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Joshua I. Barrett
West Virginia University College of Law

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STUDENT NOTES

CITIZEN PARTICIPATION IN THE REGULATION OF SURFACE MINING

Public participation in the regulatory process has become increasingly common in recent years, especially in environmental matters. The West Virginia Surface Mining and Reclamation Act contains a number of devices by which citizens can present their views concerning proposed strip mines and can compel enforcement of the Act's provisions. The federal Surface Mining Control and Reclamation Act of 1977, by allowing citizen access to almost every phase of the regulatory process, opens even more avenues for participation than are currently available in West Virginia and other states.


3 W. VA. CODE §§ 20-6-8, -11, -28, -29 (1978 Replacement Vol.).

4 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978). The Act, which is administered by the Secretary of the Interior, requires that surface mining in all states comply with certain minimal standards, either under a state regulatory program approved by the Secretary of the Interior, or under a federal program. The Act requires states which wish to assume exclusive jurisdiction over the regulation of surface mining and reclamation to submit a state program to the Secretary within 18 months from the date of passage. Failure to submit a state program acceptable to the Secretary, or failure to implement, enforce or maintain an approved program will result in enforcement of the Act under a federal program for the state. 30 U.S.C.A. §§ 1253(a), 1254(a) (West Supp. 1978). Prior to the implementation of a state or federal program, interim regulatory procedures provide certain minimal standards for mining and reclamation. 30 U.S.C.A. §§ 1251, 1252 (West Supp. 1978). These interim provisions are not within the scope of this Note.

It must be noted that all of the procedures described in this Note are considered to be minimum requirements. See 30 U.S.C.A. § 1255 (West Supp. 1978).

An invitation to citizens to take part in these regulatory and enforcement activities represents a recognition on the part of state and federal legislators that interested citizens can make a significant contribution to the public regulatory and enforcement process. But the zealous advocacy that typifies the citizen contribution to these processes often results from citizens' efforts to protect their private interests. In some instances, these interests are not synonymous with the "public interest." For example, the homeowner whose property abuts a proposed strip mine site may well be concerned about the environment, the ecological balance, the scenic beauty of his state, and the purity of his favorite fishing or swimming location. But he is also particularly concerned that his well might dry up, his basement walls crack, or his yard become a resting place for debris.

The question may then be raised: To what extent are citizens protected by the statutory procedures available to them? The kinds of procedural stumbling blocks which face individuals who are trying to protect their lives, homes and communities from devastation at the hands of strip mine operators are well illustrated in the West Virginia Supreme Court of Appeals' decision in McGrady v. Callaghan. This Note will examine that decision, and will further examine the newly enacted Surface Mining Control and Reclamation Act of 1977 to ascertain whether that legislation might signal an end to some of the frustrations experienced under current state law. In addition, a brief look at some of the other public participation procedures under the new Act might provide some guidance as to what steps interested citizens might take in the future to protect themselves and other members of the public.

I. Citizen Participation in the Permit Process

Even under the much-lauded West Virginia Surface Mining and Reclamation Act, serious questions have been raised as to the adequacy of the means available for participation by those who have no ownership interest in the land being mined. These problems are illustrated by the plight of a retired coal miner, a schoolteacher, and a gas company employee whose lands lie near or adjacent to a strip mine and whose claims were recently decided by the

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4 See Gellhorn, supra note 1, at 360.
7 244 S.E.2d 793 (W. Va. 1978).
West Virginia Supreme Court of Appeals. On March 9, 1976, an application to surface mine 110 acres in Raleigh County, West Virginia was received by the Division of Reclamation of the West Virginia Department of Natural Resources. Notice of the proposed operation was published as required by statute. In response, the petitioners and 130 other local residents initiated efforts to prevent the issuance of the permit by sending written protests to the Division of Reclamation. At this point the interested residents encountered their first procedural hurdle in that the application did not contain any information as to what the proposed operation would entail. This omission was due to DNR's policy of accepting an application upon the filing of a form which contained only such matters as the names, addresses, and histories of the applicants, the names of adjoining and nearby landowners, proof that the landowners had been notified by mail, and proof of newspaper publication. The form did not include the mining "preplans" required by law to be included in the application, yet information as to the exact nature of the proposed mining operation was only available in such preplans. When the preplans were submitted at a later date, the petitioners were not notified. Indeed, they received no further word from DNR subsequent to the original notice until they were informed that the application had been approved and the permit granted. The petitioners in McGrady v. Callaghan thus raised for the first time issues as to the fundamental fairness of the permit process as it affects the private citizen: the right to adequate notice of the pending application, the right to know the information upon which the decision is to be based, and the right to a meaningful opportunity to be heard before the granting of the permit.

The West Virginia Supreme Court of Appeals responded to these demands in a tone that can fairly be described as hostile. Although it did admonish the Division of Reclamation to pay closer attention to the mandate of the statute with regard to its

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8 Note of Argument for Petitioner at 1, McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978).
9 W. VA. CODE § 20-6-8 (1978 Replacement Vol.).
10 244 S.E.2d at 794.
11 W. VA. CODE § 20-6-8 (1978 Replacement Vol.).
12 244 S.E.2d at 794.
13 Other issues of statutory interpretation were presented to the court but were not resolved.
notice requirements,\textsuperscript{14} the thrust of the court's opinion was its rejection of the petitioners' claim of a constitutional right to a prior hearing. First, the court felt that since the petitioners' properties would not be mined, their right did not rise "to the stature of the right of one whose property or liberty is being taken by authoritative action."\textsuperscript{15} The court reasoned that the harm that might befall the petitioners was both indirect and potential in nature, noting particularly that although the possibility of damage was great, the Division of Reclamation had the duty to prevent such damage.\textsuperscript{16} Finally, the court summarily concluded that the existing procedures under the statute were in fact adequate to protect the petitioners' interests, declaring that administrative havoc would result from the additional requirement of a hearing prior to the issuance of a permit.\textsuperscript{17}

A. The Nature of the Property Interest

In order to challenge a statute on due process grounds, one must establish that there is or may be a deprivation of liberty or property.\textsuperscript{18} The apparent refusal to recognize such a deprivation in McGrady reflects a narrow view of both the nature of property and the impacts of surface mining.\textsuperscript{19}

\textsuperscript{14} 244 S.E.2d at 797.
\textsuperscript{15} Id. at 796.
\textsuperscript{16} Id.
\textsuperscript{17} Id. It is interesting to note that Chief Justice Caplan pointed to the availability of a "full evidentiary hearing" in explaining the adequacy of the protection afforded by the West Virginia statute. Although W. VA. Code § 20-6-28 (1978 Replacement Vol.) does provide for de novo review, it further provides for affirmance if the director's decision was "lawful and reasonable." See also Cardi, supra note 2, at 355-60.
\textsuperscript{18} Board of Regents v. Roth, 408 U.S. 564 (1972).
\textsuperscript{19} The West Virginia Supreme Court of Appeals in other circumstances has taken a much broader view of property interests cognizable under the due process clause. For example, in State \textit{ex rel.} Knight v. Public Service Comm'n., 245 S.E.2d 144 (W. Va. 1978), the court held that utility ratepayers have "a common law right to reasonable rates from any monopoly created by the State, and this right, having existed before the adoption of our constitution, would be encompassed within the concept of property protected by W. VA. Const. art. 3, § 10." 245 S.E.2d at 149. It could be argued under this reasoning that the property holder's common law right to be free from unreasonable interference with the use and enjoyment of property is a cognizable property interest under the due process clause. See Restatement (Second) of Torts § 822 (1977). See also Stoebuck, \textit{Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect}, 71 Dick. L. Rev. 207 (1967), in which the author incorporates the recent trend towards recognizing nonphysical takings into a broader theory of property.
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Rights of neighboring landowners are certainly affected by strip mining. Legislative recognition of this reality is abundant. For example, among the congressional findings set forth in Title One of the Surface Mining Control and Reclamation Act of 1977 is the fact that "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by . . . damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities." The House Committee on Interior and Insular Affairs commented that "in one state the Veterans Administration has suspended home financing in certain strip mining regions because poorly regulated blasting practices of the area's mines have diminished residential property values." The West Virginia Legislature has similarly found that surface mining "destroys or impairs the health, safety, welfare and property rights of the citizens of West Virginia, where proper reclamation is not practiced," and that in certain areas, any surface mining would result in such injury to health and property rights. In addition, numerous authors have discussed the threat posed by strip mining to neighboring property interests. The extent and nature of the damage that may result from the granting of a permit to strip mine militates in favor of bringing those nearby within the umbrella of due process protection.

To illustrate this point, the petitioners in McGrady drew an analogy to the law of zoning. It has been held that property owners adjacent to an area which is to be rezoned to allow the intrusion of a potentially harmful use fall within the protection of the due process clause. In Scott v. City of Indian Wells, the Supreme Court of California struck down a municipal zoning change which would permit the construction of a housing development just inside the city limits, basing its decision on the ground that nearby

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22 W. VA. CODE § 20-6-1 (1978 Replacement Vol.).
23 Id. § 20-6-11.
24 See, e.g., Cardi, supra note 2, at 325-38; Reitze, Old King Coal and the Merry Rapists of Appalachia, 22 CASE WESTERN L. REV. 650, 656 (1971). See also Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149, 152-53 (1971).
landowners who lived outside the city limits had not been given notice and an opportunity to be heard. The court noted:

Zoning does not deprive an adjacent landowner of his property, but it is clear that the individual's interest in his property is often affected by local land use controls, and the "root requirement" of the due process clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest . . . ." 

In an earlier case, Cugini v. Chiaradio,23 the Supreme Court of Rhode Island expressed a similar view when confronted with the claim that neighboring landowners were denied due process when a city allowed the construction of a government building in a residential area. Although the court ruled that the objectors (who had in fact appeared and testified before the zoning board) had not been denied due process, it agreed that their interests fell within the protection of the due process clause, remarking that "a proposal to alter the zoning restrictions made applicable to particular land may operate to depreciate the property rights of surrounding landowners."24

It must be noted, however, that the zoning analogy is a limited one. The issue of the rights of neighboring landowners has not often been litigated in a constitutional framework since it is customary for zoning statutes to require notice and a hearing before zoning decisions are made.25 In addition, zoning is often said to be an essentially legislative activity, from which the dictates of due process do not protect the individual.26 Finally, there is some authority

23 Id. at 549, 494 P.2d at 1141, 99 Cal. Rptr. at 749, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971) [emphasis added]. See also Horn v. County of Ventura, 144 Cal. Rptr. 818 (Ct. App. 1978) in which a property owner sought to enjoin the subdivision of a neighbor’s lot on the grounds that notice and hearing had not been accorded to him. Rejecting the appellant’s claim on the ground that the determination was legislative in character, see note 31 infra, the court indicated that had the determination been “quasi-judicial,” notice and a public hearing would have been required. 144 Cal. Rptr. at 819.
25 Id. at 125-26, 189 A.2d at 801.
27 See, e.g., San Diego Bldg. Contractors Ass’n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1975) (distinguishing Scott, supra note 26); City of Eastlake v. Forest City Enterprises, 426 U.S. 658, 674 (1976); Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 688, 376 A.2d 483 (1977). The principle that the due process clause does not afford individuals an opportunity to be heard when the governmental act complained of is legislative in nature was set
which directly rejects the notion that the neighbors have an interest cognizable under the due process clause.\textsuperscript{32}

Despite these limitations, it is important to note that the zoning analogy does provide some authority for the proposition that certain land uses may give rise to a protectable interest for those with property rights in adjacent land. But the better justification for protecting those landowners adjoining a proposed strip mine is the recognition that the mine site is in reality not the only property affected by the granting of a permit to strip mine. Professor Sax, in the context of an article on takings, clarified this point:

Surely it is naive . . . to suppose that one who profits from a piece of property necessarily uses only those resources within his boundaries, and equally naive to think the consequences of one property user's activities are confined to his property. Property does not exist in isolation . . . . Frequently . . . a use of, or a demand upon, property is at the same time effectively a use of, or demand upon, property beyond the border of the user.\textsuperscript{33}

B. The Availability of Information

The first issue raised by the petitioner in \textit{McGrady} is that of access to information regarding the nature and extent of the proposed action. This problem was not addressed by the court apparently because in July of 1977, DNR officially changed its policy to

\begin{quote}
forth by Mr. Justice Holmes in Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).
\end{quote}

The decision of a Texas Court of Civil Appeals in Kettlewell v. Hot Mix, Inc., 556 S.W.2d 663 (Tex. Ct. App. 1978) provides an interesting contrast to \textit{McGrady} on somewhat similar facts. Nearby property owners had sought to enjoin the operation of a newly constructed asphalt plant on the ground that the issuance of a construction permit without affording them notice and an opportunity for hearing violated their due process rights. Although the court denied their claim on several grounds, it did recognize a property interest based on the stipulated fact that "some particulate emissions, including dust, in the plant and near plaintiffs which periodically have settled on plaintiffs' personal property and sometimes been visually apparent in the air over plaintiffs' land" and other inconveniences had resulted from the plant's operation. \textit{Id.} at 666. It would be anomalous indeed if such interference, on stipulated facts, would constitute a "deprivation of property" under the due process clause while the spillover effects of surface mining would not. See also note 19, \textit{supra}.
comply with statutory language requiring applications to contain preplans. Instead, the court simply admonished DNR that "in the future compliance with statutory requirements should be made and the required information should be supplied by an applicant for a permit prior to the publication."

Like the West Virginia law, the federal Act requires an application to contain extensive information concerning the operator and the proposed operation. The federal Act, however, places greater emphasis on making this information available to the public. In addition to requiring the disclosure of information concerning the operator and other persons who may be legally or financially connected with the operation, section 507 of the Act further requires that a permit application contain other information such as maps (topographical and cross-section); watershed information; a determination of probable hydrological consequences; test borings and core samplings; and in some cases climatological factors and soil surveys. The application must also indicate the area to be affected, the schedule of operations, the engineering techniques to be used, the equipment to be employed, and plans of proposed blasting. This permit application information is to be made available locally, either at the county courthouse or at some other public office in the area of the mining.

Letter from Division of Reclamation to West Virginia Legal Services Plan, Clarksburg Office, July 25, 1977.

S.E.2d at 797.

30 U.S.C.A. § 1257(b)(1)-1257(b)(4) (West Supp. 1978). The history of the operator's past violations must also be included with the application. Id. § 1260(c).

Id. § 1257(b)(13)-1257(b)(14).

Id. § 1257(b)(10).

Id. § 1257(b)(11).

This information is available to "any person with an interest which is or may be adversely affected," a limitation which is not imposed on the remaining information in this section.

Id. § 1257(b)(12)-1257(b)(16).

Id. § 1257(e). The Act attempts to afford persons likely to be affected by blasting an extra measure of protection. Section 515 requires notice of planned blasting by publication and mail; public availability of blasting logs; limitations on the type of explosives and detonating equipment and on the size, timing and frequency of blasts; certification of blasting personnel; and availability of a pre-blasting survey for local residents. Id. § 515(b)(15). For a discussion of these provisions and their shortcomings see Note, Regulation of Blasting Under the Surface Mining Control and Reclamation Act of 1977, 81 W. VA. L. REV. 763 (1979).

Id. §§ 1257(b)(7)-1257(b)(9), 1257(g).

Id. § 1257(b)(6).
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In light of all this information available at the local level under the federal Act, it seems inconsistent that the information required to be contained in the reclamation plan is not subject to public inspection unless state law so requires. The reclamation plan is the explanation of the methods and schedule by which the land is to be restored after mining, and the proof that restoration is possible. In addition, the reclamation plan reflects the land use considerations which the applicant must take into account. These land use considerations include postmining uses of the site, possible future mining in the area, and the consistency of the operator's plans with "local, physical, environmental, and climatological conditions" and surface owner plans. To deprive the interested public of such information is to reveal only half the story. Indeed, there is no justification for subjecting the reclamation plans to less public scrutiny than the mining plans, particularly in light of the damage that can result from improper reclamation.

C. The Adequacy of Notice

It is clear, however, that the Act does provide the interested citizen with some opportunity to review and investigate the proposed mining and its projected impacts. The House Committee described these provisions as follows:

Each application will be available for public review at an appropriate place. The applicant must supply proof of newspaper notice that acquaints local residents with the location of the operation and where the application may be examined. This requirement responds to the committee's awareness of the severe difficulty which local people frequently experience in attempting to investigate the nature of impending surface mine operations.

45 Id. § 1258(b).
48 See text accompanying notes 20-23, supra.
49 H.R. Rep. No. 218, 95th Cong., 1st Sess. 92, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 593, 628. This public notice does not take place until after the permit application is complete. 44 Fed. Reg. 15,312, 15,378 (1979) (to be codified in 30 C.F.R. § 786.11(a)). This prevents the kind of problem experienced by the petitioners in McGrady, where the public notification was useless because those notified could not obtain any specific information concerning the proposed operation. See text accompanying notes 10-12, supra.
But the concern which the committee expressed in recognition of this "severe difficulty" is belied by its own statement. The flaw in its protection of the public interest lies in the fact that newspaper publication is the only method used to notify those who have no legal interest in the mining operation or the minesite. It is the newspaper, rather than personal notice, which purports to advise the neighboring landowner of impending action. Yet "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted into the back pages of a newspaper."\(^{50}\) In addition, the persons most affected by the permit, the immediate neighbors, are not mentioned by name in the advertisement.\(^{51}\) Those persons whose interests are adversely affected by such mining lose their right to participate in the administrative process thirty days after the last of four consecutive weekly advertisements.\(^{52}\) It is, therefore, apparent that an individual may easily forfeit the right to administrative access through no fault of his own. It cannot be assumed in the absence of personal notification that those who live adjacent to the proposed mine would have waived such rights. West Virginia is one of the few states which currently requires notification by mail to owners of surface area in the immediate vicinity of the proposed site.\(^{53}\) The absence of personal notice to those most likely to be affected is a serious shortcoming of the federal Act.

There is some authority for the assertion that this notice deficiency constitutes a denial of due process. The governing principles to be applied in determining the adequacy of such notice were set forth in *Mullane v. Central Hanover Bank & Trust Co.*\(^ {54}\) In *Mullane*, the Supreme Court of the United States overturned a statutory provision of the New York Banking Law by which beneficiaries of a certain trust which had been pooled in a "common trust" arrangement were notified of a judicial settlement of accounts by newspaper publication. The Court recognized the need to achieve a balance between the state's interest in administrative efficiency and the interests of the individual in being "informed that the matter is pending [in order to] choose for himself

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\(^{52}\) *Id.* § 1263(b).

\(^{53}\) *W. Va. Code* § 20-6-8 (1978 Replacement Vol.) (providing personal notice to all surface owners within 500 feet of the proposed minesite).

whether to appear or default, acquiesce or contest." Since "the notice required does not even name those whose attention it is supposed to attract," such token notice, the Court held, was inadequate to those whose interests and whereabouts were readily ascertainable.

Following Mullane, the Supreme Court has held that personal notice must be provided when action has been taken against one's real property. Schroeder v. City of New York involved that city's right to divert a river which flowed past the appellant's summer home. The Water Supply Act provided that affected landowners might participate in condemnation proceedings, provided that they submit their claims for damages within a three-year limitation period. The appellant failed to submit her claim within the three-year period, but the Supreme Court, relying on Mullane, held that the newspaper advertisements and posted notices used by the state commission did not comport with due process. The Court asserted: "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

Even if the notice provided by the Act is not constitutionally infirm, it represents an unwise policy. To neglect to notify those most likely to be injured by strip mining at the risk of having them forfeit their rights to participate in the administrative process is to lose the benefit of the most zealous citizen input and to increase the hostility with which surface mining so often has been met.

D. The Opportunity to be Heard

The principal argument which the adjoining landowners presented to the West Virginia Supreme Court of Appeals in McGrady v. Callaghan was that due process requires that those who object to the issuance of a surface mining permit be afforded an administrative hearing prior to the initial decision on the permit. The question of what kind of hearing is required and when it is required

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55 Id. at 314.
54 Id. at 315.
57 Id. at 318.
59 Id. at 212-13. See also Walker v. City of Hutchinson, 352 U.S. 112 (1956).
60 Brief for Petitioner, McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978).
by due process has been litigation in a variety of settings in recent years. In 1976, the United States Supreme Court in *Mathews v. Eldridge* attempted to synthesize its prior holdings and to set forth the principles which should guide a court in making a determination on this issue. In *Eldridge*, a social security recipient asserted that due process required a hearing prior to the termination of disability benefits. The Court disagreed. As an "ordinary principle," the Court stated, "something less than an evidentiary hearing is sufficient prior to adverse administrative action." Sound policy dictates, to an extent, that this should be so. In certain circumstances, even the most informal opportunity to present one's side of the story will assure the affected party an accurate decision and will leave that party with a sense of having been treated fairly. In addition, the sheer multitude of daily administrative decisions compels the use of informal adjudicatory proceedings wherever possible. A recent survey of informal administrative adjudications shows that the vast majority involve only the minimal requirements of notice, opportunity for comment, and statement of reasons. But the establishment of this minimum requirement provides little guidance in the multitude of differing individual factual situations which may require more formal proceedings. To deal with the variety of situations that could exist, the Court in *Eldridge* set forth a flexible test.

Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions

involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.  

The West Virginia Supreme Court of Appeals is the only court to have considered the issue of whether due process requires a hearing prior to the grant or denial of a strip mining permit. Because of the court's finding that the adjacent landowners have an insufficient property interest at stake, the issue, though approached, was not decided on its merits. Chief Justice Caplan, writing for a three to two majority in McGrady, considered the prior hearing issue only in a perfunctory manner. The court treated Eldridge with a mere synopsis of the facts and result and made no attempt to analyze or apply the Eldridge test which it had adopted only a month earlier in Waite v. Civil Service Commission. Chief Justice Caplan did, however, set forth with approval the statutory procedures otherwise available to those who object to the issuance of a permit, judging those procedures to be adequate in light of his opinion that

[to afford any and all who desire to object to an application for surface mining a constitutional right to a full evidentiary hearing prior to the issuance of the permit could and probably would result in an administrative catastrophe. The statute does not limit to any number or area those who may protest; therefore, those who oppose surface mining generally, and there are many, could demand a hearing prior to the issuance of any permit. This would create chaos and could virtually grind surface mining to a halt.  

Had the supreme court of appeals thoughtfully applied the Eldridge test to the facts in McGrady it might have arrived at a different result. The first consideration in the Eldridge test—the private interest that will be affected—is a substantial one in the case of residents adjacent to a proposed strip mine. The homes, the water supplies, and the usefulness and productivity of the lands of neighboring residents are placed in substantial jeopardy by the erroneous granting of a surface mine permit, especially in light of the fact that some lands simply cannot be reclaimed. In addition,

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67 424 U.S. at 334-35. This test was adopted by the West Virginia Supreme Court of Appeals in Waite v. Civil Service Comm'n, 241 S.E.2d 164 (W. Va. 1977).
68 244 S.E.2d at 795-96.
70 244 S.E.2d at 796.
71 See text accompanying notes 20-24, supra.
blasting and various types of pollution may result in very real hazards to the health of neighboring residents. To avoid these results it is necessary for the permit applicant to be subjected to the most exacting scrutiny.

The second part of the *Eldridge* test—the risk of erroneous deprivation under existing procedures and the probable value of additional safeguards—is somewhat more difficult to analyze when applied to the surface mining application process. For example, the Court in *Eldridge* indicated that oral presentation is unnecessary when the factual basis of an agency decision is scientific in nature, not dependent on credibility, and therefore most amenable to written communication. It might be argued that the information required to make an accurate decision concerning a strip mine application is of this nature. However, neither the coal company engineers nor the inspectors of the regulatory authority are likely to have the kind of knowledge of the conditions in the area which the local resident will possess. In *McGrady* the petitioner argued:

> The legislative criteria guiding the respondent's determination whether or not strip mining should be allowed (and under what limitations) relate specifically to local conditions . . . . Each potential strip mine site has individual characteristics which require careful consideration on a case by case approach and with full development of site information. There is no substitute for input which local residents can give concerning these diverse conditions. Any procedure which excludes, in practice, such input, invites arbitrary and capricious decision making.

The understanding of local conditions which is so crucial to a correct permit decision is not a wholly scientific finding. There is still much to be learned about the impacts that surface mining will have on certain conditions. In addition, experts may differ, and

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72 424 U.S. at 343.
73 In addition, various amici had attempted to show the risk of error in terms of the percentage of reversals. Under West Virginia strip mine law, however, decisions of the director granting permits are generally upheld by an industry-oriented Board of Review which must affirm if the director's decision was "reasonable." W. Va. Code § 20-6-28 (1978 Replacement Vol.). See Cardi, supra note 2 at 355-60.
75 For example, the House Committee on Interior and Insular Affairs has noted that "as the scale of surface coal mining has expanded in Appalachia, large earth-moving technologies have raised issues of stability and planning that are not yet
a confrontation between agency experts and those retained by private citizens should result in a better analysis of technical data.\textsuperscript{74}

The third element in the \textit{Eldridge} due process test is the government's interest, including the fiscal and administrative considerations at stake.\textsuperscript{77} In \textit{McGrady}, Chief Justice Caplan stressed the catastrophic effect on the administrative process of granting a prior hearing to every objector.\textsuperscript{78} But the Chief Justice appears to have made an assumption that a separate hearing would be required for each individual protestor, and proceeded from this assumption to paint his bleak picture. A single hearing prior to the decision on each permit application could give objectors an opportunity to be heard while avoiding excessive burdens on the regulatory authority. Moreover, even if the Chief Justice was suggesting that a single hearing on every permit would be too burdensome, this concern, though legitimate, was probably overstated.\textsuperscript{79}

A final consideration reinforces the view that those who chall

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\textsuperscript{77} 424 U.S. at 347.

\textsuperscript{78} See text accompanying note 70, supra.

\textsuperscript{79} In the hearings on the federal Act, arguments similar to those made by the Chief Justice were made in opposition to the proposed legislation's requirement of a public hearing prior to any permit decision. In response to one such argument, Committee Chairman Udall remarked:

You refer in your statement to the burdensome need for public hearings and you say in West Virginia with 300 permit applications you would have had to have 300 hearings last year. My own philosophy on this goes to two things: one, that these hearings could be concurrent or consolidated . . . . You can have 8 or 10 hearings at the same place, same day, and run them through.

I understand industry's point of view, but the reason so many environmentalists and citizens' groups have been angered and have sought these delays is there is really no place for them to go and make their case. Once you give them the machinery for the public hearing so they know they will get some notice, or if a particular operator is not responsible they can shout and scream in front of somebody who has the power to do something about it. Once we pass this bill and get uniform standards and industry gears up to comply with it, you will find that these hearings run through very quickly, that you won't have the kind of extreme situation you fear.

\textit{1977 House Hearings, supra} note 5, part II at 183. On the other hand, the prior hearing requirement in the federal Act was ultimately changed to an "informal conference." See note 84, infra.
lunge the issuance of a permit should have an opportunity to be heard. Since the decision to allow surface mining in a certain area can have serious social and environmental impacts it is essential that those affected be left with a sense that their interests have been given a fair consideration. A prior hearing can contribute significantly to this sense of fair treatment.

E. Prior Hearings Under the Federal Act

To the extent that the holding of McGrady v. Callaghan is that one who opposes a strip mine has no right to a hearing prior to the granting or denial of a permit, its future impact is limited. Under the Surface Mining Control and Reclamation Act of 1977, those who desire to enter oral objections prior to the issuance of a permit will have an opportunity to do so once the Act is implemented in its entirety through an approved state program or federal program. Section 513 mandates that an informal conference be held in the area of the proposed mining upon timely request by "any person with an interest which is or may be adversely affected" or by the officer or heads of certain governmental bodies.

The Act is unclear as to the exact nature of this conference, however. For example, the Act fails to mention who the parties shall be, although it is clear that objectors can be parties. It further fails to provide for notice of the conference other than by publication, even to those who request it. Section 510, moreover, refers to the procedure set forth in section 513 as a "public hearing," although the text of section 513 does not use the term except in the section title.

The informal conference does not appear to be intended to be an adjudication. Rather, it has been described as a forum in

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80 This element of the due process analysis, although absent from the Eldridge test, is nevertheless cited by scholars as an important consideration. See L. Tribe, American Constitutional Law 542-43 (1978).


82 Id.

83 Id. § 1260(a).

84 This aspect of the legislative history is somewhat confused. The Senate Bill (S.7) used the informal conference as an alternative to a "nonadjudicatory public hearing" in section 413 (the Senate version of § 513). S. Rep. No. 128, 95th Cong., 1st Sess. 80 (1977). The House bill, which was adopted (see H.R. Rep. No. 493, 95th Cong., 1st Sess. 107 (1977)), was amended to delete the "public hearing" language, providing only for an "informal conference" prior to the issuance or denial of the permit. Upon proposing this amendment, Congressman Murphy (Pa.)
which citizens can air their objections in an informal setting. But it is important to note that the Act does contemplate some degree of formality. For example, a record is required, unless waived. Although the Committee of Conference expressed a belief that this record need not be "as formal and complete as would be required for records of formal hearings," the Act specifies the use of electronic or stenographic means as opposed to a report by the agency representative. Additionally, a party may be allowed access to the proposed minesite "for the purpose of gathering information relevant to the proceeding." The presence of counsel and indepen-


The informal conference procedure contemplated by the conferees is not intended to be a private, closed-door "back room meeting", but rather a serious public forum, similar to Congressional hearings with full notification accorded to the public, which addresses all objections and questions, and whose proceedings are recorded and made an open public record. This compromise takes away the expense and overkill of a public hearing at every turn, but preserves the rights of objectors and retains a necessary forum for public involvement.

It is interesting to note that in the proposed final regulations, the Office attempted to limit the issues to be examined in the informal conference to those raised in the written objections, comments and requests for conferences. 43 Fed. Reg. 41,662, 41,862 (1978) (proposed regulation 30 C.F.R. § 787.14(b)(4)). This limitation was deleted in the final regulations.

This will allow the regulatory authorities to adopt whatever procedures they consider necessary to control consideration of issues at the conferences. However, this is to be done subject to the policy that all information concerning the sufficiency of the application, the applicant, the area to be affected, and whether the criteria for approval are met are relevant and proper for consideration at these conferences.


\[88\] Id.
dent experts seem to be consistent with the degree of preparedness that these provisions suggest. But the informal conference is not the full adjudication: the information gathered at such a conference, the issues confronted therein, and any agreements which might result comprise only a part of the decision to grant or deny a permit.

F. Post-Issuance Proceedings

After the informal conference, the parties are to be notified of the granting or denial of the permit, by notice containing a written statement of the findings of the regulatory authority and "the reasons therefor." At this point "the applicant or any person with an interest which is or may be adversely affected" may request a formal adjudicatory hearing under section 514 on "the reasons for the final determination." Because of the possibility that mining activities will cause irreparable damage before the formal hearing can be completed, the prior informal conference may be an inadequate substitute for a full evidentiary hearing before a permit is granted. Congress has addressed the problem to some extent by allowing the federal or state hearing authority to grant temporary relief from the granting or denial of a permit. It must be pointed out, however, that this procedure is a limited device. Temporary relief is granted on a wholly discretionary basis. In addition, parties must be notified and given an opportunity to be heard and "the person requesting such relief [must show] that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding."

The formal hearing which follows the permit decision is specifically adjudicatory in nature and subject to the requirements of section 554 of the Administrative Procedures Act or its state counterpart. But the wording of the provision raises questions

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89 Id. § 1264(a).
90 Id. § 1264(c).
92 "The Secretary . . . or the state hearing authority may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate . . . ." Id. The operator may also find temporary relief under this section.
95 "Where the regulatory authority is the State, such hearing shall be of record, adjudicatory in nature, and no person who presided at a conference under section
CITIZEN PARTICIPATION

which may have serious consequences. From the "final determination" on the permit application there has emerged a record of the informal conference, the findings by the regulatory authority, and a statement of reasons for the findings. The fact that the appeal is described in the Act as a hearing on the reasons for the final determination indicates that this procedure is a review of that decision. If so interpreted, there are two problems. First, the "hearing on the reasons" might be viewed as a limitation, confining the issues litigated on appeal to those designated as "reasons." Although this limitation might make sense from the standpoint of an aggrieved applicant who must have notice of the asserted deficiencies in his plans in order to prepare his case, from the standpoint of an aggrieved citizen-objector such an interpretation might mean that important issues are dispensed with at a level at which the citizen is without the tools of formal adjudication. Such a limitation should not be applied: the reason for approving any application is that all of the requirements of the Act have been satisfied. Therefore, any alleged deficiency should be subject to adjudication under section 514.

The second problem raised by section 514 is whether there is any other limitation on the scope of this review of the permit

513(b) shall either preside at the hearing or participate in this decision thereon or in any administrative appeal therefrom." 30 U.S.C.A. § 1264(c) (West Supp. 1978).

Id. § 1264(c).

It appears that the Office of Surface Mining may have taken this approach. In the final regulations, the Office requires the regulatory authority to give "specific reasons" for its decision. 44 Fed. Reg. 15,312, 15,381 (1979) (to be codified in 30 C.F.R. § 786.23). Explaining this requirement, the Office commented, "a regulatory authority should ordinarily list the specific facts and reasons behind each decision in order to limit the issues in any appeal." 44 Fed. Reg. 14,902, 15,102 (1979). See also Romanek, Permit Issuance—Administrative and Judicial Review—Observations and Problems, 7 Nat. Resources Law 225, 226 (1974), describing E.P.A. permit procedure regulations under the Federal Water Pollution Control Act, supra note 1.

It is interesting to note that section 514 as originally proposed allowed only the applicant to request a hearing.

If the application is disapproved, specific reasons therefor must be set forth in the notification . . . [T]he applicant may request a hearing on the reasons for said disapproval.

123 Cong. Rec. H3763 (daily ed. April 27, 1977). In this context the term "hearing on the reasons" makes sense.

The regulatory authority cannot issue a permit unless it finds in writing that all of the requirements of the Act and the regulations have been met. 30 U.S.C.A. § 1260(b) (West Supp. 1978); 44 Fed. Reg. 15,312, 15,380 (1979) (to be codified in 30 C.F.R. § 786.19).
decision. The presence of a record in the conference proceeding suggests a limited review of the record; but it must be remembered not only that the record may be waived, or that it may be incomplete, but also that the record of the conference is only part of the evidence considered in making the decision to grant or deny the permit. These factors militate in favor of de novo review but do not completely refute the possibility of deference to earlier decision-making which was not subject to the rigors of the adversary process.

Such ambiguities in the procedures for the granting or denial of a permit are most unwelcome, given the structure of the federal Act. If there is a procedural focal point in the Act, it is the permit procedure. It is only at this point that the operator has the full burden of showing that the proposed mining operation will be able to comply with all aspects of the Act.\textsuperscript{100} Furthermore, if a permit has been erroneously granted, it may be difficult to avert the destruction that could result. Once granted, revocation or suspension of a surface mining permit is unlikely, for a "pattern of violations" must first be found in order for suspension or revocation proceedings to commence.\textsuperscript{101} The definition of "pattern of violations" is unclear.\textsuperscript{102} In addition, the establishment of a pattern of violations does not trigger the procedures for revocation or suspension unless the failure to comply with the Act or the permit conditions is "unwarranted" or "willful."\textsuperscript{103} Such a requirement may preclude an order to show cause why a permit should not be revoked in the situation where the failure to comply resulted from error at the planning stage rather than from any lack of diligence in the operation of the mine. Cessation orders, like the suspension and revocation procedures, are not an effective substitute for thorough analysis at the permit level since they are designed to be emergency measures.\textsuperscript{104} Finally, even though judicial review of permit deci-

\textsuperscript{100} 30 U.S.C.A. § 510(a) (West Supp. 1978). Note that when permit renewal is sought, the burden shifts to those opposing renewal. 44 Fed. Reg. 15,312, 15,384 (1979) (to be codified in 30 C.F.R. § 788.16(b)).


\textsuperscript{102} The proposed regulations for the Initial Regulatory Program attempted to arrive at a mechanism for determining the existence of a pattern of violations. An attempt to set up a "natural norm" as a yardstick met with considerable objection and was deleted from the final version. 42 Fed. Reg. 62,669, 62,702 (1977) (to be codified in 30 C.F.R. § 722.17).


\textsuperscript{104} Id. § 1271(a)(2). It is the emergency nature of the cessation order which refutes the charge that the ability of an inspector to shut down an operation under
sions is available, the scope of review is limited.\textsuperscript{105}

The need for accurate evaluation of all relevant factors at the permit stage is compelling. Yet the permit procedures set forth in sections 513 and 514 contain a number of uncertainties. Such procedures do provide a forum in which those opposing issuance of a strip mine permit may be heard, as well as a means by which action may be taken to prevent severe damage to the area surrounding the proposed mine site and to the environment in general. If measured by a due process standard they may pass constitutional muster, but it might well be argued that a more adversary procedure is necessary prior to the issuance of a permit. It is essential that these procedures be handled with a full appreciation of the property, health, and environmental interests at stake when an application for a surface mining permit is considered.

II. CITIZEN PARTICIPATION IN OTHER AREAS: THE CITIZEN AS ENFORCER

Participation in the permit process is only one of the means chosen by Congress to promote citizen involvement in the regulation of surface mining. The enforcement provisions of the Act similarly provide for the citizen participation that is necessary to ensure that the Act is enforced with zeal and that relevant facts are brought to the attention of the regulatory body.

A. Inspections

The primary responsibility for the enforcement of the Act has been placed upon the states,\textsuperscript{106} although the federal Office of Surface Mining Reclamation and Enforcement oversees, to an extent, the state programs. A feature of this oversight is the federal inspection program, which provides for not less than one partial inspection per month and one complete inspection per calendar quarter for every surface mining operation under state control.\textsuperscript{107} Section

Any person who is or may be adversely affected by a surface mining operation may notify the Secretary or any representative of the Secretary responsible for conducting [a federal] inspection, in writing, of any violation of this chapter which he has reason to believe exists at the surface mining site. 108

Although this section does not specifically require immediate inspection, it does require that a federal inspector investigate the allegation. The complaining party may also require the Secretary to investigate the adequacy of the inspection, in which case the Secretary must furnish "a written statement of reasons for the Secretary's determination that adequate and complete inspections have or have not been made." 109 The person who has complained of the violation also has the right to obtain an informal review of an inspector's refusal to issue a citation and must be provided with a written statement of the reasons for the final disposition of the matter. 110

In addition to the procedures set forth in section 517, section 521 provides a more effective means of citizen enforcement.

Whenever, on the basis of information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the state regulatory authority. 111

If the state fails to act within ten days on the basis of this notification or if the person providing the information can prove that "imminent danger of significant environmental harm exists and the state has failed to take appropriate action," the Secretary is required to order an immediate inspection. 112 The person who provided the information is then notified and is permitted to attend the ordered inspection.

The use of the phrase, "whenever . . . the Secretary has reason to believe that any person is in violation . . . ", might serve to

108 Id. § 1267(h)(1).
109 Id. § 1267(h)(2).
110 Id. § 1267(h)(1). "This provision could be very useful in avoiding litigation." S. Rsp. No. 128, 95th Cong., 1st Sess. 86 (1977).
112 Id.
place a potentially difficult burden upon the citizen to satisfac-
torially show such a violation. Yet the House Interior and Insular
Affairs Committee indicates that a "reasonable belief could be
established by a snapshot of an operation in violation or other
simple and effective documentation of violation."113 Although doc-
umentation may still prove to be a problem, it is clear that Con-
gress intended for the Secretary to be receptive to citizen com-
 plaints.

Even though the terms of section 521 are directed to federal
enforcement, section 521(d) imposes the same substantive and
procedural requirements upon state enforcement programs.

As a condition of approval of any state program submitted pur-
suant to section 503 of this act, the enforcement provisions
thereof shall, at a minimum, incorporate sanctions no less strin-
gent than those set forth in this section, and shall contain the
same or similar procedural requirements relating thereto.114

Although this section may be read to require comparable proce-
dures for "sanctions" rather than inspections, the legislative intent
militates against such an interpretation.115

A further indication of the legislative intent to include the
private citizen in the enforcement process is that administrative
appeals from agency enforcement decisions are not limited to those
brought by mine operators and owners. Section 525 allows "any
person with an interest which is or may be adversely affected" by
a notice of violation or a cessation order, "or by any modification,
vacation or termination of such notice or order," to apply to the
Secretary for review.116 This review includes "such investigation as
the Secretary deems appropriate," and must include, on request,
a public hearing subject to section 554 of the Administrative Proce-
dure Act. In addition, one may recover costs incurred in participat-
ing in such proceedings.117

Cong. & Ad. News 593, 661.
840.15, 842.12). In applying the federal standards for citizen participation to state
inspection and enforcement programs, the Office relied on legislative history in S.
117 Id. § 1275(e).
B. Citizen Suits

In addition to administrative enforcement methods, citizen suits are permitted in district courts under section 520 of the Act.\textsuperscript{118} Under this section, "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act."\textsuperscript{119} This provision sets forth the "broadest standing requirements enunciated by the Supreme Court."\textsuperscript{120} In order to meet these requirements one must allege injury in fact,\textsuperscript{121} but such injury may merely be to one's interest in "aesthetic and environmental well being."\textsuperscript{122} In addition, practical considerations such as the absence of jurisdictional amount or diversity requirements, and a provision for an award of costs encourage citizens to assume the role of "private attorneys general," provided that such citizen suits are brought in good faith.\textsuperscript{123}


\textsuperscript{122} U.S. v. SCRAP, 412 U.S. 669, 686-87 (1973). "Neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm deprives them of standing." Id.

\textsuperscript{123} See also 44 Fed. Reg. 15,312, 15,314 (1979) (to be codified in 30 C.F.R. § 700.5): Person having an interest which is or may be adversely affected or person with a valid legal interest shall include any person—

(a) Who uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary of the State or the State regulatory authority; or

(b) Whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority.

\textsuperscript{123} 30 U.S.C.A. § 1270(a), 1270(d) (West Supp. 1978). The award of costs includes the costs of attorneys' and experts' fees. The importance of such a provision
Several portions of section 520, however, create limitations on the effectiveness of the citizen suit provisions. Except where the violation constitutes an imminent threat to health or safety or would immediately affect a legal interest, suits may not be brought until the state, the Secretary, and the alleged violator have had sixty days notice of the action. This delay could be a costly one to the environment. As a practical matter, it may be that Congress never intended for most of these suits to come to fruition. This type of notice provision has been viewed by some courts as a device designed to give the regulatory authority time to investigate and to take voluntary action on its own. Nevertheless, citizen suits are an important means of bringing environmental issues before the courts, especially for the purpose of compelling agency action.

Suits may be brought against the Secretary or the state regulatory authority alleging a failure to perform "any act or duty under this act which is not discretionary with the Secretary or with the appropriate state regulatory authority." Since the court has "jurisdiction to decide whether a function is mandatory or discretionary," the citizen suit is a vehicle by which one can urge an interpretation of the Act which may differ from the agency interpretation. Through this device, the active participation of the

should not be underestimated. See, Cramton & Boyer, Citizen Suits in the Environmental Field: Peril or Promise?, 2 ECOLOGY L.Q. 407, 417 (1972). It is also important to note that one may not have to win the citizen suit in order to be awarded costs. Costs can be awarded to "any party." The ability of the court to award costs to any party also means that costs may be awarded to the defendants in such an action. An action merely to "harass and embarass" or an action motivated by "malice and vindictiveness" may result in an award to the defendant. H.R. REP. NO. 218, 95TH CONG., 1ST SESS. 90, REPRINTED IN [1977] U.S. CODE CONG. & AD. NEWS 593, 627, CITING UNITED STATES STEEL CORP. V. UNITED STATES, 519 F.2D 359, 364 (3RD CIR. 1975); Carrion v. Yeshiva Univ., 535 F.2D 722 (2D CIR. 1976).


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courts in the interpretation of the Act may be enlisted. It must be noted, however, that in an action against an operator, unlike an action against a governmental agency, the scope of judicial interpretive power is severely limited, for actions may be brought only for alleged violations of "any rule, regulation, order or permit issued under this title." By allowing actions against operators or owners only for violations of the positive commands of the agency, Congress has relieved persons who are acting in compliance with agency regulations and permit conditions of the burden of having to defend citizen suits alleging violations of the Act. This section, however, permits a person who has been injured as a result of violations by an operator to recover damages for those injuries; this right exists in addition to whatever rights the injured party might have under common law or state statute. Actions against the United States or any other governmental instrumentality may be brought for alleged violations of the Act as well.

C. Designation of Unsuitable Areas

Of all of the devices available for enforcing the Act, the most important and the most controversial is section 522, which provides for the designation of certain lands as unsuitable for surface coal mining. This section prohibits surface mining on certain national parklands and other federally protected areas, on areas within 100 feet of a public road, within 300 feet of an occupied dwelling, public building, public park, or within 100 feet of a cemetery. More importantly, section 522 allows "any person having an interest which is or may be adversely affected" to petition the regulatory authority for the designation of certain lands as unsuit-

with the Environmental Protection Agency's apparent view that it had no duty to impose upon the states a stringent policy of non-degradation of existing clean air.

For example, in Natural Resources Defense Council v. Train, 545 F.2d 320, 328 (2d Cir. 1976), the court ruled: "[t]he structure of the Clean Air Act as amended in 1970, its legislative history, and the judicial gloss placed upon the act leave no room for an interpretation which makes the air quality standards for lead under § 108 discretionary." See also Train v. Colorado Pub. Interest Group, 426 U.S. 1 (1976).


Id. § 1272. For a discussion of the constitutional implications of this type of provision, see McGinley, supra note 2, 463-73. See also Goldblatt v. Hempstead, 369 U.S. 590 (1962); Sax, supra note 33.

able for surface mining. Upon petition, such a designation is required if the regulatory body finds that proper reclamation of the land is not technologically and economically feasible.

The Act further authorizes the regulatory authority to designate other lands unsuitable for certain types of surface mining if such mining will:

(A) be incompatible with existing state or local land use plans or programs; or
(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural values and natural systems; or
(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or
(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

It is important to note, however, that the Act seems to require that the designation process occur only upon petition. The state regulatory authority is not specifically required to conduct an ongoing review of state lands in the absence of a petition. It is, however, required to develop a process which includes:

(A) a state agency responsible for surface coal mining lands review;
(B) a data base and inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations; [and]
(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations.

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134 Id. § 1272(a), 1272(c).
135 Id. § 1272(a)(2).
Although these sections suggest that there may be a duty to review lands *sua sponte,* the Office of Surface Mining does not appear to have taken this view. Therefore the burden may fall largely upon the shoulders of private citizens to implement this crucial section of the Act.

It is especially significant that once an area is under study for designation as unsuitable for surface coal mining, a permit application to mine the area cannot be granted unless the applicant had made "substantial legal and financial commitments" to the operation prior to January 1, 1977. Active citizen participation

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133 The use of the term "review" suggests that the state regulatory authority might have such a duty, especially when compared with the language in section 522(b) which provides: "The Secretary shall conduct a review of the Federal lands to determine, pursuant to the standards set forth in paragraphs (2) and (3) of subsection (a) of this section, whether there are areas on Federal lands which are unsuitable for all or certain types of surface coal mining operations." *Id.* § 1272(b).

Under a strict reading of the statute, the state regulatory authority would not be permitted to petition for a designation since it is not a "person" within the definition set forth in section 701(19). 30 U.S.C.A. § 1291(19) (West Supp. 1978). One might argue that the state need not petition since it is anticipated that the state will be evaluating and reviewing lands on its own. The Office has taken a different approach, however, treating the apparent inability of the state to petition as a matter of inadvertence. State agencies are included in the definition of "person" in the regulations, 44 Fed. Reg. 15,312, 15,314 (1979) (to be codified in 30 C.F.R. § 700.5), on the ground that "participation in the process . . . should be as broad as possible." 43 Fed. Reg. 41,662, 61,684 (1978).

142 The Office's interpretation of section 522(b)(4) might result in some active review by the state regulatory authority independent of petitions. In response to one comment to the proposed final regulations, the Office stated: "The final regulation makes clear that the regulatory authority must gather data not only in response to petitions, but also in anticipation of petitions." 44 Fed. Reg. 14,902, 15,004 (1979). *See* 44 Fed. Reg. 15,312, 15,346 (1979) (to be codified in 30 C.F.R. § 764.21). Presumably this data-gathering process might trigger petitions by the state agency, but there appears to be no duty on the part of the state to actively review state lands to determine if they are unsuitable.

112 The final regulations provide: "Any petitions received after the close of the public comment period on a permit application relating to the same mine plan area shall not prevent the regulatory authority from issuing a decision on that permit application." 44 Fed. Reg. 15,312, 15,345 (1979) (to be codified in 30 C.F.R. § 764(a)(7)).


The phrase, 'substantial legal and financial commitments' . . . is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in powerplants, railroads, coal handling and storage facilities and other capital intensive activities. The committee does not intend that mere ownership or acquisition costs of the
in this process can be most instrumental in preventing the commencement of unreclaimable strip mines. The petition may have the added effect of supplementing the informal permit conference with a public hearing on the possible designation of the area as unsuitable prior to any decision on the permit.\textsuperscript{143}

D. Release of Performance Bonds

Another area in which the federal Act invites participation by citizens is the procedure for the release of performance bonds. Section 519 of the Act requires the operator requesting the release of all or part of a performance bond to advertise the location of the area secured by the performance bond and to notify by mail local government bodies, certain agencies and water authorities, and adjacent landowners of the proposed release.\textsuperscript{144} "Any person with a valid legal interest which might be adversely affected by the release" and certain agencies are given the right to file objections and to request a public hearing on the bond release.\textsuperscript{145} A public hearing must then be held unless the parties are able to settle their differences through an optional informal conference procedure.\textsuperscript{146}

A significant issue is raised by the use of the phrase "any person with a valid legal interest which might be affected." Although this term clearly contemplates citizen participation,\textsuperscript{147} it may be argued that the class of citizens who have standing to

\textsuperscript{132} Section 522(c), 30 U.S.C.A. § 1272(c) (West Supp. 1978), requires that a public hearing on the petition be held within ten months of its receipt. This hearing is described in the final regulations as "legislative and fact-finding in nature, without cross-examination of witnesses." 44 Fed. Reg. 15,312, 15,346 (1979) (to be codified in 30 C.F.R. § 764.17(a)). The Office felt that "cross-examination might be used to intimidate witnesses whose own experience might provide valuable information for the record." 44 Fed. Reg. 14,902, 15,004 (1979).

\textsuperscript{144} 30 U.S.C.A. § 1269 (West Supp. 1978). The performance bond is a customary device for insuring that strip mined lands are properly reclaimed. Under the Act partial release of such bonds may be allowed upon a showing that certain stages of reclamation are complete. Full release of the bond can only be achieved when all reclamation requirements have been met. Id. § 1269(c).


\textsuperscript{146} Id. § 1259(f), 1259(g).

contest a bond release is smaller than that class of persons with “an interest which is or may be adversely affected” who are allowed to contest an application for a permit. The fact that the standing requirement employed in the “citizen suits” section of the Senate bill, which read “any person having a valid legal interest,” was given precisely the same committee interpretation as the House bill’s “any person having an interest” suggests that the difference in phraseology is insignificant. One might also wonder why the Act provides for personal notice to neighbors of a proposed bond release, but fails to so notify the same persons of the filing of an application to open a surface mine. Despite these questions, the insertion of public participation into the bond release procedure is an important development in the regulation of surface mining and is one which is likely to result in vigorous review of many operators’ reclamation efforts.

E. Rulemaking

In addition to providing avenues for citizen participation in the procedures actually used in regulating surface mining, the Act also provides for citizen input into its rulemaking procedures. Section 201 authorizes the Secretary of the Interior to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this act.” Section 201 further provides that “[a]fter the Secretary has adopted the regulations required by section 501 of this title, any person may petition the director to initiate a proceeding for the issuance, amendment or repeal of a rule.”

The rulemaking is controlled by section 553 of the Administrative Procedure Act,124 which provides for notice and an opportunity

120 Supra note 120. The final regulations treat the terms as identical. See note 122, supra.
122 See text accompanying notes 49-52, supra.
124 Id. § 1211(g). This subsection specified a procedure for filing such petitions and allows the Director of the Office of Surface Mining Reclamation and Enforcement to “hold a public hearing or . . . conduct such investigation or proceeding as the Director deems appropriate in order to determine whether or not such petition should be granted.” Id. § 1211(g)(2), 1211(g)(3). The decision on the petition must be made within ninety days, and if the petition is denied, the applicant must be given written reasons for the denial. Id. § 1211(g)(4).
for interested persons to participate "through submission of written data, views, or argument with or without opportunity for oral presentation." In addition to these federal rulemaking requirements, the approval by the Secretary of the Interior of any state program pursuant to section 503 must be preceded by a public hearing within that state. Prior to the promulgation and implementation of any federal program, notice and a public hearing within the affected state must also be provided.

While the rulemaking procedures under the Act are not particularly unusual, the provisions regarding judicial review of such rulemaking are both unusual and controversial. Rulemaking by the Secretary, including approval or disapproval of state programs as well as promulgation of federal rules and regulations, is reviewable subject to specific restrictions. As is common practice, the scope of review of agency rulemaking is limited. A federal court is compelled to affirm unless it concludes that the Secretary's action is "arbitrary, capricious, or otherwise inconsistent with law." A more serious limitation on judicial review, however, is that standing to bring an action to review a rulemaking decision by the Secretary is severely restricted. Section 526 of the Act provides that a petition for review of rulemaking decisions "may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary." This requirement of prior participation is puzzling. It presents the possibility that one who failed to comment because he failed to understand the full import of the proposed rule or because his concerns were adequately expressed by others will forfeit the right to review the final rule.

The standing requirement also raises the possibility that Congress, in an effort to encourage participation at the administrative level, may have burdened the regulatory authority with unnecessary duplication of input from those who are concerned with pre-
serving their standing for review. If Congress had merely intended to avoid judicial review of agency action on the basis of objections that were never made at the administrative level, it could have done so in much clearer terms. Nevertheless, the limitation of judicial review of rulemaking to those who participated at the agency level may not be subject to challenge. Historically, due process considerations have been deemed not relevant to "legislative" decisions. In addition, the District of Columbia Court of Appeals in *Gage v. United States Atomic Energy Commission* not only approved, but in fact implemented, a requirement of participation in rulemaking at the agency level as a condition precedent to judicial review under the Administrative Orders Review Act. It is important to note, however, that the court's reasoning in *Gage* suggests no compelling argument for the limitation of parties. Its main concern appears to have been that all issues be raised at the administrative level. Although the limitation of issues on judicial review represents sound policy, the further limitation of parties who are entitled to judicial review of a rule does little to further the purposes of the Act. In fact, it

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110 For example, the Clean Air Amendments of 1977 contain a provision which limits judicial review to "[o]nly an objection to a rule which was raised with reasonable specificity during the period for public comment (including any public hearing)." 305 Pub. L. No. 95-95, § 305, 91 Stat. 685 (codified at 42 U.S.C.A. § 7607) (Pamph. 3 Nov. 1977).

111 Supra note 31.


114 [A]bsistence from the administrative process will probably preclude the compilation of a record adequate for judicial review of the specific claims [the applicant] has reserved. That is what happened in this case—and the effect of this void in the record on our ability to analyze petitioner's major claim highlights the flaw in their petition for relief from this court.

479 F.2d at 1219.


116 A commentator on the *Gage* decision has remarked:

This conclusion obviously has startling implications for the conduct of informal rulemaking proceedings. It must be administered with care and caution. The idea that informal rulemaking proceedings operate upon "parties" is itself foreign to the nature of such proceedings. Moreover, even the excusable failure to appear would have no bearing on whether or not the rule should have a binding effect. Many people may not want to undertake the burden of an appearance if they feel that the rule when
might defeat such purposes by presenting a procedural trap for the unwary.

CONCLUSION

The opportunity for citizen participation in the Surface Mining Control and Reclamation Act of 1977 may be seen as a major accomplishment in environmental legislation. Whether Congress has gone so far as to recognize that citizens affected by nearby strip mining are parties with constitutionally protectable interests in effective mining regulation remains a debatable point. More likely, the citizen's role has been framed in a more political light and, to an extent, a more practical one. Congress may well expect that the citizens who have expressed such vocal concern about the hazards of strip mining will see that the Act is properly enforced. It may even rely on these expectations.

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. Moreover, a number of decisions to be made by the regulatory authority in the designation and other processes under the act are contingent on the outcome of land use issues which require an analysis of various local and regional considerations. While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirement of the act.167

enacted will not operate against them. If they guess incorrectly, the courts should be reluctant to preclude their right to judicial review unless it appears that, as with the petitioners in Gage, they could easily have presented their case to the agency but chose to stay away.


Some environmentalists might view the reliance on citizen vigilance as a method of avoiding serious regulation by engaging in tough enforcement only where the public has expressed concern. Whether this view is warranted is debatable. It is important nevertheless that individuals make a conscientious attempt to use the methods available to them to see that the Act is properly enforced. Responsible public participation can result in the two-fold achievement of providing adequate protections to affected persons, while at the same time aiding the regulatory authority in the efficient enforcement of the Act.

Finally, it must be noted that although there is hardly an area of the Act which does not provide some opportunity for citizen participation, nearly every relevant section contains some ambiguity or limitation which can be construed so as to deprive citizen participation of its effectiveness. In some cases these limitations may even result in a denial of due process, but in all cases these limitations seem to reflect a confusion of policy—a belief on the one hand that citizen participation is vital to the effective control of surface mining, and a fear on the other that a valuable energy resource will be tied up by the continuing opposition of concerned citizens.

Joshua I. Barrett