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NEW STANDARDS FOR STRIP MINING: SOCIAL, ECONOMIC AND ENVIRONMENTAL COSTS NOW CONSIDERED

ENVIRONMENTAL LAW–SURFACE MINING CONTROL AND RECLAMATION ACT: District Court for the District of Columbia upheld regulations promulgated to protect the environment from the adverse effects of strip mining, which had been challenged on both procedural and substantive grounds. U.S. Court of Appeals for the District of Columbia affirmed without opinion the district court's decision generally upholding the Department of Interior's interim stripmining regulatons. *Surface Mining Regulation Litigation,* 11 E.R.C. 1593 (1978).

The policy behind the Surface Mining and Reclmation Act of 1977,[1] as stated by Congress, is to balance the nation's need for coal as a source of energy against the growing necessity of protecting the environment and preserving agricultural productivity.[2] Although coal is necessary to fulfill the nation's energy requirements, the impact from unreclaimed, mined areas results in heavy social and economic costs, as well as impairment of environmental quality. In addition, coal mining often results in a diminution of the potential post-mining uses of the land. But technological developments in the areas of surface mining and reclamation have progressed to the point where it has become appropriate to minimize these adverse effects of surface mining.[3]

Implementation of the Surface Mining and Reclamation Act (Act) was to occur in two stages. Nine months after the date of enactment, mine operators were to begin complying with eight subsections of the Act. This is the interim program. The purpose of this initial regulatory program is to phase in the full standards and procedures of the permanent program in a way that is consistent with the intent of Congress. The standards of the interim program do not implement the provisions of the entire Act. Rather, the full range of standards and procedures required by the Act is covered in the permanent program. Development of the permanent program is supposed to depend on the requirements of the Act and the experience gained during the initial program.[4] The interim regulations provide for, *inter*

1. 30 U.S.C. § § 1201-1328 (1977).
2. 30 U.S.C. § 1202 (1977).
3. 30 U.S.C. § 1201 (1977).
4. 42 Fed. Reg. 62,641 (1977).

alia: land restoration after mining, preservation of top soil and the hydrologic balance, revegetation, disposal of wastes and the use of explosives.[5] New operations commencing on or after February 3, 1978 must comply with the interim regulations. Operations which commenced before February 3, 1978, with exceptions, must comply with the interim regulations by May 3, 1978.[6]

Twenty-two challenges to the Act were consolidated for review in the U.S. District Court for the District of Columbia.[7] Industrial plaintiffs' motions[8] dealt with both the manner of promulgation of the regulations and substantive challenges to the regulations themselves.[9] Environmental plaintiffs[10] raised one substantive issue: whether the Secretary of the Department of Interior (Secretary) exceeded his authority in allowing extensions to the compliance deadline for pre-existing, non-conforming structures or facilities.[11] In general, the industrial plaintiffs joined in each other's motions for a preliminary injunction; the environmental plaintiffs moved for summary judgment.[12]

Section 1252(c) of the Act set up the interim program which required compliance with eight subsections of the Act nine months after the date of enactment. Industrial plaintiffs' substantive challenges alleged that five of the provisions to be included in the permanent program were improperly included in the interim program.[13] The five provisions in dispute dealt with surface effects of underground mining, mining on prime farmlands and in alluvial valley floors, and spoil and waste disposal.[14] Plaintiffs noted the absence of citation to these five provisions in section 1252(c) as the basis of their challenge. The federal defendant[15] argued that these provisions were necessary to preserve the hydrologic balance of the mined lands and to prevent water pollution, as required by a regulation[16] that was incorporated into the interim program via section 1252(c). The court held that regulation in these areas was necessary in the interim program period, and for the reasons stated by defendant, plaintiffs' motion was denied.

5. Surface Mining Regulation Litigation, 11 E.R.C. 1593, 1594 (1978); 30 U.S.C. §1265(b)(2), (b)(3), (b)(5), (b)(10), (b)(13), (b)(15), (b)(19), (d) (1978).
6. 30 U.S.C. §1252(c) (1977).
7. Surface Mining Regulation Litigation, 11 E.R.C. 1593 (1978).
8. Industrial plaintiffs included coal mine operators and trade associations.
9. ,Surface Mining Regulation Litigation, 11 E.R.C. 1593, 1595 (1978).
10. National Wildlife Federation and other environmental groups.
11. Surface Mining Regulation Litigation, 11 E.R.C. 1593, 1606 (1978).
12. *Id.* at 1594.
13. *Id.* at 1595.
14. *Id.* at 1597-99.
15. The federal defendant is the Department of the Interior.
16. 30 U.S.C. §1265(b)(10)(F) (1977).

Plaintiffs also asserted that the interim regulations as a whole were invalid because the Secretary failed to provide adequate exemption and variance procedures.[17] In deciding this issue, the district court cited to *E. I. duPont de Nemours and Co. v. Train.*[18] In that case the Supreme Court stated:

> The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations. It is clear that Congress intended these regulations to be absolute prohibitions. (97 S. Ct. at 980).

"In the statutory scheme before the court, Congress continually rejected broad exemption provisions."[19] One reason for rejection is that "to provide for unlimited exemptions would render the bill meaningless."[20] Congress was willing to allow limited variance, but only where such variances would result in equal or better protection to the environment and would result in higher post-mining land use.

Two sections provide for variances: section 1301 which concerns experimental practices and section 1265(b)(16) which deals with combined surface and underground mining. The only exemption under the Act is for small operators in section 1252(c).

Congress has made it clear that mine operators have two alternatives: to comply with the regulations or to cease operation.[21] For this reason, the court stated, plaintiffs' claim that variance and exemption granting procedures are necessary is without merit. Plaintiffs' motions were denied.[22]

The regulations were upheld where the federal defendant demonstrated that the regulation under attack was a proper implementation of a section properly within the interim program or that the Secretary in promulgating the regulations had not acted arbitrarily, capriciously or inconsistently with law. Regulations dealing with topsoil standards, blasting limitations, valley fills and third party commitments were upheld, by the court, as constituting a reasonable exercise of agency discretion under the Act. In regard to the small operator's exemption, the court found that Congress intended that the exemption should apply only to genuinely small operators. This regulation, as promulgated by the Secretary, ensures that the exemption cannot be exploited by large producers.

The industrial plaintiffs prevailed on those motions where they

17. Surface Mining Regulation Litigation, 11 E.R.C. 1593, 1599 (1978).
18. 430 U.S. 112 (1977).
19. Surface Mining Regulation Litigation, 11 E.R.C. 1593, 1600 (1978).
20. *Id.*
21. *Id.*
22. *Id.*

demonstrated that the Secretary, in promulgating the regulations, had: imposed standards on operations exempt from those requirements–scope of grandfather exemption and waste impoundments; not promulgated "final" rules which had the effect of imposing procedural restraints on plaintiffs' ability to obtain judicial review–sedimentation ponds; had superceded Federal Water Pollution Control Act[23] standards contrary to the Act–effluent limitations; and had regulated retrospectively without the required explicit statement in the statute–pre-existing structures and facilities.

The environmental plaintiffs moved for summary judgment on the sole issue in their complaint: whether the Secretary had exceeded his authority in allowing limited time extensions for compliance with performance standards for pre-existing, non-conforming structures or facilities. These limited extensions, the environmental plaintiffs argued, violated the mandates of the Act. The court held, however, that the Secretary had the power to grant limited variances. The motion for summary judgment on this issue was denied.[24]

One of the underlying policies of the Act is "to ensure a fair and generally applicable set of standards for all mining operations. . . ."[25] Although fear has been expressed that overly strict regulations will force many mining operations to close, these regulations reflect the intent of Congress and the Act.[26] They are necessary if environmental and social harm is to be kept to a minimum. By upholding the regulations the District Court of the District of Columbia and the D.C. Circuit Court of Appeals have ensured the protection of the environment and of agricultural productivity–both national necessities.

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[*Editor's Note: In the second portion of its review, on August 24, 1978, the court upheld most of the contested regulations. Remanded to the Department of the Interior for further consideration were certain regulations regarding valley and head-of hollow spoil, disposal, prime farmlands, stream buffer zones, and waste dam construction. This decision, as with the first, was the result of the consolidation of 24 suits by industry, state, and environmental plaintiffs challenging the regulations. 11 ERC 2078.*]

23. Federal Water Pollution Control Act, 33 U.S.C.A. § §1251-1361 (1977 Supp.).
24. Surface Mining Regulation Litigation, 11 E.R.C. 1593, 1606 (1978).
25. 42 Fed. Reg. 62,640 (1977).
26. 42 Fed. Reg. 62,640 (1977).