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PREVENTIVE LAW AND THE NEGOTIATING AND DRAFTING OF COAL LEASES AFTER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977*

I. INTRODUCTION

The practicing attorney, depending upon his client's needs, can generally be designated in function as either an advocate or a planner. The advocate attempts to extricate the wayward client from an existing problem, while the planner, advising the client before problems actually arise, practices preventive law. Although the advocate probably arouses more public notoriety and interest, the second function of the attorney is equally if not more important to the maintenance of society as a whole, especially when the attorney realizes that:

[i]n the preventive law area of practice the lawyering process is final and decisive. There is virtually no appeal from the lawyer's preventive law decision that his client sign the irrevocable trust, or the deed conveying property, or a contract, or engage in numerous other events having legal consequences.

In order to practice preventive law, the attorney should utilize a conceptual framework of analysis. Nonpreventive legal reason-

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1 See Brown and Brown, What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations — A Preventive Law Analysis, 10 Val. U. L. Rev. 453 (1976). This article points out that "the ethical responsibilities of the lawyer may vary depending upon the role he plays," and that the Code of Professional Responsibility generally fails "to state standards and objectives for the advisor." Id. at 454.

2 "Preventive Law has only been recognized as a subject of study relatively recently." Brown, From Preventive Law to Mock Law Office Competition, 51 Or. L. Rev. 343 (1972). A comprehensive treatise on the subject of preventive law and planning is L. Brown and E. Dauer, Planning By Lawyers: Materials on a Nonadversarial Legal Process (1978).


ing, on the one hand, takes the facts as they exist and then "subjects them to the operation of a rule of law to achieve a result.\(^5\) In preventive analysis, on the other hand, the goal is to achieve a result by choosing the proper rule of law which will determine what facts will have to exist if the client's purpose in entering the transaction is to be achieved.\(^6\) The attorney is thus theoretically projecting himself forward in time and "reaching back" for the facts needed to place his client in a favored position.\(^7\) Exactly what facts are needed to benefit the client depends largely on the law controlling the transaction or occurrence planned. Consequently, the prudent practitioner planning his client's affairs must remain abreast of changes in the law affecting them.

The enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)\(^8\) represents a significant, complex statutory departure from existing law, the full weight of which is difficult to assess. One area, however, which is clearly affected by the various provisions of the SMCRA involves the negotiating and drafting of coal leases between private parties. Thus, for the purposes of this article, preventive analysis can be stated in more concrete terms: the attorney who wishes to write a legally binding coal lease which will reflect the intent of the parties (the result) will have to choose the proper rules of law regarding leases and contracts analyzed in light of the provisions of the SMCRA (the rule of law). This analysis will determine the clauses that the attorney must write (the fact) to gain for the client the object of his or her lease: the payment of royalties and reclamation of the property (the purpose of the transaction).

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\(^5\) Id.

\(^6\) Id at A3-7 to -8.

\(^7\) Id.

Of course the concepts of fact, law, result and purpose may overlap and merge depending upon the circumstances. If the attorney realizes that his “plan” has a flaw, he may decide to change the facts (clauses), adopt a new purpose of the transaction (perhaps the sale of the coal rather than a lease), or negotiate with the opposing party or determine that the client will accept a change in result (lesser royalties). The attorney should be careful to analyze his new theories “forward and backward” to spot any potential flaws that may exist.

A central element of preventive law is the reduction of the agreement of the parties to writing: “A well drafted document which reflects and implements almost any form of transaction should at a minimum express clearly: What is to be done; Who is to do it; When it should be done; and, often, How. The next most obvious question is, ‘Suppose he doesn’t do it?’”11 The enactment of the SMCRA on August 3, 1977, has greatly increased the chances that the lessee-operator under existing coal lease agreements will not be able to fulfill his obligations.

The lessee-operator might be placed in the position of non-compliance with the terms of an existing coal lease because the SMCRA provides comprehensive objective mechanisms for the strict control of the surface mining industry12 and the surface effects of underground mining.13 The stringent permit requirements,14 reclamation requirements,15 reclamation fees,16 design criteria17 and environmental protection standards18 contained in the

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9 L. Brown and E. Dauer, supra note 2, at 273, n.1.
10 L. Brown and E. Dauer, supra note 4, at A3-7 to -9.
11 L. Brown and E. Dauer, supra note 2, at 448.
13 SMCRA also provides for the monitoring of the surface effects of underground mining. SMCRA § 516, 30 U.S.C.A. § 1266 (West Supp. 1978). Generally, the SMCRA provides that the surface effects of underground mines are subject to most of the provisions contained in Title V of the SMCRA. See 44 Fed. Reg. 15,395-422 (1979) (to be codified in 30 C.F.R. §§ 816.1-181). For the purpose of simplicity, this article shall only refer to “surface mining.”
17 Id. § 501, 30 U.S.C.A. § 1251 (West Supp. 1978). This section enabled the Secretary of the Interior to promulgate interim regulations containing design criteria (found at 42 Fed. Reg. 62,639 (1977) (to be codified at 30 C.F.R. §§ 700.1 to 837.16)). The interim regulations have already been the subject of litigation, one of the main issues being the stringent design criteria which are not site specific. See
SMCRA will have to be complied with by the lessee-operator; these requirements must also be embodied in West Virginia's mining laws if the state does not wish to have a federal regulatory program imposed upon it. \(^1\) West Virginia has already moved to comply with the SMCRA by authorizing the Director of the Department of Natural Resources (DNR) to require all applications for strip mining permits in the state to be in full compliance with section 515 of the SMCRA. \(^2\)

Thus, the SMCRA has already had a direct impact upon strip mine operations in the state of West Virginia, and landowners are undoubtedly feeling the pinch of lower royalties due to the reduced output of the operators. At the present time, the operators have been forced to sustain most of the financial losses caused by the SMCRA, because the long term coal lease by which the lessee-operator acquired his right to remove the coal was signed long before the SMCRA and the advent of increased federal involvement in environmental affairs. Unless the lease was drafted in a particularly farsighted manner, the lessee-operator is bound by his bargain with the landowner on the one hand, while having to com-

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\(^{3}\) Id. § 503, 30 U.S.C.A. § 1253 (West Supp. 1978). The states are authorized to promulgate their own regulatory programs which must be submitted by August 3, 1979. 44 Fed. Reg. 15,324 (1979) (to be codified in 30 C.F.R. § 731.12). Until approval, the federal program would control mining in the state. See supra note 17. The SMCRA specifically allows state laws to remain in effect if they are not inconsistent with the provisions of the SMCRA, and if a state law passed after the SMCRA provides for more stringent controls than those contained in the SMCRA or "fills a gap" for which there is no provision in the SMCRA, the state law will not be deemed "inconsistent" with the federal law. SMCRA § 505, 30 U.S.C.A. § 1255 (West Supp. 1978).

\(^{4}\) 30 U.S.C.A. § 1255 (West Supp. 1978). *W. Va. Code* § 20-6-23a (Cum. Supp. 1978) (implementing federal surface mining and control standards under Public Law 95-87 and expanding rulemaking authority of the director and reclamation commission: expiration of authority). This provision will be effective until August 30, 1979, the approximate date of acceptance of the West Virginia regulatory program. For discussion of the requirements of section 515, see text accompanying notes 58 to 99, infra. Further use of the term "regulatory authority" in the article refers to the Department of Natural Resources in West Virginia.
ply with inflexible reclamation guidelines on the other. The incongruity between the contractual aspects of coal leases as they are commonly drafted at the present time and the reality of the requirements of the SMCRA must be resolved in future documents.

Within the context of the need to practice preventive law, the purpose of this article is to examine the impact of the SMCRA on the negotiating and drafting of a coal lease. The emphasis, for the sake of continuity and focus, will be upon the landowner-lessee's perspective, but attorneys representing other interests or drafting other types of agreements might also benefit from the issues raised. A common theme throughout the article is the realization that the attorney should be "pessimistic enough to anticipate that the contracting parties may the next day become antagonists and that what he [or she] is writing is in reality a document for the court."21

II. THE COAL LEASE

A search for conformity during an examination of agreements purporting to be "coal leases" will yield disappointing results.22 Coal leases have been recognized as "hybrid things, partly in the nature of outright conveyances of interests in real property, partly in the nature of contracts and partly in the nature of true leases creating landlord-tenant relationships."23

A definitive treatise on coal leases is beyond the scope of this article and relatively unnecessary as coal and mineral leases have received exhaustive treatment elsewhere.24 Several basic elements,

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21 Gustin, infra note 24, at 95.
22 Because of the unlimited variables involved in the negotiating and drafting of a coal or mineral lease, such leases in West Virginia exhibit a wide variety of forms, lengths, number and types of clauses. Thus, the approach of this article will primarily be to point out potential negotiating and leasing problems raised by the SMCRA, leaving the individual attorney to address (or not address if he or she so pleases) any of the myriad issues presented in the SMCRA. Throughout the article, the term landowner-lessee is used to designate the party (be it corporation or private party) who is leasing the property to another, while lessee-operator is used to designate the person or corporation that is paying for the use of the property. These parties could "wear several hats" and change their position as they may assign their interests or enter into agreements with other parties. It is also assumed that the lessor-landowner has the proper title to both the surface and the coal that is to be leased. See note 27 infra.
24 See generally 3 AM. LAW OF MINING §§ 16.1 to 16.85 (1971 & Supp. 1976); Burgess, Representing the Landowner in a Mineral or Surface Lease or Sales
however, should be kept in mind by the attorney who is participating in the negotiating and drafting of a coal lease. The “who” of the lease, the parties, are usually designated as lessor (the landowner) and lessee (who may or may not be the operator). The “what” of the coal lease is described in the granting clause, which should contain mining and surface rights “granted in broad general terms and followed by a grant of specific mining rights by way of enlargement and not by way of restriction.”

Exact and precise descriptions of the property and the seams of coal are also important. The “when” of the lease appears in the habendum clause, defining the duration or “term” of the lease. The “how” of the lease is found in the numerous contractual provisions regarding royalties, compliance with laws, insurance, indemnification, assignment, force majeure, termination, and various other miscellaneous provisions.

The SMCRA manifests a clear intention not to preempt local laws in regard to property rights, as section 507(b)(9) provides: “[t]hat nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes.” Needless to say, the carryover of property law into the


The following very simplified discussion in the text is provided to allow the reader who is unfamiliar with coal leases to have a basic understanding of the lease agreement to provide a framework for the discussion of the SMCRA. The scope of this article is general at best, and the attorney should consult further sources prior to drafting a final agreement to insure that all necessary provisions are present in the lease.

25 Ross, supra note 24, at 63.
26 30 U.S.C.A. § 1257(b)(9) (West Supp. 1978). An analysis of the principles governing construction of deeds, severance and property rights under West Virginia law is beyond the scope of this article, which is written from a perspective assuming valid title to both the surface and the coal to be in the “landowner.”
modern lease agreement and the resort of the courts to property principles to settle contractual disputes have been criticized.\textsuperscript{28} The courts should recognize that "the mineral lease is a bilateral contract between parties and that accordingly the relative rights and obligations of the parties are essentially governed by contractual principles."\textsuperscript{29}

The SMCRA will have the greatest effect upon the contractual elements of the coal lease. In traditional contract theory, the complete terms of any agreement should be set out as fully as possible to avoid future misunderstandings and litigation.\textsuperscript{30} It is suggested that merely relying upon the former practice of inserting a thin boilerplate clause into the lease to the effect that the lessee will comply with all "state and federal laws" may in the future leave disappointed landowners responsible for payment of certain fees, liable in citizen suits or simply stuck with improperly reclaimed land that was certainly not bargained for.\textsuperscript{31}

The contractual elements and terms of the lease will be arrived at through negotiation between the parties. Negotiation is "[t]he deliberation, discussion, or conference upon the terms of a proposed agreement."\textsuperscript{32} Negotiation takes place in all forms and locations—from formal maneuvers in the corporate boardroom to grunts over lunch at the local chophouse. The amount of "dependence"\textsuperscript{33} that exists between the parties will often flavor the

\textsuperscript{28} Swenson, supra note 24, at 49-50.
\textsuperscript{29} McCollam, Impact of Louisiana Mineral Code on Oil, Gas and Mineral Leases, 22 INST. MIN. L. 37, 38 (1975).
\textsuperscript{30} 1 A. CORBIN, CONTRACTS § 95 (1963 & Supp. 1971).
\textsuperscript{31} A "compliance with all laws" clause that presently appears in many leases is as follows:
\begin{quote}
The lessee covenants that it will in all respects comply with the laws and statutes of the United States of America, and the State of West Virginia, and its political subdivisions, now or hereafter in effect, and with all valid rules, regulations and orders thereunder, regulating such mining and any related activities.
\end{quote}
Ross, supra note 24, at 70.

The landowner might want to include a list of relevant laws (without limitation) as to the work (such as MESA regulations and SMCRA regulations) as well as any other applicable laws "pertaining to old age benefits, unemployment compensation, and health insurance, and those matters, if applicable, included within the Fair Labor Standards Act, the Walsh Healey Act, and the Labor Management Relations Act." Haskin, Drilling and Mining Contracts, 18 ROCKY MTN. MIN. L. INST. 333, 367 (1971).

\textsuperscript{33} See Eisenberg, Private Ordering Through Negotiation: Dispute Settlement
discussion, but "[a]lloc bottom it is an exchange of communications leading to an agreement that the future behaviors and legal rights of the parties (or their principals) will be bounded in certain described ways that they weren't before."\(^3\)

Throughout negotiation, the attorney should constantly keep in mind the four elements of preventive analysis. After thorough "investigation of facts, negotiation, legal research, and hard sweating,"\(^4\) the drafting of the document is the culmination of the lease transaction. It is the standard by which the attorney's preventive analysis will be gauged, the framework and guide for the parties' interaction in the years ahead. If the document breaks down into litigation, society suffers general harm in addition to the specific injury to the individuals involved.

III. PROVISIONS OF THE SMCRA WHICH SHOULD NOT AFFECT THE NEGOTIATING AND DRAFTING OF COAL LEASES IN WEST VIRGINIA

The SMCRA is divided into nine separate titles, several of which will have little relevance to the attorney who is negotiating and drafting a coal lease. Title I contains the basic congressional statement of findings and policy.\(^5\) Title II concerns the establishment of the Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior,\(^6\) and Title III details the establishment of the State Mining and Mineral Resources and Research Institutes.\(^7\) These institutes will eventually have to make public the findings of their research, studies and projects,\(^8\) and the Secretary of the Interior is also authorized to "establish a center for cataloging current and projected scientific research in all fields of mining and mineral resources."\(^9\) The availability of such information may be valuable in the future to assist in solving difficult technical problems or in helping engineers predict what coal may be recoverable within the terms of a lease.

Title VI relates to the designation of lands "unsuitable for

\(^{24}\) L. BROWN AND E. DAUER, supra note 2, at 359.
\(^{27}\) Id. § 201, 30 U.S.C.A. § 1211 (West Supp. 1978).
\(^{29}\) Id. § 306(a), 30 U.S.C.A. § 1226(a) (West Supp. 1978).
mining operations for minerals or materials other than coal." The impact of this provision on leases in West Virginia may be minimal because its application depends on the existence of two types of land rarely found in the state: "Federal land of a predominantly urban or suburban character, used primarily in the public domain, or . . . Federal land where mining operations would have an adverse impact on lands used primarily for residential or related purposes." 42

Title VII, administrative and miscellaneous provisions, has a number of sections that will not concern lease negotiations in West Virginia. 43 This title does contain, however, a list of definitions for terms of art utilized in the SMCRA, 44 and there is a specific provision disclaiming any modification or amendment of a number of existing federal laws by the SMCRA. 45 Three further provisions of Title VII may also affect the negotiating and drafting process. First, employees who are allegedly discriminated against or fired as a result of reporting a violation of the SMCRA to the regulatory authority are given rights to a hearing, and if the regulatory au-

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42 SMCRA § 601(b), 30 U.S.C.A. § 1281(b) (West Supp. 1978). "Other minerals" is defined as "clay, stone, sand, gravel, metalliferous and nonmetalliferous ores, and any other solid material or substances of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form." Id. § 701(14), 30 U.S.C.A. § 1291(14) (West Supp. 1978).
The authority finds that the employer did in fact violate the SMCRA, the employee is entitled to reinstatement with back pay plus his costs and expenses (which include attorney's fees). Second, the common law rights of any property owner to water resources are not to be affected by the SMCRA, and the operator is responsible for replacing any water that is so disturbed. The final regulations further refine this provision by requiring all water leaving the mine site to be passed through sedimentation ponds, and if the pH level of the water to be discharged is less than 6.0, then an automatic lime feeder (or other approved neutralization process) has to be installed. The prudent landowner should include an indemnification clause in the lease which is broad enough to cover these situations. Third, "experimental" mining and reclamation practices may be approved under certain conditions by the regulatory authority. Although the breadth of these departures from the normal regulations should be minimal, the cautious landowner might wish to require his or her consent prior to their execution.

Title VIII of the SMCRA provides for the establishment of

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49 Every modern coal mining lease should have comprehensive provisions for insurance (see infra note 117) and indemnity. The lease might provide that the "liability insurance is not in lieu of or satisfaction of the indemnity agreement... [and that]... [t]he indemnity agreement will survive termination, cancellation or expiration of the [lease]." Vish, supra note 24, at 218. The basic indemnity clause might provide as follows:

Lessees agree that it will, during the life of this lease and for —— years thereafter, indemnify and save harmless landowner-lessee against and from all claims of every kind made against it for damage, injury or death to one or more persons (including lessees employees and the employees of any contractor or other person operating on the leased premises), or for loss or damage to property of lessor or of others based upon any action, occurrence, or nonaction by lessee, its employees, agent, contractors or others on its behalf, and against and from all expense, including court costs and legal fees and expenses incurred by lessor in defending any such claim.

Clause furnished by Mr. Patrick Deem, Esquire, supra at acknowledgement. The practitioner might add that such indemnification is expressly meant to include without limitation the following: bodily injury, disease, work related injury, damage to property in specific terms, liability in citizen suits, liens, penalties, reclamation fees, any suit brought by any employee on the basis of discrimination or act regarding the SMCRA, etc.

University Coal Research Laboratories and for an advisory council on coal research. Title IX furnishes the Administrator of the Energy Resource Development Administration with the authority to establish up to one thousand energy resource graduate fellowships on a yearly basis for a five year period.

Finally, section 528 of Title V provides that certain surface mining operations will not be subject to the provisions of the SMCRA. A "landowner" may extract coal from land leased or owned by him for his own noncommercial use. Any coal that is removed "as an incidental part of" governmental highway or other approved construction is exempted from the regulations. Also, if the surface mining operation affects two acres or less, the coal can be removed for commercial purposes. Needless to say, the latter provision has potential for abuse, and the landowner should be on guard if a potential operator attempts to explore for, or extract coal under this section without submitting proper notice to the regulatory agency.

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55 Id. § 528(1), 30 U.S.C.A. § 1278(1) (West Supp. 1978). The confusing language of this provision illustrates why the drafting of the SMCRA has come under considerable criticism.
57 SMCRA § 528(2), 30 U.S.C.A. § 1278(2) (West Supp. 1978). See supra, notes 128 to 129 and accompanying text for discussion of prospecting permits in West Virginia. The SMCRA defines "surface coal mining operations" in very broad terms. In addition to the usual "mining" activities, the areas "affected" would also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvements or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.
58 Id. § 701(28), 30 U.S.C.A. § 1291(28) (West Supp. 1978). Such an all inclusive definition of mining operations should render the (only two acres affected) exclusion virtually useless. The landowner should be wary of any actions taken by an operator which are supposedly justified by this provision.
IV. RECLAMATION REQUIREMENTS OF SECTION 515

Any attorney who is involved in a coal lease transaction should be thoroughly familiar with Title V of the SMCRA—Control of the Environmental Impacts of Surface Coal Mining. Prior to entering negotiations for a coal lease, an understanding of the environmental protection performance standards contained in section 515 will assist the attorney representing the landowner to ascertain the bargaining position of the potential lessee-operator and also conceptualize possible future problems that should be addressed in the lease. These provisions have a substantial impact upon the duties required of the lessee-operator, reducing the value of the coal in place and thus lowering the royalties that the landowner can expect under the lease.


Although current West Virginia statutes concerning surface mining regulation are relatively comprehensive, see W. Va. Code §§ 20-6-1 to -32 (1978 Replacement Vol.), the West Virginia plan promulgated under SMCRA § 503, 30 U.S.C.A. § 1253 (West Supp. 1978) will have to equal the detailed and comprehensive final federal rules for the permanent regulatory program, found in 44 Fed. Reg. 31,311 (1979) (to be codified in 30 C.F.R. §§ 700.1 to 845.20). Far stricter enforcement and citizen participation will affect operators and their ability to perform under leases in the future.

The royalty clause is one of the more important in the coal lease to the landowner, because it provides the method of computation for the payment for coal that is removed by the lessee. The most common provisions are similar to the following:

Lessee shall pay Lessor as royalty (fraction) of the market value at the mine of each ton of 2,000 pounds of all merchantable coal mined and sold by lessee from the leased premises, but said royalty shall not be less than (monetary sum) per ton of 2,000 pounds of such merchantable coal mined or sold or utilized by lessee.
One of the first provisions of section 515 states that surface coal mining operations should be conducted "so as to maximize the utilization and conservation of the solid fuel resources being recovered so that reaffecting the land in the future through surface coal mining can be minimized." This same provision is repeated almost verbatim in the reclamation plan requirements and in the provision allowing variances for combined surface and underground mining. Because of the wide discretion of the regulatory authority already recognized by the courts, these provisions could easily be the basis for the denial of a second (or possibly a first) permit where a landowner unwittingly leases only one seam of coal on his property. If at all possible, landowners should attempt to arrange for the extraction of all seams of coal under one permit to avoid future problems.

The intended post-mining use of land will affect the standards of reclamation required of the lessee-operator, as some exceptions are allowed to the requirement that all land be restored to the original contour. Normally, unless it is shown that there are extremes in the amount of overburden and spoil, the affected property must be returned to the original contour. There are two provisions in section 515, however, which allow for variances. First, variances are allowed where there is mountain top removal and the regulatory authority finds that the proposed post-mining use will compose an equal or better public or economic use as compared with the pre-mining use of affected land. The applicant must

Norvell, supra note 24, at 426. The practitioner can expand this basic clause with other elements such as hedges against inflation, methods of weighing, provisions for arm's length transactions (in case the lessee is selling to a closely "connected" person or corporation), and importantly, provisions for minimum or advance royalties. See infra note 103 on corporations. See infra note 105 as to force majeure and excuse of performance. The landowner should also request the regular submission of maps and engineering reports produced by the lessee.


See In re Surface Mining Regulation Litigation, supra note 17. The court found that Congress had granted wide discretion to the Secretary of the Interior to promulgate and administer the rules and that Congress intended that the "operators comply or not conduct operations." Id.

SMCRA § 515(b)(3), (c), (e), 30 U.S.C.A. § 1265(b)(3), (c), (e) (West Supp. 1978).


Id. § 515(c), 30 U.S.C.A. § 1265(c) (West Supp. 1978).
submit a detailed plan showing support for the proposed use and its compatibility with surrounding land use. Secondly, the landowner of property which is classified as "steep slope" can request in writing (as a part of the original permit application) that a variance be granted, if such a variance would render the land suitable for a viable commercial or recreational use. The parties to any lease should therefore address post-mining uses of the land in the lease. The landowner, depending upon the characteristics of his land, might also wish to specify where waste materials, spoil, overburden or topsoil piles are to be located and at a minimum ensure that the leased property's boundaries are coterminous with those intended to be submitted under the permit.

Augering is permitted under the SMCRA, and the landowner would probably want to specify higher royalty rates for coal mined by augering methods because of increased waste. Water im-

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69 Id.
70 "[T]he term 'steep slope' [means] any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State." Id. § 515(d)(4), 30 U.S.C.A. § 1265(d)(4) (West Supp. 1978).


72 SMCRA § 515(b)(11), (b)(13), (f), 30 U.S.C.A. § 1265(b)(11), (b)(13), (f) (West Supp. 1978). The right to transport coal from other property over the land that is leased is not implied. It must be expressly granted in the lease. Fisher v. West Virginia Coal & Transportation Co., 137 W. Va. 613, 73 S.E.2d 633 (1952). The same is true for cleaning, processing or loading coal from other lands on the leased property, and for the waste generated thereby. Moore v. Lackey Mining Co., 215 Ky. 71, 284 S.W. 415 (1926). It stands to reason that even if permission to dispose of waste from other lands were granted by the regulatory authority, there would still have to be agreement on the issue beforehand by the parties included in the lease. The final rules contain more detailed provisions as to the disposal of waste materials. 44 Fed. Reg. 15,432-37 (1979) (to be codified in 30 C.F.R. § 817.71-93).

75 Id. § 515(b)(5), 30 U.S.C.A. § 1265(b)(5) (West Supp. 1978). The landowner might wish to request that certain nutriments be added to the soil while it is being stockpiled.

76 Although permits are revisable, the revision requires a repetition of the expensive and lengthy process leading to the granting of the original permit if the revision is anything more than a minor boundary change. Id. § 511(a)(3), 30 U.S.C.A. § 1261(a)(3) (West Supp. 1978).
77 Id. § 515(b)(9), 30 U.S.C.A. § 1265(b)(9) (West Supp. 1978). Augering is not an implied covenant, and the right to auger should be expressly granted in the lease.
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poundments may be utilized,\textsuperscript{78} and the operator is required to use the "best technology currently available" in minimizing disturbances to the hydrologic balance.\textsuperscript{79} Surface mining is not permitted within five hundred feet of underground mines except on certain findings by the regulatory authority,\textsuperscript{80} and reclamation variances may be granted when both surface and underground operations are to proceed contemporaneously.\textsuperscript{81} If the landowner foresees combined operations, he should attempt to arrange agreements regarding the permits, bonding, and insurance prior to the execution of the lease.

A further requirement of the SMCRA is that operators protect off-site areas from slides\textsuperscript{82} and provide barriers to prevent on and off-site damage and erosion.\textsuperscript{83} The landowner's indemnity clauses should be broad enough to cover such circumstances as well as any liability that could occur as a result of the regulatory provisions on fire hazards\textsuperscript{84} and blasting,\textsuperscript{85} which both add additional burdens to the value of the landowner's coal. Special provisions for "steep

where the mineral and surface estates have been severed. Rochez Bros., Inc. v. Duricka, 374 Pa. 262, 97 A.2d 825 (1953). See Ross, supra note 24, at 60. Because augering is usually incident to strip mining, the coal thereby removed costs less to extract, but there is tremendous waste. Landowner-lessors should provide for escalating royalty payments according to the type of mining method used. See note 60 supra.

\textsuperscript{78} Id. § 515(b)(8), 30 U.S.C.A. § 1265(b)(8) (West Supp. 1978).
\textsuperscript{79} Id. § 515(b)(10), 30 U.S.C.A. § 1265(b)(10) (West Supp. 1978). The extensive provisions for protecting the hydrologic balance further reduces the financial value of the coal in place for the landowner. Present West Virginia statutes call for drainage systems as promulgated by the reclamation commission. W. VA. CODE § 20-6-9a (1978 Replacement Vol.).
\textsuperscript{80} Id. § 515(b)(12), 30 U.S.C.A. § 1265(b)(12) (West Supp. 1978). [T]he regulatory authority shall permit an operator to mine near, through or partially through an abandoned underground mine or closer to an active underground mine if (A) the nature, timing, and sequencing the approximate coincidence of specific surface mine activities with specific underground mine activities are jointly approved by the regulatory authorities concerned with surface mine regulation and the health and safety of underground miners, and (B) such operations will result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public.
\textsuperscript{81} Id. § 515(b)(14), 30 U.S.C.A. § 1265(b)(14) (West Supp. 1978).
\textsuperscript{82} Id. § 515(b)(21), 30 U.S.C.A. § 1265(b)(21) (West Supp. 1978).
"slope" mining will prohibit certain practices by operators, and the landowner should require that any structures, roads, or wells that are to remain on the property after the mining is finished be built in strict compliance with the regulations so as to receive regulatory approval as post-mining uses.

Of particular interest to the parties negotiating a coal lease will be the provisions in the SMCRA relating to areas that are unsuitable for mining. Any lands that received a substantial commitment of legal and financial resources prior to January 4, 1977, or any operation that was active on the date of the enactment of the SMCRA is exempt from the provisions of this section (as would be any lands under a permit issued under the SMCRA). The broad guidelines give a great amount of discretion to the regulatory authorities to decide what lands will not be suitable for mining, in addition to the specific areas enumerated as prima facie unsuitable by Congress. Any lands can be classified as unsuitable if they are typified as fragile, historical, renewable resource lands or natural hazard lands. In addition, an area may be deemed to be unsuita-

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87 The final rules have detailed specifications for roads as to vertical alignment, cuts, embankments, and natural drainage, and unless the regulatory authority approves the retention of a road (bridges, culverts, etc.) for a post mining land use, the road must be scarified and covered with topsoil. 44 Fed. Reg. 15,442-48 (1979), (to be codified in 30 C.F.R. § 817.150 to .180). An exploratory or monitoring well may only be transferred for further use as a water well with the prior approval of the regulatory authority. 44 Fed. Reg. 15,430 (1979) (to be codified in 30 C.F.R. § 817.53).


89 SMCRA § 522(a), 30 U.S.C.A. § 1272(a) (West Supp. 1978). The legislative history of section 522 provides:

The phrase "substantial legal and financial commitments" in the designation section and other provisions of the act 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 coal itself or the right to mine it should constitute "substantial legal and financial commitments."


COAL LEASES

ble for coal mining if the mining is "incompatible with existing State or local land use plans or programs." Of added importance is the fact that mining within one hundred feet of any road requires written permission from the local regulatory agency with authority over the road, and mining within three hundred feet of a residence requires a waiver from the owner. It is interesting to note that while the proposed final rules called for the written waiver of the "owner and occupant of the dwelling," the final rules do not require a waiver from the "occupant." Should the waiver be desired from the owner, the final regulations provide as follows: "The waiver must be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver." There will be no mining within three hundred feet of any "public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery."

The landowner who realizes that any of these conditions exist on or near his property may want to emphasize the lessee-operator's knowledge in an "inspection of the premises" clause that is found in many leases. In addition, it will benefit the lessee to attempt to provide a clause in the lease to the effect that any determination that the lands are unsuitable for mining will relieve him of responsibility for removing coal and paying royalties on the coal in those areas, even though any such determination that the land is unsuitable for mining by the regulatory authority will not be termed to be "permanent."

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72 Id.
73 Id. § 522(e), 30 U.S.C.A. § 1272(e) (West Supp. 1978). Previous West Virginia statutes only required that adjacent landowners be notified in the permit process. W. Va. Code § 20-6-8 (1978 Replacement Vol.). In addition, all distances are clarified by the addition of the words "measured horizontally" after the word "feet" wherever it appears. 44 Fed. Reg. 15,343 (1979) (to be codified in 30 C.F.R. § 761.11(d)). Note also that there is required to be a one hundred foot buffer zone around perennial streams or streams with a macro-invertebrate biological community. 44 Fed. Reg. 15,430 (1979) (to be codified in 30 C.F.R. § 817.57).
74 43 Fed. Reg. 41,827 (1978) (to be codified in 30 C.F.R. § 761.12(e)).
75 44 Fed. Reg. 15,343 (1979) (to be codified in 30 C.F.R. § 761.12(e)).
76 Id.
77 SMCRA § 522(e), 30 U.S.C.A. § 1272(e) (West Supp. 1978). West Virginia statutes may provide a loophole to the latter provision for the tenacious operator, as it is possible to move graves (and thus the "cemetery") in West Virginia. W. Va. Code §§ 37-13-1 to -7 (1972 Replacement Vol.).
78 SMCRA § 522(e), 30 U.S.C.A. § 1272(e) (West Supp. 1978). The legislative history of section 522 provides:

[T]he designation of unsuitability will not necessarily result in a prohi-
continue to pay minimum royalties on coal that is waiting for the technology to develop sufficiently so it can be mined. The careful drafter may wish to address "unsuitability for mining" in any references to "mineable and merchantable" coal found in the lease.⁹⁹

bition of mining. The designation can merely limit specific types of mining and thus the coal resource may still be extracted by mining technology which would protect the values upon which the designation is premised. In addition, after an area is designated, coal development is not totally precluded as exploration for coal may continue. Moreover, any interested person may petition for termination of a designation.

H. REP. No. 95-218, 95th Cong., 1st Sess. 95, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 631. The lessee will probably pressure landowners in the future for a clause stipulating that the landowner will do everything "reasonable" to assist the operator if the land is designated as unsuitable to have the designation changed, or to assist the operator if there are any other difficulties with citizens suits or penalties.

There also is a potential "unsuitable for mining issue" in regard to the designation of land as "prime farmland." SMCRA § 515(7), 30 U.S.C.A. § 1265(7) (West Supp. 1978). At a minimum, the operator may be required to adhere to more stringent standards in regard to stockpiling the soil and in regrading, resulting in increased costs.

The duty of the lessee to mine all of the "mineable and merchantable" coal is "commonly found by way of implication [in certain] parts of the lease, such as the description of the premises, the royalty clause or the habendum clause." 3 AM. LAW OF MINING § 16.48 (1971). "Mineable coal has been defined as 'coal which could be profitably mined by judicious methods.' " Tressler Coal Mining Co. v. Klefeld, 125 W. Va. 306, 24 S.E.2d 101 (1943). "Merchantable coal has been defined as 'coal which was ordinarily used, for sales and could easily be sold at a profit.' " Id. See Norvell, supra note 24, at 438. A frequently used definition of mineable and merchantable coal utilized in modern leases is as follows:

The term "mineable and merchantable coal" as used in this lease shall mean coal which, at the time it is reasonably reached in a proper plan of mining and development, can, by the use of then modern and efficient equipment and methods of adequate management, ordinarily be mined and marketed at a profit.

Ross, supra note 24, at 66. This clause is broadly worded and should continue to protect the landowner's interest. If the attorney for the lessee feels that other clauses in the lease are not sufficient protection for his client in the event of governmental action, he might consider adding the following to the above definition of mineable and merchantable coal:

Any official designation by a regulatory authority that any of the property herein leased is designated (without limitation) as:
unsuitable for mining, unreclaimable, unpermitable, or that the permit cannot be revised to include such property,
will remove the coal in that area from the meaning of "mineable and merchantable" coal as used in this lease and will relieve (upon compliance with all other terms in this lease) the lessee from all duties to mine the coal in that area.
V. PERMIT REQUIREMENTS

The landowner now has a greater stake involved in the permit process than existed previously, and similarly, the operator will want substantial concessions prior to the signing of a lease because of the increased costs of obtaining a permit. The landowner if

Many leases also contain provisions for payment for the loss of "recoverable coal" in addition to the reference to "mineable and merchantable coal."

The general permit application requirements are set forth in SMCRA § 507, 30 U.S.C.A. § 1257 (West Supp. 1978). The SMCRA provides for a five year maximum permit time, subject to continuous renewals if the operator is in compliance with the law in regard to his operations. The permit is revocable if the work has not started within three years, although this provision and the five year maximum are variable if there is special cause shown (such as high start up costs, difficulty in arranging financial agreements and complications in acquiring equipment). Note that boundary extensions require complete permit procedures, and applications for renewal must be submitted one hundred twenty days prior to expiration of the old permit. SMCRA § 506, 30 U.S.C.A. § 1257 (West Supp. 1978). Careful owners should require the lessee-operator to submit the notice or a copy of the permit renewal application prior to the date set by the regulatory authority. It is estimated by coal industry sources that the cost of obtaining a permit has tripled under the SMCRA, and it now averages $15,000 to $35,000 to obtain a permit.

The SMCRA provides for extensive public (and thus landowner) participation in the permit process. Prior to the submission of the permit to the regulatory agency, the applicant is required to run a newspaper advertisement in a local paper for four successive weeks. In addition, a verification of the advertisement must be included in the permit application. Any person having an interest in the area to be mined may file a written protest of the proposed application within thirty days after the last date the advertisement was published. The regulatory authority may then call for an informal conference to be held, and notice of the conference has to appear in a newspaper for two weeks prior to the conference. After the conference, the authority is to issue its decision on the permit application within sixty days of the "hearing." Accounting for no delays and assuming that persons submit their request for the conference at the last moment, the SMCRA has already accounted for a one hundred thirty two day permit process at best. If no conference was sought, then the authority has to file its decision within a "reasonable" time. Considerations by the authority can include the time for investigating the site, complexity of the application, whether written objection has been filed and whether the application is partially approved. If the application is approved, then the permit shall be issued. The applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons behind the final determination within thirty days after the applicant is notified of the determination. The regulatory authority is then required to provide notice to all interested parties and hold a hearing within thirty days of the request. The decision should issue within another thirty days. The authority is entitled to grant temporary relief under this section provided the person can show the likelihood of prevailing on the merits, public health and safety will not be harmed and notice has been given to all interested parties. Thus, another sixty days could be added onto the above one hundred thirty
possible should attempt to lease only to persons or organizations
which have the financial, technological and legal resources neces-
sary to comply with the stringent terms of the SMCRA. In the
future, landowners with property that has only “marginal” hopes
for profitability may be less inclined to lease the property due to
increased chances for liability and the lower royalties precipitated
by the SMCRA. In any event, operators are likely to make such
decisions for the landowner as they may be unwilling to lease such
property.

The time required to obtain a permit under the SMCRA will
be somewhat lengthy due to the extensive provisions for public
participation in the permit process. Lessee-operators will un-
doubtedly want to condition liability for advance payments and/or
minimum royalties on the issuance of a permit, as opposed to
starting the payments within a prescribed time period as was com-
mon in leases executed prior to the passage of the SMCRA. With
such a condition placed on minimum royalties and advance pay-
ments, the landowner, on the other hand, should ask to be pro-
vided with several of the important elements of the permit applica-
tion prior to the signing of the lease. The landowner should inves-
tigate the solvency, previous record in regard to mining permits,
amount of equipment, and the quality of personnel of the lessee or
operator. It is extremely important for the landowner to realize
that permit violations that occurred prior to the enactment of the
SMCRA can be considered as part of a “pattern of violations”

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two day figure, although if the permit had been granted originally, the operator
could probably continue to conduct operations (or preparation) pending the appeal.
Further appeal procedures are also available in the circuit courts (assuming the
approval of the state plan) if the party is still aggrieved after the above administrat-
The prudent lessee-operator will undoubtedly seek at least an 18 month “grace”
period before he or she incurs any liability for minimum payments on the coal.

The coal or mineral lease generally has a clause concerning commencement
and continuation of operations in a “diligent” manner. The difficulties that can be
caused by poorly drafted clauses in this regard has been noted. Burgess, supra note
24, at 475. Modern leases often require that the lessee have “X” amount of equip-
ment on the premises by a certain time, which is inducement enough to produce
the coal. Ross, supra note 24, at 69. As to minimum royalties, see supra note 60.

Although more comprehensive, the contents of the SMCRA permit applica-
tion are similar to the previous permit application requirements under West Vir-
ginia law. See W. Va. Code § 20-6-8 (1978 Replacement Vol.). The increased im-
portance of the application information to the landowner lies in the heightened
chances of revocation due to the increased scrutiny by the regulatory authority and
sufficient to revoke a permit. This is significant in the selection of a lessee-operator and in the drafting of any extraordinary termination clause or force majeure clause that is in the lease.

The SMCRA allows the full assignability, transfer and sale of surface mining permits and allows for a successor in interest to continue mining under the old permit (until his application is either approved or denied), if sufficient bond is posted and he applies for a permit within thirty days of succeeding to such interest. The landowner may wish to provide carefully that under no circumstances is the lease assignable without written permission.

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104 SMCRA § 521(a)(4), 30 U.S.C.A. § 1271(a)(4) (West Supp. 1978). In litigation over the interim regulations, the District Court for the District of Columbia held that “violations” sufficient to constitute a pattern of violations that could be sufficient to warrant a suspension or revocation of the permit could not be limited to “existing” violations. In re Surface Mining Regulation Litigation, supra note 17.

105 The force majeure clause is usually inserted into the lease to clarify those situations which will excuse the lessee from performance. Common elements of force majeure are acts of nature such as floods and earthquakes, as well as fire, strikes, and shortages of power and fuel. Generally, provisions include some rental for the property if the disturbance occurs for longer than a certain period of time, or that performance can be excused only for “X” months of the year. Lessee-operators will probably want a provision in the lease which states that performance is excused if the mining operations are prevented or prohibited by law, statute or any other governmental or regulatory authority regulation, rule, restraint or court order, including the inability to obtain permits or licenses. The landowner should seek a provision that may allow the force majeure clause to operate under extraordinary governmental action, but not where there is a pattern of violations sufficient to revoke a permit under section 521 (30 U.S.C.A. § 1271 (West Supp. 1978)) or where the revocation of the permit is due to a finding by the regulatory authority in writing after a hearing that the lessee’s conduct was knowing or willful. The landowner might also wish to incorporate some elements of the penalty provisions in his forfeiture clause, which is another important “landowner’s” element in the coal lease. This clause generally grants the forfeiture or the right of reentry for breach of covenant or failure to pay royalties. If such a clause is not present in the lease, the landowner may only have a cause of action for damages because of the breach. Vaughan v. Napier, 92 W. Va. 217, 114 S.E. 526 (1922). The lease should also include reference to bankruptcy by the lessee, reservation of liens by the lessor and the cumulative effect of lessor’s rights. Ross, supra note 24, at 73-74. Prudent parties should also address the payment of taxes in the lease. See Vish, supra note 24, at 203.

from the landowner,\textsuperscript{107} and that the landowner has the right to agree to any successor in interest to the permittee. In addition, leases should provide that if a substantial majority of the shares of the corporation holding the lease is sold, then the owner has the right either to approve the new corporate owner or to terminate the lease.\textsuperscript{108} The landowner-lessee should also try to secure the first lessee's agreement to pay the royalties in the event the assignee ever fails to do so.

The makeup of the ownership of the corporation is another element of the permit application, and the careful landowner may wish to stipulate that the permit application has to be submitted to him for his approval at least thirty days prior to its submission to the regulatory authority. A clause of this type should also be included in the lease governing any renewal or revisions in the permit. In addition, the owner may require that the request for assignment of the permit be submitted to the landowner at least sixty days prior to its submission to the regulatory authority. In this way, the landowner will have time to check the resources of the successor in interest.

In the event that the assignee is acceptable to the owner, the owner should provide for the original permittee to assume responsibility for the royalties and maintenance of the premises until the new permittee has a fully approved permit. The landowner may wish to stipulate that in the event the permit is assigned, the first lessee will have to take extraordinary steps to indemnify the

\textsuperscript{107} The practitioner should keep in mind that the rule in Dumpor's case is still extant in West Virginia. 4 Coke 119, 76 Eng. Rep. 1110 (1603). Unless there is an express covenant to the contrary, an unrestricted consent to one assignment becomes consent to all assignments thereafter. Basley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 112 S.E. 512 (1922). See Scott, \textit{Coal Lease Assignments}, 8 \textit{Nat. Res. Law.} 467 (1976).

\textsuperscript{108} Because permits formerly were non-assignable in West Virginia, so called "naked" corporations were formed with the sole purpose of acquiring coal leasehold estates and then selling or transferring the leasehold estates for a profit without any future liability being incurred by the stockholders or owners of the corporation. To become a "successor in interest," one would merely buy the stock of the permittee corporation to obtain the advantages of the permit. Thus the need for clauses to address the problems of arm's length transactions in the royalty clause. \textit{See supra} note 60. The lease might also include clauses as to the minimum capital of the lessee, rights of termination if the lessee's corporation is sold or provisions for the agreement of the landowner to the sale of stipulated percentages of the lessee's stock. The lease should also contain a clause to the effect that the failure of the lessor to exercise any rights is not a waiver of the privilege to exercise such a right in the future.
landowner, or that the other provisions of the lease as to indemnity will remain in effect for the life of the lease or for a certain period after the assignment.

The permit obtained under the SMCRA is revisable, although any substantial changes will necessitate the submission of a new application and the repetition of the public notice and hearing procedures. If the landowner does not provide for his participation in the makeup of the revision and the review process, the operator may be able to obtain changes in the permitted activities that are unacceptable to the landowner. It should also be noted that the regulatory agency will be able to review outstanding permits and require any “reasonable revision or modification” needed in the permit or the reclamation plan as is necessary during the term of the permit. The careful lessee-operator will probably attempt to include a clause to the effect that any such change in the areas that can be mined will likewise affect the agreement of the parties as to what coal the lessee is responsible for removing from the property. The landowner should request immediate notification of any regulatory agency action that affects the property.

An integral part of the application process will be the formulation by the applicant of a complete and comprehensive reclamation plan for the property. A successful plan will be essential to the granting of an application by the regulatory body, and thus the landowner might desire a clause stipulating that the reclamation plan along with the permit application be submitted for his approval prior to submission to the regulatory authority. Insur-

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11 Id.
12 Id. § 511(c), 30 U.S.C.A. § 1261(c) (West Supp. 1978).
13 See supra note 99.
14 SMCRA § 508, 30 U.S.C.A. § 1258 (West Supp. 1978). The reclamation plan will be lengthy and expensive to prepare, as it must contain numerous surveys, sophisticated technological and engineering data and detailed descriptions as to the measures taken to prevent environmental harm. West Virginia’s present reclamation plan requirements are found in W.Va. Code § 20-6-9 (1978 Replacement Vol.).
16 See Burgess, supra note 24, at 474. Some leases contain provisions that the landowner has a right to protest government action in relation to the property. Id. Any lessee would undoubtedly want to include clauses dealing with compensation for time and expense if for some reason the landowner continually rejected the proposed plan.

In addition, many parties to lease transactions are finding arbitration clauses to be an effective way to settle disputes. Generally, each side chooses an arbitrator
ance and bonding are requisites of the permit application," and the well-drafted lease from the landowner’s standpoint should contain specific provisions on these issues.

The bonding required under the SMCRA remains in effect until the land has been properly revegetated in accordance with section 515, although parts of the bond may be released as reclamation is completed. The landowner should carefully delineate what responsibility he or she wishes to take (if any) for those dams or structures that remain on the property after the cessation of mining as release of the operator’s bond may also be conditioned

and they in turn select a third person to make up the board. The clause then stipulates the time in which they are expected to come to a decision. For an arbitration clause, see § 5 Am. Law of Mining, Form 16-11, ¶ 19 (1971). If the arbitration clause is to be effective, the parties should stipulate that the decision of the arbitrators will be binding.

The insurance provisions are generally the longest and most comprehensive in the coal lease. The lessee-operator should be required to have insurance on all risks generally associated with occupational injury or disease as well as anything that could occur in the use of the premises, including the following:

(i) subsidence, (ii) pollution or contamination of water, (iii) gob pile slides, (iv) movement of overburden, (v) contractual, (vi) products, (vii) hired cars, (viii) liability arising out of employees use of personal cars for company business, (ix) contingent liabilities. Fire, property damage and extended coverage on structures for the replacement value thereof should cover perils arising out of (i) windstorm, (ii) civil commotion or riot, (iii) explosions, (iv) hail, (v) aircraft and vehicles, (vi) smoke and (vii) riot attending a strike. Equipment and rolling stock policies should insure against perils of (i) fire, (ii) tornado and windstorm, (iii) flood (meaning rising waters), (iv) explosion, (v) earthquake, (vi) collision (except coupling or shunting of cars, derailment, upset and overturning), (vii) collision, upset, overturning and/or derailment of any transporting conveyance, (viii) collapse of bridges, culverts, trestles, tipple, conveyor, head houses or any other platforms or structures, (ix) slate fall, roof fall, cave-in, landslide or squeeze, (x) strikers, locked-out workmen and persons taking part in labor disturbances, riot and civil commotion and (xi) malicious damage and vandalism.

Vish, supra note 24, at 219. The landowner should also be named as an additional insured on the policy and there should be provisions for notice to the landowner in the event the lessee fails to pay the premiums or falls behind. The landowner “may consider obtaining a representation from the operator that it will comply with co-insurance covenants of insurance contract so as to avoid becoming a co-insurer.”

Id.


on the landowner's assurances of future maintenance to the regulatory authority. If the landowner knows that dams or other hazardous conditions will remain on the property, he may seek an additional bond between himself and the lessee-operator independent of the operator's bond with the regulatory authority, or the landowner may seek to have the covenants of the lease run for a certain time after mining operations have stopped.

The landowner should be cautious regarding the exploration for coal on his property. The SMCRA is fairly lenient in this regard, and if less than two hundred fifty tons of coal are to be removed, only "notice of intention to explore" need be furnished to the regulatory authority, while mere "specific written approval" is all that is necessary if more than two hundred fifty tons are to be removed. The final rules, however, contemplate a formal "application" by the operator who expects to remove more than two hundred fifty tons, and there are distinct performance standard provisions applicable to both categories of exploration, which deal particularly with roads, vehicular traffic and reclamation. This instance is only one of many where the loose language of the SMCRA has been narrowed and clarified by the regulatory rules, and the attorney practicing preventive law should be careful to include a "compliance with all laws" clause that encompasses every conceivable regulatory rule or regulation within its definition of "applicable laws."

The federal regulations on exploration should be contrasted with current West Virginia statutory provisions for prospecting permits, which provide application and bonding standards almost as stringent as those for a complete application. Regardless, such prospecting or exploration will be expected to conform to the environmental protection standards of section 515, and to be subject to the penalty provisions of section 518. While it is not expected that the final West Virginia plan will allow prospecting without a

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120 Id. The landowner should include provisions for the purchase of the lessee's equipment and structures after the termination of the lease, if necessary.
122 Id. § 512(d), 30 U.S.C.A. § 1262(d) (West Supp. 1978).
125 See supra note 31.
126 W. VA. CODE § 20-6-7 (1978 Replacement Vol.).
bond, the provisions of section 512\textsuperscript{129} of the SMCRA could provide the unwitting landowner with liability for reclamation costs and off-site damage with little recourse against an operator who does more than just "explore" and then leaves the state.

VI. FEES, ENFORCEMENT AND PENALTY PROVISIONS

One of the early provisions in the SMCRA affecting coal lease agreements is section 402(a),\textsuperscript{130} which requires "operators" subject to the provisions of the SMCRA to pay into the reclamation fund a fee measured by each ton of coal mined, the fee to be determined according to the method of mining used to extract the coal.\textsuperscript{131} The SMCRA later defines "operator" as "any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location."\textsuperscript{132} This provision, along with the others in the SMCRA which prescribe penalties,\textsuperscript{133} requires careful drafting and delineation of the parties to the lease.

The SMCRA expressly provides a pitfall for the landowner-lessee if he is a "person, corporate officer, agent or director, [who] on behalf of a coal operator . . . knowingly makes any false statement, representation or certification required in this section."\textsuperscript{134}

\textsuperscript{131} SMCRA § 402(a), 30 U.S.C.A. § 1232(a) (West Supp. 1978). The fees are "35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary [of the Interior] whichever is less." Id. Previously, the operator paid a set fee of $60 per acre in West Virginia. W. VA. CODE § 20-6-17 (1978 Replacement Vol.). Under the SMCRA, the fees are to be paid quarterly. Id. § 402(b), 30 U.S.C.A. § 1232(b) (West Supp. 1978).
\textsuperscript{133} SMCRA §§ 402(d), 518, 30 U.S.C.A. §§ 1232(d), 1268 (West Supp. 1978).
\textsuperscript{134} SMCRA § 402(d), 30 U.S.C.A. § 1232(d) (West Supp. 1978).
convicted, such a person or entity could be punished by a fine of up to $10,000 or by imprisonment of not more than one year, or both.\textsuperscript{122} To protect himself, the landowner should be sure that the weight sheets submitted by the lessee-operator for the royalties accurately reflect the figures the lessee is sending to the regulatory body for the payment of the reclamation fee, in case a regulatory agency asks for verification by the landowner.

The reclamation fee is subject to recovery from the operator in any court of competent jurisdiction in any action to recover the fee.\textsuperscript{136} The landowner-lessor may want to stipulate that the reports and statements sent to the government by the lessee-operator as to the coal produced in the calendar quarter also be sent to the landowner.\textsuperscript{137} This would serve the two-fold purpose of checking both on the operator's honesty in dealing with the government and on the weight sheets that the operator has submitted to the landowner for the royalties.

The SMCRA provides for inspections and the issuance of cessation orders by the regulatory body if there is found to be "an imminent danger to the health or safety of the public, or [the operation] is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources."\textsuperscript{138} If the inspection reveals something less than "imminent" harm, the regulatory authority can issue a correction order which allows the operator up to ninety days to correct the problem.\textsuperscript{139} If the problem remains uncorrected,\textsuperscript{140} then a cessation order can be issued, and a civil penalty of not less than seven hundred and fifty dollars a day can be assessed for each day that the violation or failure is prolonged.\textsuperscript{141} Once again, the landowner should be aware that a pattern of violation can be grounds for the denial or revocation of a permit.\textsuperscript{142} Many of these penalty and

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} § 402(e), 30 U.S.C.A. § 1232(e) (West Supp. 1978).
\item \textsuperscript{127} \textit{Id.} § 402(e), 30 U.S.C.A. § 1232(c) (West Supp. 1978).
\item \textsuperscript{128} \textit{Id.} § 521(a)(2), 30 U.S.C.A. § 1271(a)(2) (West Supp. 1978). The West Virginia statutes also contain a cessation order provision, although such orders were rarely issued in the past. W. VA. CODE § 20-6-14a (1978 Replacement Vol.). Additional enforcement, penalty and appeal provisions are found at \textit{Id.} §§ 20-6-25 to 30.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} § 518(h), 30 U.S.C.A. § 1269(h) (West Supp. 1978).
\end{enumerate}
\end{footnotesize}
enforcement provisions call for practically "willful" conduct, and the landowner should carefully consider what conditions are placed in the \textit{force majeure} clause.\footnote{See \textit{supra} note 105.} Otherwise, the lessee-operator may be able to have the permit revoked and be released from the lease as a result of his own conduct alone, rather than because of extenuating circumstances beyond his control.

The SMCRA has an express provision allowing citizen suits to be brought by "any person having an interest which is or may be adversely affected" against the government or an operator to compel compliance with the SMCRA.\footnote{SMCRA § 520(a), 30 U.S.C.A. § 1270(a) (West Supp. 1978).} Also, a person "who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to [the SMCRA] may bring an action for damages (including reasonable attorney and expert witness fees)."\footnote{Id. § 520(f), 30 U.S.C.A. § 1270(f) (West Supp. 1978).} The landowner's indemnity clause should be broad enough to cover citizen suits,\footnote{See \textit{supra} note 49.} and the landowner should realize that "unfriendly" neighbors may take advantage of the citizen participation provisions of the SMCRA to slow down mining operations.\footnote{Citizen participation is also present in the application requirements, SMCRA § 507, 30 U.S.C.A. § 1257 (West Supp. 1978), reclamation plan requirements, \textit{Id.}, § 508, 30 U.S.C.A. § 1258 (West Supp. 1978), and in the blasting requirements of section 515, 30 U.S.C.A. § 1265 (West Supp. 1978).} This section could also be used by the \textit{landowner} to supplement any common law remedies he or she may have for breach of the lease provisions, or to protect the land if the lessee-operator's actions are so excessive that the owner's conscience prevails over the prospect of lost revenues.

The attorney representing the landowner might also address his client's participation in any hearing affecting the lessee-operator, or at least make the landowner-lessee aware that much of his time in the future could be taken up in proceedings against the lessee-operator. States are required to include penalty provisions in their programs that are at least as stringent as those contained in section 518 of the SMCRA.\footnote{SMCRA § 518(i), 30 U.S.C.A. § 1268(i) (West Supp. 1978).} Civil penalties may be assessed for violation of permit conditions or any of the provisions of Title V, but the civil penalty (not to exceed $5,000 for each violation) is mandated where a cessation order has been issued
under section 521. The operator is entitled to a hearing concerning the penalty assessments and notice when the regulatory authority has fully determined that a violation did occur. The landowner should request notice of such a determination from the lessee-operator. Wilful and knowing violations can incur a stiffer fine of $10,000 in addition to a year's imprisonment, and directors, officers and agents of corporations who "willfully and knowingly" participate in violations are subject to the same penalties and imprisonment provisions as enumerated above.

Particular attention should be paid by the landowner to a broadly worded clause in the penalty provisions of the SMCRA which states in essence that whoever knowingly fails to make (or conversely makes any false) statement, representation, or certification required in a number of "documents" to be filed or maintained as a result of the SMCRA, may be subject to fine, imprisonment or both. Any landowner who is requested to submit data for the permittee's application should be cognizant of the possible consequences of this provision.

VII. Conclusion

The individual attorney who has developed a static pattern of forms and clauses to use in coal lease transactions should frequently review his or her materials to ascertain whether or not changes in the law have rendered ineffective the protections previously thought necessary for the landowner-lessee client. The passage of the SMCRA has significantly changed the burdens placed upon the lessee-operator regarding environmental protection, financial liability for fees, penalties, reclamation, and civil liability. In addition, stringent enforcement and penalty provisions of the SMCRA signify a greater likelihood that the operator is going to experience delays and possible shutdowns as a result of increased scrutiny by the regulatory authority and concerned citizens.

150 Id. § 518(a), 30 U.S.C.A. § 1268(a) (West Supp. 1978). Each day can be considered a separate violation, and various considerations in the permittee's history can be utilized by the regulatory authority in setting the amount of the penalty. Id.
151 SMCRA § 518(b), (c), 30 U.S.C.A. § 1268(b), (c) (West Supp. 1978).
151.1 Id. § 518(e), 30 U.S.C.A. § 1268(e) (West Supp. 1978).
153 Id. § 518(g), 30 U.S.C.A. § 1268(g) (West Supp. 1978). This provision provides another example of the "sloppy" drafting of the SMCRA, as the word "plant" (instead of "plan") appears in reference to "documents." A maximum fine of $10,000 and imprisonment for up to one year are possible under this section.
The practitioner may find that while the essentials of many clauses drafted for landowner clients in the past may suffice to protect landowners under the stringent requirements of the SMCRA, the addition of specific references to the regulations promulgated as a result of the SMCRA will clarify the positions of the parties and reduce the chances for litigation over the lease. Thus, the SMCRA will have a substantial impact on the negotiating process prior to the signing of the lease, in respect to the provisions in the lease governing duration, advance payments and minimum royalties, royalties, permits and reclamation plans, and indemnification. Advising a landowner to execute a lease that does not contain terms compatible with the stringent provisions of the SMCRA creates the risk of lost royalties, civil liability, and substantial frustration for the client. The potential threat to the attorney of professional liability under these circumstances only serves to reemphasize the necessity of practicing preventive law in the coal lease transaction.

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