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Terrence W. Mackey

James A. Hardee

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## REGULATION OF OPEN CUT MINING IN WYOMING

Following the lead of other states who have taken steps toward the reclamation of land disturbed by open pit mining, the 1969 Wyoming Legislature enacted the Open Cut Land Reclamation Act.<sup>1</sup> Pursuant to this act the Commissioner of Public Lands promulgated rules and regulations for the enforcement and administration of the act which became effective on August 7, 1969.<sup>2</sup> Also during 1969, the Department of the Interior published regulations pertaining to open cut reclamation on federal lands.<sup>3</sup> This regulation became effective January 18, 1969. The following is a discussion of the content of the regulations and the Wyoming act, the weak or conflicting points in each, and the probable results of their interaction.

Acts similar to the Wyoming Act have been in existence for a number of years in states where strip mining of coal has been a major industry. West Virginia enacted a reclamation statute in 1939 (the first state with significant strip mining to pass such an act).<sup>4</sup> Five other states adopted strip mining reclamation acts in the 1940's and early 1950's.<sup>5</sup> The declared policy of such statutes, including the Wyoming act, is to reclaim and conserve land subject to surface disturbance by open cut mining while protecting other uses of the land; the general health, welfare and safety of the people; and the taxable value of the land.<sup>6</sup> The justification for this policy is apparent from a standpoint of land use, because failure to reclaim usually leaves the land a barren waste which is valueless for productive purposes.

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1. WYO. STAT. §§ 30-96.1 to -96.13 (Supp. 1969).

2. Commissioner of Public Lands, *Rules and Regulations Promulgated Under the Open Cut Land Reclamation Act*, August 7, 1969, hereinafter cited as Regs.

3. 34 Fed. Reg. 852 (Jan. 18, 1969).

4. W. VA. ACTS ch. 84, 1939. Repealed by W. VA. ACTS ch. 85, 1945. The current West Virginia act can be found in W. VA. CODE ANN. §§ 2461(2)-(10e), 2312(35)-(35g5) (Supp. 1963).

5. For a history of early strip mining legislation and a good brief discussion of each of the early acts, see Meiners, *Strip Mining Legislation*, 3 NATURAL RESOURCES J. 442 (1963-1964).

6. WYO. STAT. § 30-96.2 (Supp. 1969). The constitutionality of these acts has generally been upheld, *supra*, note 5.

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Although these reclamation statutes were predominantly inspired by the coal mining industry, most of the acts, including Wyoming's, are not limited to coal mining regulation. With such diversified minerals as iron ore, uranium, coal, trona, and soda being taken from the ground in diverse areas of the state, the amount of land affected and the need for subsequent reclamation is extensive. Indeed, when the vast reserves of uranium recently discovered in Wyoming are considered, it can be anticipated that uranium mining by the open cut method will be at least as extensive as open cut coal mining and just as much in need of supervision under the statute.<sup>7</sup>

### THE WYOMING ACT AND REGULATIONS

The Wyoming Open Cut Land Reclamation Act is patterned on an act by the same popular name adopted in Oklahoma in 1967.<sup>8</sup> While other state acts will also be examined and compared to the provisions of the Wyoming act, frequent reference will be made to this similar Oklahoma enactment.

#### *Statutory and Regulatory Definitions*

The Wyoming act and its corresponding regulations use the standard definitions found in other state acts. Perhaps the most serious problem with the act and the regulations is created by the failure of the draftsmen to include sufficient definitions by which the Commissioner of Public Lands (the administering officer under the Wyoming act, hereafter referred to as the commissioner) can be guided. The magnitude of the omission of definitional material is clear upon examination of the regulations.<sup>9</sup> Perhaps the first order of business for the commissioner will be to clearly state the

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7. This comment will not deal with the economic aspects of strip mining regulation other than when directly related to the reclamation of land under the act. For a discussion of the economics of state regulation, see Brooks, *Strip Mine Reclamation and Economic Analysis*, 6 NATURAL RESOURCES J. 13 (1966).

8. OKLA. STAT. ANN. tit. 45, §§ 701-13 (Supp. 1967).

9. See Regs. ch. I, § 2 and ch. II, § 8(a) wherein the only definitions in the regulations are found.

meaning of such phrases as "substantially completed" and "standards of permissible toxicity and radioactivity."

The most important definition found in the act pertains to the land to be reclaimed. Both the Wyoming and Oklahoma acts define "affected land" as land from which the overburden has been removed or upon which overburden or refuse has been deposited, or both, *after the effective date of the act*. Accordingly, the regulations provide that "affected land" includes only lands disturbed after May 23, 1969.<sup>10</sup> Since the regulations<sup>11</sup> require that reclamation procedures be carried out on all *affected land* except as otherwise provided by rule or order of the commissioner, by definition no land which was disturbed prior to the effective date of the act is subject to its provisions.

### *Exempt Lands*

Since the cost and other burdens of reclamation are placed upon the operator, a significant provision of the act provides that "no operator shall be compelled to perform at his own expense measures required hereunder with respect to operations that were completed or substantially completed prior to the date hereof."<sup>12</sup> At first blush it would seem that a pit which is being mined on the effective date of the act is creating affected land and thus requires reclamation. Certainly the policy behind the exemption of a "substantially completed" pit is clear, but with no definitional guide, it is not clear what constitutes a "substantially completed" pit. The matter will most likely be resolved at a hearing before the commissioner and it is suggested that such a hearing result in a clear definition of this language so that the industry may have a guide as to what is or is not exempt.

An additional exclusion provides that all pits and quarries opened after the effective date of the act which are under the supervision and control of any government agency whose regulations are equal to or greater than those imposed

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10. Regs. ch. II, § 8(a)(2).

11. Regs. ch. II, § 8(c).

12. Wyo. STAT. § 30-96.4(a) (Supp. 1969).

by the substantive provisions of the Wyoming act are exempt.<sup>13</sup> The regulations state that in order to obtain an exemption on a pit or quarry opened after the effective date of the act, the operator must request the exemption at a hearing.<sup>14</sup> At the hearing he must show that the regulations of the government agency controlling the land upon which the pit is to be opened are equal to or greater than the substantive provisions of the Wyoming act. It is further stated that an exemption is subject to later review in light of changed circumstances. There is no elaboration of changed circumstances but presumably the exemption could be taken away if for some reason the land upon which the pit was located changed hands from one governmental agency for whom an exemption would apply to a governmental agency whose regulations did not meet the test or who had no regulations at all. The burden of seeking and proving an exemption is in the first instance on the operator, but the burden of terminating an exemption seems to rest with the commissioner.

Although the same exemption is found in the Oklahoma act,<sup>15</sup> it is not a common feature of the acts of other states, *e.g.*, Montana's<sup>16</sup> and North Dakota's<sup>17</sup> acts. Notwithstanding, it seems to be an appropriate exemption in states with large amounts of federal land since the federal regulations would probably require duplication and therefore cause an added unnecessary burden on the operator.

### *Permits*

The act requires an operator to obtain a permit for any new open cut mining<sup>18</sup> not exempted under another section of the act. Since the exemptions are not automatic and it is a violation of the penalty provisions of the act not to have a permit for new open cut mining, a hearing must be held to

13. The subject of open cut mining on federal lands will be dealt with elsewhere in this comment.

14. Regs. ch. II, § 8(f).

15. OKLA. STAT. ANN. tit. 45, § 704(b) (Supp. 1967).

16. MONT. REV. CODES ANN. § 50-1001 to -1017 (Supp. 1969).

17. N. D. CENT. CODE § 38-14-01 to -13 (Supp. 1969).

18. Regs. ch. II, § 8(a)(1). New open cut mining is defined as open cut mining which will create affected land.

determine exemptions for any mining done after the effective date of the act. There is no time limit on the permit, and it is apparently perpetual. An operator may seek to amend his permit by an amended application. The fee for a permit is fifty dollars and the application forms may be obtained from the commissioner, although there is no charge for an amended application. Except for affected land the operator may withdraw land from the permit by notifying the commissioner who is required to reduce the amount of the bond proportionately to reflect the withdrawn land.

The Oklahoma act<sup>19</sup> is substantially the same except that permits are issued on an annual basis with a commencement date of July 1, which entitles the holder to engage in open cut mining until the following June 30. Both Montana<sup>20</sup> and North Dakota<sup>21</sup> require a permit only for open cut mining in an area where the overburden exceeds ten feet in depth. Thus, no permit is required for any mining in which the overburden is less than the amount required in those states.

The Wyoming regulations specifically state that no permit is required for prospecting, which is defined as making preliminary tests to determine the probable value of a natural deposit. Consequently, under the Wyoming act no permit is required until actual mining operations begin.

### *Substantive Requirements*

The act delineates the obligations of the operator in reclaiming and restoring the land. Generally, this includes grading of peaks and ridges to a rolling topography, which is defined in the regulations as grading the ridges to a width of ten feet at the top and grading the peaks to a width of fifteen feet at the top. Although the tops of the ridges and peaks must be reasonably level, the operator can seek an exception to this when good cause can be shown. Again no mention is made as to the meaning of the language "good

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19. OKLA. STAT. ANN. tit. 45, § 705 (Supp. 1967).

20. MONT. REV. CODES ANN. § 50-1008 (Supp. 1969).

21. N. D. CENT. CODE § 38-14-04 (Supp. 1969).

cause'' and perhaps some guidelines should be set forth in the regulations.

Earth dams are required in the final cuts to impound water or other liquids which are contaminated, so long as the impounding of the water or other liquids does not interfere with or damage underground mining or other mining operations or the adjoining property and is in compliance with the laws, rules and regulations administered by the State Engineer. What constitutes contaminated water for which dams must be built has not yet been determined and the commissioner upon proof at a hearing may require the building of dams. Presumably then, until standards are established, final cut dams are required only after a hearing by the commissioner as to the need for the dam. Any exposed mineral seams which are combustible or may form acid must be covered to a depth of not less than two feet with earth or spoil material if such covering of the seam is practical in the discretion of the commissioner.

Reseeding programs are recommended and required only when determined practical by the commissioner subject to a hearing if the operator feels that the recommended program is impractical. However, if an operator complies with the program recommended by the commissioner, he is discharged from his obligations with respect to the reseeded lands regardless of the success of the program. The operator might also experiment with methods of revegetation agreed upon by the operator and the commissioner and again the operator is discharged regardless of the success of the program. The regulations set a presumptive cost of reseeded in the amount of fifty dollars per acre unless otherwise shown in a reclamation plan. Reseeding is to be done between the last frost in the spring and the first frost in the fall but is not to be done when the weather is unsuitable.<sup>22</sup>

A map showing the location of the pit by section, township, range and county and other identifying information must be submitted each year not later than September 1. The map must show the number of acres of affected land

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22. See Regs. ch. III for details of restoration requirements.

and must be accompanied by a report showing the steps taken toward reclamation.<sup>23</sup>

The Oklahoma act<sup>24</sup> differs in one major aspect in this area in that it speaks of and provides for reforestation of the land, which is omitted in the Wyoming act, although revegetation as referred to in the Wyoming act would seem to encompass reforestation where necessary. Most other acts contain variations on the duties of the operator set forth in the Wyoming act and all mention reforestation, an omission in the Wyoming act noted above. The requirements of reclamation in other states are more complex than in Wyoming but include the same basic elements.

The essential factor in this section of the Wyoming act is the discretionary element given to the commissioner to meet the needs of the area in which reclamation is required. Debate has long raged over such discretionary powers as opposed to explicit statutory requirements. This law settles the debate for our purposes and Wyoming must now place faith in the commissioner and his delegates to insure that reclamation best suited to a particular region is carried out.

### *Bond*

Every state act contains a provision which requires that the operator submit a bond to insure that money will be available to carry out the required reclamation of the land. The bond provisions of the Wyoming act require that the operator submit a bond in an amount equal to the cost of restoration required by the act as determined by the commissioner. Cash, government securities or property bond may be submitted in lieu of a surety bond. The amount of the bond can be changed. The bond remains in effect until the "mined acreage" (presumably affected land) has been restored and approval and release has been obtained from the commissioner. The release covers only restored "mined acreage," and the bond may be adjusted to reflect reclamation costs for remaining unrestored acreage.

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23. Regs. ch. IV.

24. OKLA. STAT. ANN. tit. 45, § 706 (Supp. 1967).



A surety may not cancel a bond without ninety days notice to the commissioner and the written consent of the commissioner. The commissioner may not withhold his consent if the conditions of the bond have been met. If the operator's surety is suspended under the laws of the state of Wyoming, the operator may substitute a new surety who meets the statutory requirements. Upon failure of the operator to substitute within thirty days, the commissioner may withdraw the operator's permit until substitution is made.

When an operator violates the act or fails to comply with the rules and regulations he will be notified of such violation by the commissioner. If within ninety days of written notice the operator fails to comply, the commissioner may proceed to forfeit the bond in accordance with the appropriate provisions of the act. A forfeiture for this reason shall satisfy all of the obligations of the operator under the act. The burden of reclamation is then shifted to the commissioner. The operator, however, may seek reduction of the bond whenever reclamation of affected land has occurred to the extent that it reduces his obligation.

The regulations allow the operator to submit an estimated bond with his application.<sup>25</sup> The commissioner, however, must still determine the correct amount of bond. If the amount of estimated bond equals or exceeds the bond amount set by the commissioner, then the bond will be adjusted to the amount determined by the commissioner and the permit made permanent. When the bond set by the commissioner exceeds the estimated bond, the operator may seek a hearing before the commissioner on the matter and, upon a showing that the bond set by the commissioner is excessive the operator and the commissioner may negotiate the amount of bond necessary to meet the requirements of the act. The regulations make no mention of the effect of an impasse in negotiations, but presumably the only remedy available is in the courts.

If the operator does not choose to submit an estimated bond with his application, then the commissioner will set

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25. Regs. ch. II, § 7.

bond in an amount necessary to meet the requirements of the act, taking into account the reclamation requirements in the regulations. Again if the operator feels that the bond set by the commissioner is excessive, he may seek a hearing to lower the bond. The operator may make his grading requirements a part of his general mining operations and the bond will be reduced by the appropriate amount, but if he so elects and fails to meet grading requirements, then the commissioner may, at a hearing, increase the amount of the bond to reflect to cost of grading.

The Wyoming bond provision is somewhat unique in that it does not set a minimum amount of bond for a given area. Although the regulations raise a presumption that the bond will be set at a minimum of fifty dollars per acre based on the cost of reseeding, this can be reduced upon hearing or by submission of a comprehensive reclamation plan.

The Oklahoma act<sup>26</sup> sets the amount of bond as equal to the assessed value of the land in the preceeding year or fifty dollars per acre, whichever is the lesser. This seems restrictive since the bond would in no case be greater than fifty dollars per acre, and this may not be sufficient to meet the cost of reclamation by the state in case of forfeiture by the operator. Both the Montana<sup>27</sup> and the North Dakota<sup>28</sup> acts require a bond in the amount of two hundred dollars per acre or portion thereof. The Pennsylvania acts sets the bond at five hundred to one thousand dollars per acre based upon the number of acres of land involved and the bond shall never be less than five thousand dollars regardless of the amount of land involved.<sup>29</sup> Although a set dollar value of bond may give the appearance of providing for adequate reclamation, this may not be so as that amount may be insufficient to meet the restoration and reclamation required by the act. In the early stages the commissioner should lean towards higher estimated costs until experience indicates some minimum amount of bond that will be sufficient to meet reclama-

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26. OKLA. STAT. ANN. tit. 45, § 708 (Supp. 1967).

27. MONT. REV. CODES ANN. § 50-1011 (Supp. 1969).

28. N. D. CENT. CODE § 38-14-07 (Supp. 1969).

29. PA. STAT. ANN. tit. 52, § 1396.4(g) (1966).

tion costs. This is necessary to protect the state's reclamation fund from depletion caused by forfeiture of bonds set in insufficient amounts.

Upon a violation by an operator of any of the provisions of the act, the commissioner may request the State Attorney General to institute proceedings to forfeit the bond of the offender. Prior to any such action the commissioner must have given the operator notice of the violation and thirty days in which to correct the violation or seek a hearing with the commissioner. After a hearing with the operator in regard to the violation, the commissioner may either withdraw the notice of violation or proceed to forfeit the bond.

The Wyoming forfeiture procedure is not unique when compared with statutes in other states. The Oklahoma act<sup>30</sup> is identical to the Wyoming act. The Montana bond forfeiture provision<sup>31</sup> is also identical to the Wyoming provision, but the North Dakota provision<sup>32</sup> allows the commissioner rather than the Attorney General to initiate forfeiture and contains no notice period. Pennsylvania gives the power to declare a forfeiture to the Secretary of Mines and Mineral Industries who thereupon certifies the same to the Attorney General who may proceed to enforce and collect the amount of liability providing also that an aggrieved operator may seek a contest of the Secretary's action in accordance with the act.<sup>33</sup>

### *Enforcement Provisions*

The enforcement provisions of the Wyoming act vary little from the Oklahoma act. In Wyoming, a penalty for failure to obtain a permit is imposed in the amount of not more than one thousand dollars per day of violation,<sup>34</sup> whereas, in Oklahoma the penalty is from fifty to one thousand

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30. OKLA. STAT. ANN. tit. 45, § 711 (Supp. 1967).

31. MONT. REV. CODES ANN. § 50-1013 (Supp. 1969).

32. N. D. CENT. CODE § 38-14-09 (Supp. 1969).

33. PA. STAT. ANN. tit. 52, § 1396.15 (1966).

34. WYO. STAT. § 30-96.13 (Supp. 1969).

dollars per day of violation.<sup>35</sup> Montana<sup>36</sup> and North Dakota<sup>37</sup> provide a similar penalty but a notable exception is found in the North Dakota penalty provision. There it is provided that the Public Service Commission (the administering agency) may seek injunctive relief against operators with permits who violate the act. Pennsylvania has taken this one step further, allowing not only injunctive relief<sup>38</sup> but also allowing a private citizen of the state (after making demand on the public officer or employee whose duty it is to enforce the act and where such officer or employee has failed to do so) to bring an action of mandamus forcing the officer or employee to enforce the statutory requirements. To avoid frivolous action by private citizens, a sworn statement, made by the citizen seeking enforcement of the act, to the officer or employee charged with enforcement of the act is required setting forth the alleged violations and such sworn statement is subject to the Pennsylvania law of perjury.<sup>39</sup>

From the standpoint of a conservationist the Pennsylvania act provides the greatest protection for the land affected. In states without provisions for injunctive relief, the only apparent relief is forfeiture of the operator's bond by the commissioner. Such a provision again shows the need to insure a fair and adequate bond since the marginal operator would be tempted, where the amount of bond does not reflect the true cost of reclamation, to take the less expensive (to the operator) route by forfeiting the bond, thus shifting the burden of reclamation to the state at an expense greater than the amount received upon forfeiture. This particular result is dealt with in Kansas by refusing a second permit to an operator who forfeited the bond on his first permit unless the land under the first permit can be reclaimed at no expense to the state. The operator can pay the state the difference between the amount of bond forfeited and the cost of reclamation and thereby become eligible for a second permit, or in the alternative, perform the necessary reclamation

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35. OKLA. STAT. ANN. tit. 45, § 713 (Supp. 1967).

36. MONT. REV. CODES ANN. § 50-1016 (Supp. 1969).

37. N. D. CENT. CODE § 38-14-12 (Supp. 1969).

38. PA. STAT. ANN. tit. 52, § 1396.20 (1966).

39. *Id.* § 1396.21 (1966).

outstanding under the first permit and thereby become eligible for a second permit.<sup>40</sup>

Certainly one method of dealing with this matter in states without a provision like that found in Kansas (such as Wyoming) is to set the amount of bond for the second permit high enough to reflect the increased risk to the state of a second forfeiture. Although this will not pay the cost to the state of reclamation of the land under the first permit, for which bond was forfeited, it might reduce the temptation of forfeiture a second time. Another method and perhaps the best is to include this as a factor for setting bond in the regulations.

### *General Provisions*

All state acts give the board empowered to administer and enforce the act the power of rule making and subject the rules to the state's administrative procedures act.<sup>41</sup> The rules of practice and procedure under the Wyoming act are set forth in Chapter I of the Wyoming Regulations.

The procedural aspects of practice before the commissioner are substantially the same as before other boards and commissions in Wyoming.

The regulations<sup>42</sup> also deal with one area not specifically mentioned in the act, that being the submission of a reclamation plan by an operator to meet the requirements of the act. The plan allows the operator to make reclamation a continuing part of his mining operation and this is reflected in a reduced amount of bond. Submission of such a plan is optional with the operator and the commissioner may accept or reject the plan at his discretion. If the commissioner rejects the plan the operator may seek a hearing before the commissioner on the matter. If the commissioner accepts the plan he may modify the bond requirements to meet the cost of the plan. Upon failure of the operator to carry out

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40. KAN. STAT. ANN. § 49-416 (Supp. 1968).

41. The Wyoming Administrative Procedures Act is found at WYO. STAT. § 9-267.19 (Supp. 1969).

42. Regs. ch. IV, § 1.

his plan, the commissioner may hold a hearing and increase the bond to reflect the cost of work not done under the plan. The use of a reclamation plan seems to encourage the diligent operator to make reclamation a part of his mining operation, thus reducing the cost of compliance with the act and yet giving the commissioner the power to insure that security is had to enforce the act.

### THE FEDERAL REGULATIONS

#### *Scope*

Because of the large amount of federal land which is involved in the strip mining industry in Wyoming, one of the most far reaching provisions (and possibly the most troublesome) of the Wyoming act is the exemption of lands to which an equal or greater reclamation requirement of any governmental agency attaches.<sup>43</sup> The federal government moved into the area of strip mining reclamation with the publication of regulations by the Department of the Interior.<sup>44</sup> These regulations apply to all land mined under the Mineral Leasing Act of February 25, 1920,<sup>45</sup> the Mineral Leasing Act for Acquired Lands,<sup>46</sup> the Materials Act of July 31, 1947<sup>47</sup> and land appropriated for highway uses.<sup>48</sup> Excluded from coverage under the regulations are oil and gas operations, tribal lands, minerals located under the general mining laws, minerals under the Materials Act within the jurisdiction of the Secretary of Agriculture<sup>49</sup> and land, the surface of which is not owned by the federal government. The regulations apply to permits, leases and contracts issued subsequent to the January 18, 1969, effective date.<sup>50</sup>

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43. WYO. STAT. § 30-96.4(b) (Supp. 1969).

44. 34 Fed. Reg. 852 (Jan. 18, 1969). All citations to the regulations hereafter are as they will appear in the Code of Federal Regulations to facilitate the citing of particular portions.

45. 30 U.S.C. § 181-287 (1964).

46. 30 U.S.C. § 351-359 (1964).

47. 30 U.S.C. § 601-604 (1964).

48. 23 U.S.C. § 317 (1964).

49. 5 U.S.C. § 511 (1964).

50. 43. CFR 23.2.

*Procedure*

Except for the organizational and semantic differences between federal and state government, the regulations closely parallel the state reclamation acts which have been discussed above. As in the state statutes, an operator is required to apply for a permit before commencing activity on the lands covered under the regulations.<sup>51</sup> Unlike Wyoming, however, the federal regulations include an express provision for denial of a permit if an operator has previously defaulted on a bond under the regulation. This denial may be lifted only if the land upon which the operator defaulted is reclaimed without expense to the federal government.<sup>52</sup> Once a permit has been requested, a study of the proposed operation is made by the appropriate officer (named in the regulations) to determine the requirements necessary to maintain the present status of the land and to facilitate reclamation. The terms and scope of this plan are largely in the discretion of the officer since the limitations in the regulations are broad. However, if the officer determines that any of the following conditions might result from operations under the permit, he may prohibit or restrict such operation:

1. Rock or landslides which could endanger lives or property,
2. Substantial deposits of sediment and silt in water resources,
3. Destruction of key wildlife habitat or cultural, historical, scenic or natural features, or
4. Lowering of water quality below state or federal standards (a permit may be issued if it is shown that the lowering is necessary for increased economic and social development and it is approved by the Federal Water Pollution Control Administration).

Once the determination has been made the operator is informed of the requirements necessary and they are incorporated in the permit or contract.<sup>53</sup>

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51. *Id.* 23.4.

52. *Id.* 23.6

53. *Id.* 23.5.

Upon issuance of a permit, the operator must then submit a plan of exploration for the mineral being sought (prospecting) and have it approved before he is allowed to commence any surface disturbing operations. The mining supervisor and district manager (the appropriate officers designated by the regulations) then review the plan with an eye toward preservation and reclamation of surface resources.<sup>54</sup> The operator must then submit a plan for the actual mining operation. This is similar to the exploration plan but more detailed. The regulations suggest that the following provisions *may* be included in the mining plan:

1. A description of the area and location to be affected;
2. Two maps or photographs showing topographical, cultural and drainage features of the area;
3. Statement of proposed methods of operations;
4. Estimate of quantity of water used and pollutants to be carried into any receiving waters;
5. A design for the treatment of drainage to prevent erosion and pollution;
6. A statement of the proposed manner of reclamation;
7. A description of safety and resource preservation measures;
8. Where revegetation is required, a plan for such revegetation; and
9. If required, the proposed methods of backfilling.

The mining plan is then reviewed by the officer and if approved the operator is to comply therewith. The plan may be changed upon later review.<sup>55</sup>

The regulations, like the statutes discussed above rely upon bonding for enforcement. The bond shall not be less than two thousand dollars, but above that level it is set according to how much the officer feels is necessary to carry out the approved plan of reclamation. The officer does have power, however, to raise as well as lower the bond under

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54. *Id.* 23.7.

55. *Id.* 23.8.



changed conditions arising after the bond is set.<sup>56</sup> To facilitate the administration of the regulations each operator is required to file an annual report as to the work performed and the actions taken under the mining plan.<sup>57</sup> Further promulgation of non-compliance, and suspension of the permit upon continued non-compliance are essentially the same as the state statutes.<sup>58</sup>

### *Federal and State Coordination*

As can be seen from the foregoing discussion, the federal regulations are even more discretionary than the Wyoming statute. Since all lands located under the general mining laws are excluded from the regulation of the federal government, they would fall under the Wyoming statute in the absence of a showing of local government restrictions equal to or greater than the Wyoming statute. Even as to those lands which are covered by the federal regulations, there would appear to be a minimum level of performance established by the express provisions of the Wyoming statute. For instance, an operator whose land fell under the jurisdiction of the federal regulations would be extremely careful to include all express provisions of the Wyoming statute in his mining plan so that the federal regulations would be equal to or greater than the Wyoming statute. By doing so, he avoids the obligation of posting a bond with both the state and the federal government. Thus, even though the requirement of grading (backfilling) is left to the discretion of the federal officer and the manner of grading is left to the operator under the federal regulations, an operator would submit the Wyoming grading requirements in his mining plan to avoid conflicts with the state regulations.

A major problem may arise where the discretion of the state commissioner and the discretion of the federal officer come into conflict. An example would be in the area of revegetation. Under both the Wyoming statute and the federal regulation the requirement of replanting is left to official

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56. *Id.* 23.9.

57. *Id.* 23.10.

58. *Id.* 23.11-12.

discretion. If the state commissioner should determine that replanting is practical, should the operator be brought under the Wyoming statute if the federal officer omits such replanting from the federal requirements? Since the discretionary determinations must be made on a site by site basis, the burden of coordinating the discretionary functions of the state and federal officers falls squarely on the individual operator. In all probability the operator must seek a determination of these discretionary areas before submitting his mining plan and prior to seeking a state exemption from the state act. In effect his mining plan is subject to review by the mining supervisor, the district manager and the Wyoming Commissioner of Public Lands before it is submitted for final granting of the federal permit. The commissioner becomes a third party in the decision-making process by virtue of the operator's desire to avoid posting a bond under the Wyoming act.

### CONCLUSION

The Wyoming Open Cut Land Reclamation Act is a start toward the restoration of land which is disrupted by mineral extraction from open pit mining. Although the act makes no provision for restoration of land which was "affected" before the act was passed, the act serves as a *minimum* standard for federally regulated land in the state and the *complete* standard for non-federal land. The future of the act lies in its most prominent feature—the large amount of discretion placed in the commissioner. Since the legislature did not include the more concrete provisions for enforcement and determination of operator's duties discussed previously as having been used in other acts of this type, the effectiveness of the Wyoming act will rise and fall in accordance with the zeal and judgment of the Commissioner of Public Lands and his delegates. This flexibility and discretion may serve to create an equitable and effective program for land reclamation in Wyoming or to reduce the act to an empty shell.

TERRENCE W. MACKEY

JAMES A. HARDEE