

1980

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Recommended Citation

Woods, Nancy D. (1980) "Public Participation under the Surface Mining Control and Reclamation Act of 1977: A Panoply of Rights," *Land & Water Law Review*. Vol. 15 : Iss. 2 , pp. 503 - 532.

Available at: https://scholarship.law.uwyo.edu/land_water/vol15/iss2/4

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COMMENT

PUBLIC PARTICIPATION UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: A PANOPLY OF RIGHTS

INTRODUCTION

President Jimmy Carter signed the Surface Mining Control and Reclamation Act of 1977¹ (the "Act" or Pub. L. 95-87) into law on August 3, 1977. The legislative endeavor which resulted in the federal surface mining reclamation law consumed over six years of controversy and debate in Congress.² Once enacted, the Act insured extensive public participation in the daily workings of administrative agencies³ regulating surface coal mining and reclamation operations within the states:

It is the purpose of this Act to . . . assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary [of Interior] or any State under this Chapter.⁴

The Act's public participation scheme is so extensive, in fact, that it merits description as "a panoply of rights"⁵ by the Act's principal sponsor, the Honorable Morris K. Udall.⁶ He further notes that he is "not certain the United States Code contains another law that includes such a full role for citizen involvement as Public Law 95-87."⁷ The Act allows public access to almost every phase of the regulatory process by providing both procedures and encouragement for active public involvement in the regulation of

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1. 30 U.S.C. § 1201 et seq. (1977).
2. Hall, *Enforcement Under The Surface Mining Control and Reclamation Act of 1977—Public Law 95-87*, in SURFACE MINING CONTROL AND RECLAMATION ACT (Day and Green, eds. 1980).
3. Either a State regulatory authority under an approved State program pursuant to 30 U.S.C. 1253 (1977) or the Secretary acting through the Office of Surface Mining Reclamation and Enforcement (OSM) pursuant to a promulgated Federal program pursuant to 30 U.S.C. 1254 (1977).
4. 30 U.S.C. § 1202(i) (1977).
5. Udall, *The Enactment of the Surface Mining Control and Reclamation Act of 1977 in Retrospect*, 81 W. VA. L. REV. 553, 557 (1979).
6. United States House of Representatives, Chairman, Committee on Interior and Insular Affairs.
7. Udall, *supra* note 5.

surface coal mining. As will be detailed below, the procedures include public participation in implementing, administering and enforcing the Act. The encouragement lies in ready access to information obtained under the Act; flexible standing rules for administrative and judicial processes; and authorization of awards for costs and expenses in the administrative and judicial proceedings.

The purpose of this comment is to explain the principal reasons for the public participation scheme mandated by the Act, detail some of the particular procedures and encouragement provided by the Act, and predict whether the citizen role will actually assist implementation of the Act.

WHY EXTENSIVE PUBLIC PARTICIPATION?

The Act was designed to promote good-faith, informed, and effective state regulation⁸ of surface coal mining in accordance with state programs approved under section 503⁹ of the Act. However, in designing the Act around the states, Congress faced an "undeniable legacy of destruction associated with coal mining [testifying] to the laxity or nonexistence of state regulation."¹⁰ Therefore, the extensive public participation scheme illustrates Congress' recognition that citizens can help prevent the old pattern of minimal state regulation and enforcement from being repeated.¹¹

These old patterns of minimal state regulation are usually explained as stemming from two problems: the reluctance of a state to impose stringent controls on its own industry¹² which would place it at a competitive disadvantage as against coal producers in other states,¹³ and the limited resources and information available to any state (or federal) regulatory authority for informed decisions and actions. As was stated by Congress:

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8. 30 U.S.C. § 1201(f) (1977).
 9. 30 U.S.C. § 1253 (1977).
 10. H. R. REP. NO. 95-128, 95th Cong., 1st Sess. at 58 (1977).
 11. S. REP. NO. 95-128, 95th Cong., 1st Sess. at 90 (1977), See H. R. REP. NO. 95-128, 95th Cong., 1st Sess. at 129 (1977).
 12. H. R. REP. NO. 95-218, 95th Cong., 1st Sess. 58 (1977).
 13. Udall, *supra* note 5, at 556 and see 30 U.S.C. § 1201(g) (1977).

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. . . . While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act.¹⁴

Therefore, three clear and intended advantages accrue under the Act's public participation scheme: (1) any otherwise unrepresented views or unknown information may be presented to aid agency operations; (2) the citizens can assist the agency to insure operator compliance with the Act; and (3) the citizens can assist the public to insure agency compliance with the Act. However, another equally important social advantage is served by a thorough public participation scheme. The opportunity for public input into the administrative process can help enhance confidence in both the agency's willingness and ability to make responsive and responsible decisions, and the fairness and effectiveness of administrative processes in general.¹⁵

PUBLIC PARTICIPATION PROCEDURES

This section includes specific public participation procedures provided by the Act, and, in certain instances, proposed procedures included in Wyoming's program sub-

14. H. R. REP. NO. 218, 95th Cong., 1st Sess., 88-89 (1977).

15. Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L. J. 359, 361 (1972).

mittal.¹⁶ At this time it is important to note that OSM, (the federal regulatory authority charged with administering the Act), is perhaps the most sensitive in the area of public participation. As stated in the preamble to the permanent regulatory program, "[t]he legislative history establishes convincingly that, at least with respect to citizen participation, a State program must *parallel* the Federal scheme. . . . [Therefore], citizen rights granted under Federal law and regulations may not be abridged by State programs."¹⁷ (Emphasis added.)

Wyoming does have some variations from the federal Act. The variations have been justified in the program submittal as being sufficiently similar¹⁸ to the federal provisions that Wyoming is still capable of carrying out the terms of the federal Act. Wyoming also has provisions which have no federal counterpart. Such distinct provisions should not be construed to be inconsistent with the Act.¹⁹ However, the strength of these claims, and hence the complexion of any regulatory program in Wyoming, must await the Secretary's final decision²⁰ on Wyoming's proposed state program for the regulation of surface coal mining and reclamation operations.

A. *Implementation*

The public has a mechanism to ensure proper implementation of the Act through initiation of or participation in agency rulemaking. The rulemaking procedures under the Act are not particularly unusual. They require publication, a thirty day public comment period following publication, and at least one public hearing on the proposed regulation.²¹ On the basis of the Act's purpose to provide

16. Wyoming's proposed program for the regulation of surface coal mining and reclamation operations was submitted on August 15, 1979 and initially disapproved by the Secretary of the Interior on February 15, 1980. See 45 Fed. Reg. 20930 (March 31, 1980).

17. 44 Fed. Reg. 14901, 15297 (March 13, 1979).

18. Both 30 U.S.C. §§ 1268(i) and 1271(d) (1977), together with the general language of 30 U.S.C. § 1253 allow for this "similar" argument.

19. 30 U.S.C. § 1255(b) (1977).

20. Wyoming expects a final decision on a revised state program around the end of June, 1980.

21. 30 U.S.C. § 1251(a) (1977).

“public participation in the development . . . of regulations”, OSM has required Wyoming to include a similar rulemaking provision in its program.²²

In contrast, the Act's provisions for judicial review of the rulemaking are unusual. The Act limits the time to initiate suit to sixty days from the date of the action.²³ It also limits standing to bring the action to “only those persons who participated in the administrative proceedings. . . .” This presents the possibility that one who failed to comment because he either failed to understand the rule or believed his concerns were addressed by others would forfeit his right to seek judicial review of the final rule.²⁴

To date OSM has not required that Wyoming have a similar provision for judicial review of rulemaking. However, the National Wildlife Federation (NWF) criticized Texas for its failure to include either the Act's sixty day review provision or its limited scope of review rule²⁵ (“arbitrary, capricious or otherwise inconsistent with law”) in its proposed program.²⁶ The NWF claimed that this omission was contrary to the federal regulation that state programs provide for judicial review in accordance with the federal Act.²⁷ However, the NWF's interpretation of the judicial review provision in section 526(e) is open to debate, since it provides that “action of the State regulatory authority . . . shall be subject to judicial review in accordance with *State law*. . . .” (Emphasis added.)²⁸

B. Administration

The public has the opportunity to assist in the proper administration of the Act through participation in the

22. Existing rulemaking requirements are found in WYO. STAT. § 9-4-103(a) (1977).

23. 30 U.S.C. § 1276(a)(1) (1977).

24. Barrett, *Citizen Participation in the Regulation of Surface Mining*, 81 W. VA. L. REV. 675, 705 (1979).

25. Galloway and Thatcher, *Comments of National Wildlife Federation on Proposed State Program of Texas*, (December 26, 1979).

26. 30 U.S.C. § 1276(a)(1) (1977).

27. 30 C.F.R. § 732.15(b)(15) (1979).

28. 30 U.S.C. § 1276(e) (1977).

permitting and bonding processes, and the agency and judicial review processes related thereto. Public participation in this context (as in the enforcement context) involves a number of basic "minimum" participation rights; one of the most important of which is the requirement for adequate notice of the opportunity to participate. OSM has interpreted the public notice requirement to include the need to circulate easily understandable notices, which will not be overlooked by the public, in a manner reasonably likely to reach the persons who will be interested in the actions which are the subject of the notice.²⁹ In addition, the notices should be published in a timely fashion in order to give the public a meaningful opportunity to participate in the proceedings.³⁰

Another important minimum is the requirement for a reasonable forum in which the views of the public may be received. This includes the need to schedule a convenient time and place for the agency proceedings.³¹ It also includes the need to structure the process to provide (1) an institutionalized mechanism for consideration of the public views in a manner which will affect decisionmaking; (2) a means of documenting how elicited views were received; and (3) the reasons for the disposition.³² These ensure that the agency is accountable to the participants in a manner which guarantees that all who wish to be heard will be heard and their views considered by the decisionmakers.

Finally, each opportunity for public participation must include notice of the decision and a reasonable time for appeal. This right to appeal should be available to a broad segment of the public (usually phrased in terms of any person with "an interest which is or may be adversely affected").³³

The Act's public participation scheme for the permitting process provides the above discussed minimum requirements of public notice and opportunity to comment, oppor-

29. Comment eight in *Draft State Program Review Guide* (June 19, 1979).

30. *Id.*

31. *Id.*

32. Comment fourteen in *Draft State Program Review Guide* (June 19, 1979).

33. See standing discussion in *Provisions Encouraging Public Participation*.

tunity for informal and formal hearings, and opportunity for judicial review of the final agency action. The scheme goes beyond these minimums, however, in two respects. First, public participation is inserted early in the permitting process. Second, OSM's regulatory provisions add detail to the statutory minimums.

Once an application for a permit is deemed complete,³⁴ the Act provides for public notice in the form of a four-week publication in a newspaper in the locality of the proposed operation.³⁵ The Wyoming Environmental Quality Act expands this notice to include personal notice to the owners of the surface and mineral rights of the land proposed to be within the permit area and certain owners of neighboring lands.³⁶ Due to the federal Act's absence of personal notice, it has been criticized as neglecting those most likely to be injured by the operation at the risk of having them forfeit their rights to participate in the administrative process.³⁷ "Chance alone brings to the attention of even a local resident an advertisement in small type inserted into the back pages of a newspaper."³⁸

OSM's regulations attempt to respond to this criticism. The content of the newspaper notice must include a map³⁹ of the location of the proposed operation for the lay public who may not understand the technical, legal, and engineering terminology that a textual description of the land generally involves.⁴⁰ However, in instances where a written description would be a better means of giving such notice, the newspaper publication may include this in lieu of the preferred map description.⁴¹ To date, OSM has requested that state programs contain a parallel provision, even where existing state law provides personal notice to those most likely to be affected.

34. 30 C.F.R. § 770.5 (1979) defines "Complete application" to mean "an application for exploration approval or permit, which contains all information required under the Act, this Subchapter, and the regulatory program."

35. 30 U.S.C. § 1263(a) (1977).

36. WYO. STAT. § 35-11-406(f) (1977).

37. Barrett, *supra* note 24, at 685.

38. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 315 (1950).

39. 30 C.F.R. § 786.11(a) (2) (1979).

40. 43 Fed. Reg. 41661, 41724 (September 18, 1978).

41. 44 Fed. Reg. 14901, 15097 (March 13, 1979).

The Act provides for a thirty day period after the last publication in which objections and requests for an informal conference may be filed.⁴² If the agency receives a request for an informal conference, the conference must be held within a reasonable time (unless the request is withdrawn or agreement stipulated).⁴³ The decision on the application is then made within sixty days of the conference.⁴⁴

The Act is unclear as to the exact nature of this informal conference. In addition, OSM's regulations avoid detailing specific procedures for the conduct of the conference since:

[T]he legislative history of Section 513(b) [indicates] Congressional intent that, aside from the minimum requirements provided by the Act, the conduct of the informal conference was to be left to regulatory discretion, so as to insure that the issues to be considered at such hearings can be most expeditiously and practically resolved.⁴⁵

However, to some extent, the nature and conduct of the conference are specified by the Act and regulations. It is clear that the conference is not to be an adjudicative proceeding. But a certain degree of formality is required. As the congressional conference managers indicated:

The informal conference procedure contemplated by the conferees is not intended to be a private, closed-door "back room meeting", but rather a serious public forum, similar to Congressional hearings with full notification accorded to the public, which addresses all objections and questions, and whose proceedings are recorded and made an open public record.⁴⁶ This compromise takes away the expense and overkill of a public hearing at every turn, but preserves the rights of objectors and retains a necessary forum for public involvement.⁴⁷

42. 30 U.S.C. § 1263(b) (1977).

43. 30 U.S.C. § 1263(b) (1977).

44. 30 U.S.C. § 1264(a) (1977).

45. 43 Fed. Reg. 41661, 41725 (September 18, 1978).

46. 30 U.S.C. § 1263(b) specifies that the record is an electronic or stenographic record, which can be waived by all parties.

47. *Additional Legislative History* presented to the House of Representatives by the Conference Managers on July 21, 1977. 123 Cong. Rec. H 7586 (daily ed. July 21, 1977).

In addition, the Act allows for citizen access to the purposed permit area to gather information relevant to the proceeding.⁴⁸ Even though this "minesite visit" is not a right, OSM indicates that these should ordinarily be conducted upon request, unless there are substantial reasons not to do so, (i.e. the usefulness of the visit may depend on terrain, distances involved, availability of data on the area already on file, the materiality of data to be obtained by a visit, and the number of persons requesting such a visit).⁴⁹

Beyond these procedural elements, the regulatory authority may adopt whatever procedures it considers necessary to control consideration of issues at the conference. But the procedures adopted cannot unduly restrict public participation at the conference, and must allow for full and free examination of all relevant issues concerning the proposed area to be affected, the applicant and the application.⁵⁰

If any informal conference is requested, it will be held during the period in which an in-house substantive review⁵¹ of the permit application is being conducted. Shortly after the conference, the agency will make its decision either approving, requiring a modification of, or denying the application.⁵² Because the conference is not a full adjudication, the information and issues discussed at the conference, and any agreements which may result, comprise only a part of the decision on the application.⁵³ In this light, the conference begins to appear like an effort by Congress to insert the public into the process early, functioning as a member of the agency staff which reviews the application and recommends action to the decisionmaker (which recommendation may or may not be persuasive). The decision-

48. 30 U.S.C. § 1263(b) (1977).

49. 44 Fed. Reg. 14901, 15099 (March 13, 1979).

50. *Id.*

51. As contrasted with the review for completeness, which must result in the finding contained in note 34 *supra*. The substantive review must result in the determinations described in 30 U.S.C. § 1260(b) (1977).

52. 30 C.F.R. § 786.23(a) (1979).

53. Barrett, *supra* note 24, at 692.

maker is then free to consider any other relevant evidence, which may or may not be disclosed during the conference as an important factor for the decision. Due to the abuses which may result, a full adjudicative proceeding was provided in the Act for review of the initial administrative decision on the application.

Any person with an interest which is or may be adversely affected by the decision may request an adjudicative hearing on the permit application decision.⁵⁴ Due to the broad grant of standing, (which does not depend upon participation in the conference), OSM regulations expand the Act's notice requirements. The Act only requires notice of the decision to be given to the applicant, the parties to any conference,⁵⁵ and the governmental entities described in section 510(a)⁵⁶ of the Act. OSM regulations require an additional newspaper publication of the decision.⁵⁷ Without this notice, adversely affected persons could lose their last opportunity for review of the permit decision,⁵⁸ inasmuch as section 514(f)⁵⁹ of the Act limits the opportunity for judicial appeal to only those who participated in the formal administrative hearing.

Because the Act provides for only a post-decision adjudicative hearing, Congress has allowed limited relief from an arbitrary initial decision on the application through a temporary relief provision.⁶⁰ Temporary relief is discretionary, and can be granted only after a substantial burden is met by the petitioners. In addition, even though the Act may appear, through silence, to allow this relief from either the granting or denial of a permit, OSM's regulations specifically limit this relief to the instance when the agency's decision is to approve the application and grant the permit.⁶¹ The rationale for this limitation is given in the preambles

54. 30 U.S.C. § 1264(e) (1977).

55. 30 U.S.C. § 1264(a) (1977).

56. 30 U.S.C. § 1260(a) (1977).

57. 30 C.F.R. § 786.23(e) (2) (1979).

58. 44 Fed. Reg. 14901, 15103 (March 13, 1979).

59. 30 U.S.C. § 1264(f) (1977).

60. 30 U.S.C. § 1264(d) (1977).

61. 30 C.F.R. § 787.11(b) (2) (iv) (1979).

to the proposed⁶² and final⁶³ permanent regulatory program. In short, OSM believes that, because reclamation feasibility is an essential finding for the granting of a permit, only a full adjudicative hearing on the merits can support the reversal of an initial determination that reclamation will not be feasible. In addition, OSM asserts that the general principles of administrative law limit the award of temporary relief to only those cases which would restore the status quo to that existing prior to the governmental action.

There are two problems with the Office's rationale. First, the criteria for a permit decision includes more than a demonstration that reclamation is feasible.⁶⁴ In fact, a number of decisions which the agency could erroneously make have no relation to reclamation feasibility⁶⁵ and should be challengeable under the temporary relief provision. Secondly, the status quo argument makes no sense in the context of an existing operation seeking either an initial permit following state program approval,⁶⁶ a revised permit,⁶⁷ a renewed permit,⁶⁸ or a permit transfer.⁶⁹ However, OSM rejected this argument on the basis that the status quo is "no permit".⁷⁰ This author contends that the status quo is either mining or no mining, and rejects the relevance of OSM's focus on a "permit".

The primary procedural requirements for the adjudicative hearing are found in section 514(c) and (e)⁷¹ of the Act. These include notice, an adjudicative ("in nature") proceeding, including the agency's right to administer oaths and subpoena witnesses, and specified agency discovery power, a limitation that the conference presiding officer cannot participate in the hearing, the preparation of a record, and a final written decision on the application

62. 43 Fed. Reg. 41661, 41727-41728 (September 18, 1978).

63. 44 Fed. Reg. 14901, 15105 (March 13, 1979).

64. See 30 U.S.C. § 1260(b) (1977).

65. 30 U.S.C. § 1260(b) (1), (4), (5) (A), (6), and (c) (1977).

66. 30 U.S.C. §§ 1252(d) and 1256(a) (1977).

67. 30 U.S.C. § 1261 (1977).

68. 30 U.S.C. § 1256(d) (1977).

69. 30 U.S.C. § 1256(b) (1977).

70. 44 Fed. Reg. 14901, 15105 (March 13, 1979).

71. 30 U.S.C. § 1264(c) and (e) (1977).

accompanied by reasons. OSM's regulations⁷² expand these procedural requirements for state programs to require a right to prehearing discovery and the need for the decision to be in the form of findings of fact and conclusions of law. OSM's justification is that such devices assist the parties in evaluating settlement possibilities and provide for rational fact-finding and judicial review.⁷³ Beyond this, there is no need for state programs to require a particular presiding officer in the nature of an administrative law judge, to provide that oral testimony shall be allowed in all cases, or to prohibit all ex parte contacts (even though ex parte contacts between representatives of the parties and the hearing decisionmaker are prohibited).⁷⁴

Under section 514(f)⁷⁵ of the Act, the applicant, or any person adversely affected who has participated in the administrative proceeding under section 514(c) through (e) of the Act, has the right to seek judicial review under section 526⁷⁶ of either the final decision on the permit application or the failure to act on an application within the Act's time limits. This right of judicial review is in addition to the right to initiate a citizen suit pursuant to section 520⁷⁷ of the Act.⁷⁸

Public participation in the context of coal exploration⁷⁹ is not addressed in the Act. However, OSM's regulations⁸⁰ provide for a certain amount of public participation for exploration where more than two hundred and fifty tons of coal are removed. This includes public notice through posting the applicant's information in the locality of the operation (rather than newspaper or mail notice) and an opportunity to comment on the application for approval. OSM rejected establishing further public participation opportunities on

72. 30 C.F.R. § 787.11 (1979).

73. 44 Fed. Reg. 14901, 15105 (March 13, 1979).

74. 30 C.F.R. § 787.11(b)(3)(iii) (1979) and *see* 44 Fed. Reg. 14901, 15105 (March 13, 1979).

75. 30 U.S.C. § 1264(f) (1977).

76. 30 U.S.C. § 1276 (1977).

77. 30 U.S.C. § 1270 (1977).

78. 30 U.S.C. § 1276(e) (1977).

79. 30 U.S.C. § 1262 (1977).

80. 30 C.F.R. § 776.12(b) (1979).

the basis that "exploration, which is ordinarily on a smaller scale than mining, need not be subjected to as wide an area of public participation as mining permits."⁸¹

In contrast to the public participation scheme in the permit process, participation in the decisions regarding performance bonding occurs late and is not as extensive as schemes in other areas. Regardless of this, however, the Act's bonding procedures constitute a large departure from state schemes. The Act provides for public review of the type and amount of bond in the permitting process. The Act also provides for public participation in any decision regarding the release of bonds.

The basic structure outlined in section 519⁸² for bond release is: (1) request for release by the operator;⁸³ (2) public notice (both newspaper and mail notice);⁸⁴ (3) opportunity for objections and evaluation;⁸⁵ (4) inspection and evaluation of the site by the regulatory authority⁸⁶ (the preamble indicates that if citizens act quickly following notice of the request they will be afforded an opportunity to participate in the inspection);⁸⁷ (5) informal conference if requested and if provided for in the regulatory program;⁸⁸ (6) opportunity for a public hearing prior to release of the bond;⁸⁹ (7) regulatory decision and notice of its decision;⁹⁰ and (8) right to appeal the decision.⁹¹

One unusual change in OSM's usual policy of expanding the Act's provisions on public participation is contained in the preamble to the permanent regulatory program. OSM stated that it deleted procedures⁹² allowing petitions for

81. 44 Fed. Reg. 14901, 15020 (March 13, 1979).

82. 30 U.S.C. § 1269 (1977).

83. 30 U.S.C. § 1269(a) (1977).

84. 30 U.S.C. § 1269(a) (1977).

85. 30 U.S.C. § 1269(f) (1977).

86. 30 U.S.C. § 1269(b) (1977).

87. 44 Fed. Reg. 14901, 15121 (March 13, 1979).

88. 30 U.S.C. § 1269(g) (1977).

89. 30 U.S.C. § 1269(f) and (h) (1977).

90. 30 C.F.R. § 807.11(h)(ii) (1979).

91. 30 U.S.C. § 1276(a)(2) (1977).

92. The author is unable to direct the reader into the proposed regulations which are referred to as being deleted. Neither the proposed nor the draft proposed regulations appear to allow petitions for forfeiture.

bond forfeiture. OSM's explanation was that, if the regulatory authority refuses to forfeit a bond under circumstances where forfeiture is mandatory, any person with standing under section 520 may sue to compel compliance with the regulations of the Act.⁹³ One might question OSM's authority for stating that the regulatory authority can be forced to comply with the regulations. See section 520(a)(2)⁹⁴ of the Act and the discussion of citizen suits in the next part. This is further highlighted by the fact that the Act only briefly mentions bond forfeiture in sections 503(a)(2)⁹⁵ and 509(a),⁹⁶ and neither instance mandates any action by the regulatory authority. Only the regulations⁹⁷ require forfeiture under certain circumstances.

C. *Enforcement*

Public participation in the enforcement context includes participation in inspection, enforcement and penalty procedures, and the administrative and judicial review processes pertaining thereto. This area is perhaps the most sensitive of all areas where the Act has inserted extensive public participation. As such, this area is one where the legislative history reinforcing citizen rights is the most complete, and thus OSM's position is the most inflexible. As Richard Hall, Assistant Director of Inspection and Enforcement stated:

By the terms of the federal Act and its clear legislative history, there is no way around the citizen enforcement provisions. As compared to other legislation, the Act is unique in the complete set of rights it grants to the public. The position has always been, and, to my knowledge still is, that the public enforcement provisions are basic to state program approval. They are the sine qua non to state program approval.⁹⁸

93. 44 Fed. Reg. 14901, 15123 (March 13, 1979).

94. 30 U.S.C. § 1270(a)(2) (1977).

95. 30 U.S.C. § 1253(a)(2) (1977).

96. 30 U.S.C. § 1259(a) (1977).

97. 30 C.F.R. § 808.13(a) (1979).

98. September 10, 1979 meeting in Casper, Wyoming which included Warren Morton, Speaker of the House for the Wyoming House of Representatives; Allan Minier, Governor's Office; Nancy D. Wood, Governor's Office; Richard Hall, OSM Assistant Director of Inspection and Enforcement; Donald Crane, OSM Regional Director for Region V; and Marilyn Kelm, Special Assistant for State Regulations.

OSM's position is reflected in a number of minimum criteria which compose the "complete set of rights": (1) the right to request inspections and to participate in the resulting inspection; (2) the right to the informal review established by section 517(h)(1) and(2) of the Act; (3) citizen access to administrative processes for the review of notices, orders, orders to show cause, and civil penalties; and (4) citizen access to courts for citizen suits, damage actions, and review of enforcement proceedings.⁹⁹

The Act provides for extensive public involvement in the inspection scheme of section 517¹⁰⁰ and 521(a)(1)¹⁰¹ of the Act. Any person may request that the regulatory authority conduct an inspection. The request ordinarily should be in writing and signed, and may request that the citizen's identity be kept confidential.¹⁰² However, where prompt action due to an imminent hazard is needed, an oral report followed by a written complaint is sufficient.¹⁰³ As OSM points out, since a mine is subject to inspection at any time, no prejudice can result if complete information is first obtained in oral form.¹⁰⁴

An inspection should occur if the inspection request appears to contain correct information and provides a reasonable basis to believe that there is a violation of the Act, regulations, or permit, that there is imminent danger to the public, or that any significant environmental harm exists.¹⁰⁵ Furthermore, the citizen has the right to be notified of the scheduled inspection and to accompany the inspector, so long as he remains under the inspector's control and supervision.¹⁰⁶ In this instance he waives any right to have his identity remain confidential (in addition, a non-disclosure request will not be honored where disclosure is required under any federal or state law).¹⁰⁷

99. 44 Fed. Reg. 14901, 15297 (March 13, 1979).

100. 30 U.S.C. § 1267 (1977).

101. 30 U.S.C. § 1271 (1977).

102. 30 C.F.R. § 842.12(b) (1979).

103. 30 C.F.R. § 842.12(a) (1979). Imminent hazard requirement is a construction of the preamble to the permanent regulatory program.

104. 43 Fed. Reg. 41661, 41793 (September 18, 1978).

105. 30 C.F.R. § 340.15 together with 842.11(b)(1)(i) (1979).

106. 30 C.F.R. § 842.12(c) (1979).

107. 30 C.F.R. § 842.12(b) (1979). See for example 5 U.S.C. § 552.

The regulatory authority must notify the citizen of the results of the inspection or reasons why an inspection was not conducted.¹⁰⁸ This notice should also specify the citizen's right to a review of the agency's action or inaction.¹⁰⁹ Depending upon the issues and the type of review desired, a dissatisfied citizen can receive this agency review through the informal review process provided for under section 517(h) (1)¹¹⁰ and 30 C.F.R. section 842.14, the formal review proceeding provided by section 525,¹¹¹ or choose to participate in an informal public hearing,¹¹² (often referred to as "mine site review"), under section 521(a) (5).¹¹³

If the agency action was either no inspection or no enforcement action, the dissatisfied citizen must proceed through informal review.¹¹⁴ Informal review may also be used to complain about inadequate enforcement action taken during an inspection. However, there are several disadvantages to informal review. The regulatory authority probably cannot change any enforcement notices or orders because the operator would have no opportunity to participate in the review.¹¹⁵ In addition, there is no right to either present oral testimony¹¹⁶ or appeal the review¹¹⁷ unless granted by the regulatory authority. Finally, if an appeal from the informal review is granted, the scope of review is restricted: there is no right to *de novo* factual findings, discovery, or cross examination.¹¹⁸

The major benefit of the informal review opportunity is that, where the agency has taken some enforcement action, seeking informal review first and then subsequently invoking formal review under section 525 allows the citizen

108. 30 C.F.R. § 842.12(d) (1979).

109. 30 C.F.R. § 842.12(d) (1979).

110. 30 U.S.C. § 1267(h) (1) (1977).

111. 30 U.S.C. § 1275 (1977).

112. 30 C.F.R. § 843.15 (January 11, 1980).

113. 30 U.S.C. § 1271(a) (5) (1977).

114. See 30 U.S.C. § 1275(a) (1) which requires review of a "notice or order". In this instance there is not notice or order.

115. Galloway and McAteer, *Administrative Adjudication Under the Surface Mining Control and Reclamation Act of 1977: The Citizen's Perspective*, 6 N. Ky. L. Rev. 1, 10 (1979).

116. *Id.*

117. 44 Fed. Reg. 14901, 15300 (March 13, 1979).

118. Galloway, *supra* note 115, at 13.

to "have two 'bites' at the apple of review."¹¹⁹ Obviously, in this instance the citizen can invoke the section 525 formal review first. However, one commentator notes that, if section 525 review is invoked, the reviewing board would probably rule that the regulatory authority has lost jurisdiction to review the issue under informal review,¹²⁰ (even though it still can modify, vacate or terminate the notice or order outside the informal review process¹²¹).

One major problem associated with the informal public hearing ("mine site review") is that a citizen probably cannot initiate this proceeding. This conclusion is based on the fact that the hearing will not be held if the operator fails to request one within thirty days of service of notice.¹²² In addition, this hearing opportunity is only available when the notice or order requires cessation of mining (either expressly or impliedly).¹²³ However, where such a hearing is held, a citizen can urge the agency to change the notice or order without the restriction present in the informal review context.¹²⁴

There is no administrative appeal provided from the decisions of the regulatory authority in informal hearings. However, such an informal hearing does not affect formal section 525 review rights (therefore, the operators also have two "bites" for administrative review of notices or orders requiring cessation of operations¹²⁵). Finally, as in the informal review context, initiation of formal section 525 proceedings probably waives any right to an informal hearing under section 521(a)(5),¹²⁶ (once again, the agency can still modify, vacate or terminate a notice or order even though it is the subject of any of the above review proceedings).

As discussed above, a citizen dissatisfied with agency inspection or enforcement action must decide whether to

119. *Id.* at 10 n. 23.

120. *Id.* n. 26.

121. 30 U.S.C. § 1271(a)(2) and (3) (1977).

122. 30 C.F.R. § 843.15 (January 11, 1980).

123. 30 C.F.R. § 843.15(a) (January 11, 1980).

124. Galloway, *supra* note 115, at 16 n. 38.

125. *Id.* at 10 n. 23.

126. *Id.* at 17 n. 40.

invoke informal review or formal review. If there has been *some* enforcement action, (i.e. a notice or order is issued), and formal review is initiated, (whether or not preceeded by informal review), the citizen must next decide whether to invoke certain special review procedures.¹²⁷

Temporary relief¹²⁸ will typically be used by the operator to stay the operation of a notice or order during the pendency of the formal review.¹²⁹ However, one commentator suggests that citizens can use this process to achieve stricter or more immediate enforcement¹³⁰ by urging the issuance of a cessation order in lieu of a notice of violation or more stringent affirmative obligations in either a notice or order. The Act limits this opportunity, however. Section 525(c) seems to limit temporary relief to only that person who initiated the section 525 formal review, (“... the *applicant* may file . . . a request for temporary relief”¹³¹) (Emphasis added.). OSM’s regulations are consistent with this interpretation. 43 C.F.R. section 4.1261 allows “[a]n application for temporary relief [to] be filed by any *party* to the proceeding. . . .”¹³² (Emphasis added.) Then 43 C.F.R. section 1105 confers the status of “party” to “any other person having an interest which is or may be adversely affected . . .” only when such person files an application for section 525 review.¹³³ Once again, however, the burden to demonstrate that such relief is proper limits its availability.

If temporary relief is denied and the review requested concerns a cessation order, either the applicant or any person having an interest which is or may be adversely affected may request expedited review of the order.¹³⁴ This consists of forcing the agency to make a decision within thirty days, unless the person seeking the review fails to perfect the application,¹³⁵ requests a delay or acts to frus-

127. *Id.* at 17.

128. 30 U.S.C. § 1276(c) (1977).

129. 43 C.F.R. § 4.1116 (1979).

130. Galloway, *supra* note 11, at 40.

131. 30 U.S.C. § 1275(c) (1977).

132. 43 C.F.R. § 4.1261 (1979).

133. 43 C.F.R. § 4.1105(a)(2)(ii) (1979).

134. 30 U.S.C. § 1275(b) (1977).

135. 43 C.F.R. § 4.1186(b)(2) (1979).

trate the nature of the proceeding,¹³⁶ or fails to give notice to the parties in the specified manner.¹³⁷ If any of these events occur, the decision deadline extends to one-hundred twenty days.¹³⁸

Two important enforcement proceedings cannot be initiated by anyone but the permittee: the order to show cause proceeding (for suspension or revocation of a permit),¹³⁹ and civil penalty review.¹⁴⁰ This does not mean that citizen participation is any less important to these proceedings. This was expressly recognized for the order to show cause proceeding in the legislative history: "Any person who has an interest which is or may be adversely affected by a suspension or revocation of a permit shall be allowed to participate."¹⁴¹ Therefore, intervention into this proceeding is one manner whereby a citizen may participate. Another and more indirect manner consists of active participation in the review proceedings provided for in sections 525 and 518. The order to show cause proceeding centers around finding a pattern of violations caused either willfully or by an unwarranted failure to comply with the Act or permit conditions. An operator may not be able to contest the fact of violations or degree of fault if this has already been adjudicated in a section 525 or 518 proceeding.¹⁴²

Public participation in civil penalty proceedings¹⁴³ also assists in proper enforcement of the Act. As noted above, the citizen cannot initiate a penalty review proceeding. In addition to this limitation, notice to the public (even where the penalty is based on a citizen-initiated inspection) consists only of access to agency information on penalty assessments and proceedings. However, public participation is important in this context. It must be remembered that the operator's failure to seek formal review concerning the fact

136. 43 C.F.R. § 4.1187(i) (1979).

137. 43 C.F.R. § 4.1187(a) (1979).

138. 43 C.F.R. § 4.1180 (1979).

139. 30 U.S.C. § 1271(a)(4) (1977).

140. 30 U.S.C. §§ 1268(b) and (c) (1977).

141. S. REP. No. 128, 95th Cong. 1st Sess. 96 (1977).

142. Galloway, *supra* note 115, at 36 n. 100.

143. 30 U.S.C. § 1269 (1977).

of the violation or the propriety of any affirmative obligations does not preclude him from challenging these issues in a civil penalty proceeding.¹⁴⁴ Therefore, any finding on these issues directly affects the enforcement notice or order initially given or later modified by the agency. In this area, then, it is only the informed citizen who has the opportunity to participate in any informal conference on the penalty or seek to intervene in any formal administrative hearing.

Two important enforcement proceedings exist outside the administrative agency structure: the citizen suit provision¹⁴⁵ and the damage action.¹⁴⁶

Section 520¹⁴⁷ of the Act confers on a non-official person with standing the authority to assume the role of a "private attorney general"¹⁴⁸ and bring suit in federal district court¹⁴⁹ for violations of rules, regulations, orders or permits,¹⁵⁰ or for the agency's failure to comply with a nondiscretionary duty under the Act.¹⁵¹ This authority is limited by the condition precedent of sixty days notice to the agency and violator, except where the violation or order is creating a hazard or immediately affecting a legal interest of the plaintiff, (in such cases a notice is sufficient without the sixty-day delay).¹⁵² In addition, the scope of the complained-of action is limited by the person who is being sued. An operator can only be held to the positive commands of the agency, (i.e. rules, regulations, orders or permits). Thus, where those commands conflict with the Act, the operator is not caught in a "no-win" situation. The regulatory authority, however, is held only to the commands of the legislation and not regulations, even though it may have limited its discretion under the Act by regulation.

144. 43 C.F.R. § 4.1163 (1979).

145. 30 U.S.C. § 1270 (1977).

146. 30 U.S.C. § 1270(f) (1977).

147. 30 U.S.C. § 1270 (1977).

148. See Mogel, *Award of Attorneys' Fees in Administrative Proceedings—Is It In The Public Interest?*, 49 MISS. L. J. 271 which describes the impact *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) had on any further judicial development of the "private attorney general" concept as a means for assessing fees against private litigants.

149. 30 U.S.C. § 1270(a) and (c) (1) (1977).

150. 30 U.S.C. § 1270(a) (1) (1977).

151. 30 U.S.C. § 1270(a) (2) (1977).

152. 30 U.S.C. § 1270(b) (1977).

Section 520 may also be used to urge an interpretation of the Act which may differ from the agency's interpretation.¹⁵³ In this instance a person can circumvent the limits on judicial review of agency rulemaking and seek to compel a nondiscretionary duty under the Act that has been given flexibility by regulation.¹⁵⁴ Regardless of the context, however, the active participation of courts may be enlisted by a citizen to seek a proper interpretation and implementation of the Act.¹⁵⁵

OSM used the public participation¹⁵⁶ and state program¹⁵⁷ provisions of the Act to require Wyoming and other states to include a citizen suit provision corresponding to section 520 in their proposed state programs. Such a provision will ensure access to state courts. However, it will not preclude a citizen suit in federal district court for a violation or for the purpose of compelling agency action.¹⁵⁸

Damage actions¹⁵⁹ also may be used as additional "sanctions" for violations which result in injury to a person or his property. However, as with the citizen suit provisions, these actions are also limited to violations of the agency's affirmative commands. One commentator had a useful suggestion regarding these actions. Since it is necessary to prove a violation in order to prevail, it may be wise to pursue administrative remedies, prove a violation and thereafter file a damage claim in court. After such administrative action resulting in a finding that a violation occurred, the finding should constitute *prima facie* evidence of a violation for the purposes of the damage action.¹⁶⁰

PROVISIONS ENCOURAGING PUBLIC PARTICIPATION

Any procedures described in the prior section which assist the public's awareness of either proposed or existing

153. Barrett, *supra* note 24, at 699.

154. For judicial review limits, *see* 30 U.S.C. § 1276(e).

155. Barrett, *supra* note 24, at 699.

156. 30 U.S.C. § 1202(i) (1977).

157. 30 U.S.C. § 1253(a) (2) (1977).

158. *See* reference to "State regulatory authority" contained in 30 U.S.C. § 1270(a) (2) (1977).

159. 30 U.S.C. § 1270(f) (1977).

160. Galloway, *supra* note 115, at 7, 8.

operations, or remove stumbling blocks to active public involvement in agency or court proceedings encourage public participation. The public notice provisions described above are such "encouragement provisions". This section includes other specific encouragement provisions, principally provisions which allow public access to information obtained under the Act, flexible standing and intervention rules for administrative and judicial processes, and authorization of awards for costs and expenses (including attorney and expert witness fees) in the administrative and judicial proceedings.

Access to Information

Section 517(f)¹⁶¹ of the Act establishes the general rule that all information obtained by the regulatory authority under title V of the Act (sections 501 through 529¹⁶²) is ordinarily to be made reasonably available for public inspection and copying:¹⁶³

Copies of any records, reports, inspection materials, or information obtained under this title by the regulatory authority shall be made immediately available to the public at central and sufficient locations in the county, multicounty, and State area of mining so that they are conveniently available to residents in the areas of mining.¹⁶⁴

The Act, however, does provide for certain exceptions to the general rule. The exceptions include: (1) information in permit applications which pertains only to the analysis of the chemical and physical properties of the coal to be mined (except information regarding mineral or elemental contents of the coal which are potentially toxic in the environment);¹⁶⁵ (2) information in the section 508¹⁶⁶ reclamation plan portion of the application which is not on

161. 30 U.S.C. § 1267(f) (1977).

162. This title is styled "Control of the Environmental Impacts of Surface Coal Mining."

163. 43 Fed. Reg. 41661, 41725 (September 18, 1978).

164. 30 U.S.C. § 1267(f) (1977).

165. 30 U.S.C. §§ 1257(b)(17) and 1258(a)(12) (1977).

166. 30 U.S.C. § 1258(b) (1977).

file pursuant to state law;¹⁶⁷ and (3) information requested to be kept confidential on the basis that it contains trade secrets or is privileged commercial or financial information which relates to the competitive rights of the person intending to conduct coal exploration.¹⁶⁸ In addition, a citizen should be aware that he must demonstrate an interest which is or may be adversely affected in order to have access to information pertaining to the coal seam itself.¹⁶⁹ OSM cautions, however, that as exclusions, these are to be interpreted narrowly.¹⁷⁰

Under the Act and OSM's regulations it is unclear how broadly the exceptions may legitimately be construed. Coal is often an aquifer, and thus much hydrological information may be excluded from public review, (as consisting of "analyses of the chemical and physical properties of the coal"). In addition, "physical properties of the coal" may be interpreted very broadly. Finally, where the information pertains to coal which is not marketable, limiting public access to such information appears to serve no purpose.

OSM's regulations provide a note of caution to regulatory authorities and a further opportunity for public input into agency decisions, (probably only through intervention):

Due process requires that a person not be individually deprived of individual property without some opportunity for a hearing. The divulgence of information in the possession of the regulatory authority which is entitled to confidential protection . . . must, therefore, be protected by providing for advance notice to and opportunity to be heard by the person.¹⁷¹

167. It should be noted that the federal section cited here has no reference to information not on file pursuant to federal law.

168. 30 U.S.C. § 1262(b) (1977), as implemented by 30 C.F.R. § 776.17(b) (1979).

169. 30 U.S.C. §§ 1257(b) (17) and 1258(a) (12) (1977). It should be noted that these provisions contain, in addition to information pertaining to coal seams, information pertaining to test borings, core samplings, and soil samples.

170. 43 Fed. Reg. 41661, 41725 (September 18, 1978).

171. 44 Fed. Reg. 14901, 15021 (March 13, 1979).

Standing and Intervention

The key phrase which defines the maximum burden which can be imposed on persons seeking to invoke the majority of the administrative and judicial proceedings under the Act is "person having an interest which is or may be adversely affected."¹⁷² It is clear from the Act's legislative history that this standard is not to be construed narrowly or restrictively:

It is the intent of the Committee that the phrase "any person having an interest which is or may be adversely affected" shall be construed to be coterminous with the broadest standing requirements enunciated by the United States Supreme Court.¹⁷³

OSM has incorporated this philosophy into the regulatory definition of the term.¹⁷⁴ The preamble to the permanent regulatory program¹⁷⁵ indicates that OSM condensed the definition from various United States Supreme Court cases¹⁷⁶ which, in its estimation, represent the latest Supreme Court decisions on standing. Thus, OSM rejected all comments criticizing the definition on the basis that it is too broad. In particular, OSM rejected limitations which would remove subjective judgments, require a direct impact upon a person's property, circumscribe the geographic area within which a person must reside to have standing, or circumscribe the area of resource impact to the permit or the adjacent area.¹⁷⁷ In short, therefore, no definition of the term is too broad so long as it is consistent with the Supreme Court's statements in *Sierra Club v. Morton*.¹⁷⁸

An out-of-place phrase, "person with a valid legal interest", occurs in section 519(f) and defines the class

172. This phrase is used in 30 U.S.C. §§ 1257(b) (17), 1263(b), 1264(c), 1264(f), 1267(h) (1), 1270(a), 1272(c), 1275(a) (1), and 1281(c).

173. H. R. REP. No. 95-218, 95th Cong. 1st Sess., 90 (1977).

174. 30 C.F.R. § 700.5 (1979).

175. 44 Fed. Reg. 14901, 14912 through 14913 (March 13, 1979).

176. *Sierra Club v. Morton*, 405 U.S. 727 (1972), *SCRAP II*, 412 U.S. 669, *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, (1978).

177. 44 Fed. Reg. 14901, 14913 (March 13, 1979).

178. 405 U.S. 727 (1972).

of persons who may contest a bond release. OSM rejected the argument that this class of persons is smaller than the class of persons with "an interest which is or may be adversely affected" by defining both phrases the same way.¹⁷⁹ OSM's rationale rests on legislative history, which it believes indicates an intent to have the same standing test apply throughout the Act,¹⁸⁰ (Congressional hearings show people using the two phrases interchangeably¹⁸¹).

A recent Wyoming Supreme Court case¹⁸² illustrates a similar philosophy that standing is not a rigid or dogmatic rule to be construed narrowly or restrictively. The Wyoming Court also cited the *Sierra Club* decision as defining the appropriate bounds for the standing to sue doctrine.¹⁸³

Even with a liberal standing doctrine, earlier discussions detailing procedures which cannot be initiated by persons other than the permittee indicate the need for similarly liberal citizen intervention rights. OSM's general rules relating to intervention¹⁸⁴ clearly contemplate that intervention will be liberally granted. In fact, intervention *must* be granted if the petitioner had a statutory right to initiate the proceeding or has an interest which is or may be adversely affected by the outcome of the proceedings.¹⁸⁵ Thus, under OSM's regulations, there is no limitation on the *right* to intervene beyond the broad standing requirements outlined above. OSM also allows persons to assume a limited party status.¹⁸⁶ This enables persons who do not have sufficient time or resources for full participation to participate in agency proceedings.

One commentator¹⁸⁷ suggests that intervention "rights" may not translate to valuable participation in the proceedings. The reason public intervention is allowed and

179. 30 C.F.R. § 700.5 (1979).

180. 44 Fed. Reg. 14901, 14913 (March 13, 1979).

181. See H. R. REP. No. 93-1072, 93rd Cong., 2d Sess. 77-78 (1974).

182. Washakie County School District Number One v. Herschler, 606 P.2d 310 (Wyo. 1980).

183. *Id.* at 316.

184. 43 C.F.R. § 4.1110 (1979).

185. 43 C.F.R. § 4.1110(c) (1979).

186. 43 C.F.R. § 4.1110(e) (1979).

187. Gellhorn, *supra* note 15.

encouraged in agency proceedings is usually to explore issues already raised by the parties, but from a different perspective. If this opportunity is overextended, the benefits of intervention may no longer outweigh the costs.¹⁸⁸ Therefore, the regulatory authority, (which is not OSM if an approved state program is implemented in a state), should retain considerable discretion to structure public intervention¹⁸⁹ so as to ensure that it is utilized for the purpose which it is intended to serve.

Awards of Costs and Expenses

The Act's "panoply" of citizen rights do not translate into participation in fact if the public interest groups are financially unable to participate. The Act addresses this problem through the "encouragement provisions" of sections 520(d) and (f)¹⁹⁰ and 525(e)¹⁹¹ of the Act. These provisions authorize an award of costs and expenses (including attorney and expert witness fees) reasonably incurred as a result of initiation of or participation in administrative and judicial proceedings. OSM expanded this provision by regulation to also include costs and expenses reasonably incurred in seeking the award.¹⁹² The regulations¹⁹³ also detail who receives the award, who pays the award, and what findings must be made.

For the purpose of title V, a person may receive an award from the permittee if he *initiates* the section 525 review proceeding and there is a finding of a violation or of an imminent hazard; or if he *participates* in the proceeding in which such finding was made and he substantially contributed to a full and fair determination of the issues. The "substantial contribution" finding in either an initiation or participation context also supports a petition for the award to be paid from the regulatory authority. A permittee, however, is eligible to receive an award from

188. *Id.* at 387.

189. *Id.* at 384.

190. 30 U.S.C. § 1270(d) and (f) (1977).

191. 30 U.S.C. § 1275(e) (1977).

192. 43 C.F.R. § 4.1295 (1979).

193. 43 C.F.R. § 4.1294 (1979).

either the agency or any person only if the permittee can demonstrate that the agency or person took or initiated enforcement action in bad faith or for the purpose of harrassing or embarrassing the permittee. Similarly, the regulatory authority can petition the hearings board to receive an award on the same "bad faith" argument.

The two surprising regulatory provisions, regarding the double standard for an award depending upon whether the permittee or other person is the petitioner and the availability of an award payable to the agency, are both justified by OSM on the basis of legislative history. Senate report number 128 states that such awards may be made "to the permittee or government when the suit or participation is brought in bad faith."¹⁹⁴

One final note should be made. A person who may desire to receive an award of costs and expenses, (including attorney and expert witness fees), may waive his opportunity if he cannot show good cause for failure to make a timely, (i.e. forty-five day) filing of a petition for the award.¹⁹⁵

There have been several sound attacks levied on this type of provision which, in effect, results in forcing the "deep pockets" of industry or government agencies to fund litigation.¹⁹⁶ The common attack is that administration of such a proceeding would be difficult. The agency would be required to determine whether a participant has made a "substantial contribution", an especially difficult question in the event of settlement. After this, it would have to determine the "reasonable" amount to be paid.¹⁹⁷ These determinations will tend to create fee litigation wholly unrelated to public participation in the regulation of surface coal mining. Another problem with such awards is that it will be difficult for the agency to insure that its decision on fees and costs is not influenced by the extent it agrees or disagrees with the participant's/petitioner's position.¹⁹⁸ As one

194. S. REP. No. 128, 95th Cong. 1st Sess. at 59 (1977).

195. 43 C.F.R. 4.1291 (1979).

196. Mogel, *supra* note 148, at 283.

197. Gellhorn, *supra* note 15, at 396.

198. *Id.*

commentator notes, "it . . . remains . . . [to be seen] whether the advantages of helping public groups to secure representation . . . would outweigh the disadvantage of burdening the agency with control of the award."¹⁹⁹

A "Panoply of Rights" Encased in a "Lawyer's Dream"

This last section attempts to predict whether the Act's magnificent array of citizen rights is actually so extraordinarily intricate and complex as to be beyond the reach of those to whom the Act is truly dedicated: "the people—the citizens of Appalachian coal fields, the farmers of the Midwest or the ranchers of the Northern plains."²⁰⁰

The Act's content and organization both justify the label "lawyer's dream",²⁰¹ and would challenge even a person familiar with the "lay-out" of environmental legislation to sort out the number of administrative and judicial proceedings that the Act authorizes. Further, if anything, OSM's regulations make a nightmare out of the dream. Once a person figures out that informal conference, informal review, mine site hearings, and assessment conferences are all different animals, OSM amends its rules to call "mine site" hearings "informal" hearings.²⁰²

On this ground alone one might wish to skip all these "informal" procedures. However, little clarity is gained thereby. The person then faces the morass of hearings, formal review, temporary relief, expedited review, civil penalty review, and an order to show cause hearing.

Overlapping all these procedures are the nagging rules regarding who can initiate, petition or apply for what, when, and what is waived if any rule or notice is overlooked. Finally, as in the most intricate game, certain advantages and disadvantages depend on what proceeding and strategy for appeal is finally chosen. These advantages include such

199. *Id.*

200. Udall, *supra* note 5, at 557.

201. Galloway, *supra* note 115, at 3.

202. See notice in 45 Fed. Reg. 2626 (January 11, 1980).

things as different burdens of proof²⁰³ as between different proceedings reviewing the same issue, and proceed to such major issues as different substantive reviews themselves, (i.e. *de novo* versus review on the record or administrative versus judicial review).

In light of all this, an additional OSM regulation is almost humorous: "These rules shall be construed to achieve the just, timely and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved."²⁰⁴

The above picture has been painted too bleakly. However, an important point is intended. If public participation is to be effective for either the agency or any person, sensible and sensitive rules guiding that participation within reasonable limits must be developed.²⁰⁵ This is even reflected by OSM in a response to a comment requesting *more* procedures:

After careful consideration of each comment, OSM has not accepted the proposals to expand on public participation requirements. . . . The existing language gives the Office flexibility in working with the States to develop suitable public participation procedures that give States the flexibility to select methods best suited to their individual conditions and needs.²⁰⁶

Therefore, for the layman who wants to participate, a good rule of thumb is that an active participant will be able to: (1) receive notice on nearly everything; (2) have access to nearly everything (information or mine site); (3) be able to object and receive an informal review on nearly anything (agency or operator action); (4) petition

203. Issues regarding the fact of the violation and the propriety of any affirmative obligations can be challenged in both the formal § 525 review and the § 518 civil penalty review. The burden of proof in civil penalty proceedings (43 C.F.R. § 4.115) allocates to OSM the burden of production and the burden of persuasion. However, the § 525 review proceeding (43 C.F.R. § 4.1171) places the burden of production on OSM but allocates the burden of persuasion to the applicant for review.

204. 43 C.F.R. § 4.1102 (1979).

205. Gellhorn, *supra* note 15, at 403.

206. 44 Fed. Reg. 14901, 14965 (March 13, 1979).

and receive formal *de novo* review on nearly everything informally reviewed; (5) petition and receive agency record review (if granted); and (6) petition and receive judicial review on a number of things. The rules of the game, however, should not be overlooked and can, in many instances, control the nature and even the outcome of the proceedings. Therefore, they should be regarded not so much as stumbling blocks for the unaware but as aids to the informed.

To conclude, it is interesting to observe that an article written by an administrative law judge involved with these public participation procedures noted a problem with the limited public and party participation which has occurred to date.²⁰⁷ The article pointed out that there have been few petitions for intervention, (none of which brought to the proceeding otherwise unrepresented views),²⁰⁸ limited use of procedural devices by the parties,²⁰⁹ and limited participation in appeals.²¹⁰ The federal law is not self-executing. It cannot achieve the purposes intended by Congress without a conscientious attempt to use the procedures made available. Or, as stated in the *Strip Mine Handbook*:

It's up to you to use the law—intelligently and responsibly—to protect your land, your water, your air, your property, your community, and your own health and safety.²¹¹

NANCY D. WOOD

207. Mirkin, *Administrative Review*, in SURFACE MINING CONTROL AND RECLAMATION ACT (Day and Green eds. 1980).

208. *Id.* at 24.

209. *Id.*

210. *Id.*

211. *The Strip Mine Handbook: Citizen's Guide to the New Federal Surface Mining Law. How to Use it to Protect Your Community and Yourself.* Center for Law and Social Policy Environmental Policy Institute.