill wastes in December 1985. That report excluded coal waste from the purview of the Bevill Amendments.

On January 23, 1990, EPA published its final rule which established that the temporary exemption from Subtitle C (i.e., hazardous) wastes was limited to twenty specific mineral processing wastes.¹⁰⁰ All other solid wastes from the processing of ores and minerals were removed from the mining waste exclu-

⁹³ 56 Fed. Reg. 50979 (Oct. 9, 1991).

⁹⁴ SMCRA § 515, 30 U.S.C. § 1265 (1988).

⁹⁵ See SMCRA §§ 515(b)(11), 515(b)(3), 515(b)(14) and 515(f), 30 U.S.C. §§ 1265(b)(11), 1265(b)(3), 1265(b)(14), and 1265(f) (1988).

⁹⁶ See 30 C.F.R. §§ 816.81, 816.83, 816.84, 816.87 and 816.89. Underground mining activity standards are promulgated in corresponding sections in 30 C.F.R. Part 817.

⁹⁷ 42 U.S.C. § 6921(b)(3)(A)(ii) (1988).

⁹⁸ See 45 Fed. Reg. 76618, 76619 (Nov. 19, 1980).

⁹⁹ See 42 U.S.C. §§ 6921(b)(3)(A)(iii), § 6921(b)(3)(C) (1988).

¹⁰⁰ 55 Fed. Reg. 2322 (Jan. 23, 1990).

sion, and thus are subject to regulation as hazardous wastes if they exhibit one or more characteristics of hazardous wastes.¹⁰¹

In *Environmental Defense Fund v. EPA*, the Bevill Amendment was held to apply only to "high volume, low hazard" wastes.¹⁰² The Court of Appeals for the District of Columbia Circuit held the scope of the Amendment encompassed only "high volume, low hazard" wastes from the "extraction, beneficiation and processing of ores."¹⁰³ Recently, EPA has invited comments for possible rulemaking regarding treatment of mine and mineral processing wastes.¹⁰⁴ Such an invitation raises the speculation EPA may be taking the first step toward express regulation of these wastes.¹⁰⁵

EPA draws a distinction between "indigenous" and "non-indigenous" mining wastes.¹⁰⁶ Non-indigenous wastes are those not uniquely associated with mining which are subject to regulation under RCRA. Solvents (those used for servicing mining equipment), paint sludges, and discarded commercial chemical products are non-indigenous wastes.¹⁰⁷ RCRA expressly delegates to the Secretary of Interior authority over regulation of hazardous wastes with respect to coal mining wastes and overburden for which a mining permit has been issued under SMCRA.¹⁰⁸ This provision does not apply to nonhazardous solid wastes from mining and coal processing which are subject to regulation under solid waste programs such as state solid waste management plans.¹⁰⁹

OSM initially promulgated rules requiring SMCRA permittees to dispose of hazardous non-coal mine wastes consistent

¹⁰¹ *Id.*

¹⁰² *Environmental Defense Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied, sub nom.*, *American Mining Congress v. Environmental Defense Fund*, 489 U.S. 1011 (1989).

¹⁰³ *Env'tl. Defense Fund*, 852 F.2d at 1329.

¹⁰⁴ 4 *Mine Regulation Reporter* 479 (Nov. 8, 1991).

¹⁰⁵ *Id.* The United States Circuit Court for the District of Columbia Circuit has recently upheld EPA's "high volume, low hazard" criteria rules promulgated for implementing the "special waste" exemption under RCRA subtitle C, which deals with RCRA's applicability to mine processing wastes. *Solite Corp. v. EPA*, ___ F.2d ___ (D.C. Cir. 1991).

¹⁰⁶ See 45 Fed. Reg. 76618, 76619 (Nov. 19, 1980).

¹⁰⁷ *Id.*

¹⁰⁸ 42 U.S.C. §§ 6905(c), § 6925(f) (1988).

¹⁰⁹ See *Chemical Mfrs. Ass'n v. EPA*, 673 F.2d 507, 513 (D.C. Cir. 1982).

with RCRA and any implementing regulations.¹¹⁰ These rules were struck down in *In re Permanent Surface Mining Regulation Litigation*¹¹¹ and remanded to the Secretary. OSM later suspended these provisions, declining to enforce the requirements of RCRA regarding hazardous non-coal wastes.¹¹² An approved SMCRA permit is deemed to be a permit issued pursuant to Subtitle C of RCRA with respect to the treatment, storage, or disposal of coal mining wastes and overburden which are subject to a SMCRA permit.¹¹³

b. *Underground Storage Tanks*

Subchapter IX of RCRA provides for the establishment of a program to control "regulated substances" in underground storage tanks (USTs).¹¹⁴ Regulated substances include petroleum and hazardous substances as defined by CERCLA.¹¹⁵ The preliminary stage of this program requires owners of underground storage tanks to file notification forms with a designated state agency. This requirement applies to tanks presently in operation, as well as tanks taken out of operation after January 1, 1974, that have not been removed from the ground.¹¹⁶ Failure to notify the appropriate state agency will result in a \$10,000-per-tank penalty.¹¹⁷

EPA has promulgated extensive technical and financial responsibility requirements for owners and operators of USTs.¹¹⁸ Additionally, several states have promulgated their own regulations concerning underground storage tanks. Some local ordinances also will likely cover USTs as well.

¹¹⁰ 30 C.F.R. §§ 816.89(d), 817.89(d) (1991). OSM has recently promulgated a final rule on coal mine waste disposal which deleted provisions in the regulations which formerly referenced RCRA § 3001 for non-coal mine waste as hazardous. 56 Fed. Reg. 65612 (Dec. 17, 1991). OSM justified the deletion on the grounds that such matters are with EPA's jurisdiction not OSM's. 56 Fed. Reg. 65612, 65623-24 (Dec. 17, 1991).

¹¹¹ 620 F. Supp. 1519, *aff'd in part, sub. nom.* National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).

¹¹² See 51 Fed. Reg. 41952, 41959, 41962 (Nov. 20, 1986).

¹¹³ 42 U.S.C. § 6925(f) (1988).

¹¹⁴ 42 U.S.C. § 6991a-h (1988).

¹¹⁵ 42 U.S.C. § 9601(14) (1988).

¹¹⁶ 42 U.S.C. §§ 6991a, b; see generally 40 C.F.R. §§ 280.10-.112 (1991).

¹¹⁷ 42 U.S.C. § 6991e(d)(1) (1988).

¹¹⁸ See 53 Fed. Reg. 37082 (Sept. 23, 1988).

4. *Comprehensive Environmental Response, Compensation, and Liability Act*

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹¹⁹—also commonly known as “Superfund”—was first passed by Congress in December 1980 and was substantially amended in 1986. CERCLA established a regulatory program to identify sites where hazardous substances have been, or are threatened to be, released into the environment. CERCLA’s goals are to ensure these sites are cleaned up by responsible parties or the government, to evaluate damages to natural resources, and to create claims procedures for parties who have cleaned up sites or spent money to restore natural resources.

CERCLA represents the most general environmental liability facing coal mining and other industries: it imposes strict liability and applies retroactively. CERCLA provides for joint and several liability among responsible parties, so one party can be charged with the entire cost of cleanup, even if others were also involved.¹²⁰ Potentially responsible parties (PRPs) may include: (1) any party owning or operating a site releasing or threatening to release hazardous substances, (2) any party arranging for the disposal of the substances, and (3) any party transporting the substances.¹²¹ The definition of “hazardous substance” incorporates the RCRA definition of hazardous waste,¹²² but the classification of a substance is subject to change.

At present EPA has an informal policy of non-enforcement under CERCLA for coal mining operations.¹²³ EPA has decided, given the combination of SMCRA permit requirements and the money available under the SMCRA Title IV Abandoned Mine Land Program (AML), the SMCRA regulatory program is an adequate substitute for federal CERCLA enforcement in that area.¹²⁴ Even with an informal relaxation of federal CERCLA

¹¹⁹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [hereinafter CERCLA], Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675 (1988)).

¹²⁰ *E.g.*, *United States v. Northeastern Pharmaceutical & Chemical Company*, 810 F.2d 726 (8th Cir. 1986), *cert. den.*, 484 U.S. 848 (1987); *United States v. Ward*, 618 F. Supp. 884 (E.D. N.C. 1985).

¹²¹ 42 U.S.C. § 9607(a) (1988).

¹²² 42 U.S.C. § 6903(5) (1988).

¹²³ *See* 51 Fed. Reg. 21062-63 (June 10, 1986).

¹²⁴ *Id.*

enforcement, coal mine operators face liability to states, Indian tribes, and private parties.¹²⁵

Regardless of EPA's relaxed enforcement policy, compliance with SMCRA is not a defense to a CERCLA claim. If the mining operation is conducted pursuant to a Clean Water Act permit, however, the release may be exempt under CERCLA as a "federally permitted release."¹²⁶ This exemption is limited "to the extent damage was caused by releases . . . not expressly permitted . . . which exceeded the limitations established . . . or which occurred during a time . . . when there [was] no permit" ¹²⁷

5. *Toxic Substances Control Act*

EPA regulates the cleanup, disposal, and storage for disposal of polychlorinated biphenyls (PCBs) under the Toxic Substances Control Act.¹²⁸ PCBs are found in certain electrical transformers and capacitors used throughout mining operations and other common industrial facilities. The use of PCBs, except as authorized under EPA regulations, is prohibited.¹²⁹

The Toxic Substance Control Act's (TSCA) specific directive to regulate PCBs is the backbone of PCB regulation in general. PCB-contaminated material falls into various categories, but the threshold below which EPA usually will not find contamination is a concentration below fifty parts per million (ppm). EPA divides these transformers into two basic categories:

"PCB-contaminated transformers" which contain PCB materials of greater than 50 ppm but less than 500 ppm; [and]

"PCB transformers" which contain more than 500 ppm of PCB materials.¹³⁰

EPA allows the disposal of "PCB-contaminated transformers" using procedures providing less than the full range of protections

¹²⁵ 42 U.S.C. § 9659 (1988).

¹²⁶ See CERCLA § 107(J), 42 U.S.C. § 9607(J) (1988). A federally permitted release is defined in CERCLA § 101(10), 42 U.S.C. § 9601(10) (1988).

¹²⁷ *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 673-74 (D. Idaho 1986).

¹²⁸ Toxic Substances Control Act [hereinafter TSCA], Pub. L. No. 94-469, 90 Stat. 2003 (codified at 15 U.S.C. §§ 2601-2671 (1988)). In particular, PCBs are extensively regulated under TSCA § 6(e), 15 U.S.C. § 2605(e) (1988).

¹²⁹ EPA's regulations are found at 40 C.F.R. Part 761 (1991). PCB use is prohibited by 40 C.F.R. § 761.20 (1991).

¹³⁰ 40 C.F.R. § 761.3 (1991).

afforded when disposing of "PCB transformers."¹³¹ PCB spills of over fifty ppm occurring before May 4, 1987, are considered "historic spills," and EPA may require different cleanup levels in those instances than those established for post-May 4, 1987, spills. Even though historic spills may now have less than fifty ppm, EPA has discretion to require cleanup to zero ppm.

EPA has imposed several restrictions upon the use of PCB transformers pursuant to TSCA section 6(e).¹³² The use and storage for reuse of PCB transformers posing an exposure risk to food is prohibited.¹³³ The use of large network PCB transformers in or near commercial buildings is also prohibited.¹³⁴ The installation of PCB transformers which were placed in storage for reuse or removed from another location is prohibited in or near commercial buildings.¹³⁵

All PCB transformers must be registered with fire response personnel¹³⁶ and those transformers used in or near commercial buildings must be registered with the building owners.¹³⁷ Combustible materials are required to be removed from any PCB transformer enclosure.¹³⁸ PCB transformers must be inspected at least once every three months and any leaks found must be repaired immediately.¹³⁹

PCB storage areas, transformers, and other PCB equipment are required to be clearly marked in accordance with EPA's marking formats.¹⁴⁰ PCBs must be disposed of in an incinerator or, in certain instances, in a chemical waste landfill.¹⁴¹ Extensive regulations have been promulgated for the storage and disposal of PCBs, including PCB-contaminated items.¹⁴²

EPA has promulgated extensive PCB monitoring and cleanup regulations requiring "adequate" cleanup of spilled PCBs.¹⁴³

¹³¹ See 40 C.F.R. § 761.20 (1991).

¹³² 15 U.S.C. § 2605(e) (1988).

¹³³ 40 C.F.R. § 761.30(a)(1)(i) (1991).

¹³⁴ 40 C.F.R. § 761.30(a)(1)(ii) (1991).

¹³⁵ 40 C.F.R. § 761.30(a)(1)(iii) (1991).

¹³⁶ 40 C.F.R. § 761.30(a)(1)(vi) (1991).

¹³⁷ 40 C.F.R. § 761.30(a)(1)(vii) (1991).

¹³⁸ 40 C.F.R. § 761.30(a)(1)(viii) (1991).

¹³⁹ 40 C.F.R. § 761.30(a)(1)(ix), (x) (1991).

¹⁴⁰ 40 C.F.R. §§ 761.40, 761.45 (1991).

¹⁴¹ 40 C.F.R. § 761.60 (1991).

¹⁴² 40 C.F.R. §§ 761.60, 761.65 (1991).

¹⁴³ See 40 C.F.R. §§ 761.120 and 761.125 (1991).

Each mining company must prepare an annual document describing the types of PCB items at each mine.¹⁴⁴

6. *Safe Drinking Water Act*

Congress enacted the Safe Drinking Water Act (SDWA) to regulate the safety of the nation's public drinking water supplies.¹⁴⁵ The primary applicability of the SDWA to surface coal mine operations is contained in part C of the Act: "Protection of Underground Sources of Drinking Water."¹⁴⁶ Also important are the emergency powers granted to EPA to enforce SDWA provisions.¹⁴⁷

Primary protection afforded underground sources of drinking water (USDW) is achieved through regulation of underground injection of contaminants. Underground injection is regulated and/or prohibited, where it

endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.¹⁴⁸

Underground injection is defined in the SDWA as "subsurface emplacement of fluids by well injection," and includes injection of fluids for enhanced recovery of oil and natural gas.¹⁴⁹

The SDWA is primarily applicable to coal operators who have preparation or washing facilities and who inject coal processing wastewater into an abandoned underground mine system. Such wastewater, or slurry—often called "blackwater"—besides being high in suspended solids is generally known to contain a number of contaminants including heavy metals, iron, and sulfates. Abandoned underground mine workings often serve as sources of drinking water for residents in the mountainous, coal-

¹⁴⁴ 40 C.F.R. § 761.180 (1991).

¹⁴⁵ Safe Drinking Water Act of 1974 [hereinafter SDWA], Pub. L. No. 93-523, 88 Stat. 1660 (codified at 42 U.S.C. §§ 300f-300j-26), as amended by Pub. L. No. 99-339, 100 Stat. 666, June 19, 1986 (Safe Drinking Water Act Amendments of 1986).

¹⁴⁶ 42 U.S.C. §§ 300h-300h-7 (1988).

¹⁴⁷ 42 U.S.C. §§ 300i-300i-1 (1988).

¹⁴⁸ 42 U.S.C. § 300h(d)(2) (1988).

¹⁴⁹ 42 U.S.C. § 300h(d)(1) (1988).

bearing areas of Appalachia. Moreover, underground mine workings—some more than 100 years old—often lie above USDWs that are considered to be affected by such underground injection and that serve these area residents.

Underground injection control (UIC) regulations are found at 40 C.F.R. parts 144 through 147. These regulations have been promulgated pursuant to the SDWA and are intended to protect USDWs from contamination by well injection. These rules prohibit underground injection except as authorized by permit or rule issued under the UIC program.¹⁵⁰ Additionally, the regulations prohibit the *construction* of any well required to have a permit, before that permit is obtained.¹⁵¹

Any injection of a substance into underground sources of drinking water is prohibited “if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part 142 or may otherwise adversely affect the health of persons.”¹⁵² An applicant for a UIC permit has the burden of showing such contamination will not occur.¹⁵³ Wastewater injection wells carrying process water from coal preparation activities are generally considered Class V injection wells.¹⁵⁴ Class V injection wells are authorized by rule;¹⁵⁵ however, EPA has the power under 40 C.F.R. section 144.27 to require the owner of any well authorized by rule to submit additional information to enable the Agency to determine whether the well may be endangering a USDW in violation of 40 C.F.R. section 144.12.

The SDWA provides for state primary enforcement responsibility.¹⁵⁶ If a state fails to submit a program or the program is not approvable, EPA will establish a program for that state.¹⁵⁷ Currently, four states in the eastern coal fields have approved UIC programs and thus have “primacy” to enforce the UIC regulations: West Virginia, Maryland, Ohio, and Illinois. Four states have EPA-administered programs—the so-called “direct

¹⁵⁰ 40 C.F.R. § 144.11 (1991).

¹⁵¹ *Id.*

¹⁵² 40 C.F.R. § 144.12 (1991).

¹⁵³ *Id.*

¹⁵⁴ 40 C.F.R. § 144.6(e) (1991).

¹⁵⁵ 40 C.F.R. 144.24 (1991). Authorization by rule automatically terminates upon the operator's failure to submit the required information to the agency. 40 C.F.R. § 144.27(c) (1991).

¹⁵⁶ 42 U.S.C. §§ 300h-300h-5 (1988).

¹⁵⁷ 40 C.F.R. § 144.1(e) (1991).

implementation” states: Pennsylvania, Kentucky, Tennessee, and Virginia. Indiana has primacy over Class II injection wells only; otherwise, it is an EPA direct implementation state. Operators of facilities subject to EPA direct implementation programs and permits are also independently subject to numerous federal environmental statutes and their requirements and prohibitions.¹⁵⁸

SMCRA recognizes the benefits of replacing coal mining or processing wastes into the areas from which they originated. Section 516(b)(3) of SMCRA expressly encourages such activities by providing that permits issued to underground mine operators by the SMCRA permitting authority should require operators to maximize, “to the extent technologically and economically feasible, [the] return of mine and processing waste, tailings, and any other waste incident to the mining operation, to the mine workings or excavations.”¹⁵⁹ Regulations implementing section 516(b)(3) authorize the SMCRA permitting authority to approve plans for returning mine wastes to mined out areas of underground mines subject only to the approval of the Federal Mine Health and Safety Administration (MSHA).¹⁶⁰

Given the express statutory encouragement of section 516(b)(3) and the informational requirements contained in the implementing regulations, with which compliance is necessary before approval to dispose coal mining wastes underground can be obtained, one could conclude the SMCRA permitting authority and MSHA are the only agencies whose approval must be obtained prior to returning coal mine wastes to abandoned underground workings. However, this is not the case. What is encouraged by SMCRA, and what seems to be an efficient solution to coal mine waste disposal, is actually at odds with EPA’s regulation of drinking water supplies.

7. *Endangered Species Act*

In 1973 Congress passed the Endangered Species Act¹⁶¹ (ESA) to prevent the extinction of species of fish, wildlife, plants, and

¹⁵⁸ 40 C.F.R. § 144.4 (1991). These include, if applicable, the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1273-1287; the National Historic Preservation Act of 1966, 16 U.S.C. § 470-470w-6; the Endangered Species Act, 16 U.S.C. §§ 1531-1544; the Coastal Zone Management Act, 16 U.S.C. § 1451-1464; and the Fish and Wildlife Coordination Act, 16 U.S.C. § 661-668.

¹⁵⁹ 30 U.S.C. § 1266(b)(3) (1988).

¹⁶⁰ 30 C.F.R. §§ 1266(b)(3) (1991).

¹⁶¹ Endangered Species Act [hereinafter ESA], Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1544 (1988)).

their ecosystems.¹⁶² Congress' declared policy was that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."¹⁶³ The Supreme Court has stated protection of endangered species is to be accorded the highest priority.¹⁶⁴

The ESA mandates any action "authorized, funded, or carried out" by any federal agency shall not jeopardize the continued existence of an endangered species or threatened species or result in the destruction or adverse modification of a critical habitat.¹⁶⁵ In addition, SMCRA requires a permittee, "to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable . . ."¹⁶⁶

The Secretary of the Interior has promulgated regulations for OSM that implement the ESA:

Endangered and threatened species. No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The operator shall promptly report to the regulatory authority any State- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.¹⁶⁷

To be afforded protections under the ESA, the species must be "threatened" or "endangered," and the Act sets up a specific

¹⁶² 16 U.S.C. § 1531(a), (b) (1988).

¹⁶³ 16 U.S.C. § 1531(c) (1988).

¹⁶⁴ See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (TVA's construction of the giant Tellico hydroelectric dam was halted by the presence of a tiny, endangered snail darter).

¹⁶⁵ 16 U.S.C. § 1536(a)(1), (2) (1988).

¹⁶⁶ 30 U.S.C. § 1265(b)(24) (1988).

¹⁶⁷ 30 C.F.R. § 816.97(b) (1983).

procedure for such determination.¹⁶⁸ Under those procedures, the Secretary must, by regulation, make specific determinations whether any species is endangered or threatened.¹⁶⁹

The ESA has specific procedures for petitioning the Secretary regarding the listing and delisting, by regulation, of species as threatened or endangered, including publication of notice and opportunity for comment.¹⁷⁰ Regulations enforcing the ESA apply only to *endangered* and *threatened* wildlife and plants.¹⁷¹ Once a species is included on the federal list, or proposed for listing, it is subject to numerous prohibitions and afforded significant protection.

Many states have also developed similar state endangered and threatened lists of fish, wildlife and plants.¹⁷²

SMCRA encourages wildlife enhancement and protections in a number of provisions;¹⁷³ however, the ESA requirements must be fulfilled regardless of the level of protection afforded by the SMCRA.

8. *Emergency Planning and Community Right to Know Act*

The Emergency Planning and Community Right-to-Know Act was enacted by Congress in 1986, as Title III of the Superfund Amendments and Reauthorization Act (SARA Title III).¹⁷⁴ SARA Title III is primarily a reporting statute. Facilities with significant amounts of hazardous materials on-site must report

¹⁶⁸ 16 U.S.C. § 1533 (1988).

¹⁶⁹ 16 U.S.C. § 1533(a)(1) (1988). The statute provides the following factors for determining whether a species is threatened or endangered:

- (a) the present or threatened destruction, modification or curtailment of its habitat or range;
- (b) over-utilization for commercial, recreational, scientific or educational purposes;
- (c) disease predation;
- (d) the inadequacy of existing regulatory mechanisms; or
- (e) other natural or manmade factors affecting its continued existence.

¹⁷⁰ See 16 U.S.C. § 1533(b) (1988).

¹⁷¹ 50 C.F.R. § 17.2(a) (1975).

¹⁷² See, e.g., 58 PA. CODE Chapter 75 (endangered and threatened species list developed for fish, amphibians, and reptiles by Pennsylvania Fish Commission pursuant to Pennsylvania Fish and Boat Code); 3 MO. CODE REGS. 10-4.111(3) (list of rare and endangered species pursuant to Missouri Wildlife Code).

¹⁷³ SMCRA §§ 515(b)(17), (24), 30 U.S.C. §§ 1265(b)(17), (24) (1988).

¹⁷⁴ Superfund Amendments and Reauthorization Act [hereinafter SARA], Pub. L. No. 99-499, 100 Stat. 1614 (codified at 42 U.S.C. §§ 11001 to 11050 (1988)).

the existence of these materials to the government.¹⁷⁵ The facility is also required to participate in the emergency planning process with local response authorities.¹⁷⁶ However, mines are *not* subject to several requirements of the Act, as discussed below.

Mines *are* required to report to the government the existence of "extremely hazardous substances" in an amount in excess of a "threshold planning quantity."¹⁷⁷ If additional materials in excess of the threshold values are brought on-site at some point in the future, notification must be made within sixty days.¹⁷⁸ A mine must also designate a "facility representative" to participate in the local emergency planning process as the coordinator for the mine.¹⁷⁹

In addition to other federal, state or local reporting requirements, mining operations must report emergency releases under section 304 of SARA Title III.¹⁸⁰ This applies to a release of a reportable quantity of any extremely hazardous substance or CERCLA hazardous substance.¹⁸¹ Reporting requirements are subject to several exemptions, the most important of which covers any release which results in exposure to persons solely within the boundaries of the mine.¹⁸² When a release requires SARA Title III notification, the mine must immediately notify the "community emergency coordinator."¹⁸³

Coal mines are not subject to emergency and hazardous chemical inventory reporting¹⁸⁴ or annual estimates of releases of toxic chemicals.¹⁸⁵

¹⁷⁵ SARA Title III §§ 302(b), 312, 42 U.S.C. §§ 11002(b), 11022 (1988).

¹⁷⁶ SARA Title III § 303(d), 42 U.S.C. § 11003(d) (1988).

¹⁷⁷ SARA Title III § 302, 42 U.S.C. § 11002 (1988). *See also* 52 Fed. Reg. 13384 (Apr. 22, 1987) (mining sites must be included within Section 302 of the Title III program).

¹⁷⁸ 40 C.F.R. §§ 355.20, 355.30(b) (1991).

¹⁷⁹ 40 C.F.R. § 355.30(c) (1991). The mine is also under an obligation to inform the emergency planning committee of "any changes occurring at the facility which may be relevant to emergency planning." 40 C.F.R. § 355.30(d)(1), (2) (1991).

¹⁸⁰ 42 U.S.C. § 11004 (1988). This is in addition to CERCLA notification under 42 U.S.C. § 9603 (1988).

¹⁸¹ *See* 40 C.F.R. § 302.4 (1991) for a list of CERCLA identified hazardous substances. The reportable quantity for any nonlisted material is one pound. RCRA § 102(b), 42 U.S.C. § 9602(b) (1988).

¹⁸² 40 C.F.R. § 355.40(a)(2) (1991). Other exemptions include: any release which is "federally permitted" as defined in 42 U.S.C. § 9603(f) of CERCLA as well as any loss exempt from CERCLA reporting under 42 U.S.C. § 9603(a) because it is outside the definition of a "release" in 42 U.S.C. § 9601(22) of CERCLA.

¹⁸³ 40 C.F.R. § 355.40(b) (1991).

¹⁸⁴ SARA Title III § 312, 42 U.S.C. § 11022 (1988). These provisions are implemented at 40 C.F.R. § 370.20 (1991).

¹⁸⁵ SARA Title III § 313, 42 U.S.C. § 11023 (1988).

Most information furnished to the government under SARA Title III is available to the public.¹⁸⁶ Enforcement sanctions under SARA Title III include civil, administrative, and criminal penalties of up to \$75,000 per day.¹⁸⁷ Citizen suits are also authorized for violations of SARA Title III.¹⁸⁸

9. *National Environmental Policy Act*

Section 101 of the National Environmental Policy Act of 1969 (NEPA)¹⁸⁹ makes it the policy of the federal government to use all practicable means to administer federal programs in the most environmentally sound fashion.¹⁹⁰ Toward that end, section 102(l) requires the laws and regulations of the United States be “administered in accordance with the policies set forth” in the Act.¹⁹¹ For the first time, federal agencies were explicitly required to consider the environmental effects of their actions.

The principal obligation imposed upon federal agencies under NEPA is the preparation of an Environmental Impact Statement (EIS) for major federal actions.¹⁹² The EIS forces agencies to take environmental factors into consideration when making significant decisions. The courts have stated that the statute establishes a “strict standard of compliance”¹⁹³ and that NEPA

¹⁸⁶ SARA Title III § 324, 42 U.S.C. § 11044 (1988).

¹⁸⁷ SARA Title III § 324, 42 U.S.C. § 11045 (1988).

¹⁸⁸ SARA Title III § 326, 42 U.S.C. § 11046 (1988).

¹⁸⁹ National Environmental Policy Act of 1969 [hereinafter NEPA], Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4370a (1988)).

¹⁹⁰ 42 U.S.C. § 4331 (1988).

¹⁹¹ Prior to passage of NEPA, some federal agencies believed that they lacked statutory authority to consider the environmental ramifications of their actions.

¹⁹² NEPA § 102(2)(c) (1988) states:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the federal governmental shall— . . .

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(c) (1988).

¹⁹³ *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

“mandates a particular sort of careful and informed decision making process and creates judicially enforceable duties.”¹⁹⁴

Congress specifically addressed NEPA when it enacted SMCRA. Congress declared the approval of state programs,¹⁹⁵ promulgation of federal programs,¹⁹⁶ implementation of the federal lands program,¹⁹⁷ and the issuance of interim regulations¹⁹⁸ “shall not constitute a major action within the meaning of section 102(2)(c)” of NEPA.¹⁹⁹ However, Congress specifically stated that adoption of permanent program regulations pursuant to section 501(b)²⁰⁰ of SMCRA “shall constitute a major action” within the meaning of NEPA.²⁰¹

While Congress exempted the promulgation of federal programs from NEPA requirements, it did not exempt permitting actions in federal program states such as Tennessee. In OSM’s seven years of experience in administering that program, it has issued approximately 300 surface mine permits. OSM conducts an environmental assessment (EA) for these permitting actions, and, so far in Tennessee, they have all resulted in findings of no significant impact (FONSI). OSM does, however, compile an EIS for lands-unsuitable petitions²⁰² in federal program states and for many large permitting actions in western federal program states.

While the operator is not directly responsible for preparation of the EAs or EISs, the permitting process can be significantly slowed, and the applicant might be requested to provide the bulk of the information necessary for the agency’s compliance with NEPA.²⁰³

10. *National Historic Preservation Act*

As environmental awareness becomes more prevalent in our society and the reach of the federal government becomes more

¹⁹⁴ *Id.* at 1115. (“If the [agency’s] decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.”).

¹⁹⁵ SMCRA § 503(b), 30 U.S.C. § 1253(b) (1988).

¹⁹⁶ SMCRA § 504, 30 U.S.C. § 1254 (1988).

¹⁹⁷ SMCRA § 523, 30 U.S.C. § 1273 (1988).

¹⁹⁸ SMCRA § 501(a), 30 U.S.C. § 1251(a) (1988).

¹⁹⁹ SMCRA § 702(d), 30 U.S.C. § 1292(d) (1988).

²⁰⁰ SMCRA § 501(b), 30 U.S.C. § 1251(b) (1988).

²⁰¹ SMCRA § 702(d), 30 U.S.C. § 1292(d) (1988).

²⁰² OSM combines the lands-unsuitable petition evaluation document with the EIS in these instances.

²⁰³ See 30 C.F.R. § 942.773(b)(6) (1991) (OSM “may require specific additional information from the applicant” so as to comply with NEPA’s requirements.).

extensive, more and more requirements are placed on regulated industries. One non-traditional environmental law applied through SMCRA is the National Historic Preservation Act of 1966.²⁰⁴

OSM promulgated its final rule protecting historic properties from surface coal mining operations on February 10, 1987.²⁰⁵ OSM cited as its authority for the regulations sections 507(b)(13), 522 (A)(3)(b), 522(e)(3) and 522(e)(5) of SMCRA;²⁰⁶ section 106 of the National Historic Preservation Act;²⁰⁷ the district court decision in *In re Permanent Surface Mining Regulation Litigation II*;²⁰⁸ and a petition for rulemaking filed by the Society of Professional Archaeologists.²⁰⁹

As part of the Department of Interior's responsibility under the Historic Preservation Act (not itself applicable to the states), OSM's review and approval of state programs which are federally funded or assisted must "ensure that appropriate consideration is being given to historic properties."²¹⁰

OSM's final rule protecting historic places stated:

The regulatory authority may require the applicant to protect historic or archeological properties on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.²¹¹

Although some language of the National Historic Preservation Act is used in these regulations, OSM stated in the preamble

²⁰⁴ National Historic Preservation Act of 1966, Pub. L. No. 89-665, *as amended* 16 U.S.C. § 470-470w-6 (1988).

²⁰⁵ 52 Fed. Reg. 4244 (Feb. 10, 1987).

²⁰⁶ 30 U.S.C. §§ 1257(b)(13), 1272(a)(3)(b), (e)(3), and (e)(5) (1991).

²⁰⁷ Pub. L. No. 89-665, *as amended*, 16 U.S.C. §§ 470 *et seq.* (1988). Section 106 of the Act requires Federal agency heads, prior to authorizing expenditure of federal funds on a federal or federally assisted undertaking, to consider the effect of the undertaking on historic resources.

²⁰⁸ 620 F. Supp. 1519, *aff'd in part, rev'd in part, sub. nom.* National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988). In this decision, the district court determined that the exclusion of privately-owned properties listed on the National Register of Historic Places from the protections offered by Section 522(e)(3) was improper, and that Congress intended to protect both privately owned and publicly-owned places on the National Register of Historic Places. 620 F. Supp. at 1555-56.

²⁰⁹ The Society of Professional Archaeologists filed the petition on September 15, 1983. *See also* 51 Fed. Reg. 3802 (Jan. 30, 1986).

²¹⁰ 52 Fed. Reg. 4245 (Feb. 10, 1987).

²¹¹ 30 C.F.R. § 780.31(b) (1991).

to the rulemaking that it had sufficient authority under SMCRA to promulgate these rules.²¹²

C. *Related Laws With Environmental Implications*

1. *State Constitutional Environmental Protections*

After federal passage of NEPA in 1970, many states enacted similar state-based protections, so-called "little-NEPAs."²¹³ Other states went further and passed state constitutional amendments, as did Pennsylvania in 1971:

§ 27. Natural resources and the public estate.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.²¹⁴

The Pennsylvania Department of Environmental Resources (the agency which administers SMCRA in Pennsylvania) frequently employs the Amendment, in litigation involving SMCRA, to support its position prohibiting any type of potential pollution. Clearly, that regulatory authority believes the Amendment's protections may exceed those of SMCRA.

When Congress enacted SMCRA in 1977, it found that "coal mining operations presently contribute significantly to the Nation's energy requirements," and that "surface and underground coal mining operations affect interstate commerce, [and] contribute to the economic well-being, security, and general welfare of the Nation"²¹⁵ One of SMCRA's purposes is to "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

²¹² 52 Fed. Reg. 4247 (Feb. 10, 1987).

²¹³ Minnesota Environmental Rights Act, MINN. STAT. ANN §§ 116 B *et seq.* (West 1987).

²¹⁴ PENN. CONST. ART. I, § 27.

²¹⁵ SMCRA §§ 101(b), (j), 30 U.S.C. §§ 1201(b), (j) (1988).

essential source of energy.”²¹⁶ Full utilization of the nation’s coal resources is encouraged by SMCRA.²¹⁷

State constitutional and statutory provisions designed to guarantee a clean environment do not consider the balance between energy security and environmental protection envisioned by Congress when it enacted the comprehensive provisions of SMCRA. In case of a conflict between SMCRA—which is implemented as a *state* statute in primacy states—and a state constitutional amendment, the statute must fall. SMCRA permittees in states where such extraordinary environmental protection exists are subject to constant tension between the policy choices made by Congress in SMCRA and the state’s policy on environmental matters as expressed through unique statutory and constitutional protections.

2. *Liability Under Federal Securities Laws For Failure To Disclose Certain Environmental Information*

The Securities and Exchange Commission (SEC) has promulgated various regulations requiring corporations to disclose certain environmentally-related information. Information required to be disclosed includes: (a) compliance with environmental regulations, (b) a description of circumstances that might materially affect earnings (such as identified environmental contamination), and (c) significant environmental litigation or any corporate policies that might result in environmental fines or penalties. Failure to comply with SEC disclosure requirements may result in severe penalties.

Current SEC disclosure requirements are contained in Regulation S-K.²¹⁸ These requirements are satisfied by annual reports either through Form 10-K, or registration statements filed under the Securities Act of 1933. These disclosure requirements are based upon the general standard of materiality that the registrant “reasonably believes” a legal proceeding will not result in monetary sanctions of \$100,000 or more. Materiality requirements were recently discussed in the Supreme Court ruling in *Basic, Inc. v. Levinson*.²¹⁹ Disclosure is also required of the material

²¹⁶ SMCRA § 102(f), 30 U.S.C. § 1202(f) (1988).

²¹⁷ SMCRA §§ 102(k), 515(b)(1), 30 U.S.C. §§ 1202(k), 1265(b)(1) (1988).

²¹⁸ 17 C.F.R. Part 229 (1991).

²¹⁹ 485 U.S. 224 (1988).

effects of compliance with federal, state, and local laws regulating the discharge of materials into the environment which may have an effect upon the capital expenditures, earnings, and competitive position of the registrant corporation.²²⁰

A description is also required of administrative or judicial proceedings arising under any federal, state, or local provisions that have been enacted or adopted, regulating the discharge of materials into the environment or primarily for protecting the environment if:

Such proceeding is material to the business or financial condition of the [mining company];

Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, [or other charges to income exceeding 10% of the mining company's consolidated assets]; or

A governmental authority is a party to such a proceeding [and the proceeding involves potential monetary sanctions equal to or in excess of \$100,000].²²¹

Special attention is required by management if the corporation has been notified of its status as a PRP under CERCLA.²²²

Although there is no express disclosure requirement, Regulation S-K's "Management's Discussion and Analysis" provision requires that the mining company provide a narrative analysis of its financial statements and condition, and of several factors which offset financial results.²²³

The SEC has issued an interpretation of certain disclosure requirements in relation to Management's Discussion and Analysis of financial conditions and results of operations. This interpretation establishes a rebuttable presumption requiring disclosure of many environmental risks which may face the corporation.²²⁴ However, the SEC also indicated a corporation's receipt of a notice from EPA that it is a PRP under CERCLA does not necessarily require disclosure of this liability.²²⁵

Disclosure of environmental liability is implicitly required if it is necessary to ensure other statements made in SEC reports

²²⁰ 17 C.F.R. § 229.101(c)(1)(xii) (1991).

²²¹ 17 C.F.R. § 229.103 (Instruction 5) (1991).

²²² See SEC Release Nos. 33-6835 and 34-26831 (May 8, 1989).

²²³ 17 C.F.R. § 229.303 (1991).

²²⁴ See SEC Release Nos. 33-6835 and 34-26831 (May 8, 1989).

²²⁵ *Id.*

or filings are not misleading.²²⁶ Rarely has the SEC taken enforcement actions regarding environmental disclosure requirements. The most notable exception is found in *In the matter of United States Steel Corporation*.²²⁷

III. COMPLIANCE WITH OTHER ENVIRONMENTAL LAWS AS A PREREQUISITE TO SMCRA PERMIT ISSUANCE UNDER SECTION 510(c)

In what is commonly known as the "permit blocking" provision of SMCRA section 510(c) is designed to provide a system for blocking permits of applicants who own or control mines with currently uncorrected violations of the Act or of "any law, rule or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection."²²⁸ Under SMCRA and its state analogues, the applicant must submit a list of violations in connection with any surface mining operation incurred in the past three years.²²⁹ However, only if there is a *current* violation may the regulatory authority block permit issuance.²³⁰ Since all of the regulatory authorities are required to review those violations of SMCRA and of "any law, rule or regulation in pertaining to *air or water environmental protection*," the threshold question in this analysis is the scope of those laws which trigger the permit-blocking mechanism in section 510(c).

Although there have been no cases interpreting what laws are referenced by the term "air or water environmental protection,"²³¹ a review of SMCRA, its legislative history, and agency rulemakings supports a narrow interpretation of that term.

Evidence of Congress' intent to look only at the Clean Air Act and the Clean Water Act is found in SMCRA section 713(a), which states:

²²⁶ See Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1988), Rule 408, 17 C.F.R. § 230.408 (1991); Securities Exchange Act of 1934 § 10b, 15 U.S.C. § 78j (1988), Rule 10b-5, 17 C.F.R. § 240.106-5 (1991); Rule 12b-20, 17 C.F.R. § 240.12b-20 (1991).

²²⁷ SEC Release No. 34-16223 (Sept. 27, 1979).

²²⁸ SMCRA § 510(c), 30 U.S.C. § 1260(c) (1988).

²²⁹ 30 C.F.R. § 773.15(c) (1991). See also 25 PA. CODE § 86.36; 405 KAR § 8:010 (13)(2)(b).

²³⁰ See 30 C.F.R. § 773.15(b)(1); 25 PA. CODE § 86.36; 405 KAR § 8:010(13)(2)(b).

²³¹ It has been held that § 510(c) applies to state air or water environmental laws only to the extent that the state law was enacted pursuant to a Federal law. See *Stelby v. OSMRE*, 109 IBLA 242 (1989).

The President shall, to the extent appropriate, and in keeping with the particular enforcement requirements of each act referred to herein, insure the coordination of *regulatory and inspection activities* among the departments, agencies, and instrumentalities to which such activities are assigned by this [Act] by *the Clean Air Act* [and] by *the Water Pollution Control Act*²³²

No mention is made of any other statutes requiring coordination of regulatory and inspection activities.

The fact that Congress specified “air or water” environmental laws and did not use language encompassing every law that may indirectly concern air or water indicates a limitation to those federal laws expressly confined to air and water—the Clean Air Act and the Clean Water Act. Congress recognized the regulation of coal mining by a new agency would overlap areas subject to regulation by EPA, and it addressed the issue of SMCRA’s relation to other agencies in the 1975 and 1976 predecessors to the final version of SMCRA.

In its 1975 report accompanying House Bill 25, the House of Representatives Committee on Interior and Insular Affairs explained the relation of House Bill 25 to other laws, and further that:

The Committee felt that the requirement for the Secretary of the Interior to obtain the concurrence of the Administrator of the Environmental Protection Agency is necessary to ensure that any environmental requirement of this Act is consistent with the environmental programs and authorities of the EPA and, *in particular*, those programs authorized under the *Clean Air Act*, as amended, and the *Federal Water Pollution Control Act*, as amended *EPA has established water quality standards, air quality standards, and implementation and compliance requirements for the coal mining and processing industry*, and issues permits to the industry to ensure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of EPA’s abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that any risk of duplication or conflict be minimized²³³

²³² 30 U.S.C. § 1303 (1988) (emphasis added).

²³³ H.R. Rep. No. 45, 94th Cong., 1st Sess. 133-134 (1975) (emphasis added).

The same language referring to coordination with EPA, specifically with respect to its responsibilities under the Clean Air Act and the Clean Water Act, is found verbatim in the next version of SMCRA.²³⁴

Although legislative history is not dispositive, these House Reports support the argument that the "law, rule or regulation pertaining to air or water environmental protection" contemplated by section 510(c) refers only to those laws administered by the EPA—again, only the Clean Air Act and Clean Water Act.

OSM has promulgated regulations which essentially repeat the statutory language.²³⁵ OSM's rulemaking for the "Ownership and Control Rule"²³⁶ has also provided information that supports a narrow interpretation of which laws are implicated by section 510(c). Throughout the preamble to that final rulemaking OSM describes the compliance review to be conducted by the regulatory authority by consistently referring to "*certain*" other environmental laws.²³⁷ The use of the word "certain" in reference to the environmental laws must be interpreted to connote specificity, and not to encompass *any* law having some indirect nexus with air or water quality.

OSM's current policy is that it will concern itself only with environmental laws enforced by EPA—the FCWA and FCAA. OSM has admitted section 510(c) could be interpreted more broadly to encompass any law with a nexus to air or water, but insists it has, to-date, only been concerned with programs enforced by EPA.²³⁸ As a practical matter, the Applicant Violator System (AVS) is a limited database and it is unlikely a broad spectrum of violations data is generally available.

It appears fairly certain that section 510(c) compliance requirements are restricted to SMCRA violations and violations occurring under the FCWA and FCAA only.

CONCLUSION

As a comprehensive regulatory statute covering a specific industry and its effect upon several resources, SMCRA regula-

²³⁴ See H.R. Rep. No. 896, 94th Cong., 2d Sess. 92 (1976).

²³⁵ 30 C.F.R. § 733.15(b) (October 3, 1988) (formerly 30 C.F.R. 786.17(c)).

²³⁶ 50 Fed. Reg. 13724 (April 5, 1985); 53 Fed. Reg. 38868 (Oct. 3, 1988).

²³⁷ 53 Fed. Reg. 38868 (Oct. 3, 1988).

²³⁸ Telephone conversation with OSM's primary author of the Ownership and Control Rule, Andrew F. DeVito (July 1991).

tory policy has the potential for creating an uneasy tension between its demands and those confronted under other environmental statutes which focus upon the protection of a single resource. An effort must be made to harmonize the various environmental protections applied on the coal mining industry with the policies which served as the basis for the nation's only comprehensive environmental program targeted at mining. As new environmental statutes and regulations are developed, the regulatory agencies must accommodate those environmental regulations and policies already established.