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The Protection of Hydrologic and Land Preservation Values under the Surface Mining Control and Reclamation Act of 1977: A Welcome Reform

David Wooley
Appalachian Research and Defense Fund, Inc.

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THE PROTECTION OF HYDROLOGIC AND LAND PRESERVATION VALUES UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: A WELCOME REFORM

DAVID WOOLEY*

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I. INTRODUCTION

Amid the huge controversy over the passage and implementation of the Surface Mining Control and Reclamation Act of 1977,' it is too easy to forget the fundamental reasons for its passage. In a word, the reason is "water." It is water which makes the eastern mountains so lushly green and has shaped the beautiful Appalachian terrain. Water is also, however, part of a delicate yet pow-

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* B.A., Rutgers University, 1972; J.D., Rutgers University School of Law, 1975. Mr. Wooley served as a law clerk with the United States Court of Appeals for the Third Circuit, 1975-1976, and is currently a staff attorney with the Appalachian Research and Defense Fund, Inc., Charleston, West Virginia.

erful system which, when disturbed, strips away exposed topsoil, becomes contaminated by uncovered acid bearing material, and creates landslides, floods and ruined lands. It was a recognition of the problems associated with water which, more than any other single element, led to the passage of the Act. The hydrologic and land use impacts of the anticipated coal boom of the 1980's must be fully understood and controlled in order to prevent the complete ecologic collapse of the Appalachian region.

From a coal industry point of view, it is important to recall that the problems addressed in the SMCRA did not originate with the first irate citizen or meddling environmentalist. They also did not begin with the passage of environmentally oriented laws and regulations, or with the first visits by government inspectors. Rather, these problems arose from the basic fact that the interaction of strip mining and Appalachian hydrology naturally tends to produce the terrible morass of landslides, impassible haulroads, topsoil loss, aggravated flooding, liability for property damage, stream pollution and other conditions which cut into industrial profits and inflame the local populace. The recognition of these problems coincides with an era in which the ancient unrestrained prerogatives of the American private enterprise system are being weakened by the expansion of government regulatory power.

Currently, the strip mine industry is making an all-out attack, at the administrative, judicial and legislative levels, upon the extensive and complex nature of the Act and its regulations. The industry has been joined and supported in its attack by state officials in West Virginia. However, it is important for all persons involved in this controversy to recall that the complexity of the Act is dictated by the complexities of nature and especially the behavior of its key component—water. We are just beginning to understand many of the factors necessary to ensure the survival of an ecosystem or watershed. We are just beginning to comprehend the full consequences of destroying the ecology of small and large segments of water systems and biological chains.²

² There are many current examples which demonstrate the rudimentary state of our knowledge about the full effects of strip mining and the surface effects of underground mining. Specialists utilizing state of the art technology are now trying to determine a way to: (1) abate the toxic mine drainage originating in abandoned deep mines which threatens the Laurel Creek and a portion of the New River in Fayette County, West Virginia; and (2) extinguish a burning coal seam near Marks Branch (New Town), Mingo County, West Virginia. Too little is known about the movement of groundwater and oxygen through buried acid strip mine overburden
Hence there is a need for a technically sophisticated system of controls to prevent the unnecessary destruction resulting from strip mining and the surface effects of underground mining. We are evolving toward such controls today, but we have by no means achieved an adequate understanding or ability to predict or control all of the consequences of the late twentieth century coal boom. Our struggle with technical problems is further complicated by the simultaneous evolution in our understanding of, and experience with, democratic processes and regulatory methods. The questions of whether society will succeed in preserving the integrity of the environment, in developing the essential democratic decision making mechanisms, and in achieving an effective regulatory program now hang in the balance. From my perspective, there is cause for both hope and alarm.

This article will sketch some of the advances which the SMCRA achieves over earlier regulatory and technical controls undertaken in the state of West Virginia. It seems appropriate to use the West Virginia regulatory program as a source of comparison because West Virginia’s Surface Mining and Reclamation Act of 1971 is widely regarded as the toughest state statute in the

on the Buckhannon and Birch River Watersheds in West Virginia. There are unanswered questions concerning the role of bacteria and organic matter in the process of long term revegetation of strip mine sites. As a final matter, experts disagree on the extent of pollution and sediments controls necessary to protect fresh water organisms. See Birge, Hudson, Black and Westerman, *Embryo-Larva Bioessays on Inorganic Coal Elements and In Situ Biomonitoring of Coal Waster Effluents* 97 (proceedings of SYMPOSIUM, SURFACE MINING AND FISH/WILDLIFE NEEDS IN THE EASTERN UNITED STATES, W. Va. University and United States Dep’t of Interior Fish and Wildlife Service, Dec., 1978) [hereinafter cited as SYMPOSIUM].

Citizens of the recently devastated Tug River Valley (making up the southwestern border of West Virginia) are petitioning for a study of the presently unascertainable effects of massive strip mine activity on watershed flooding. Knowledge concerning landslide prevention in Appalachia is confined to a few specialists. It is, therefore, clear that the difficulties inherent in developing a sound regulatory system in the midst of such ignorance should not be underestimated.

The incredible proliferation of our species and demand for resources has forced us to operate far beyond our understanding, possibly at great expense to the future generations. The most important single concept of ecology is that there exists a vast complex interrelationship between all elements of our natural world. Not even the simplest of natural systems is understood. The worth of maintaining our natural diversity cannot be underestimated.

Harker, *Suitable or Unsuitable—A Question of Dubious Resolution* 49, SYMPOSIUM, *supra*.

\(^2\) W. Va. CODE §§ 20-6-1 to -32 (1978 Replacement Vol.).
nation. This article will also point to some of the haunting failures which have occurred at the federal and state regulatory levels during the interim stages of the SMCRA's implementation. The discussion will focus primarily on hydrologic and land use controls and upon some critical yet unresolved legal issues which must be addressed in the near future.

II. SMCRA IMPROVEMENTS OVER PREEXISTING STATE STATUTORY AND REGULATORY LAW

The SMCRA was passed less than seven years after the enactment of the historic West Virginia Surface Mining and Reclamation Act of 1971. In those years, West Virginia and the nation have grown in both their awareness of the hazards of strip mining and in their technical ability to control those hazards. The West Vir-

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4 The "interim" stage of implementation is established in 30 U.S.C.A. § 1252 (West Supp. 1978), which sets into effect certain of the most critical environmental performance standards and basic enforcement structures contained in the Act. All existing strip mines were required to abide by these selected standards as of May 3, 1978. All permits received by a state agency after February 3, 1978, must contain terms consistent with the interim standards. The interim regulations were published in the Federal Register on Tuesday, December 13, 1977. See 42 Fed. Reg. 62,639 (1977) (to be codified in 30 C.F.R. §§ 700.1 to 837.16) [all citations to the Federal Register are hereinafter cited directly to the page upon which the material appears]. Permanent regulations to implement the remaining performance standards, and establish a full regulatory system were published in the Federal Register on March 13, 1979. See 44 Fed. Reg. 15,312-463 (1979) (to be codified in 30 C.F.R. §§ 700.1 to 815.15).

The states are required under the SMCRA to pass equivalent laws and regulations in order to qualify for primary authority to regulate strip mines, the surface effects of deep mines and to receive substantial federal grant money. 30 U.S.C.A. § 1253 (West Supp. 1978). During the 1978 West Virginia legislative session, the West Virginia Surface Mining and Reclamation Act was amended so as to authorize the Department of Natural Resources to promulgate regulations and issue permits consistent with the SMCRA. See W. Va. Code § 20-6-23a (Cumm. Supp. 1978). State interim regulations were promulgated on August 14, 1978. See W. Va. Surface Mining Regulations, 20-6, series VII (1978). These regulations were in most respects similar to the federal interim regulations except as noted in part IV of this article. Citation to these new regulations, (1978), is to be distinguished from citation to the earlier state regulations, (1971), by the dates which will appear in the text or footnote.

5 W. Va. Code §§ 20-6-1 to -32 (1978 Replacement Vol.). During the publication of this article, the West Virginia Legislature enacted a new surface mine law which merely extended the effect of § 20-6-23a for an additional year. See supra note 4. As yet, the state does not have an adequate law necessary to allow the state to be granted primary enforcement authority pursuant to the SMCRA. See note 152, infra, and accompanying text.
ginia Act, although generally regarded as well developed legislation, contains many inadequacies which have been corrected in the SMCRA. Many critics, however, have argued that there has been poor enforcement of the West Virginia Act. It is therefore unclear whether state or federal implementation of the SMCRA in West Virginia will effectively correct these inadequacies.8

a. Protection of the Hydrologic Balance

There are several significant ways in which the SMCRA is superior to prior state approaches in the prevention of water pollution and damages from unnatural water flow. The primary hydrologic hazards associated with strip mining include: a) pollution of surface and ground water with sediment (suspended solids); b) pollution of surface and groundwater with iron, sulfate, salts, toxic bearing metals and acid forming materials;7 c) soil erosion; d) de-

8 One of the findings of the SMCRA is that, because of the diverse nature of lands subject to strip mining, primary governmental responsibility for the regulation of surface mining and reclamation should rest with the states. 30 U.S.C.A. § 1201(f) (West Supp. 1978). One of the stated purposes of the Act is to “assist the states in developing and implementing a program to achieve the purposes of this Act.” Id. § 1202(g). Consistent with these principles, sections 405 and 503 establish a procedure by which the states can take over the primary enforcement role under the SMCRA. Id. §§ 1235, 1253. The states may choose not to take over enforcement or may fail to propose an adequate program, in which case the Office of Surface Mining, (OSM), is mandated to establish a program to assume the primary enforcement role and implement a federal program no later than June 3, 1980. Id. § 1254. It is generally expected that most states will choose to apply for “primacy” in order to receive the substantial federal grants and to appease local industry which generally prefers state rather than federal enforcement personnel. The state primacy applications are due to be submitted to OSM in August of 1979. 30 U.S.C.A. §§ 1253(a), 1254(a) (West Supp. 1978). OSM must rule on the adequacy of the program plan submitted by each state by April 3, 1980. 44 Fed. Reg. 15,326-28 (1979) (to be codified in 30 C.F.R. §§ 732.1-.17). Until then, the mix of federal and state enforcement activity as conceived in the interim program remains in effect. Once a state program is approved, OSM will assume what is primarily an oversight function. It will, however, retain enforcement powers. See 30 U.S.C.A. §§ 1267, 1271 (West Supp. 1978).

stabilization of stream channels and banks; e) flooding from sediment pond or water impoundment failures; f) flooding from increased runoff (from unvegetated areas) and the accompanying loss of flood carrying capability of streams clogged with silt deposits and debris; and g) reduced ground water table from blasting and other aquifer disturbance.

To rural people who are without access to manmade water systems, uncontaminated well and stream water are of paramount importance. Severe pollution of well water can result in the depopulation of rural areas since such contamination is virtually impossible to reverse. Streams provide fish, recreation, and water supply for small farms, residences, wildlife, livestock and irrigation. Cumulative damage to headwater streams results in the gradual destruction of major rivers where pollution and its effects are carried hundreds of miles downstream creating added maintenance expenses for public water systems, reservoirs and navigation, and the loss of recreational values.

Congress recognized these values by announcing in section 515(b)(10) of the SMCRA that strip miners, in addition to merely treating the effects of pollution, must minimize disturbances to the entire "hydrologic balance" of the mine site.9 This comprehensive and long term approach to hydrologic problems is reflected in the several improvements which the SMCRA achieves over prior West Virginia legislation. For the first time, West Virginia strip miners are now required to monitor the quality and quantity of groundwater.10 In most areas this monitoring must be performed through the use of wells. Previously, little if any of such monitoring had been performed in the state. This has resulted in a corresponding lack of understanding of West Virginia's groundwater systems. The

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9 A. Galbraith, A WATER YIELD AND CHANNEL STABILITY ANALYSIS PROCEDURE—KOOTENI NATIONAL FOREST (U.S. Dep't of Agriculture, 1973).
   The objective of this section is to have the permittee research and to understand the hydrologic balance in the affected area so that operations are planned and conducted to minimize disturbances both on and off-site. . . . It is necessary for permittee to project long-term trends toward restoring the balance . . . [and] plan operations to control ground water quality and flow, to minimize the impact on the hydrologic balance, and to prevent adverse changes over the long term.

data generated by this requirement will eventually result in the identification of sensitive areas or geologic configurations which may need the added protection of modified operation methods or may need to be designated as areas unsuitable for strip mining." Presently, we are operating in an informational vacuum which is exemplified by the shortage of qualified hydrologists and geologists in the Appalachian region.

Groundwater monitoring is complemented by the requirement that all applicants for a strip mine permit identify the location of all subsurface water at the site. This will prevent the unwary operator from causing difficult or irreversible water quality or land stability problems and will ensure the adequacy of plans for drainage systems, spoil disposal and disposal of acid producing material. There was no such requirement under prior West Virginia regulations.

The federal application requirements are far more complete than prior state practice. All applications for strip mine permits must contain "a determination of the probable hydrologic consequences" of the mining and reclamation operations. The applicant must collect and submit data concerning the "quality and quantity of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions. . . ." The permitting authority is further required to use this data to assess the cumulative hydrologic impacts of all anticipated mining in the area. No permits can be granted until this information is available and incorporated into the permit application.

Where a permit is issued, the operator is under a continuing obligation to demonstrate through monitoring data that surface water leaving the site after reclamation meets the established water quality standards without treatment, and that the surface

11 30 U.S.C.A. § 1272 (West Supp. 1978). This section establishes a mechanism for declaring certain geographic areas off limits to strip mining where reclamation as required by the SMCRA is not technologically and economically feasible. See text accompanying notes 98-105 infra.
12 Id. § 1258(a)(12).
13 Id. § 1258(a)(11).
14 Id.
15 Id. See also 30 U.S.C.A. § 1260(b)(3) (West Supp. 1978) (permit approval criteria).
16 Id.
water is not otherwise upsetting the prevailing hydrologic balance.\textsuperscript{17} Where the operator cannot make such a demonstration, he is not entitled to the release of the reclamation bonds\textsuperscript{18} and future permit applications for the same geographic area or same operator may be denied.\textsuperscript{19}

The data resulting from these requirements will, or should, have tremendously important consequences as land use planning tools. When used in conjunction with the provisions for "designating lands unsuitable for mining,"\textsuperscript{20} these requirements will eliminate the piecemeal destruction of watersheds. Such destruction was a characteristic of a permit by permit decision-making process. This represents a recognition of the fact that while any one permit may not in and of itself result in irreparable damage to a large watershed area, a pattern of mining development can over time be disastrous. The Act therefore requires state and federal permitting authorities to assess cumulative impacts and apply that assessment in the consideration of each individual permit application.

These requirements will demand a much higher degree of technical skill and administrative sophistication than is currently possessed by the West Virginia Department of Natural Resources (DNR) and most other state agencies. To meet these requirements, the states must develop a concerned and professional attitude toward land use planning. This will be difficult to achieve in West Virginia where there has been a traditional hostility towards land use planning and a history of political interference in administrative decision-making. Perhaps the largest unanswered question under the Act is whether current state agencies and officials can abandon primitive and narrowly focused decision-making practices so as to embrace modern planning and data collection concepts.\textsuperscript{21} Recent expressions of arrogant and rigid belief in past

\textsuperscript{17} 42 Fed. Reg. 62,685 (1977) (to be codified in 30 C.F.R. § 715.17(b)(v)(2)).
\textsuperscript{18} See 30 U.S.C.A. § 1259 (West Supp. 1978) (performance bonds, terms and conditions); Id. §§ 1269(b), (c) (bond release); Id. § 1271(a)(4) (revocation and suspension of permits).
\textsuperscript{19} Id. § 1260(b)(2), (c).
\textsuperscript{20} Id. § 1272.
\textsuperscript{21} In comments submitted to OSM concerning the proposed permanent regulations, the West Virginia Department of Natural Resources objected to a proposed requirement for detailed information in strip mine applications pertaining to fish and wildlife resources. Letter from DNR to OSM, Comments on Proposed Permanent Regulation § 783.16 (Nov. 22, 1978). The state also objected to the necessity of requiring other information regarding hydrologic impacts.
practices by state regulatory officials in DNR’s Reclamation Division lead many critics to fear that such sophisticated innovations cannot be assimilated or tolerated by old school administrators who do not possess the orientation or will to implement such goals. The shortage of trained professionals and technical experts will also hamper effective implementation. The nation’s evolution toward effective regulation of the strip mine industry will require many old patterns to be broken, many an administrator’s turf to be torn up and many outmoded attitudes to be overcome. Whether the Department of Interior’s Office of Surface Mining, (OSM), has the will to bring about these changes is also questionable given recent experience.

b. Water Contamination From Strip Mine Overburden and Deep Mines

The past failure of DNR to prevent the contamination of West Virginia rivers with acid and other pollutants through regulation is clearly evident. As a result of unplanned and ignorantly conceived strip and underground coal mining, the Monongahela River Basin (draining much of northern West Virginia) carries more mining related pollution than any other river in the nation. Acid problems are severe or potentially severe on the Buckhannon, Elk, Little Kanawha, Cheat, West Fork and Tygart Rivers.

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22 DNR Reclamation Division officials believe that the SMCRA will not result in improvements over the state’s past program. They have adopted an uncooperative attitude toward federal agency personnel (which is curiously similar to the attitude of many industry representatives). DNR press statements during late 1978 and early 1979 have been filled with prophesy of doom for the industry. These predictions have often been based on misinterpretations of the SMCRA and regulations. These actions have, in part, resulted in DNR’s inability to convince the 1979 West Virginia Legislature to upgrade the state law to incorporate new federal requirements. Although DNR invested a great deal of time to come up with adequate legislation, there was insufficient support in the legislature to even have it introduced. These events could well lead to the establishment of a federal program having primary enforcement power in West Virginia and the denial of a substantial federal funding to DNR. This could eventually result in the dismantling of DNR’s Reclamation Division. In some ways this would be regrettable, but it can not be avoided unless state officials make a good faith effort to improve the state program and to impress the benefits of the SMCRA upon legislative and industrial leaders.


24 W. Va. Dep’t of Natural Resources, Existing and Potential Adverse Impacts of Coal Mining on the Buckhannon River Watershed (undated).

25 Jernejcic, Effects of Mining on Tygart Lake, SYMPOSIUM supra note 2, at 146;
in the southern portion of the state, while generally escaping acid coal seams and overburden, are often prone to contamination from sulfates and iron.

Although legally authorized to do so,\textsuperscript{26} West Virginia has never made a comprehensive attempt to control damage to streams from toxic deep mine drainage. It was not until 1977 that the state put minimal controls on surface disturbances around and incident to new deep mines.\textsuperscript{27} These controls have proven ineffective because DNR does not have sufficient inspection personnel to enforce the requirements on the approximately 900 active deep mines in the state. The state has never even set water quality standards for sediment and iron.\textsuperscript{28} The sulfate standard was deleted in 1976. In addition, the Environmental Protection Agency, (EPA), has made almost no attempt to enforce the National Pollution Discharge Elimination System requirements for coal mines of the Federal Water Pollution Control Act of 1972.\textsuperscript{29} A special committee formed by DNR to study acid drainage problems has failed to suggest a solution. The only bright spot in the picture is a recent attempt by the environmental unit of the West Virginia Office of the Attorney General to utilize the common law doctrine of “public nuisance” to force an owner of a closed deep mine to treat, perpetually if necessary, polluted mine drainage.\textsuperscript{30}

\textsuperscript{26} See W. Va. Code §§ 20-5-1 to -16 (1978 Replacement Vol.); W. Va. Code §§ 20-5A-1 to -19 (Cum. Supp. 1978). Under these laws, underground coal mine water pollution problems are to be regulated by DNR’s Water Resources Division. Although the agency has made some progress in combating mine drainage problems, it has been restricted in its efforts by inadequate enforcement tools, funding and personnel. DNR’s proposed legislation, see supra note 22, would have removed the Water Resources Division’s authority over coal mine water pollution and placed it in the Reclamation Division. Although this might make the permit process more efficient, some members of the Water Resources Division have criticized the Reclamation Division as being too conservative and industry oriented and, therefore, oppose the idea for fear of ineffective regulation and enforcement.

\textsuperscript{27} W. Va. Code § 22-2-63 (1978 Replacement Vol.).

\textsuperscript{28} New membership on the state’s Water Resources Board holds open the possibility of at least achieving adequate water quality standards in the near future.

\textsuperscript{29} 33 U.S.C.A. § 1342 (West Supp. 1978). After repeated threats of citizen suits, EPA finally began issuing permits for mining operators in 1977. The issuance of the permits was not, however, followed up with any meaningful enforcement.

\textsuperscript{30} State v. New River Coal Co., No. C-78-1124 (Fayette Cty. Cir. Ct., W. Va., Feb. 15, 1979) (order granting preliminary injunction). A preliminary injunction was issued requiring the company to prepare a plan for the abatement of toxic deep
In regard to strip mines, DNR's Reclamation Division has continued to issue strip mine permits in acid producing areas despite repeated warnings from personnel of other DNR divisions and EPA that damaging "acid seeps" were occurring on lands reclaimed to DNR's specifications. Repeated requests made by the Wildlife Division to the Reclamation Division to require overburden analysis prior to permitting new strip mines in certain known acid producing areas were ignored in most cases until the summer of 1978 when DNR was required by the SMCRA to upgrade its regulations to meet federal standards.

Although DNR recently began to take actions which may stem the problem on the Buckhannon Watershed, there are other problem areas which remain unaddressed. A good example is the Birch River Watershed. Despite reports of "acid seeps" from "reclaimed" lands, DNR has allowed at least 2,000 additional acres to remain under permit without requiring changes or modifications to avoid acid problems. The Reclamation Division is just

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31 An acid seep may develop when acid producing overburden is buried in a place and manner such that water with oxygen content comes into contact with the overburden creating an acid material which is carried off by the groundwater in solution. The groundwater may be thus contaminated in areas where there are present or future uses of the groundwater for domestic purposes. It may also emerge at the surface and become part of a stream flow where, if in sufficient concentration, it is fatal to fish and other aquatic life. See Gasper, supra note 7; Hill and Grim, Environmental Factors in Surface Mine Recovery (1975) (presented at Symposium on the Restoration and Recovery of Damaged Ecosystems, Va. Polytechnic Inst. and State University, Blacksburg, Va., March, 1975); Gasper, DNR Memorandum: Kittanning Mine Acid Task Force Tour (Nov. 29, 1978).

32 News articles have reported that the Director of the Department of Natural Resources has objected to the federal requirement for groundwater monitoring. "You're talking about groundwater. We don't have any trouble with water here." Charleston Gazette, Jan. 17, 1979, at 2A, col. 3.

33 The operations in question had not initiated mining when the permits were discovered by citizens group researchers. In addition to the acid problem, the permits were plainly inconsistent with the SMCRA's requirements regarding return to approximate original contour. 30 U.S.C.A. § 1265(b)(3) (West Supp. 1978). These facts were brought to the attention of DNR which responded in February, 1979, by informing the operators that they must upgrade their permit applications before beginning operations on the sites. The notice did not mention the acid problems. Each of the permits had been previously reviewed by DNR after the enactment of the SMCRA without any changes in permit conditions.
now learning that its past method of dealing with acid producing material (by simply burying it under four feet of overburden) is often inadequate to prevent water and oxygen from reaching it and producing an acid groundwater problem.

The SMCRA will correct most of these problems. Requirements for premining chemical analysis of overburden\textsuperscript{31} and premining hydrologic surveys\textsuperscript{35} will, for the first time, give us an accurate picture of the potential for acid drainage. The Act contains express prohibitions against the contamination of surface and ground waters from acid materials.\textsuperscript{38} The Act also places new requirements on the location of disposal sites, the time limits for the burial and treatment of overburden (from the time of exposure) and the plugging of boreholes, shafts, wells and auger holes.\textsuperscript{37}

In regard to underground mines, the Act prohibits the construction of such mines in a manner which allows "gravity discharge" of water from acid or iron producing coal seams.\textsuperscript{39} There are now much more effective controls concerning the hydrologic surface effects of underground mine activity than have existed under state law, and federal grant money has already provided the states with badly needed personnel to control the surface effects of underground mines.\textsuperscript{39}

Other innovations made by the SMCRA bearing on water quality include: a) tighter restrictions on disturbance, relocation and diversion of stream beds;\textsuperscript{40} b) a prohibition, with a variance provision, on strip mine interception of deep mine workings

\footnotesize{
\textsuperscript{35} Id. §§ 1257(b)(11), (14).
\textsuperscript{35} Id. § 1265(b)(14).
\textsuperscript{37} See 42 Fed. Reg. 62,696, 62,698 (1977) (to be codified in 30 C.F.R. §§ 717.17(g), 717.14(e)).
\textsuperscript{39} 30 U.S.C.A. § 1266(b)(12) (West Supp. 1978). State officials object to this requirement citing instances where water impounded in down dip mines has burst out at weak spots in the mountain. This hazard appears avoidable by leaving adequate undisturbed barriers coupled with more careful placement of drainage and exploration shafts at the lower end of the seam.
\textsuperscript{39} Controls are established on the surface disposal of mine waste piles, subsidence, sealing of unneeded portals, entry ways, drifts, open shafts, hydrologic balance, revegetation requirements, water pollution abatement requirements, permit bonding and enforcement provisions. 30 U.S.C.A. § 1266 (West Supp. 1978).
}
("daylighting") to prevent breakouts of untreated and often toxic impounded mine waters;"41 c) the first statutory protection of landowners whose water supplies are adversely affected by strip or underground mines, including a requirement that a substitute water supply be procured at the operator's expense if the premining water supply is contaminated or lost;"42 d) stricter limits on the allowable amounts of iron, manganese and total suspended solids in water leaving a strip or underground mine site;"43 e) the first uniform prohibition on the discharge or diversion of surface water into underground mine workings;"44 f) larger buffer zones of undisturbed vegetation and topsoil which must be maintained between the mining operation and streams;"45 and g) new restrictions on the placement of excess spoil piles."46

41 Past state practice was to allow operators to "daylight" with the requirement that there be treatment of any polluted waters issuing from the deep mine. Unfortunately, this did not take into account the potential for substantially increased flows in downstream areas from sudden breakouts of large quantities of water capable of causing short term flood conditions. Furthermore, unless the operator was prepared in advance to treat mine drainage, and unless the drainage occurred at a place and in amounts convenient for the location of treatment facilities, much contaminated water could escape before adequate treatment methods were devised. Compare W. Va. Surface Mining Regulations § 8(e) (1971) with 30 U.S.C.A. § 1265(b)(12) (West Supp. 1978).


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<td>70.0 ppm.</td>
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42 Fed. Reg. 62,685 (1977) (to be codified in 30 C.F.R. § 715.17(a)).

44 42 Fed. Reg. 62,688 (1977) (to be codified in 30 C.F.R. § 715.17(n)).

45 The buffer zone has been increased from the old state standard of 50 feet to 100 feet under federal law. Compare W. Va. Surface Mining Regulations § 7.02 (1971) with 42 Fed. Reg. 62,686 (1977) (to be codified in 30 C.F.R. § 715.17(d)).

c. Sediment Pond and Water Impoundment Design

The SMCRA requires several new controls concerning sediment ponds and water impoundments. The new requirements are designed to ensure effectiveness in the removal of sediment from mine site drainage and to ensure the safety of the pond or impoundment. The principal new requirements for sediment ponds include: a) a twenty-four hour detention time for water inflow entering the pond from a ten year, twenty-four hour precipitation event;\(^47\) b) a design to prevent sediment flow through the pond ("short circuiting");\(^48\) c) principal and emergency spillways capable of safely passing runoff from a twenty-five year, twenty-four hour precipitation event and other spillway safety specifications;\(^19\) d) restrictions on the height and top width of embankments, up and downstream slopes, foundation requirements, fill material and construction methods;\(^50\) and e) periodic inspections by registered professional engineers during and after construction.\(^51\) These requirements, along with the water quality standard for sediment, will result in great improvements over past state practices in terms of the protection of the state's streams for water supply, fishing, recreation and flood carrying capacity.\(^52\)

State officials have remarked that these new sediment control requirements will necessitate larger and more complex pond designs, and that in some of the more steep southern West Virginia terrain, such ponds will pose an unacceptable safety risk to down-

\(^47\) 43 Fed. Reg. 52,744 (1978) (to be codified in 30 C.F.R. § 715.171(e)(3)) (these proposed interim regulations were published by OSM pursuant to the directives of the District Court for the District of Columbia in In Re Surface Mining Regulation Litigation, 456 F. Supp. 1301 (D.D.C. 1978), which required OSM to reconsider the sediment pond and head-of-hollow fill regulations). This section provides variances from the standard for pond designs having greater sediment removal efficiency, for certain types of sediment characteristics and for the use of chemical flocculents. See 43 Fed. Reg. 52,744 (1978) (to be codified in 30 C.F.R. § 715.171(e)(2)) (allows special sediment control measures for steep slope areas).

\(^48\) 43 Fed. Reg. 52,744 (1978) (to be codified in 30 C.F.R. § 715.171(e)(5)).

\(^49\) Id. (to be codified in 30 C.F.R. § 715.17(e)(9)).

\(^50\) 43 Fed. Reg. 52,745 (1978) (to be codified in 30 C.F.R. §§ 715.171(e)(10)-(16)).

\(^51\) Id. (to be codified in 30 C.F.R. §§ 715.171(e)(18), (20)).

\(^52\) Compare the regulations cited supra notes 47-52 with W. VA. DEPT. OF NATURAL RESOURCES, DRAINAGE HANDBOOK FOR SURFACE MINING 1-51 (1975). Under prior state practice, sediment ponds were frequently designed by surveyors and often without consideration given to detention time, pond configuration and other elements of design bearing on settling efficiency.
stream residents.\textsuperscript{52} They have prudently pledged not to approve large ponds in such areas. This may mean that some areas of West Virginia will not be strip mined because of the inability of operators to meet the federal sediment control rules. This news is welcomed by many conservationists and steep terrain residents who have in the past frequently complained that DNR regulations were not sufficient to prevent large discharges of silt into area streams which often reduce the fish population and the flood carrying capability of the streams.\textsuperscript{54} Complaints by DNR officials and industry spokespersons are, however, undoubtedly overstated. Section 715.17(e) of the interim regulations promulgated pursuant to the SMCRA provides numerous variances and alternatives from the basic sediment pond size standard.\textsuperscript{55} The industry will certainly have to undertake much more careful planning and will have to change many of the inferior methods used in the past. Here, as in other areas, the industry's despair over new sediment control measures appears to be based more upon its distaste for effective governmental regulation and resistance to unprofitable change, than on its ability to meet the new requirements.

The federal rules establish additional safety requirements for large sediment ponds\textsuperscript{56} and for other water impoundments and dams not intended for sediment control.\textsuperscript{57} Although DNR has had authority since 1973 to establish impoundment and dam design criteria,\textsuperscript{58} it has never formally adopted regulations on point. DNR has, however, used a checklist and various design handbooks involving these criteria when reviewing proposed plans.

Past state control over the reclamation of deep mine waste-

\textsuperscript{52} J. Pittsenbarger, Remarks to the Annual Conf. of the W. Va. Surface Mining and Reclamation Ass'n (197–).  
\textsuperscript{54} Strip mining has been implicated in flooding for another reason. The stripping of vegetation from the land may cause water to runoff much faster than from undisturbed areas, thereby increasing downstream flows. In flood prone areas where the creek bottom and banks have filled with silt, this flow from large strip mines can aggravate flood heights and increase property damages.  
\textsuperscript{55} 42 Fed. Reg. 62,686 (1977) (to be codified in 30 C.F.R. § 715.17(e)).  
\textsuperscript{56} Ponds above 20 feet in height at the embankment must meet the additional criteria specified in 42 Fed. Reg. 62,686 (1977) (to be codified in 30 C.F.R. § 715.17(e)(6)(i)-(iv)).  
\textsuperscript{58} W. Va. Code § 20-5D-4(j) (1978 Replacement Vol.)
piles is similarly dwarfed by the comprehensiveness of the new federal regulations. Improper placement of waste from deep mines and coal preparation plants on valley floors and unprotected stream banks has had disastrous impacts in the form of landslides, water pollution and the loss of productive land. The Abandoned Mine Reclamation Fund established by section 401 of the SMCRA will also help to correct dangerous and pollution causing impoundments (such as the Peach Creek dam in Logan County, West Virginia), and waste piles created by past industry neglect. West Virginia's commitment to meet the need for the reclamation of dangerous impoundments and waste piles was codified in the 1972 Coal Refuse Disposal Control Act and the 1973 Dam Control Act. Neither of these programs has been adequately funded due, in part, to reliance on annual legislative appropriations.

\[d. \] Conservation of Top Soil and Revegetation

A key aspect of successful reclamation and maintenance of post mining water quality is the type of material placed on the surface after the regrading of the overburden. This material must be capable of perpetually supporting vegetation necessary to control erosion. Normally the best material for this purpose is the upper layer of topsoil from the pre-mining surface. The topsoil layer in West Virginia is, however, often very thin on steep hillsides and ridgetops. Consequently, operators must often use other layers of the overburden for top dressing. The two major objectives in steep Appalachian terrain, therefore, should be to conserve what little topsoil there is (for its organic, bacterial and nutrient content) and to make deliberate scientific choices as to the material to be used as supplemental top dressing material.

The prior practice in West Virginia, as reflected by DNR regulations, handled neither of those objectives well. There was no specific requirement that topsoil be removed as a separate layer for

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60 30 U.S.C.A. §§ 1231-1243 (West Supp. 1978). This program is funded by a tax on the production of coal.
61 W. Va. Code §§ 20-6c-1 to -8 (1978 Replacement Vol.). This Act, unlike the SMCRA and the State Dam Control Act, places no restrictions on the creation of new mine refuse piles.
63 In some areas topsoil may be only three or four inches thick.
storage and later use. Operators were not required to perform tests prior to mining in order to be able to select, segregate and protect the material most suitable to support vegetation where topsoil is scarce. Instead, testing was required only "after final grading and before seeding or planting." The state regulations directed the operator to select, based upon what the testing revealed, an appropriate type of plant, including "acid tolerant" species if necessary. Testing was conducted solely for pH (acidity), leaving the operator and regulatory agency in the dark as to such critical factors as the percentage of organic material, nitrogen, phosphorus, potassium and water holding capacity. If testing revealed that the pH for the regraded surface was too low (representing high acid content), the operator was summarily informed that "[n]o vegetation can be expected to survive below pH 3.5 without intensive soil preparation treatment."

Under the state program, planting plans for all areas were not required to be prepared until sixty days after completion and approval of the final grading and backfilling. Section 9B.06 of the past state regulations made it clear that the decision as to which plant species should be used depended upon what kind of material the operator discovers he has placed on the surface. The state program only required DNR to define the amount of lime and a limited variety of fertilizers to be used.

This was clearly an example of backward planning which failed to guarantee that the regraded surface could support vegetation. Typically, problems would arise in the following way: seed

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64 W. Va. Code § 20-6-10 (1978 Replacement Vol.). See also W. Va. Surface Mining Regulations § 8A.06 (1971). Section 8.02 of the 1971 regulations required the removal and stockpiling of topsoil or upper horizon materials only in acid producing areas, but did not define topsoil or require it to be segregated from other "upper horizon" materials.
66 Id. § 9B.04(a).
67 Id. § 9B.03.
68 Under the federal interim regulations, testing for these characteristics is required before mining begins if selected overburden materials is planned for use instead of, or as supplement to, topsoil. 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. § 715.16(a)(4)).
70 Id. § 9B.06.
71 Id. § 9B.06; W. Va. Code § 20-6-10 (1978 Replacement Vol.).
72 Id. § 9C.
73 See 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. § 715.16(d)).
and fertilizer would be lavished upon the regraded overburden creating a green facade dependent upon repeated application of seed and nutrients; after two growing seasons, the revegetation bond was released to the operator who then usually ceased applications of seed and fertilizer. After a few years the fertilizer could wash away or be depleted leaving spoil too acidic or infertile to support adequate vegetation. The result was too often a barren and crusty gullied surface. Often the original topsoil lay buried at the bottom of a pit under tons of lifeless spoil. After the bond was released no further inspections of the site were performed and discovery of subsequent vegetation failure was made, if at all, only by chance. DNR had no further legal authority over the operator after the bond was released.

Revegetation failure was by no means universal, but it brought a sufficient amount of complaints to convince Congress to adopt more stringent requirements. Under federal standards, the topsoil must now be removed in a separate layer for immediate redistribution or storage. Even where topsoil is very thin, the operator must remove at least the top six inches. Operators proposing to substitute other overburden materials for topsoil must now demonstrate in advance to the regulatory authority that the substitute material is “more suitable for restoring land capability and productivity.” In some areas of West Virginia, selected overburden will certainly be more suitable. For the first time, however, the operators and state government officials will be making informed choices.

The SMCRA also contains innovative requirements concerning storage and redistribution of topsoil (or its substitute) in order to ensure uniform thickness and protection against excess compaction, contamination, erosion and slippage. Revegetation bonds are not to be released to the operator until the mining site has successfully remained revegetated for five years after the last year

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26 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. § 715.16(a)(1)).
27 Id. (to be codified in 30 C.F.R. § 715.16(a)(2)). In part, this was a recognition that topsoil generally contains greater organic material and microbiology favorable to plant life.
29 Id. (to be codified in 30 C.F.R. §§ 715.16(b),(c); see also Comment at Item 7, 42 Fed. Reg. 62,649 (1977).
of augmented seeding, fertilizing and/or irrigation. This presumably means that the operator must either continue seeding and fertilizing perpetually on land that cannot sustain full vegetation without such aid, or forfeit the bond. Such a provision will be an incentive for careful planning and accurate testing of overburden materials. Another major improvement is the establishment of a vegetation reference area consisting of an undisturbed area in the vicinity of the strip mine against which inspectors can more accurately judge the operator's success in revegetating an area.

III. LAND USE CONSIDERATIONS

a. Post Mining Land Use and Terrain Configuration

A central requirement of the SMCRA is that lands must be returned to their "approximate original contour." Prior to passage of the Act, this concept ran into opposition from the West Virginia coal industry and state officials because it restricted an increasingly popular production method known as "mountaintop removal." This method typically involves flattening a mountain down to the level of the lowest coal seam within economical reach through blasting and the removal of overburden to a fill area. In Appalachia, the fill area is usually in a small valley area or at the head of a hollow, both of which are frequently on a steep slope covering a large area of land.

Some critics have argued that the mountaintop removal method should be limited to reduce the number and size of such fills. This criticism is based on the fact that experience with these

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80 30 U.S.C.A. §§ 1265(b)(21), 1269(c)(2) (West Supp. 1978). The West Virginia Department of Natural Resources filed comments on the proposed permanent regulations arguing that periodic reseeding and application of fertilizers should not interrupt the running of the five year period. DNR's comment is consistent with its own prior practice but not with the need to guarantee perpetual revegetation. Bonding under the SMCRA is not tied to a fixed maximum as under the 1971 West Virginia law, rather it is to be set according to the estimated cost of having a third party come onto the site to carry out the work and must be periodically adjusted in order to reflect increase in costs over time. 30 U.S.C.A. §§ 1259(a), (e), 1269(c)(2) (West Supp. 1978).

81 Under current state law forfeiture of a reclamation bond means that the operator can never be granted another permit. W. Va. Code § 20-6-8 (1978 Replacement Vol.). The SMCRA does not specifically address whether permits must be denied on this basis.


fill structures is limited, and there is uncertainty about their long term stability. Proponents of the mountaintop removal method argue that it can be used to create flat land for housing, agriculture and business development in a region having limited natural flat areas.

Congress reacted to these arguments with a compromise. It exempted the mountaintop method from the requirement for return to approximate original contour where certain guarantees are made by permit applicants regarding the safety of fills and the creation of improved post mining land uses. Mountaintop production methods must now return land to its approximate original contour unless the operator has developed clearly attainable plans for the post mining use of the mountaintop area. These plans may involve commercial, industrial, agricultural, residential or public facility uses. The Act and regulations set forth detailed criteria for both land use requirements and the safety design for valley fills.

44 Fed. Reg. 15,415 (1979) (to be codified in 30 C.F.R. § 816.133). This regulation requires that the following factors be given consideration by the regulatory authority before approval may be given to a proposed “alternative land use” (i.e., change from a prior use) or a mountaintop removal operation (where return to approximate original contour is not planned):

1. determination of compatability with adjacent land uses;
2. consultation with local land use and zoning authorities;
3. specific plans showing feasibility (economic and technical) of accomplishing and utilizing the land in the manner intended;
4. specific plans to integrate mining and reclamation with the proposed land use;
5. letters of financial commitment from public and private sources of funding;
6. demonstration that proposed use will not delay reclamation and that it will not harm fish and wildlife; and
7. special demonstrations where proposed use is for cropland including a commitment from the person who will manage the crops, a demonstration of adequate water resources and a demonstration of suitable topsoil. It should be noted that these provisions are part of the permanent regulatory program which was promulgated on Tuesday, March 13, 1979. 44 Fed. Reg. 15,312-463 (1979) (to be codified in 30 C.F.R. §§ 700-845.20).
The compromise was a good one, but it will be difficult to enforce in West Virginia where the regulatory authority has little experience with land use planning and where there has traditionally been strong hostility from industry and local officials to any planning proposals which limit development options. Appalachian environmental and community groups are intent upon strict enforcement of the land use requirements due to their concern for the safety of the lands and people located below massive fill areas, and out of a fear of the cumulative effects of a production practice which threatens to decapitate virtually every mountaintop in the coal region.\textsuperscript{86} It is important to ensure that applicants' post mining land use plans are not merely a facade to justify stripping, and that the goals contained in such plans will in fact be achieved and will meet some definite community or regional need.\textsuperscript{87}

Most strip mines are located in isolated areas where it is highly questionable that anyone would want to locate a home or business there. Furthermore, it is likely that the development costs for housing on mountaintop strip sites are often prohibitively expensive due to the added expense of bringing water, sewer, utilities, paved roads and materials to elevated and generally remote sites. To bring the mountaintop removal jobs closer to established towns means that the residents there will be potentially impacted by years of blasting, truck traffic, and the continuing threat of slides, pond failures and other problems. The careful planning and coordination of mining and community development could overcome some of these problems, but there is generally insufficient interest or inadequate resources to do this in many rural Appalachian areas.

\textit{b. Valley Fills}

Controversy has also raged over which types of valley fill de-

\textsuperscript{86} The concerns are also for the aesthetic impacts. West Virginia is officially referred to as the "Mountain State," but critics of strip mining feel it is quickly being reduced to a "Mesa State."

\textsuperscript{87} During the period from February 3, 1978 to August, 1978, DNR basically ignored the land use requirements of the SMCRA and granted many permits which did not call for return to original contour and provided for a postmining land use labeled "Woodland and Wildlife." This category does not, under the SMCRA, allow an exemption from the requirement for return to approximate original contour. See Notice of Intent to Sue, filed by the Tug Valley Recovery Center, et al., to Secretary, Cecil Andrus, Dep't of Interior (July 13, 1978) (as amended by letter of Aug. 14, 1978).
sign should be allowed under the Act. OSM initially rejected the West Virginia fill construction method known as "rock core drainage" in its interim program regulations.⁵⁸ Although OSM eventually capitulated, it continued to express doubts about the safety of the West Virginia design.⁵⁹ There are, however, several new significant requirements which West Virginia spoil fills will have to meet by reason of the Act.

The most important of these new requirements relates to the assessment of the hydrologic balance of the proposed site. Federal regulations prohibit all fill sites from having springs, wet weather seeps or water courses unless lateral drains and underdrains are

⁵⁸ See West Virginia Department of Natural Resources, Drainage Handbook for Surface Mining 55-58 (1978). The West Virginia method involves the creation of a rock core in the center of the fill to which gravity flow will direct all drainage through and out of the fill. The OSM preferred method calls for the diversion of all drainage away from or around the fill area. The objective of both methods is to keep the fill mass dry in order to keep it from becoming saturated with water. Water saturation of the fill could cause instability, slips or slides, which in turn could cause property damage, water pollution or other destruction in off-site areas. Critics of the West Virginia method allege that the rock core will act as a filter, trapping fine sediment particles. Over the years, the rock core could become clogged thereby reducing the ability of the core to drain the fill. Such clogging can lead to water saturation of the fill thereby making it unstable. Often toxic materials are buried in the valley fill. Water saturation can therefore cause toxic pollutants to emerge with the water from the fill in openings or seeps. This is, of course, harmful to streams. The West Virginia Department of Natural Resources apparently recognizes the potential for such clogging: "The top of the rock drain shall form a trapezoidal channel for possible flows over the core instead of through it in the event the pores of the core become blocked by debris or sediment." Id. at 56. Such clogging can take as long as 20 years to be completed, by which time there may be thousands of such fill areas in West Virginia including some near populated areas and sensitive streams.

⁵⁹ The preamble accompanying the proposed rules for the permanent regulatory program states that "[t]he use of [the West Virginia method of rock core drainage] has been controversial, it is highly touted in practice by operators, and eyed somewhat skeptically by the engineering profession." 43 Fed. Reg. 41,758 (1978). The preamble further states that "[s]everal professional engineers have expressed concern with long-term clogging of the rock core by fine-grained sediment in the drainage and in some cases piping (internal erosion) caused by the flow of water within the fill which could lead to instability and potential failure of the fill." Id. at 41,761. The preamble also expresses concern over the ability of the states to adequately monitor construction practices: "inadequate engineering practices would be more likely to result in failure in the rock core system. It is critical that the rock core maintain its permeability throughout. If one impermeable section is placed or if a section becomes impermeable, the result could be disastrous." Id.
utilized.\textsuperscript{90} State practice, as reflected by DNR’s 1975 Drainage Handbook for Surface Mining, makes no mention of fill site hydrologic conditions or filter and underdrain systems. DNR’s application forms do not require the applicants to provide such information. The prior state practice was also inadequate in failing to contain strict testing, inspection and certification requirements;\textsuperscript{91} restrict the use of coal processing wastes in the fill;\textsuperscript{92} require a filter system to guard the draining function of the rock core;\textsuperscript{92} require a long term static safety factor;\textsuperscript{94} have strict requirements on the type of rock used in the core;\textsuperscript{95} require “keyway cuts” (excavation into stable bedrock) or rock toe buttresses to stabilize the fill;\textsuperscript{96} and to limit the permissible size of the fills.\textsuperscript{97} These items all required by the Act represent substantial improvements over past West Virginia methods. Time will judge whether these new requirements will be sufficient to prevent environmental damage and public danger from valley fill failures.

c. **Designation of Lands Unsuitable for Strip Mining**

Congress recognized that there are many sensitive areas where reclamation cannot be achieved or where the prevention of long term environmental destruction cannot be guaranteed. It therefore established a mechanism for prohibiting strip mining on an area-wide basis. This significant aspect of the Act\textsuperscript{98} is similar to provisions contained in section eleven of the 1971 West Virginia Act.\textsuperscript{99}

\textsuperscript{90} 43 Fed. Reg. 52,743-44 (1978) (to be codified in 30 C.F.R. §§ 715.15(a)(10), 715.15(c)(2)(i)).
\textsuperscript{91} 43 Fed. Reg. 52,742-43 (1978) (to be codified in 30 C.F.R. §§ 715.15(a)(2), (10), (14)).
\textsuperscript{92} 43 Fed. Reg. 52,743 (1978) (to be codified in 30 C.F.R. § 715.15(a)(11)).
\textsuperscript{93} 43 Fed. Reg. 52,744 (1978) (to be codified in 30 C.F.R. § 715.15(c)(2)(11)).
\textsuperscript{94} 43 Fed. Reg. 52,743 (1978) (to be codified in 30 C.F.R. § 715.15(b)(1)) (“based upon subsurface exploration, geotechnical testing, foundation design, and accepted engineering analyses”). See also 43 Fed. Reg. 52,743 (1978) (to be codified in 30 C.F.R. § 715.15(c)).
\textsuperscript{95} Id. (to be codified in 30 C.F.R. § 715.15(b)(5)).
\textsuperscript{96} Id. (to be codified in 30 C.F.R. § 715.15(a)(9)).
\textsuperscript{97} 43 Fed. Reg. 52,743-44 (1978) (to be codified in 30 C.F.R. § 715.15(c)(1)).
\textsuperscript{99} W. Va. Code § 20-6-11 (1978 Replacement Vol.):

The legislature finds that there are certain areas in the State of West Virginia which are impossible to reclaim either by natural growth or by technological activity and that if surface mining is conducted in these certain areas such operations may naturally cause stream pollution, landslides, the accumulation of stagnant water, flooding, the destruction of
Nevertheless, the SMCRA’s provisions will have even greater significance in West Virginia because they go farther than the prior state law and because the state law was never fully enforced.

Former DNR Director Ira Latimer, who headed the Department until 1977, refused to enforce section eleven of the West Virginia Act, in part because of a suit filed in Kanawha County Circuit Court challenging it as effectuating an unconstitutional taking. The statute was, however, upheld in a thorough opinion by Chief Circuit Judge McHugh on June 22, 1976. Thereafter, Latimer continued to refuse to enforce the section. David Callaghan assumed the Directorship of DNR in January of 1977 and was immediately asked to enforce the deletion provisions of section 11. He refused and later defended a legal action on the point before the West Virginia Supreme Court of Appeals. More recently, Director Callaghan has cited section 11 as a basis for the denial of permits in certain sensitive areas. Although this action gained much support for the Department from citizen groups, the Department has still not undertaken the task of identifying sensitive unreclaimable areas of the state for “deletion.”

land for agricultural purposes, the destruction of aesthetic values, the destruction of recreational areas and the future use of the area and surrounding areas, thereby destroying or impairing the health and property rights of others, and in general creating hazards dangerous to life and property so as to constitute an imminent and inordinate peril to the welfare of the State, and that such areas shall not be mined by the surface-mining process.

Therefore, authority is hereby vested in the director to delete certain areas from all surface-mining operations.


After being removed in 1977 as DNR Director, Mr. Latimer went to work for the Boden Mining Company. John Ashcraft, the Department of Mines Director, did the same. Ben Green, Chief of the Reclamation Division, and his assistant Bill Raney later left to head up the West Virginia Surface Mining and Reclamation Association. Citizen groups have been critical of these transfers since it would appear to demonstrate an industry bias in the Department and provide the industries employing the former officials with continuing influence in the Department. Several top officials remaining with the Reclamation Division worked for years under Mr. Green’s direction.

The state supreme court did not rule on the issue. See McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978).

Recent West Virginia permit applications rejected on this basis include SMA No. 1657 (Job Nob, near Seneca Rocks and Spruce Knob) and SMA No. 2512 (near Woodville, Lincoln County).
Professors Vincent Cardi and Patrick McGinley have in recent years presented convincing and comprehensive arguments in the West Virginia Law Review which demonstrate that area wide deletion is both proper and constitutional under the West Virginia Act. In the face of this history, critics are naturally skeptical as to whether the Department of Natural Resources will fully enforce the complex and administratively demanding "designation" provisions of the SMCRA.

Under section 522 of the SMCRA the states are expressly required (as a condition of receiving enforcement primacy and federal grant money) to establish a planning process which will enable "objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of the state are unsuitable for all or certain types of surface coal mining. . . ." The Act sets forth express criteria and procedures for exercising the designation authority. This includes the right of citizens to petition and receive a hearing on requests to prohibit stripping in their neighborhoods and regions of the state in which they have an interest. As was stated above in regard to hydrologic studies, there is a serious question as to whether DNR has the requisite personnel and institutional motivation to undertake this necessarily sophisticated process of data collection and land use decision-making.

Areas may be designated as unsuitable by reason of their geographic proximity to sensitive areas, or on the basis of natural or social characteristics. For example, mountaintop removal operations involving return to original contour could be halted in all areas having certain slope, soil and overburden characteristics which might collectively cause stability problems. Many operators and state officials have argued that in southern West Virginia some

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105 43 Fed. Reg. 41,825, 51,831 (1978) (to be codified in 30 C.F.R. §§ 760, 765, 769). In comments on proposed federal regulations concerning designation of lands unsuitable, DNR stated that the data base and inventory system mandated by the SMCRA should not necessarily be available to the public, and asked that the proposed regulation give the states authority to withhold the information. See W. Va. Dep't of Natural Resources, Comments to Proposed Rules 760.4(b) and 764.23 (1978).


107 Id. § 1272(c).
areas cannot be safely returned to original contour and, therefore, they should be allowed to create huge flat areas accompanied by massive valley fills as an alternative. This argument backfires, however, since many of the slope and overburden stability problems in steep slope areas also apply to valley fills. A better alternative is to halt such operations on land having slopes above a given figure based upon engineering calculations. A model could be developed to factor in the presence of particularly slide-prone overburden materials and other factors affecting stability. Areas possessing the instability characteristics could then be identified so that the operators and the public will know where strip mining should not be allowed in advance of any proposed development plans.

Other areas may be designated for social reasons. For example, areas having population densities should be designated as unsuitable. Areas in which there has been no strip mining and where strip mining activity would disrupt the lifestyle and economic patterns of the community are also suitable candidates for designation.

Other clear candidates for designation in West Virginia include flood-prone areas where stripping could occur in the flood plain or aggravate flood heights by runoff velocity and sediment loads; areas near natural and state parks where public appreciation would be disrupted by blasting, truck traffic or where tourism would be discouraged; areas having acid overburden problems which cannot be controlled with current reclamation methods; areas having sensitive trout streams, especially where the stream has no “buffering” capacity to absorb acid contributions as is the case in some northern West Virginia areas; areas having flood control projects susceptible to damage from sediment; areas having important wildlife benefits; and areas in which adequate roads do not exist for coal transport (until such time as the road is upgraded).108

108 The West Virginia Act directs DNR to protect against hazards to public roads. W. Va. Code § 20-6-11 (1978 Replacement Vol.). The DNR has received suggestions that it coordinate its review of permit applications with the Department of Highways in order to ensure that narrow and lightly paved public roads are not destroyed by hauling operators. The DNR has generally refused to look at the adequacy of area roads in the permit process even when raised by citizen protesters. DNR went so far as to defend this position in McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978) (the court did not rule on this point).
IV. PUBLIC PARTICIPATION ASPECTS

The public participation aspects of the SMCRA are discussed elsewhere in this publication in greater detail.\textsuperscript{109} It seems appropriate, however, to address what impact these new provisions will have on existing practices in West Virginia. One major source of citizen frustration with West Virginia’s program has been the people’s inability to have access to DNR records and personnel. The bitter opposition of the Chief of the Reclamation Division to citizen involvement has resulted in an incredible number of road blocks to citizen participation in decision-making. The following discussion is a typical scenario of citizen involvement.

A citizen may read a legal advertisement about a proposed mine in his area. He or she travels to Charleston, West Virginia, to look at the application and submit comments within the thirty day deadline mentioned in the advertisement. There the citizen discovers a permit file consisting of a short form and a map. He or she asks to see the reclamation, mining, blasting and drainage plans and is told that DNR does not require these to be submitted with the application.\textsuperscript{110} If the citizen requests to be notified when the plans are filed, he or she is told that it is impossible to give such notice.\textsuperscript{111} If the citizen desires a copy of any item in a file, he or she must produce a written request accompanied by a certified check at a rate of fifty cents per page. DNR refuses to accept cash or uncertified checks even in small amounts. This requires a separate trip to the bank after one learns how many pages are needed.\textsuperscript{112}

\textsuperscript{109} See Note, Citizen Participation in the Regulation of Surface Mining, 81 W. Va. L. Rev. 675 (1979).

\textsuperscript{110} This practice is plainly contrary to state law and was challenged in McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978). In McGrady the court advised DNR to correct the practice and require all plans to be on file at the time of the legal advertisement. After many months of delay this policy was changed, but DNR still does not require the drainage plans to be on file until long after the public notice.

\textsuperscript{111} Another frustrating example occurred when citizens from Clifton, West Virginia, filed many protests. The operator then withdrew his application and submitted a new one for adjacent acreage. The citizens asked that their protests be transferred to the new file. This request was denied and, in order to protect their interest, the people were obliged to resubmit protest letters for the new application number. Although these are isolated examples, they do indicate an attitude adverse to meaningful public participation.

\textsuperscript{112} This is justified by DNR’s Reclamation Division on the grounds that the division cannot or will not make an effort to establish a petty cash fund and for fear of receiving bad checks. Considering the small amounts usually involved, many persons consider this a form of insult and bureaucratic harassment.
If a citizen's protest to the application is not successful, he or she may appeal to the Reclamation Board of Review. The Board is currently composed of a strip mine operator, a member of a coal mining consulting firm, a forestry consultant to large land and mineral owning companies and two other persons. It has no power to stay the issuance of the permit. Thus, while the administrative appeal drags on, the strip mine operation in question begins.\textsuperscript{113}

After the operation begins, inspection reports are rarely kept up to date in the permit files. It is generally impossible to determine from the file whether the inspections have been made, the status of the operation and the operator's record of compliance. Citizen participation in rule-making has been frustrated by the fact that DNR's regulations remained unchanged between 1971 and 1978, during which time informal policy changes occurred without public knowledge.

Excerpts from West Virginia's comments on proposed federal regulations further illustrate the Reclamation Division's attitude. DNR declared it 'foolish' to give citizens access to data information collected in regard to the program for designating lands unsuitable for strip mining.\textsuperscript{114} In objecting to the creation of a brochure describing the designation process and access to data, DNR stated that 'the preparation of a brochure that explains the use of highly technical and scientific information in laymen terms would defy the most astute authors. The whole concept of this subsection is again completely asinine. . . .'\textsuperscript{115}

Until recently, the Department routinely ignored requests for public hearings on permit applications. The appointment of a new DNR Director, however, and the approaching implementation of the SMCRA has greatly improved access to the Director's office and the Department's willingness to hear citizen comments. At the first public hearing ever granted by the Department, approxi-

\textsuperscript{113} In McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978), the court, with two justices dissenting, held that the administrative appeal must be exhausted before one can seek the mandamus remedy provided in W. VA. CODE § 20-6-11 (1978 Replacement Vol.).

\textsuperscript{114} Comments to Proposed Rules, supra note 105. An example of the ability to boil down technical and scientific (as well as legal) information into layman's terms can be found in the publication: CENTER FOR LAW AND SOCIAL POLICY, THE STRIP MINE HANDBOOK (1978). This pamphlet describes many aspects of strip mining with suggestions for avenues of citizen participation.

\textsuperscript{115} Id.
mately 400 persons attended to oppose a proposed permit. To the citizens’ great satisfaction the permit was denied on the basis of section eleven of the West Virginia Act. When the coal company appealed to the Reclamation Board of Review, however, the citizens’ request to become parties and/or intervenors was frustrated by a refusal of the Board to consider the request until the day of the hearing, leaving no time for preparation or the subpoena of witnesses. The Board also has no rules of procedure as required by the West Virginia Administrative Procedures Act.

The passage of the SMCRA will force changes in West Virginia’s approach to public participation. The Act mandates significant public participation at all decision-making levels including permit review, permit revision, inspections, blasting schedules and preblast surveys, notices of violation and cessation orders, approval of state program components, land use decisions, civil penalties and bond release. There are also broader notice provisions, broader requirements for public access to conflict of interest information on agency employees, and broader citizen suit provisions (which allow for attorneys fees) than under prior West Virginia law.

V. PERSONNEL AND ENFORCEMENT POWERS

The SMCRA should cause a dramatic improvement in the ability of the states to enforce strip mining laws. Perhaps the most important benefit will be financial assistance to upgrade and improve the staffing of state programs. Until the federal dollars began

116 In anticipation of the denial, the citizens obtained a preliminary injunction against the Board. The state argued that it had authority to exclude affected citizens from the appeal proceedings. Conley v. West Virginia Reclamation Board of Review, No. 78-4334 (Kanawha County Cir. Ct., Nov. 1978).
119 Id. § 1261(c).
120 Id. § 1267(h).
121 Id. §§ 1265(a)(15)(A),(E).
122 Id. § 1275(a)(1).
123 Id. § 1253(b)(3).
124 Id. §§ 1272(c), 1265(c).
125 Id. § 1268(b).
126 Id. § 1269(b).
127 Id. §§ 1235(c), 1237(g)(2).
128 Id. § 1263.
129 Id. § 1270.
to flow late in 1978, the West Virginia Reclamation Division had no geologist, hydrologist or soil scientist working directly and constantly to review permit applications. The total number of personnel normally reviewing applications (not including inspectors) is six. These people, with the approval by the Reclamation Chief and Director, issued over 600 permits and deep mine plan approvals in 1978.120

The real key to the application process is the information and time available to the local inspector who makes the visit to the proposed site. The past shortage of inspectors, each of whom must also visit every operating strip job twice a month, creates a serious question as to whether the application process thoroughly considers such critical items as the location of fills, the adequacy of drainage structures and the potential cumulative impacts on adjacent communities or sensitive streams. Until recently there were twelve to fourteen inspectors covering the entire southern half of West Virginia. The federal dollars will double this number for DNR and add a significant number of federal inspectors in OSM field offices. Federal funding will also assist DNR in employing a larger number of attorneys to assist in law enforcement.

As a result of the SMCRA, state inspectors will for the first time be armed with the power to recommend civil penalties.121 Previously, West Virginia inspectors had no such power and fines could only be assessed through criminal prosecutions brought by the inspectors (without legal assistance) in the magistrate courts. The maximum fine under the 1971 West Virginia law was $1,000 for most violations.122 In 1975 the average fine was $231.123 Assuming that a busy inspector can only afford the time to prosecute the worst violators, this type of fine is not likely to be a significant deterrent to an operator whose daily operation cost can be as high

120 This figure includes 214 strip mine permits, 156 prospective permits, two incidental permits, 166 approvals of deep mine opening reclamation plans, and 73 permits for other mining operations. W. Va. Dep’t of Natural Resources, Status Report, July 1, 1967 to Dec. 31, 1978 (1979).
122 W. Va. Code § 20-6-30 (1978 Replacement Vol.; see also CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ENFORCEMENT OF STRIP MINING LAWS IN THREE APPALACHIAN STATES 62 (1975). The fine may go higher if it is shown that the operator “deliberately violates” a provision of the state act or strips without a permit. But this provision is seldom used.
123 CENTER FOR SCIENCE IN THE PUBLIC INTEREST, supra note 132. Figures for more recent years are unavailable from DNR.
as $57,000.\textsuperscript{134} Under the SMCRA, penalties may be as high as $5,000 per violation, per day.\textsuperscript{135}

The list of 374 prosecutions brought by DNR in 1978\textsuperscript{136} tends to confirm the conclusion that the fines do not deter violations of the reclamation rules. Twenty-three operators, including some large companies, were prosecuted for strip mining without a permit. Prosecution for stripping without a permit is not, apparently, grounds for the denial of a subsequent permit application sought by the same operator. There were 119 prosecutions for disturbing lands beyond the permit area. There were 160 prosecutions for violations related to water pollution control requirements. The federal penalties, if properly implemented, should make the threat of enforcement actions a meaningful deterrent.

In other ways, the SMCRA and the West Virginia Act have similar enforcement powers delegated to inspectors and agency heads. Both laws make the issuance of notices of violation, cessation orders and permit suspensions or revocations mandatory.\textsuperscript{137} The West Virginia Act gives the inspector broader discretion in issuing cessation orders,\textsuperscript{138} while the SMCRA has a mandatory requirement for the inspector to "impose affirmative obligations on the operator" to take "necessary steps to abate the imminent danger or the significant environmental harm."\textsuperscript{139} Unfortunately, the enforcement policies of OSM and DNR are also similar in that

\textsuperscript{134} This figure is for a mine producing 1.5 million tons per year. Smaller mines may require $3,500 per day. See Skelly & Loy, Economic and Engineering Analyses of the United States Surface Coal Mines and Effective Land Reclamation (U.S. Bureau of Mines Report No. 50,241,049, 1975).


\textsuperscript{136} W. Va. Dep’t of Natural Resources, Status Report, \textit{supra} note 130.


each agency does not appear to impose enforcement sanctions as strictly as the law requires.

A study performed by the Center for Science in the Public Interest in 1975 on DNR enforcement activity concluded that notices of violation and warnings were not being issued in all cases where the inspector discovered a violation. More specifically, the study concluded that the power to order cessation, suspension and revocation of permits and bond forfeiture was not being fully employed. Although DNR does not keep statistics on the number and type of enforcement actions taken (except for permit revocations), experience indicates that many inspection forms do not contain a time limit in which the operators must correct the violation. The imposition of a time limit is important because the failure to meet the deadline is the mechanism for triggering a stronger sanction. There were only three permit revocations in 1978. There were eleven blasting assessments made in 1978. A thorough study is clearly needed in order to determine how often inspectors and DNR officials are exercising nondiscretionary enforcement sanctions.

The Office of Surface Mining is suffering from a similar defect in its short history. A study recently released on OSM enforcement efforts by the Center for Law and Social Policy reports a "[c]onsistent failure to perform mandatory duties required by section 521 of the Act and 30 C.F.R. § 722." As examples, the study notes that OSM has failed to establish a system or procedure to review inspection reports from the states in order to carry out the federal inspections required after repeated violations are recorded in state reports. OSM was criticized for failing to establish procedures for reviewing operators' records to discover patterns of violations and unwarranted failures to comply with the Act. The study also complained that only forty-two percent of

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140 CENTER FOR SCIENCE IN THE PUBLIC INTEREST, supra note 132, at 60-62.
141 In one recent case an operator was issued a cessation order by DNR for not having his sediment pond system finished before mining began. Residents report that the operator has continued operating even though the DNR file does not show any release of the cessation order.
142 CENTER FOR LAW AND SOCIAL POLICY, ANALYSIS OF ENFORCEMENT AND INSPECTION ACTIVITIES OF OSM 3 (1978) [hereinafter cited as ANALYSIS OF ENFORCEMENT].
143 Id.
144 Id. Discovery of such a pattern is supposed to lead to a show cause order for revocation or suspension of permits. See 42 Fed. Reg. 62,702 (1977) (to be codified in 30 C.F.R. § 722.16). At the time of the study, OSM had never issued a show cause order.
the nation’s strip mines and only four percent of the underground mines had been visited by OSM inspectors.146 Where inspections had occurred, the study uncovered a “consistent failure” on the part of inspectors to issue citations for all violations encountered. The study estimates that “at least half” of such violations have gone uncited.146 In many situations OSM inspectors were found to cite the most obvious violation, but they failed to cite numerous related violations.147

The study found that many OSM Regional offices did not have the necessary technical personnel and equipment to properly analyze water and soil samples and blasting activity.148 Thirty-four out of the ninety-three performance standards in the interim program regulations had never been cited.149 Criticism was leveled at the failure of inspectors to impose requirements for remedial action (“affirmative obligations”)150 on operators found in violation of standards. Notices of violation too frequently failed to set an abatement period during which violations were to be corrected.151 The study concluded that there is “weak and inconsistent” administration of the civil penalty system.152

146 Id. This would appear to be a violation of 42 Fed. Reg. 62,700 (1977) (to be codified in 30 C.F.R. § 721.11(c)), which requires a complete inspection every six months. Evidence in the study showed that the visits did not represent a complete inspection of the sites.

147 Id.

148 Id. The study argues that an operator’s negligence in not complying with one standard cannot be an excuse for its failure to meet another related requirement. Id. at 10. See Newsome Brothers, Inc., 1 IMBA 190, 194, [1971-1973] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 15,384 (1972).

149 ANALYSIS OF ENFORCEMENT, supra note 142, at 5. OSM files showed that hydrology tests and measurements have rarely been carried out (25 tests of effluent made in 393 visits). Id.

150 Id. at 10-11. The study also noted that 31 standards had been cited less than seven times.

151 Id. at 18-19. See also 30 U.S.C.A. § 1271(a)(2) (West Supp. 1978). This section requires the inspector to impose “affirmative obligations” whenever a significant imminent environmental harm or imminent danger exists and where mere cessation of mining would not remove the hazard. See 42 Fed. Reg. 62,701 (1977) (to be codified in 30 C.F.R. § 722.11(c)).

152 Id. at 17. The failure to set an abatement period is unlawful under 30 U.S.C.A. § 1271(a)(5) (West Supp. 1978).

153 Id. at 20. In particular, the “seriousness criteria” found in 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. §§ 723.12(c),(d), were misapplied, and that operators were not always being given separate assessments for each day of violation. 42 Fed. Reg. 62,703 (1977) (to be codified in 30 C.F.R. § 723.14(a)).
These failings might be understandable to the extent that the agency is new and has had difficulty in becoming fully staffed. There are, however, serious failings which, if not corrected, could seriously hamper the effectiveness of the agency. The federal presence in West Virginia has, nevertheless, had many positive aspects. In at least two situations OSM was effective in halting two wildcat mines, (operating without a permit), where state enforcement was either ineffective or long delayed.\footnote{See Sandy New Era, Aug. 25, 1978, at 1, col. 1; United States v. Claypool Constr. Co., Inc., No. 79-0004-C (S.D. W. Va., filed 1979).
\footnote{Letter from Walter N. Heine, Director, Office of Surface Mining, to David Callaghan, Director, West Virginia Department of Natural Resources (Sept. 31, 1978). The letter begins: This letter is to summarize various points of agreement which you and I, and our respective staffs have reached in the course of discussion over the last two weeks. I am hopeful that on the basis of the agreements reached we will be able to move forward in a cooperative spirit in order to fully implement the Federal Surface Mining Act in West Virginia. Id. With respect to groundwater monitoring the letter states: Where use of monitoring wells cannot adequately monitor the change in quality and quantity of underground water, DNR may approve alternative means to monitor the underground water. This is especially relevant where wells may not assure adequate or accurate monitoring data in the remote rural areas of West Virginia's mountainous terrain due to the presence of multiple aquifers or underground streams. In conducting inspections, OSM will be guided by West Virginia requirements. Id.}}

VI. Other Experience Under the Interim Program

Citizen and environmental groups generally welcome the improvements which are promised under the SMCRA, but these groups have also expressed a nagging fear that OSM will merely become another insensitive layer of bureaucracy unwilling to force necessary and major changes in state programs. Some experiences under the interim program tend to justify these fears.

In September of 1978, OSM Director Walter Heine and the DNR concluded an agreement which provided West Virginia with funds and settled several disputes over the proper interpretation of the Act and the regulations. The effect of the agreement is to severely cut back on the requirement for groundwater monitoring on strip mine sites in West Virginia.\footnote{Letter from Walter N. Heine, Director, Office of Surface Mining, to David Callaghan, Director, West Virginia Department of Natural Resources (Sept. 31, 1978). The letter begins: This letter is to summarize various points of agreement which you and I, and our respective staffs have reached in the course of discussion over the last two weeks. I am hopeful that on the basis of the agreements reached we will be able to move forward in a cooperative spirit in order to fully implement the Federal Surface Mining Act in West Virginia. Id. With respect to groundwater monitoring the letter states: Where use of monitoring wells cannot adequately monitor the change in quality and quantity of underground water, DNR may approve alternative means to monitor the underground water. This is especially relevant where wells may not assure adequate or accurate monitoring data in the remote rural areas of West Virginia's mountainous terrain due to the presence of multiple aquifers or underground streams. In conducting inspections, OSM will be guided by West Virginia requirements. Id.} For months DNR and Governor Jay Rockefeller had been using industry's arguments and inflated cost figures in seeking to weaken proposed federal regula-
tions and OSM enforcement policies.\(^{155}\) The critics of OSM's regulations have used cost estimates developed by industry groups which have, on examination, proved to be highly inaccurate and conflicting.\(^{156}\) Similar pressure was brought by key members of the United States Senate.

The agreement, in effect, exempted West Virginia surface mines from the requirement for groundwater monitoring unless there is use of the groundwater within one half mile of the mining site.\(^{157}\) OSM officials excused this variance by arguing that they have not developed policies to implement the monitoring program and did not know how to respond to operators cited for the violation who sought guidance on how to comply. Both Pennsylvania and Maryland have developed groundwater monitoring programs. Since DNR is receiving a large grant, and OSM has staff hydrologists, there is no apparent reason why one of the two agencies could not develop monitoring criteria to at least provide for interim mon-

\(^{155}\) A West Virginia Senate oversight hearing, convened with virtually no notice to the public, provided Governor Rockefeller with an opportunity to criticize OSM personnel. Rockefeller's statement contained serious inaccuracies concerning the provisions of the SMCRA and enforcement policy. Citizen groups in the state requested a meeting with the Governor concerning the content of his statement. The request was refused. Later meetings of the Committee were cancelled due to questions raised about the legality of the oversight function.

More recently, Governor Rockefeller has maintained his attacks on the Office of Surface Mining and its regulations. The following is a report of remarks made by Rockefeller at an informal luncheon with reporters held on Friday, February 16, 1979:

Rockefeller said he has already talked the Office of Surface Mining into altering some regulations but now, 'there's no budging OSM. . . . OSM is feeling so badgered and put upon that as a matter of professional pride, they're not going to do anything.'

Rockefeller said he is considering a meeting with President Carter to discuss the regulations as well as going to court to fight imports of coke needed to make steel, which threaten U.S. producers of metallurgical coal. It may eventually be necessary to go to Congress to modify the stripmine law, he said.

Charleston Gazette, Feb. 17, 1979, at 11A, col. 4. See also note 150, supra.

\(^{156}\) Environmental Policy Inst. & Center for Law and Social Policy, Testimony Before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs (March 5, 1979).

\(^{157}\) Although the agreement did not state this expressly, later memos from the Chief of DNR Reclamation Division confirmed that this was the understanding involved. J. Pittsenbarger, Division of Reclamation Chief, Memorandum to All Reclamation Personnel (Oct. 2, 1978). This exemption is clearly conflicting with 42 Fed. Reg. 62,687 (1977) (to be codified in 30 C.F.R. § 715.17(h)).
itoring procedures. Instead, OSM commissioned a long term study and granted the state an exemption from the groundwater monitoring requirement for most mines in the state.\textsuperscript{158}

Another basis for fear first came to light in May of 1978 when a citizen's group researcher discovered that DNR was issuing permits for mountaintop removal operations without requiring either return to approximate original contour or satisfaction of the land use requirements.\textsuperscript{159} DNR officials responded that permits were being issued consistent with state law and regulations. They took the position that they had no authority to enforce the SMCRA and OSM's regulations, and furthermore, did not believe that the federal requirement regarding return to original contour in mountaintop removal operations was essential to the protection of the envi-

\textsuperscript{158} OSM responded to citizen protests by promising to announce interim criteria for monitoring in January, 1979. In February, 1979, citizen groups were denied an opportunity to review and comment on draft guidelines. To date no such criteria have been announced and it is unclear what effect the criteria will have upon the OSM-DNR agreement.

\textsuperscript{159} Notice of Intent to Sue, supra note 87. Twenty-seven operators were found out of compliance. Of these, 13 had been issued permits after February 13, 1978. The SMCRA mandates that all permits issued by the state authority after that date contain terms requiring compliance with the interim program regulations. See 30 U.S.C.A. § 1252(b) (West Supp. 1978). The state did include a terse resolution to this effect on the permit certificates, but ignored the fact that accompanying mining plans were clearly inconsistent.

A notice of intent to sue against both agencies was filed in July. See Notice of Intent to Sue, supra note 87. In response, OSM officials initially agreed to begin enforcement actions, but this promise was never fulfilled. The state was initially unresponsive, but did finally agree to stop issuing other insufficient permits and in October, 1978, sent letters to the named operators advising them to comply with the regulations through modifications of their operation plans, or to shut down.

The list of noncomplying mountaintop operators did not include continuing operations permitted before January 1, 1978. No effort has been made by DNR until February, 1979, to discover noncomplying permits issued in earlier years. The citizen's research and notice of intent to sue also noted that most permits issued after February 3 had inadequate blasting plans. Eventually, most of the listed operators revised their mining plans to return the land to approximate original contour. No evaluation, however, has been made to determine whether the slope and overburden characteristics are such that the replaced mountaintop will be stable. See text accompanying supra notes 98-107. Several unresolved legal issues remain. There are conflicting views as to how close in elevation and configuration the regraded surface must be to the original contour of the land. One or more operators are attempting to justify an alternative land use. There is wide disagreement as to what will constitute an adequate post mining land use plan. See 42 Fed. Reg. 62,681, 62,692 (1977) (to be codified in 30 C.F.R. §§ 715.13(d), 716.3).
environment. DNR’s issuance of such permits after February 3, 1978, appears to be a clear violation of section 502 of the SMCRA.\(^{160}\)

If DNR did not have the authority under state law to issue permits consistent with the federal law, then it should not have issued any permits at all. Instead, DNR received, processed and granted permits in record numbers. At a conference sponsored by the West Virginia Surface Mining and Reclamation Association, a DNR official boasted that in early 1978 the number of permits issued had increased by 300% and that DNR had processed a year’s worth of permits in five months.\(^{161}\) Virtually all of these permits were violations of the federal law.

DNR did not begin to attempt to issue permits complying with the federal regulations until September, 1978, seven months after the statutory deadline.\(^{162}\) Permits issued since September, how-

\(^{160}\) 30 U.S.C.A. § 1252(b) (West Supp. 1978) states:
   All surface coal mining operations on lands on which such operations are regulated by a State which commence operations pursuant to a permit issued on or after [February 3, 1978] shall comply and such permits shall contain terms requiring compliance with the provisions [of the interim regulations].

\(^{161}\) See also 30 U.S.C.A. §§ 1252(c), (e) (West Supp. 1978). The state officials claimed that they had met this requirement by placing a statement on the face of the permit certificate concerning compliance with the federal regulations. This does not, however, excuse their conduct since many aspects of the plans approved in the applications were in violation of the federal regulations and the Act. See 30 U.S.C.A. § 1255 (West Supp. 1978).

\(^{162}\) Roger Hall, W. Va. Dep’t of Natural Resources, Speech Before the Annual Conference of the West Virginia Surface Mining and Reclamation Association (Jan. 1979). Mr. Hall also noted that the department had received a record number of permits towards the end of 1977 and into early 1978. The number of permits received was significantly higher than the number received by the Department for comparable periods prior to the enactment of the Act:

- November, 1977: 385%
- December, 1977: 295%
- January, 1978: 282%

See also Address by John D. Rockefeller, III, Gov., to the Mining and Reclamation Council of America at 6 (March 7, 1979):

We have approximately the same number of permits for surface mining issued in 1978 and in 1977. And, I would have to say that those also were, for a period of time, operating under the temporary federal regulations. But, we try to make it work. We try to expedite. We try to have the bureaucracy conform to the coal imperative of that clearly coal-oriented state, I try not to send out mixed signals to anyone.

The federal deadline was February 3, 1978, pursuant to 30 U.S.C.A. § 1252(b) (West Supp. 1978).
ever, continue to have deficiencies. Citizen groups reviewed more than a score of such permits and have found that very few, if any, contained soil surveys identifying the "A" horizon or soil analyses to determine the necessity for added nutrients and soil amendments. In addition, topsoil handling procedures were generally vague and lacking specifications with regard to excess compaction, protection of stored topsoil and uniform thickness of redistribution and scarification. None of the permits reviewed contained sufficient information to enable the state to determine whether portions of the "B" or "C" horizon or other overburden layers should be used to supplement topsoil. A significant number of permits reviewed failed to identify revegetation reference areas, ground-water monitoring plans and surface water monitoring plans. Many of the plans that did mention these requirements were conclusory and did not sufficiently describe how compliance would be achieved.

Aside from the new permits, all operators who received permits before February 3, 1978 (except certain small operators) were required to be in compliance with the interim regulations by May 3, 1978. DNR, however, waited until February of 1979 to begin a systematic effort to bring such permits into compliance and has given all operators until June of 1980 to file upgraded permit applications consistent with the interim regulations.

Another issue regarding the DNR-OSM agreement concerns regulations issued by DNR in August of 1978. These regulations were designed to upgrade DNR's reclamation requirements to the level required by the federal interim program and to qualify the agency for federal grant money. A serious problem has arisen, however, with regard to the language in the agreement. The agreement

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143 See 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. § 715.16(a)(2)).
144 See Id. (to be codified in 30 C.F.R. §§ 715.16(b), (c)).
145 See Id. (to be codified in 30 C.F.R. § 715.16(a)(3)).
146 See Id. at 62,691 (to be codified in 30 C.F.R. § 715.20(f)).
147 See Id. at 62,687 (to be codified in 30 C.F.R. § 715.17(h)(3)).
148 See Id. at 62,685 (to be codified in 30 C.F.R. § 715.17(b)).
150 The list of noncomplying mountaintop operators did not include continuing operations permitted before January 1, 1978. No effort has been made by DNR to discover noncomplying permits issued in earlier years. The citizens research also found that most permits issued after February 3, 1978, had inadequate blasting, water monitoring and soil handling plans. In addition, five of the operations had not begun land disturbance and the operators were instructed not to commence until approval of revised plans.
stated that the state regulations, (promulgated on August 14, 1978), are "essentially in compliance with, and adequate to implement, the initial regulatory program." In several important respects involving topsoil handling and groundwater monitoring, the DNR regulations are weaker than the federal requirements. After the agreement was signed, the DNR regulations were further weakened when the State Legislative Rule Making Review Committee removed DNR's authority to require topsoil conservation requirements for surface areas disturbed by deep mine openings and created certain exemptions from daily water quality monitoring.

A coal operator recently defended against federal citations issued for its failure to conserve topsoil in reliance on the OSM-DNR agreement. The argument advanced by the operator was that an operator's compliance with the weaker state regulations must automatically be considered compliance with the federal regulations because the agreement estops OSM. This contention was upheld by Administrative Law Judge Thomas Allen, and is now on appeal to the Department of Interior Board of Surface Mining and Reclamation Appeals.

171 Letter, supra note 154, at 4.
172 W. Va. Surface Mining Regulations § 9.02 (1978), concerning top soil conservation fails to specify the following restrictions contained in 42 Fed. Reg. 62,684 (1977) (to be codified in 30 C.F.R. § 715.16(a)-(c)) of the federal interim regulations published in the Federal Register on December 13, 1977:

- Limitations on the size of an area from which topsoil may be removed.
- Specification of methods to control erosion of exposed overburden.
- Segregation of the "A" horizon (or top 6 inch layer).
- Potential need to segregate "B" & "C" Horizons.
- Restrictions on the use of subsoil.
- Scarification of land before redistribution of topsoil.
- Requirement to redistribute to approximate uniform thickness.
- Prevention of excess compaction of redistributed topsoil.
- Protection of stored topsoil by a vegetative cover or equivalent methods.

The state regulations also failed to include groundwater protection standards required by 42 Fed. Reg. 62,687 (1977) (to be codified in 30 C.F.R. § 715.17(h)).

173 See generally Daily Antheneum, Sept. 20, 1978 ("State Strip Mining Law Tougher Than Nation's").

174 Carbon Fuel Co. v. OSM, Nos. CH 9-1-R, 9-2-R, 9-2-P, 9-3-P, 9-6-P (U.S. Dept of Interior, Office of Hearing and Appeals, issued Jan. 12, 1979). In this case the company argued that it had no duty to conserve topsoil or obtain approval for substituted material.

175 Brief for Carbon Fuel Co., supra note 174 (submitted January 8, 1979). A copy of the OSM-DNR agreement was attached to the brief.

176 Carbon Fuel Co. v. OSM, supra note 174.

177 Carbon Fuel Co. v. OSM, No. IBSMA 79-12 (filed Nov. 20, 1978).
OSM's capitulation to the state is particularly disturbing since it foreshadows a liberal use of the so called "state window" concept contained in the federal regulations.\textsuperscript{178} Congress recognized that because of the nation's diversity of terrain and other natural elements, the states should have primary enforcement authority.\textsuperscript{179} This concept, linked with the language found in section 503 of the SMCRA,\textsuperscript{180} has been interpreted by OSM to allow the states to have somewhat different performance standards than are contained in the regulations issued by the Secretary of the Interior through OSM, when local conditions so warrant.\textsuperscript{181} The congressional intent was not, however, intended to empower OSM to allow the states to do away with critical aspects of topsoil conservation and maintenance of the hydrological balance. If West Virginia is successful in maintaining its right to have weaker performance standards in these and other areas, much of the benefit expected to result from the Act's passage will have been lost. It is essential that OSM restrict the "state window" concept to its proper scope.

One final example of poor federal-state interaction during the interim program relates to the abandoned mine reclamation program. During the interim period, and prior to the submission and approval of a state abandoned mine reclamation program, OSM is empowered under section 410 of the SMCRA to expend moneys for emergency restoration reclamation, abatement control or prevention of adverse impact by abandoned mines constituting an imminent danger to the public.\textsuperscript{182} In April, 1977, several such emergency situations were identified in West Virginia, including the hazardous Peach Creek refuse pile. OSM chose to offer the state an opportunity to undertake the reclamation work under a federal grant. Although the state expressed an interest, almost a year has passed without the state having submitted an application for the funding or having developed plans for abatement of the emergency problem. OSM has similarly not acted to correct the danger. Although there are conflicting charges as to which agency has been at fault, the point is that one of the two should have acted more quickly.\textsuperscript{183} OSM's failure to encourage the state to initiate reclamation...

\textsuperscript{178} 44 Fed. Reg. 15,324 (1979) (to be codified in 30 C.F.R. § 731.13).
\textsuperscript{180} Id. § 1255.
\textsuperscript{181} Id. § 1253.
\textsuperscript{182} Id. § 1240.
\textsuperscript{183} DNR officials were quoted as having said that the state agency does not have adequate staff to submit the application or plan reclamation efforts. They also...
tion, or to undertake the reclamation project itself, is particularly disturbing. This parallels other instances where OSM has been reluctant to respond appropriately to the unwillingness of the states to implement the SMCRA and its regulations.\textsuperscript{184}

\section*{VII. Conclusion}

Using West Virginia as a model, recent events do not bode well for the fate of effective strip mine regulation in the states. Perhaps the most disturbing factor during this period is the degree of hostility which has been directed at OSM by the states who must be counted upon to assist in the SMCRA's implementation. In West Virginia, the state government has continued to attack OSM despite attempts by the OSM to meet DNR's demands.\textsuperscript{185} The hostility of DNR's Reclamation Division and the Governor's office has also been picked up by the 1979 state legislature which refused to pass legislation drafted by DNR which would have upgraded the

\textsuperscript{184} As of the date of publication, the two agencies finally entered into a "cooperative agreement," but actual reclamation plans are still unformulated and will take at least several months to prepare.

\textsuperscript{185} For example, in September 1979, Governor Rockefeller severely criticized OSM before a Senate oversight committee. John D. Rockefeller, III, Testimony Before the West Virginia Senate Energy and Natural Resources Committee (Sept. 11, 1978). After extensive meetings that fall between OSM and state officials, Rockefeller wrote to the Senate Committee stating that the major problems between the two agencies had been resolved. See McGraw-Hill, Mine Regulation and Productivity Report at 3 (Oct. 20, 1978); McGraw-Hill, Mine Regulation and Productivity Report at 4 (Nov. 24, 1978). Yet, in March 1979, the Reclamation Chief of DNR testified before House oversight hearings by reading portions of the September Rockefeller testimony without any regard to intervening events. In February, 1979, the Director of West Virginia DNR stated to the press that the latest draft of federal permanent regulations appeared to be a victory for the state. Charleston Daily Mail, (Feb. 6, 1979). In March, 1979, the Governor made statements regarding "panic" in the coalfields. He was also quoted as having said at an industry conference that OSM regulations were "illogical and uninformed," more stringent than Congress intended and as having the effect of straight-jacketing the industry and state officials. Charleston Daily Mail, page 1 (March 8, 1979). \textit{See also}, Walter Heine, Director, Office of Surface Mining, Testimony Before the House Subcommittee on Energy and the Environment (March 6, 1979).
state law to federal standards. Instead, it enacted legislation extending DNR’s authority to enforce interim regulations for another year. Unfortunately, state officials’ criticism of OSM may have backfired. By rejecting the DNR proposed legislation, and by imposing severe time limits and legislative review requirements on needed rulemaking, it is quite likely that DNR will not have an acceptable enforcement package to submit to the Office of Surface Mining. Additionally, if legislative hostility towards OSM contin-

188 A resolution was passed early in the session attacking OSM personnel and urging the DNR Director to resist “unwarranted federal interference” from OSM. The resolution also stated that the Act and regulations were disrupting and placing hardship on the coal industry. The resolution further “protests and deplores” conditions caused by OSM regulations, and called for investigation of the “philosophies and professional conduct” of the OSM staff. These statements, like other industry charges have not been substantiated and no evidence presented to support them. See House Concurrent Resolution No. 9, 1979 W. Va. Leg. Sess. (Jan. 25, 1979).

187 W. Va. Code § 20-6-23b (passed March 8, 1979). The section states in part: nothing in this section shall be construed as an expression of approval of or satisfaction with the federal surface mining act or any rule or regulation promulgated thereto, or thereunder so as to limit or affect any suit, action or other proceeding brought to invalidate, set aside or modify, in whole or in part the federal surface mining Act or any rule or regulation promulgated thereto or thereunder. . . .

The Act directs DNR to propose legislation and regulations to enable the state to assume “exclusive” jurisdiction over the regulation of coal mining. Since it is impossible for the state to preempt the federal authority, it is highly doubtful that DNR could follow this directive and still submit an acceptable state enforcement program to the federal agency. DNR’s ability to propose an acceptable state implementation plan will be further hampered by mandated legislative review (by the Joint Committee on Government and Finance) of all proposed state regulations and state implementation programs. See W. Va. Code §§ 20-6-23(b),(d) (1978 Replacement Vol.). Legislative rulemaking review powers are also contained in W. Va. Code §§ 29A-3-11, 12 (1978 Replacement Vol.). This procedure has not yet been challenged in West Virginia.

189 Legislative rulemaking review is at best a cumbersome process leading to delay in rulemaking. It has been criticized since it allows a minority group of nonexpert and heavily lobbied legislators to dictate policy to the executive branch on technical matters. The decision as to membership of the review committee is extremely crucial since a committee overloaded with industrial favorites could do extensive damage to the effectiveness of administrative rules and defeat the intent of the full legislature. The 1979 act requires DNR to submit a complete state program (proposed legislation and permanent regulations) by May 31, 1979. Many consider this to be an impossible deadline. DNR will be expending scarce staff time in liaison with the legislative committee which could be better spent in developing a sound enforcement program. After committee approval of the enforcement package, it will be difficult to make any changes required by OSM without another round of involved negotiations with the legislative committee.
ues in the 1980 session, an acceptable law may not emerge. In either case, OSM will have no option under the SMCRA but to begin to establish a full scale federal enforcement agency for West Virginia.180

Since it is now clear that the state has committed itself to the industry’s view of the Act and appears bent on obstructing its implementation,180 the critical question has become how far will OSM allow itself to be pushed away from the effective implementation of the Act. The political realities in Congress will make it difficult for OSM to deny a primary enforcement role for West Virginia. Yet citizen suit provisions, which are available to enforce provisions of the Act,191 will clearly require that an unacceptable plan must be rejected.192

In the midst of these events remains the basic fact that greater control and understanding of the hydrologic effects of strip mining are essential to the welfare of the state of West Virginia. Although West Virginia has made substantial improvements during the past decade in strip mine methods and regulations, it is clear that the SMCRA should force many necessary changes which will more effectively prevent and control adverse impacts. Although the West Virginia DNR may deserve to be called the nation’s best pre-

180 30 U.S.C.A. § 1254 (West Supp. 1978). This federal agency must be in place and operating by June, 1980. This means that OSM must make a determination at least several months prior to that date to reject the state program in order to have a full enforcement program in place by June, 1980.

180 This close relationship between industry and state officials is illustrated in the comments submitted by the Governor’s Office of Economic and Community Development to OSM’s draft environmental impact statement on the permanent program rules. In a letter from Daniel S. Green, Manager of Program Support Services, Governor’s Office of Economic and Community Development, to Frank Anderson, Office of Surface Mining, it is stated that comments provided by William Raney, Vice President of the West Virginia Surface Mining and Reclamation Association, are adopted as part of the official statement of position of the State Clearinghouse. Letter of Nov. 21, 1978. A letter from Mr. Raney is included with the state’s comments. It suggests that the Association’s input in the state’s comments was specifically solicited by the state. See Letter from William Raney, Vice President, W. Va. Surface Mining and Reclamation Association, to Daniel S. Green, Governor’s Office of Economic and Community Development (Nov. 9, 1978). Moreover, of the approximately 72 pages of comments submitted by the state, 67 were provided by Mr. Raney, the industry representative. See generally, U.S. DEP’T OF THE INTERIOR, OFFICE OF SURFACE MINING, FINAL ENVIRONMENTAL STATEMENT—OSM-EIS-1 AB31 to AB70 (Jan. 1979).


192 Id. § 1254.
SMCRA strip mine regulatory program, the poor record of other states and DNR's own past and current inadequacies make this a hollow honor which is irrelevant to the task ahead.

It seems appropriate to conclude this article with the hope that the state and federal administrative agencies can lay aside the present hostility and mistrust in favor of a cooperative effort to bring needed changes in the mining industry. Their ability to do this will depend upon their ability to avoid industry induced political pressures brought to bear by the legislative and executive branches of state and federal government. Elected officials must begin to refrain from interfering with the administrative process in order to give this SMCRA a chance to work. Above all, however, citizens must be prepared to enforce their right to a complete and effective strip mine enforcement program in West Virginia, as well as the rest of the nation.