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7-29-1980

Clean Water Act & Company: Impact on Mining

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Citation Information

Pring, George W., "Clean Water Act & Company: Impact on Mining" (1980). *Federal Lands, Laws and Policies and the Development of Natural Resources: A Short Course (Summer Conference, July 28-August 1)*.

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George W. Pring, *Clean Water Act & Company: Impact on Mining, in FEDERAL LANDS, LAWS AND POLICIES AND THE DEVELOPMENT OF NATURAL RESOURCES: A SHORT COURSE* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1980).

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OUTLINE

CLEAN WATER ACT & COMPANY:
IMPACT ON MINING

BY

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FEDERAL LANDS, LAWS AND
POLICIES AND THE DEVELOPMENT
OF NATURAL RESOURCES

THE UNIVERSITY OF COLORADO SCHOOL OF LAW

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I. INTRODUCTION

A. The 1970s: A new body of federal water quality laws affecting mining:

1. Federal Water Pollution Control Act of 1972 (FWPCA) or more popularly the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq.
2. Safe Drinking Water Act of 1974, 42 U.S.C. §§ 201(f), 300f et seq.
3. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et seq.
4. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq.
5. Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 et seq.
6. The "maybes":
 - a. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq.

- b. Mineral Leasing Acts of 1920 and 1947, 30 U.S.C. §§ 181 et seq.
 - c. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq.
 - d. National Forest Management Act of 1976, 16 U.S.C. §§ 1600 et seq.
7. State versions of the above (particularly water quality and mining reclamation acts).
- B. The "bottom line":
- 1. Water pollution laws seldom present an absolute barrier to mining.
 - 2. They require:
 - a. Lengthen planning lead time.
 - b. Elevate environmental planning considerations.
 - c. Develop contingency plans.
 - d. Expect increased government, lawyer, public involvement in all mining phases.
 - e. Prepare for "delay."
 - f. Calculate as "cost of doing business."
- C. Overview of mine pollution:
- 1. Four basic types: sedimentation (TSS), dissolved solids (TDS), acid mine drainage (AMD), toxics.
 - 2. Two basic means: "point source" (PS) and "nonpoint source" (NPS).
 - 3. Standard controls: collection, containment, chemical treatment, cultivation.

II CLEAN WATER ACT

- A. Stated goals:
- 1. §101(a): "restore and maintain" the Nation's waters.
 - 2. § 101(a)(1): "eliminate" pollution discharges entirely by 1985.

3. §101(a)(2): "Fishable/swimmable" water by 1983.
4. §101(a)(3): "prohibit" toxic discharges
5. Ironically, The Act's control mechanisms are designed to fall short of all of the above goals.
6. §§ 101(b), (e): state primacy and public participation.

B. Key definitions:

1. "Pollutant," "Pollution" - §§ 502(6), (19).
2. "Point source" - § 502(14).
3. "Nonpoint source" - § 208⁺
4. "Discharge" - §§ 502(12), (16).
5. "Navigable waters" - § 502(7).

C. Regulatory scheme - "point sources":

1. Central control mechanism: prohibit "discharge of any pollutant" without a permit - § 301(a).
2. Establish "technology-based" pollution limits:
 - a. Existing sources: "effluent limitations"
 - i. 1977 "BPT" - § 301(b)(1)(A).
 - ii. 1984⁺ "BCT" for "conventional pollutants" - § 301(b)(2)(E) - and "BAT" for "toxics" and "nonconventional" pollutants - §§ 301(b)(2)(C), (D), (F).
 - b. New sources: "performance standards" - § 306.
3. Virtually all mining falls into one of three categories established by EPA:
 - a. Ore mining and dressing - 40 C.F.R. Part 440 (1978), as amended 43 Fed. Reg. 29774 (1978), 44 Fed. Reg. 11547 (1979).
 - b. Mineral mining and processing - 40 C.F.R. Part 436 (1978), as amended 44 Fed. Reg. 76793 (1979).
 - c. Coal mining - 40 C.F.R. Part 434 (1978), as amended 44 Fed. Reg. 2586, 39391, 64082, 76788 (1979).

4. "Effluent limitations" (existing mines) have been issued for all three categories; "new source performance standards" only for phosphate and coal mining subcategories.
 5. These technology-based ELs and NSPSs are translated by EPA/State into specific discharge numerical limits in the "NPDES" permit - § 402; 40 C.F.R. Part 120; see proposed rules consolidating NPDES (CWA), RCRA, SDWA, PSD (CAA), and 404 (CWA) permits, 44 Fed. Reg. 34244 (1979). The NPDES permit contains:
 - a. Effluent limits.
 - b. Compliance schedule.
 - c. Monitoring and reporting requirements.
 - d. Boilerplate.
 6. The State-delegated programs - § 402(b): e.g. Colorado Water Quality Control Act, 11 Colo. Rev. Stats. §§ 25-8101 et seq.
 7. Sanctions - §§ 308, 309, 401(a), 504, 505, 508.
 8. Court review - § 509.
 9. Special problems:
 - a. "Better than best": Water quality related effluent limitations (similar to Clean Air Act's "Non-attainment") - §§ 301(b)(1)(C), 303 (see II.E., below).
 - b. Nondegradation - § 101(a).
 - c. Does the NEPA EIS requirement apply - § 511(c)?
 - d. In-situ leaching methods - 22 Rocky Mtn. Min. L. Instit. 349 (1976).
- D. Non-regulatory scheme - "nonpoint sources":
1. Congress adopted a "planning" (as opposed to regulatory) approach for the difficult problem of NPS.
 2. Water quality management (WQM) planning - §§ 208, 303(e).
 3. Is mining a "point source" or a "nonpoint source"?
U.S. v. Earth Sciences Inc., 13 BNA ERC 1417 (10th Cir. 1977)

4. Impact of § 208 planning on mining:

- a. Theoretically: can lead to new, enforceable requirements:
 - i. Prohibit point source permits in conflict with 208 plans - § 208(e).
 - ii. 208 "best management plans" for nonpoint source pollution can be required of point source permit holders - § 304(e). See, e.g., proposed spill prevention control and countermeasure regulations, 43 Fed. Reg. 39276 (1978).
 - iii. Methods to control nonpoint source mining pollution required - § 304(f)(B).
- b. Practically, § 208 planning under CWA "going nowhere slowly" - see GAO, CED-78-167 (12/11/78).
- c. But, SMCRA and the new permanent program regulations more than fill the gap for surface coal mining (see III, below).

E. Water quality standards (WQS) - § 303.

1. Important carryover from old Act:
 - a. Most significant for mining in western basins where natural and NPS pollution high.
 - b. Environmental Defense Fund v. Costle, 13 BNA ERC 1867 (D.D.C. 1979), app. pending.
2. Setting WQS - §§ 303(a)-(b), (c).
3. Water quality based effluent limitations - § 301(b)(1)(C); e.g., U.S. v. Homestake Mining Co., 13 BNA ERC 1018 (8th Cir. 1979).
4. Total maximum daily loads - § 303(d).
5. Integrated in WQM planning - §§ 303(e), 208.

F. Dredge and fill permit program - § 404.

1. Entirely separate permit process applicable to mining - anytime there is a "discharge" of dredged or fill material into the navigable water.
2. Administered by U.S. Army Corps of Engineers.
3. State program delegation - § 404(g).

III SURFACE MINING CONTROL AND RECLAMATION ACT of 1977

A. SMCRA sets up strict water quality requirements as part of exploration, mining, and reclamation.

1. Act applies to:

- a. Coal mining only - §§ 102, 501 et seq.
- b. Principally surface mining - do. - but with provisions for surface effects of deep mining - §§ 516.
- c. On public or private property - §§ 501 et seq.

2. Sets up another federal permit program, delegatable to the states - §§ 501-06 .

3. Provides a weighty series of Congressional standards governing water quality impacts of stripmining e.g.:

- a. Backfill to prevent toxic leaching - § 515(b)(3).
- b. Grading to restore drainage, cover acid-forming and toxic layers - do.
- c. Stabilize to prevent erosion - § 515(b)(4).
- d. Control water quality in impoundments - §515(b)(8).
- e. Minimize disturbance to hydrologic balance - § 515(b)(10).
- f. Refrain from road construction in stream beds - § 515(b)(18).
- g. Underground mine requirements - §516(b).

B. A two-tiered federal regulatory program is in process:

1. "Interim Regulations" - §§ 501(a), 502.

- a. Effective in 1978.
- b. For water quality see 30 C.F.R. §§ 715.14 - .18, 717.17-18, 42 Fed. Reg. 62639 et seq. (1977).
- c. Upheld generally, 452 F. Supp. 327, 456 F.Supp. 1301 (D.D.C. 1978).

2. "Permanent regulations" - § 501(b).

a. Effectiveness in limbo.

b. For water quality see 30 C.F.R. §§ 815.15, 816.41-.57, 817.41-.57, 822, 44 Fed. Reg. 14902 et seq. (1979).

c. Upheld generally, 13 BNA ERC 1586 (D.D.C. 1979), 14 BNA ERC 1083 (D.D.C. 1980), 14 BNA ERC _____ (D.D.C. 1980).

C. Effect: SMCRA succeeds where CWA failed in merging controls over both point and nonpoint source mining pollution.