Procedural Provisions for Permanent Program Permit Applications

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PROCEDURAL PROVISIONS FOR PERMANENT PROGRAM PERMIT APPLICATIONS

I. INTRODUCTION................................................................. 945

II. THE FEDERAL PERMANENT REGULATORY PROGRAM IN TENNESSEE......................................................... 947

A. Required Legal, Financial and Compliance Information ........................................................... 947

III. STATE PERMANENT REGULATORY PROGRAMS............................................................................. 955

A. Kentucky........................................................................................................ 955
   1. Required Legal, Financial and Compliance Information .................................................. 957
   2. Public Notification and Participation........................................................................... 958
   3. Public Comment and Objection................................................................................ 959
   4. Criteria for Permit Approval.................................................................................... 960
   5. Permit Review........................................................................................................ 962

B. Pennsylvania............................................................................................................ 963
   1. Required Legal, Financial and Compliance Information .................................................. 964
   2. Public Notification.................................................................................................... 964
   3. Public Comment and Objection................................................................................ 965
   4. Criteria for Permit Approval.................................................................................... 966
   5. Permit Review........................................................................................................ 967

C. West Virginia............................................................................................................... 968
   1. Public Notice........................................................................................................... 969
   2. Permit Review........................................................................................................ 970

IV. SUMMARY.................................................................................................................. 971

I. INTRODUCTION

In 1977, Congress passed the Surface Mining Control and Reclamation Act\(^1\) (SMCRA, the Act), thereby providing for the creation

of numerous state programs, all based on a federal model.\textsuperscript{2} Citing the need to develop a nation-wide program in order to combat the social and economic costs imposed on citizens by a "substantial number of acres" of disturbed and unreclaimed land,\textsuperscript{3} Congress nevertheless left it to the states to develop their own permanent reclamation programs.\textsuperscript{4} Pursuant to the statute, the Office of Surface Mining Reclamation and Enforcement (OSM) of the Department of the Interior promulgated regulations providing a model reclamation program and requiring states to propose their own permanent programs or have the federal government institute a federal program in their state.\textsuperscript{5}

Between 1980 and 1982, the OSM approved the state programs of West Virginia, Pennsylvania and Kentucky.\textsuperscript{6} It also instituted a federal program in Tennessee.\textsuperscript{7} Although Tennessee's program is the actual federal program and the other three states' SMCRA permanent programs are all based heavily on the federal program, there exist several differences among the programs of which the legal practitioner should be aware if he/she is representing a coal mine operator or owner in one of the above-mentioned states for the first time.

This article outlines the application requirements of the federal program, with attention to how the program is implemented in Tennessee. It then outlines the analogous requirements of the permanent programs in Kentucky, Pennsylvania and West Virginia and points out how certain provisions in these programs differ from the provisions of the federal program. This article covers only the permanent program provisions set forth in Parts 773, 774, 777 and 778 of Title 30 of the Code of Federal Regulations [hereinafter C.F.R.]. It does not cover the differences among the federal and state programs in minimum requirements for information on environmental resources or reclamation plans. Furthermore, it covers only the per-

\textsuperscript{5} 30 C.F.R. § 700 (1988).
\textsuperscript{7} 30 C.F.R. § 942 (1988).
mit application requirements for the permanent programs under
SMCRA and does not cover application processes for other envi-
ronmental or wildlife permits that may be required.

II. THE FEDERAL PERMANENT REGULATORY PROGRAM IN
TENNESSEE

Tennessee's permanent regulatory program is run by the OSM, the regulatory authority referred to in the provisions of the federal program. As a result, the Tennessee permanent program primarily consists of the provisions of the federal program with some additions. Except as outlined in the sections that follow, the Tennessee program is identical to the federal program set forth in 30 C.F.R. sections 700-942.

The provisions of the federal program require the applicant for a permanent program permit to file an application with the appropriate state or federal regulatory authority in the format required by that authority. Part 777 of Title 30 of the Code of Federal Regulations further sets out general requirements for the reporting of technical analyses and the formats of maps and plans. Moreover, Part 777 requires that applications be verified under oath by a "responsible official" of the applicant and that a fee, as determined by the regulatory authority, accompany the application.

A. Required Legal, Financial and Compliance Information

The provisions of the federal program contained in 30 C.F.R. Pt. 778 set forth the minimum legal, financial and compliance requirements and related general information required to be included in permanent program permit applications. Information re-

required to be disclosed includes the form of business of the applicant;\textsuperscript{17} the names and addresses, where applicable, of the applicant and any of its officers, directors, major shareholders, partners and principal;\textsuperscript{18} information about past, present and pending mining operations and permits held or applied for by the applicant and, where applicable, its partners, major shareholders or principal;\textsuperscript{19} the names and addresses of owners of the property to be mined and the property contiguous to the proposed permit area;\textsuperscript{20} "the Mine Safety and Health Administration (MSHA) numbers for all mine-associated structures that require MSHA approval";\textsuperscript{21} and a list of all the applicant's interests in land or options or pending bids on such interests or lands contiguous to the permit area.\textsuperscript{22} This last item of information remains confidential upon request of the applicant if it is not required to be on public file by state law.\textsuperscript{23}

The regulations in Part 778 further require the disclosure of information regarding the revocation or suspension of any state or federal coal mining permit of the applicant or an associated person or operation, forfeiture of a performance bond or security by the applicant or associated person or operation, and information regarding violation notices received by the applicant or any associated person or operation.\textsuperscript{24} Required disclosures include a brief statement of the facts surrounding any suspension, revocation, forfeiture or notice;\textsuperscript{25} identification of the status of the bond or security forfeited;\textsuperscript{26} identification of the regulatory authority involved in suspending or revoking a permit or giving notice of a violation;\textsuperscript{27} information regarding any administrative or judicial proceeding resulting from the suspension, revocation, forfeiture or notice;\textsuperscript{28} and

\textsuperscript{17} Id.
\textsuperscript{18} 30 C.F.R. § 778.13(c)(1) (1988).
\textsuperscript{19} 30 C.F.R. §§ 778.13(c)(2), (d) (1988).
\textsuperscript{20} 30 C.F.R. §§ 778.13(e), (f) (1988).
\textsuperscript{21} 30 C.F.R. § 778.13(g) (1988).
\textsuperscript{22} 30 C.F.R. § 778.13(h) (1988).
\textsuperscript{23} Id.
\textsuperscript{24} 30 C.F.R. § 778.14 (1988).
\textsuperscript{25} 30 C.F.R. §§ 778.14(b), (c)(2) (1988).
\textsuperscript{26} 30 C.F.R. § 778.14(b)(3) (1988).
any steps taken or being taken by the applicant to remedy any violation.\textsuperscript{29}

The applicant must provide in the application information regarding its right of entry onto the proposed permit area and its right to conduct mining operations there,\textsuperscript{30} including a description of the documents that grant it its right of entry.\textsuperscript{31} In addition, the applicant must provide a copy of the documents in question if the surface property rights have been severed from the mineral rights.\textsuperscript{32}

The applicant must also indicate whether the proposed permit site lies within an area designated as unsuitable for mining or in an area under study for such designation.\textsuperscript{33} Generally, if the proposed permit site lies within such an area, the application will be denied.\textsuperscript{34} However, if the "applicant made substantial legal and financial commitments" to the proposed operations before January 4, 1977, it may claim an exemption from the general restriction regarding unsuitable lands, as provided for in 30 C.F.R. section 761.12.\textsuperscript{35}

The application must include the "anticipated or actual starting and termination date of each phase of the [proposed mining] operation and the anticipated number of acres of land to be affected during each phase of mining over the life of the mine."\textsuperscript{36} Although they do not expressly provide that financing requirements will constitute the only reason for the granting of a permit with a duration longer than five years, the federal regulations do apply requirements for application for a longer-duration permit only to such circumstances.\textsuperscript{37} The regulations require the application to be "complete and accurate for the specified longer term"\textsuperscript{38} and to include written confirmation by the applicant's intended source of financing that the longer term "is reasonably needed to allow the applicant to

\textsuperscript{29} 30 C.F.R. § 778.14(c)(5) (1988).
\textsuperscript{30} 30 C.F.R. § 778.15(a) (1988).
\textsuperscript{31} Id.
\textsuperscript{32} 30 C.F.R. § 778.15(b) (1988).
\textsuperscript{33} 30 C.F.R. § 778.16(a) (1988).
\textsuperscript{34} 30 C.F.R. § 773.13(c)(3) (1988).
\textsuperscript{35} 30 C.F.R. § 778.16(b) (1988).
\textsuperscript{36} 30 C.F.R. § 778.17(a) (1988).
\textsuperscript{37} 30 C.F.R. § 778.17(b) (1988).
\textsuperscript{38} 30 C.F.R. § 778.17(b)(1) (1988).
obtain financing for equipment and for the opening of the operation"39 "[i]f the applicant requires an initial permit term in excess of [five] years" for that reason.40 The application also must contain either a certificate of liability insurance or evidence of self-insurance in compliance with 30 C.F.R. section 800.16.41

If the applicant intends to use any structures in common with a separately permitted mining operation, the plans for the structures may be included with one application and included in the other by reference.42 The permittees each must bond the structure separately unless they reach an agreement by which they share the bonding cost. In such event, the applicant must include with the permit a copy of the agreement to satisfy any bonding requirements of the regulatory authority.43

The federal program also requires the applicant to publish, upon submission of an "administratively complete application,"44 public notices of its application in a newspaper of general circulation in the locality of the proposed permit area.45 However, the governing section makes no mention of what constitutes an administratively complete application or how the regulatory authority is to determine whether the application is administratively complete.

The federal regulations for Tennessee, however, specifically provide that, after the applicant applies for a permanent program permit by submitting five copies of the application to OSM,46 OSM will review the application for administrative completeness and notify the applicant, in writing, of its findings.47 If the application is missing any information, the OSM may, in the case of a "flagrantly deficient application," reject the application immediately.48 In the case of less serious deficiencies, it may simply request further in-

40. 30 C.F.R. § 778.17(b) (1988).
41. 30 C.F.R. § 778.18 (1988).
42. 30 C.F.R. § 778.22 (1988).
43. Id.
44. 30 C.F.R. § 773.13(a) (1988).
45. Id.
formation from the applicant. OSM may request supplemental information not required by the Act to aid in compliance with other federal laws. Although not provided for in the federal program, the regulations for Tennessee state that a representative of OSM will visit the permit area to determine whether the application information matches actual site conditions. The representative will have important features of the site marked by flags.

The federal program provides that the applicant must publish public notices of its application in the form of advertisements in a newspaper of general circulation in the locality of the proposed permit area. The advertisement must be published at least weekly for a period of four consecutive weeks, and the applicant must submit to the regulatory authority a copy of the advertisement as it is to appear in the newspaper, making it "a part of the application not later than [four] weeks after the last date of publication as required by" 30 C.F.R. section 773.13(a)(1).

Section 773.13 of the federal program sets forth the minimum information which the advertisement must contain, including, among other items, a "concise statement" describing any public road which the applicant desires to close or relocate or the outside right of way which lies within 100 feet of the intended mine site. The statement is not required where public notice and hearing have been previously provided for the road in accordance with 30 C.F.R. 761(12)(d).

The federal program provides that the applicant must file the application with "the recorder at the courthouse of the county where the mining is proposed to occur, or an accessible public office approved by the regulatory authority" for the public to inspect and copy. This copy of the application need not contain certain infor-

50. 30 C.F.R. §§ 942.773(b)(6), (c) (1988).
52. Id.
54. Id.
57. Id.
mation exempt from disclosure.\textsuperscript{59} Information in an application "regarding coal seams, test borings, core samplings, or soil samples . . . will be made available to any person with an interest which is or may be adversely affected"\textsuperscript{60} or to the public if state law requires disclosure.\textsuperscript{61} The federal regulations require the regulatory authority to "provide procedures, including notice and opportunity to be heard for persons both seeking and opposing disclosure, to ensure confidentiality of qualified confidential information, which shall be clearly identified by the applicant and submitted separately from the remainder of the application."\textsuperscript{62} The section further limits confidential information to

\begin{itemize}
  \item[i] Information regarding the analysis of the chemical and physical properties of the coal to be mined, except information on components of such coal which are potentially toxic in the environment;\textsuperscript{63}
  \item[i] Information required under section 508 of the [SMCRA] that is not on public file pursuant to State law and that the applicant has requested in writing to be held confidential;\textsuperscript{64} [and]
  \item[i] Information on the nature and location of archeological resources on public land and Indian land as required under the Archeological Resources Protection Act of 1979.\textsuperscript{65}
\end{itemize}

Upon receipt of an "administratively complete" application, the regulatory authority will notify interested federal, state, and local governmental agencies of the application and of a place where it may be inspected.\textsuperscript{66} The governmental agencies so notified by the regulatory authority may submit written comments or objections within a reasonable time after being notified.\textsuperscript{67} Persons with an interest that is or may be adversely affected by the regulatory authority's decision on the permit, or the officer or head of any federal, state or local agency, may file a written objection within thirty days

\textsuperscript{59} Id.
\textsuperscript{60} 30 C.F.R. § 773.13(d)(2) (1988).
\textsuperscript{61} Id.
of the publication of the last of the four consecutive weekly advertisements required by 30 C.F.R. section 773.13(a).\textsuperscript{68} The regulatory authority will transmit copies of comments and objections to the applicant upon receipt thereof\textsuperscript{69} and will "[f]ile a copy for public inspection at the same public office where the application is filed."\textsuperscript{70}

Those persons having the right to file with the regulatory authority a written objection to the permit may also file a written request, by the same deadline applicable to written objections for an informal conference on the granting of the permit.\textsuperscript{71} The regulatory authority is obliged to hold such a conference if requested to do so\textsuperscript{72} unless all parties requesting the conference withdraw their requests.\textsuperscript{73} The regulatory authority will notify the applicant of the location, time and date of the conference and will advertise the location, time and date in a newspaper of general circulation in the locality of the proposed permit area.\textsuperscript{74} "The requirements of section 5 of the Administrative Procedure Act, as amended (5 U.S.C. 554) (regarding the format of formal adjudications, including presentations of issues and who may render a decision or make recommendations leading to a decision)\textsuperscript{75} shall not apply to the conduct of the informal conference."\textsuperscript{76} The representative of the regulatory authority who conducts the conference may accept relevant information in any form.\textsuperscript{77} Unless such a record is waived by all the parties, an electronic or stenographic record of the proceeding will be available to all parties to the conference until the "final release of the applicant’s performance bond or other equivalent guarantee. . . ."\textsuperscript{78}

In determining whether to grant the permit, the regulatory authority will review the application, any comments or objections sub-

\textsuperscript{68} 30 C.F.R. § 773.13(b)(2) (1988).
\textsuperscript{71} 30 C.F.R. § 773.13(c) (1988).
\textsuperscript{72} 30 C.F.R. § 773.13(c)(iii)(2) (1988).
\textsuperscript{73} 30 C.F.R. § 773.13(c)(iii)(3) (1988).
\textsuperscript{74} 30 C.F.R. § 773.13(c)(iii)(2)(ii) (1988).
\textsuperscript{76} 30 C.F.R. § 773.13(c)(iii)(2)(iv) (1988).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
mitted, and the record of any informal conference held with regard to the permit.\textsuperscript{79} Prior to granting the permit, the regulatory authority must find that no coal mining and reclamation operation currently owned or operated by the applicant is in violation of SMCRA or any other federal environmental law, rule or regulation or any state environmental law, rule or regulation promulgated pursuant to a federal law.\textsuperscript{80} If the regulatory authority cannot make such a finding, the applicant may still be able to obtain a permit if the applicant can show either that any violation has been or is being corrected satisfactorily\textsuperscript{81} or that the applicant is pursuing a good-faith administrative or judicial appeal of the violation.\textsuperscript{82} In the latter case, the regulatory authority may issue a permit “conditionally pending the outcome of [the] appeal . . . .”\textsuperscript{83} However, if the regulatory authority finds that the applicant controls or has controlled a mining and reclamation operation in such a manner as to manifest an intent not to comply with the provisions of SMCRA, the permit will not be granted.\textsuperscript{84}

Beyond the findings regarding compliance with SMCRA in the applicant’s other mining operations, the regulatory authority must make certain written findings before it may grant a permit.\textsuperscript{85} The regulatory authority is required to find that the terms of the application meet all requirements of SMCRA and the permanent regulatory program\textsuperscript{86} and are sufficient to provide for all required reclamation,\textsuperscript{87} protection of all structures,\textsuperscript{88} protected species\textsuperscript{89} and historic places,\textsuperscript{90} and all hydrologic concerns of the area outside of the permit site.\textsuperscript{91} The authority must further find that the application

\textsuperscript{79} 30 C.F.R. \S 773.15(a)(1) (1988).
\textsuperscript{80} 30 C.F.R. \S 773.15(b) (1988).
\textsuperscript{81} 30 C.F.R. \S 773.15(b)(1) (1988).
\textsuperscript{82} 30 C.F.R. \S 773.15(b)(ii) (1988).
\textsuperscript{83} 30 C.F.R. \S 773.15(b)(ii)(2) (1988).
\textsuperscript{84} 30 C.F.R. \S 773.15(b)(ii)(3) (1988).
\textsuperscript{85} 30 C.F.R. \S 773.15(c) (1988).
\textsuperscript{86} 30 C.F.R. \S 773.15(c)(1) (1988).
\textsuperscript{87} 30 C.F.R. \S 773.15(c)(2) (1988).
\textsuperscript{88} 30 C.F.R. \S 773.15(c)(6) (1988).
\textsuperscript{89} 30 C.F.R. \S 773.15(c)(10) (1988).
\textsuperscript{90} 30 C.F.R. \S 773.15(c)(11) (1988).
\textsuperscript{91} 30 C.F.R. \S 773.15(c)(5) (1988).
terms provide, where applicable, that all requisite documents have been submitted to the authority,\(^{92}\) that all reclamation fees of other operations have been paid,\(^{93}\) and that all requirements for "non-standard" mining practices, re-mining or long-term agricultural postmining land use have been met.\(^{94}\)

The regulatory authority will "issue a written statement, within a reasonable time set by [it], either granting, requiring modification of, or denying the application."\(^{95}\) If an informal conference is held, the decision will be issued within sixty days of the close of the conference, unless a later decision time is required by a pending administrative or judicial procedure.\(^{96}\) If the authority decides to issue a permit, it will require the applicant to submit a performance bond or like guarantee.\(^{97}\)

III. STATE PERMANENT REGULATORY PROGRAMS

While the provisions of the permanent regulatory programs of Kentucky, Pennsylvania and West Virginia are all based on those of the federal program, there exist a number of differences between the various state programs and the federal program. The following section details the areas in which the various state programs vary from the provisions of the federal program.

A. Kentucky

Although the provisions of the Kentucky permanent regulatory program are substantially identical to those of the federal program in many respects, the Kentucky regulations go beyond the federal program in certain specific requirements. The regulatory authority supervising the administration of the permanent regulatory program in Kentucky is the Natural Resources and Environmental Protection Cabinet (the Cabinet).\(^{98}\) The Kentucky regulations require, as an

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94. 30 C.F.R. §§ 773.15(c)(8), (9), (12) (1988).
96. Id.
initial step, the filing with the Cabinet of a preliminary application, complete with descriptive maps.\textsuperscript{99} Within fifteen days of the filing, Cabinet personnel conduct an on-site inspection of the proposed permit area, together with the applicant or its representatives and the representatives of appropriate government agencies.\textsuperscript{100} After the inspection, the applicant may submit a formal permit application.\textsuperscript{101}

The Kentucky regulations not only specify that the application shall be complete but also that the application will be considered incomplete if all design plans for the permit area are not in final, detailed form.\textsuperscript{102} Maps submitted as part of the application must be updated to include any changes in the proposed permit area since the submission of the preliminary application maps.\textsuperscript{103} All maps must meet the requirements of the federal program and be of a scale between 400 and 500 feet to the inch, with the scale to be clearly shown on the map.\textsuperscript{104} While the Kentucky regulations contain no requirements regarding the nature of the person performing technical analyses, all engineering design plans and maps, where applicable, must be prepared by or under the direction of a qualified registered professional engineer who is required to sign, seal and certify all such maps and plans.\textsuperscript{105}

The Kentucky regulations provide that a permit fee of $375 plus $75 for each acre of surface land to be affected by the permit must accompany all applications filed after July 15, 1982.\textsuperscript{106} A cashier's check or money order payable to the Kentucky State Treasurer must accompany each application or the application will not be processed.\textsuperscript{107} As under the federal program, the truthfulness of information contained in applications for permits under the Kentucky program must be verified under oath by an authorized representative of the applicant.\textsuperscript{108}

\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} 405 KY. ADMIN. REGS. 8:010 § 5(c) (1987).
\textsuperscript{103} 405 KY. ADMIN. REGS. 8:010 § 5(6)(a)(1) (1987).
\textsuperscript{104} 405 KY. ADMIN. REGS. 8:010 § 5(6)(a)(2) (1987).
\textsuperscript{106} 405 KY. ADMIN. REGS. 8:010 § 6(2) (1987).
\textsuperscript{107} 405 KY. ADMIN. REGS. 8:010 § 6(3) (1987).
\textsuperscript{108} 405 KY. ADMIN. REGS. 8:010 § 7 (1987).
1. Required Legal, Financial and Compliance Information

The requirements for legal, financial and compliance information contained in 30 C.F.R. Pt. 778 of the federal program are closely paralleled by the Kentucky regulations. The Kentucky program contains all the requirements of the federal program with the following exceptions:

1) If the applicant is a partnership, it must include in its application a certified copy of the partnership agreement. If it is a corporation, the applicant must include in its application either a certified copy of the certificate of incorporation from the Secretary of State if it is a Kentucky corporation or, "if a foreign corporation, a certified copy of the Certificate of Authority to conduct business within the Commonwealth of Kentucky."

2) Each application must contain proof that the person signing the application has the authority to do so on behalf of the applicant.

3) "If an applicant proposes to conduct surface mining activities within 300 feet of an occupied dwelling, the application shall contain the waiver of the owner of the dwelling" as required in 405 Kentucky Administrative Regulations Service 24:040 section 2(5) [hereinafter Ky. Admin. Regs.].

4) The Kentucky regulations make it explicit that the cabinet will grant a permit for periods in excess of five years only where such a permit is required to obtain necessary financing for the operation and where such requirement is confirmed in writing by the applicant's proposed source of financing.

5) The application must contain a "certificate of liability insurance" as required by 405 Ky. Admin. Regs. 10:030 section 4.

110. 405 KY. ADMIN. REGS. 8:010 § 2(3)(e); 8:040 § 2(3)(e) (1987).
111. 405 KY. ADMIN. REGS. 8:030 § 2(7); 8:040 § 2(7) (1987).
112. 405 KY. ADMIN. REGS. 8:030 § 5(3); 8:040 § 5(3) (1987).
113. 405 KY. ADMIN. REGS. 8:030 § 6(2); 8:040 § 6(2); 8:010 § 17(1) (1987).
114. 405 KY. ADMIN. REGS. 8:030 § 7; 8:040 § 7 (1987).
6) The application must include a list of all other licenses and permits required in order to conduct the proposed mining operations.\(^1\)\(^1\)\(^5\)

7) The application must include, separately from the copy of the proposed public notice advertisement, the name and address of the regional office of the Cabinet where the application will be available for public inspection.\(^1\)\(^6\)

2. Public Notification and Participation

After an applicant has filed its application with the Cabinet, it must provide public notice of the application through publication of an advertisement in certain newspapers under the same terms as provided in the federal regulations, except that the Kentucky regulations require notice of the permit application to be published in "the newspaper of largest bona fide circulation, . . . in the county wherein the proposed surface coal mining and reclamation operations are to be located."\(^1\)\(^7\) The advertisement must be published weekly for at least four consecutive weeks,\(^1\)\(^8\) and a copy of the advertisement, together with proof of publication, must be made part of the application no later than fifteen days after the last publication of the notice.\(^1\)\(^9\)

Proof of publication "may consist of an affidavit from the publishing newspaper certifying the dates, place and content of the advertisements."\(^1\)\(^2\)\(^0\) The advertisement must contain all the information required by the federal program and, in addition, must include the following information:

1) The map or description must refer to the appropriate United States Geological Survey (USGS) maps describing the permit area.\(^1\)\(^2\)\(^1\)
2) The Kentucky regulations absolutely require the statement regarding affected public roads required by the federal program and make no provision for an exception in the case of previous public hearing on the matter.\textsuperscript{122}

3) The Kentucky program further requires publication in the advertisement of the "proposed postmining land use if different than the premining land use,"\textsuperscript{123} as well as publication of the application number.\textsuperscript{124}

3. Public Comment and Objection

Under the Kentucky program, the federal, state and local governmental agencies who receive notice of an application from the Cabinet have thirty days from the date of the last publication of public notice by the applicant to submit their comments on the permit application to the Cabinet.\textsuperscript{125} The Cabinet will send a copy of the comments to the applicant and make the comments available for public inspection, subject to the same restrictions that apply to the permit application itself.\textsuperscript{126} The Kentucky provision for filing of written objections to the application is substantially identical to the federal program's filing provision.\textsuperscript{127} The same parties who may file an objection may request an informal conference within thirty days of the publication of the last of the four consecutive weekly advertisements.\textsuperscript{128}

If a party requests an informal conference, the Cabinet will hold such a conference within twenty days of the last opportunity to request such a conference.\textsuperscript{129} The Kentucky regulations do not provide, as does the federal program, that the Cabinet need notify the applicant, except by publication, of the conference.\textsuperscript{130} All other re-

\textsuperscript{122} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 8(5)(e) (1987).
\textsuperscript{123} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 8(5)(f) (1987).
\textsuperscript{124} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 8(5)(g) (1987).
\textsuperscript{125} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S\S 9(1), 2(2) (1987).
\textsuperscript{126} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S\S 9(3), 12 (1987).
\textsuperscript{127} 30 C.F.R. \S 773.13(b)(2)(3) (1988); 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 10 (1987).
\textsuperscript{128} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 11(1) (1987).
\textsuperscript{129} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 11(2) (1987).
\textsuperscript{130} 405 KY. \textsc{ ADMIN. REGS.} 8:010 \S 11(2)(b) (1987).
requirements regarding public notice, comment, and objection, as well as regarding the informal conference, are substantially identical to the federal program provisions.

The Kentucky program requires the Cabinet, as the relevant regulatory authority, to make the application available for public inspection upon written request "in accordance with Kentucky open records statutes." Beyond this requirement, all other provisions regarding public inspection of the application and the confidentiality of certain portions are substantially identical to the provisions of the federal program.

4. Criteria for Permit Approval

Pursuant to 405 Ky. Admin. Regs. 8:010 section 14, a provision substantially identical to 30 C.F.R. section 773.15(c), the Cabinet must make certain findings based on the information "affirmatively demonstrate[d]" by the application, as well as on other sources of information available to the Cabinet, and set them forth in writing. However, the Kentucky regulations go beyond the federal program in requiring the Cabinet to make the following findings concerning certain items not addressed by equivalent requirements in the federal program:

1) The permit area must not be on "any lands subject to the prohibitions or limitations" of 405 Ky. Admin. Regs. 24:040 sections (1), (2) or (3). It must not be "within 100 feet of the outside right-of-way line of any public road, except as provided for" in 405 Ky. Admin. Regs. 24:040 section 2(6). Nor may the permit area be "within 300 feet from any occupied dwelling, except as provided for" in 40 Ky. Admin. Regs. 24:040 section 2(5).

133. Id.
2) The reclamation operations in the permit area must be consistent with "other such operations anticipated to be performed in areas adjacent to the proposed permit area."\(^\text{137}\)

3) The Cabinet must make all other necessary approvals as required by the other provisions of the permanent regulatory program.\(^\text{138}\)

4) The applicant must not have forfeited any bond provided pursuant to the enabling legislation, Kentucky Revised Statutes chapter 350, unless the "land for which the bond was forfeited has been satisfactorily reclaimed without cost to the state or the operator or person has paid such sum as the cabinet finds is adequate to reclaim such lands."\(^\text{139}\)

5) If the applicant has had a permit "revoked, suspended or terminated under [Kentucky Revised Statutes] chapter 350, . . . another permit may be issued, or a suspended permit may be reinstated, only if the applicant has complied with all of the requirements of [Kentucky Revised Statutes] chapter 350 or submitted proof satisfactory to the cabinet that such violation has been corrected or is in the process of being corrected, in respect to all permits issued to" the applicant.\(^\text{140}\)

6) The operation must not "constitute a hazard to or do physical damage to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake or other public property."\(^\text{141}\) Protected areas also include "wild river[s]" established pursuant to Kentucky Revised Statues chapter 146 or state parks, unless adequate measures, approved by all affected agencies as provided by 405 Ky. Admin. Regs. 24:040, have been exercised to protect the affected area.\(^\text{142}\)

5. Permit Review

Upon initial receipt of the application, the Cabinet will make an initial completeness determination and notify the applicant, within ten working days of the initial receipt of the application, whether the application has been found to be initially complete and, if not, what deficiencies render it incomplete.\footnote{143. 405 KY. ADMIN. REGS. 8:010 § 13(1) (1987).} If the application is found deficient, the applicant will have ten days from receipt of the notice to submit additional information to complete the application.\footnote{144. Id.} If the application remains incomplete after ten working days after the applicant’s receipt of the deficiency notification, the application will be returned to the applicant with reasons for the finding of deficiency.\footnote{145. Id.}

Within sixty-five working days of the notice of initial completeness, the Cabinet will approve or deny the permit application.\footnote{146. 405 KY. ADMIN. REGS. 8:010 § 16(1)(b) (1987).} If the Cabinet cannot meet these deadlines because of intervening hearings or informal conferences regarding the permit, the Cabinet will have additional time, but not more than twenty days, to approve or deny the application.\footnote{147. Id. The Cabinet may approve, modify or deny, in whole or in part, an application.\footnote{148. 405 KY. ADMIN. REGS. 8:010 §§ 16(2), (3) (1987).} It must notify the applicant of its findings in writing.\footnote{149. Id. Upon approval of its permit, the applicant must post the required performance bond or provide an equivalent guarantee.\footnote{150. 405 KY. ADMIN. REGS. 8:010 § 16(5) (1987).}} With certain exceptions,\footnote{151. 405 KY. ADMIN. REGS. 8:010 § 16(5) (1987).} failure to begin an operation within three years of the issuance of the permit will result in its termination.\footnote{152. 405 KY. ADMIN. REGS. 8:010 § 17(2)(b) (1987).} In addition, the permittee operates under the permit subject to certain conditions specified in the regulations, including limitation to the terms of the permit,\footnote{153. 405 KY. ADMIN. REGS. 8:010 § 18(1) (1987).} provisions for right of entry
of certain government officials,154 and requirements for preservation of the environment.155

B. Pennsylvania

The Pennsylvania permanent program regulations provide that “[n]o person shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such person has first obtained a permit from the” Department of Environmental Resources (DER), the regulatory authority in Pennsylvania.156 Furthermore, permits are issued only to mine operators.157

The Pennsylvania program makes no provision for a preliminary application or site inspection by DER personnel prior to submission of the permit application. The application process is begun by submission of the complete application. Likewise, there is no provision in the regulations for an “initial completeness” review as in Kentucky158 or a review for “administrative completeness” as in Tennessee.159 Although the general requirements for permit applications in the Pennsylvania regulations are substantially identical to those in the federal program,160 they make no specific provisions for the format of maps to be submitted.

The Pennsylvania program requires the applicant to submit with the application a fee of $250 in the form of a check payable to the Commonwealth of Pennsylvania. The provisions further require a fee of $50 per acre “for all acreage proposed to be used by the mining operation”161 to be paid for all applications for the surface mining of coal.162 The acreage must “correspond to the acreage bonded and the fee may be paid at the time the bond is provided for the permit.”163 The verification provision regarding the truth-

155. 405 KY. ADMIN. REGS. 8:010 § 18(3) (1987).
156. 25 PA. CODE § 86.11(a) (1987).
157. 25 PA. CODE § 86.11(b) (1987).
158. 405 KY. ADMIN. REGS. 8:010 § 5(c) (1987).
159. 30 C.F.R. § 773.13(a) (1988).
161. 25 PA. CODE § 86.17(b) (1987).
162. Id.
163. Id.
fulness of the statements in the application in the Pennsylvania regulations is the same as in the federal program.164

1. Required Legal, Financial and Compliance Information

The Pennsylvania requirements for legal, financial and compliance information contain all the analogous requirements of the federal program. There are several requirements in the Pennsylvania program, however, not found in the federal regulations.

With regard to information concerning right of entry, the applicant must state whether its right of entry is "the subject of pending court litigation."165 Additionally, the applicant must provide either a written consent to the proposed operation of the owner of the property to be mined166 or a copy of "the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods and an abstract of title relating such documents to the current surface landowner."167 The applicant also must submit with the application, upon a form provided by the DER, the written consent of the landowner for the applicant and DER representatives to enter upon the land during the period of the operation.168

As in Kentucky, the Pennsylvania program provides that permits with terms in excess of five years will only be issued if the applicant includes in the application written confirmation from the intended financial source that a permit term in excess of five years is required in order to obtain necessary financing for the operation.169 Further, the application must be "full and complete for the longer term."170

2. Public Notification

The Pennsylvania regulations require the applicant for a permit, as a first step after the submission of the application, to place, at

164. 25 PA. CODE § 86.18 (1987).
165. 25 PA. CODE § 86.64(a) (1987).
166. 25 PA. CODE § 86.64(b)(1) (1987).
167. 25 PA. CODE § 86.64(b)(2) (1987).
168. 25 PA. CODE § 86.64(c) (1987).
169. 25 PA. CODE § 86.40(a) (1987).
the time of filing the application with DER, an advertisement in a local newspaper giving notice of the application.\textsuperscript{171} With a few exceptions, the requirements for the content of the advertisement are substantially identical to those of the federal program.\textsuperscript{172}

Like the Kentucky regulation, the Pennsylvania program requires the applicant to state in the advertisement the name of the appropriate USGS maps describing the permit area.\textsuperscript{173} The concise statement regarding affected roads required in the federal program unless other arrangements have been made is required to be made in the advertisement.\textsuperscript{174} The provisions require a similar statement if the applicant intends to mine within 100 feet of a stream.\textsuperscript{175}

The proof of publication requirement in the Pennsylvania program is more stringent than the federal requirement. Specifically, the applicant must submit the original notarized statement of the newspaper that the published public notice requirement is being met.\textsuperscript{176}

The applicant must file a complete copy of the application with a public office approved by DER in the county where the mining activity is to take place.\textsuperscript{177} In addition, the application must be available there for public inspection and copying.\textsuperscript{178} Information which is to remain confidential must be clearly marked as such and submitted separately from the remainder of the application.\textsuperscript{179}

3. Public Comment and Objection

The DER will receive all comments on and objections to the permit application until thirty days after "receipt of notice or publication in the Pennsylvania Bulletin or within thirty days after the

\begin{footnotes}
\footnote{171. 25 PA. Code § 86.31(a) (1987).}
\footnote{172. Id.}
\footnote{173. 25 PA. Code § 86.31(a)(2)(iii) (1987).}
\footnote{174. 25 PA. Code § 86.31(a)(5) (1987).}
\footnote{175. 25 PA. Code § 86.31(a)(6) (1987).}
\footnote{176. 25 PA. Code § 86.70 (1987).}
\footnote{177. 25 PA. Code § 86.31(b) (1987).}
\footnote{178. Id.}
\footnote{179. 25 PA. Code § 86.35(b) (1987).}
\end{footnotes}
last publication of the newspaper advertisement placed by the applicant," as required. Following this comment period, DER will immediately transmit comments and objections so received to the applicant. The Pennsylvania regulations provide that "any person or the officer or head of any Federal, State or local government agency may, in writing, request that the Department hold an informal conference on any application for a permit." This provision is more liberal than either the federal or Kentucky programs, which limit participation to government officers and people who are or might be directly affected by any determination on the permit. Other provisions regarding the conference are substantially identical to the federal provisions, however.

4. Criteria for Permit Approval

In a manner similar to the federal program, the Pennsylvania regulations require that DER make certain findings in order to issue a permit. Although the Pennsylvania program provisions include all the terms of the federal program, some of the required findings go beyond the requirements of the federal regulations, including the following:

1) The applicant must demonstrate that there exists no presumptive evidence of potential pollution of the waters of Pennsylvania.

2) The permit area must not be within specified distances of certain protected areas, including roads, inhabited houses, and streams.

3) A right of entry must be obtained for each parcel of land affected by the permit.

4) The applicant must have submitted proof that any violations by the applicant or a related party concerning coal mining or any rule or other provision promulgated by the DER, or any law, rule or regulation of the United States or any state law promulgated pursuant to a federal law dealing with air or water quality are in the process of being corrected to the satisfaction of DER or the relevant regulatory authority.\textsuperscript{189}

5) DER must find that there exists no history of such violations as would demonstrate the applicant’s inability to comply with the provisions of the permanent regulatory program.\textsuperscript{190}

5. Permit Review

The Department will approve or deny an application for a permit within sixty days of the close of an informal conference or within a “reasonable time” following receipt of the complete application if no informal conference has been held.\textsuperscript{191} Generally, failure to begin mining pursuant to the permit within three years of the issuance of the permit will result in the permit’s termination.\textsuperscript{192}

The Department issues permits subject to certain conditions, and the permittee must conduct its operation pursuant to the provisions of the permit and application.\textsuperscript{193} For example, the representatives of the Commonwealth retain a right of entry to the permit area.\textsuperscript{194} Likewise, the permittee may only affect by coal mining those lands covered by the permit for which a bond has been filed\textsuperscript{195} and must agree to take all possible steps to prevent adverse impact of the mining activity on the environment or public health and safety due to noncompliance with the permit.\textsuperscript{196}

\textsuperscript{192} 25 PA. Code § 86.40(b) (1987).
\textsuperscript{194} 25 PA. Code § 86.41(2) (1987).
\textsuperscript{195} 25 PA. Code § 86.41(3) (1987).
\textsuperscript{196} 25 PA. Code § 86.42 (1987).
C. West Virginia

The West Virginia permanent program application requirements parallel significantly those provided in the federal program; the general disclosure requirements are substantially identical. The major difference the practitioner will discover, however, is that the provisions of West Virginia's permanent regulatory program are contained in the West Virginia Code rather than in the code of State Regulations. That portion of the West Virginia Code detailing the legal, financial and compliance information required also contains requirements found in the provisions for the applicant's operation and reclamation plan in the permanent programs of Tennessee, Kentucky and Pennsylvania. However, the legal, financial and compliance information required under the West Virginia permanent program is the same as that required in the federal program outlined in the preceding sections. With regard to information concerning identification of interests, the West Virginia regulations provide not only that the applicant provide the Department of Energy with the names of all owners of land contiguous to the proposed permit area, but also that the applicant notify these owners of its application "on or before the first day of publication" of the newspaper advertisement notice.

The applicant must submit as part of the application "a certificate issued by an insurance company authorized to do business in this state covering the surface-mining operation for which the permit is sought, or evidence that the applicant has satisfied state self-insurance requirements." Proof of insurance is required on an annual basis.

As in Kentucky and Pennsylvania, the regulations in West Virginia explicitly state that permits will be granted for terms longer than five years only where the applicant demonstrates that a longer

200. Id.
permit term is required in order to acquire financing for the operation and where the application is complete for the longer term. However, the provision does not stipulate how the applicant may demonstrate that the longer term is necessary.

The applicant must include with its application a $1000 application fee (in the form of a check). Upon filing its application with the Department of Energy, the applicant must place an advertisement in a newspaper of general circulation in the county of the proposed permit area. The requirements for the advertisement are substantially identical to those of the federal program. The advertisement must be published at least weekly for four weeks and may begin to be published upon receipt of notice from the Commissioner that the application is complete. The advertisement must contain a statement setting forth the ownership of the proposed permit area, as well as “a map of the tract location and boundaries of the proposed site so that the proposed operation is readily locatable by local residents, [and] the location of the office of the department of energy where the application is available for public inspection.” The advertisement must further state that “written protests will be accepted by the commissioner until a certain date which shall be at least thirty days after the last publication of the applicant’s letter.” A copy of the advertisement is to accompany the application.

1. Public Notice

The Commissioner of the Department of Energy notifies the affected government agencies and sewage and water treatment authorities that have an interest in or jurisdiction over the proposed

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204. Id.
207. Id.
210. Id.
211. Id.
212. Id.
permit area and the mining operation.\textsuperscript{213} Any person who has an interest that is or may be affected by the determination on the permit, and any official or head of a federal, state or local agency which was notified by the Commissioner may file written objections with the Commissioner within thirty days after the publication of the last of the four consecutive notices.\textsuperscript{214} Comments from the notified agencies and objections from any interested parties are immediately communicated to the applicant.\textsuperscript{215} If any party requests an informal conference within thirty days of the publication of the last of the four consecutive weekly notices, the request is granted.\textsuperscript{216} All provisions set forth in the federal program apply to this conference.\textsuperscript{217}

2. Permit Review

Within five working days of receipt of the application, the Commissioner must notify the applicant as to the application's completeness.\textsuperscript{218} If it is incomplete, the Commissioner notifies the applicant of the reason for the deficiency.\textsuperscript{219} Within sixty days of receiving the complete application or within thirty days of the close of any informal conference regarding application, the Commissioner must approve or disapprove the application.\textsuperscript{220} If the Commissioner disapproves the permit or takes action after an informal conference, he must provide the applicant or any parties to the conference with a written report of his findings and the reasons for his actions.\textsuperscript{221} An applicant may appeal a disapproval within thirty days of such action to the Reclamation Board of Review.\textsuperscript{222} If the Commissioner approves the application, he issues the permit.\textsuperscript{223}

\textsuperscript{213} W. VA. CODE § 22A-3-20(a) (Repl. Vol. 1985).
\textsuperscript{214} W. VA. CODE § 22A-3-20(b) (Repl. Vol. 1985).
\textsuperscript{215} W. VA. CODE §§ 22A-3-20(a), (b) (Repl. Vol. 1985).
\textsuperscript{216} W. VA. CODE § 22A-3-20(b) (Repl. Vol. 1985).
\textsuperscript{217} Id.
\textsuperscript{218} W. VA. CODE § 22A-3-8(g) (Repl. Vol. 1985).
\textsuperscript{219} Id.
\textsuperscript{221} W. VA. CODE § 22A-3-21(b) (Repl. Vol. 1985).
\textsuperscript{222} W. VA. CODE § 22A-4-1(a) (Repl. Vol. 1985).
\textsuperscript{223} W. VA. CODE § 22A-3-21(b) (Repl. Vol. 1985).
The Reclamation Board of Review, continued by section 1, article 4, chapter 22 of the W. VA. CODE, is a five-member board, the members of which are appointed by the governor for terms of five years each with the advice and consent of the Senate. Actions may be brought before the Board by any party permitted to take part in the informal hearing. The Board conducts a *de novo* review of the appeal, allowing any party to bring evidence before the board. If the Board finds the decision appealed from to be lawful and reasonable, it issues a written order affirming the decision. Otherwise, it issues a written order reversing or modifying the decision.

Findings required of the Commissioner prior to approving the application are substantially similar to those provided for in the federal program. The West Virginia program, however, does require the Commissioner to affirmatively find that neither the applicant nor any associates or operations under its control are in violation of any of the provisions of the West Virginia permanent program or any other environmental laws or regulations. If the Commissioner is unable to make such a finding, he may nevertheless issue the permit, provided the applicant demonstrates that the violations in question have been or are being corrected.

If the mining operation has not begun within three years of the issuance of the permit the permit will terminate, except in special circumstances, as where the delay is beyond the control of the operator.

IV. Summary

The various states, in enacting permanent programs pursuant to SMCRA, have created programs with small but potentially trou-
blesome procedural differences. The differences are ones of which practitioners working with analogous laws in a neighboring state for the first time should be aware.

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