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TEXAS SURFACE MINING AND RECLAMATION ACT— NEW HOPE FOR PROTECTION OF TEXAS RESOURCES

KAY C. MARTINEZ

The Texas Surface Mining and Reclamation Act¹ was signed into law on June 21, 1975, making Texas one of the last states with a significant mining industry to pass legislation regulating the activity commonly referred to as strip mining. The concept of governmental control of mining operations, however, is relatively new and is a response to the environmental problems which have resulted from a period of unregulated use of natural resources.² Presently, 35 states have such legislation, and it is the specter of possible federal controls that has stimulated much of this state response.³

STRIP MINING, A NECESSARY EVIL?

The term "surface mining" includes several methods of removing minerals near the earth's surface which most states group together for purposes of regulation.⁴ Area strip mining, most commonly used on flat terrain, consists of cutting a trench through the overburden, and this overburden is then dumped beside the strip as "spoil."⁵ As the operator moves across the land creating successive parallel strips, this "spoil" is dumped into the previous cut, creating a high ridge of loose, unstable soil. The final cut, however, is seldom filled. When the mining operation is completed, the area resembles a giant washboard, which can prove to be extremely disruptive to the land use.⁶

Strip mining has been an increasingly important method of mineral extraction since the 1930's.⁷ It is economically preferable to shaft mining, both to

1. Tex. Rev. Civ. Stat. Ann. art. 5920-10 (Supp. 1976).

2. Moran, *Changing Concepts Relative to Land Use Controls and the Mineral Extractive Industries*, 7 NATURAL RESOURCES LAW, 1, 15-16 (1974).

3. For example, the Jackson-Udall bill has been passed twice by both the House and Senate and vetoed by the President. S. 425, 93d Cong., 1st Sess. § 202 (1973).

4. Open pit mining, such as that used in stone quarries and sand pits, hydraulic mining, dredging, and auger mining are usually included. See Cardi, *Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act*, 75 W. VA. L. REV. 319, 320-21 (1973).

5. Overburden is defined as "all materials displaced in a mining operation which are not, or will not be, removed from the affected area." Tex. Rev. Civ. Stat. Ann. art. 5920-10, § 4(7) (Supp. 1976).

6. U.S. DEP'T OF THE INTERIOR, *EFFECTS OF SURFACE MINING ON THE FISH AND WILDLIFE RESOURCES OF THE UNITED STATES* 18 (1968).

7. Brooks, *Strip Mine Reclamation and Economic Analysis*, 6 NATURAL RESOURCES J. 13, 17 (1966).

the operator and to the consumer.⁸ Although coal itself is now used less frequently as a home fuel, its use in electric power generation has caused increased demand. The coal nearer the surface, which contains too much sulfur for use as a home fuel, can be burned for electricity as successfully as the deeper coal, which is more costly to mine.⁹ The gigantic machinery currently available to the mining industry has also greatly increased the feasibility of this method of mineral extraction. Consequently, more than 50 percent of all coal is now being mined by the stripping method, and as a result four million acres of land were subjected to strip mining in 1972.¹⁰ For these reasons it seems more probable that strip mining will continue to gain importance as our energy needs increase.

Unfortunately, some of the same characteristics which have made strip mining desirable have also produced extremely undesirable results in the environment. Water pollution is the most serious area of injury. It is produced by the acids which are contained in the coal seams and the overburden.¹¹ The water run-off from strip mined areas carries iron sulfate into nearby lakes and streams, which can be disastrous. Dissolved in water, the sulfur hydrolizes to sulfuric acid, discoloring the water with a slick called "yellow boy" and changing the pH level. When this level drops sufficiently, most life in the waterway is killed.¹² Furthermore, all land downslope from the mine may be devegetated as the sulfur-laden water runs over it toward the streams.¹³ Sedimentation of clay, silt, and sand from the displaced overburden also affects the suitability of the water for human use.¹⁴ This problem may be alleviated by "impounding" the water until the dirt settles out, but such a remedy can cause flooding.¹⁵ The surfaces of areas which

8. Rising labor costs have increased the expense of shaft mining, which requires more personnel. Increased competition from other fuels has made the cheaper stripping method even more desirable. Moreover, the amount of coal suitable for shaft mining is decreasing. See Note, *Reclamation of Strip Mine Spoils*, 50 KY. L.J. 524, 526 (1962).

9. *Strip Mine Reclamation Regulation*, 39 Mo. L. REV. 429, 430n.9 (1974).

10. *Id.* at 429-30.

11. U.S. DEP'T OF THE INTERIOR, *EFFECTS OF SURFACE MINING ON THE FISH AND WILDLIFE RESOURCES OF THE UNITED STATES* 14-15 (1968).

12. *Id.* at 23. It has been estimated that a river through which sulfuric acid has flowed for one hour cannot be totally restored for 30 months. A small quantity of such acid passing through a stream one day a year can render the water incapable of ever supporting life. Brooks, *Strip Mine Reclamation and Economic Analysis*, 6 NATURAL RESOURCES J. 13, 25 (1966).

13. *Id.* at 26. The destruction of fish and other organisms in a waterway is not the only serious result of the presence of sulfuric acid. The natural purification process is affected when the organisms which usually act to decompose raw sewage in the water are destroyed; this results in increased water treatment costs and unappealing, fouled water.

14. U.S. DEP'T OF THE INTERIOR, *EFFECTS OF SURFACE MINING ON THE FISH AND WILDLIFE RESOURCES OF THE UNITED STATES* 27 (1968).

15. Benoit, *Strip Mining and Methods of Control by the Three Levels of Government*, 8 URBAN L. ANN. 143, 145 (1974).

have been strip mined absorb less water, consequently the water table is not replenished by rain, which can be particularly serious in dry areas.¹⁶ The weakened ability of the denuded land to absorb water also causes increased flooding in strip mined areas.¹⁷

Stripping often results in a lowering of the local tax base because the land is considerably less valuable after it has been strip mined and also because there is often a resulting depopulation of the surrounding area.¹⁸ But it is the aesthetic disadvantage of strip mining, the "rape of the land," with which the public is most familiar. The great, barren "washboards" of ridges and the stagnant water standing in the unfilled final cut constitute a scar on the land which, without reclamation, is destined to remain.

Despite these disadvantages, it is not suggested that strip mining be abandoned altogether; with our increasing need for new sources of energy, this would hardly be a practical solution. The problems have been included here in order to emphasize the great importance of regulating surface mining in order to minimize these deleterious effects wherever possible.

FEDERAL REGULATION OF SURFACE MINING

The first significant attempt to regulate mining activity was the Federal Mining Law of 1872.¹⁹ Its provisions reflected the concern, prevalent during this period, for establishing property ownership rather than protecting natural resources; few if any restrictions were imposed on the mining operations themselves. This law was followed by the Mineral Leasing Act of 1920.²⁰ The approach to mining regulation which these laws embraced resulted not only in the industrial and economic growth of the nation, but also in the wasted areas of Appalachia. To date, the numerous attempts to supersede or amend these laws have been unsuccessful.

If and when federal legislation to regulate surface mining is passed, it will be necessary for state acts to be re-examined in light of the federal guidelines. It seems likely that such a bill will closely resemble the Jackson-Udall bill,²¹ and an examination of it might anticipate some areas of possible conflict.

Under the proposed bill, the regulations would be drawn up by an Office of Land Use Policy, Reclamation, and Enforcement, and would be adminis-

16. Cardi, *Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act*, 75 W. VA. L. REV. 319, 328 (1973).

17. *Id.* at 327.

18. Benoit, *Strip Mining Methods of Control by the Three Levels of Government*, 8 URBAN L. ANN. 143, 146 (1974).

19. Act of May 10, 1872, ch. 152, 17 Stat. 91.

20. Act of Feb. 25, 1920, ch. 85, § 1, 41 Stat. 437.

21. S. 425, 93d Cong., 1st Sess. § 202 (1973) (vetoed by President Ford).

tered under the Department of the Interior.²² These regulations would apply only to federal lands, while the states would be required to develop regulatory programs for private and state-owned lands.²³ The state plans, however, would have to be approved by the Office of Surface Mining,²⁴ and the bill enumerates certain criteria which state programs must meet in order to qualify for federal assistance under the Act.²⁵

Like most state strip mine statutes, the proposed Federal Act requires from potential strip mine operators a detailed application before a permit to begin operations may be granted.²⁶ But unlike many states, the Federal Act would provide for public notice when an application is filed, and for public hearings on these applications.²⁷

Plans for reclamation of mined lands are called for in most state surface mining legislation, but the requirements for these plans vary in scope and stringency. The proposed Federal Act would set certain minimum standards for these plans,²⁸ as well as minimum standards which must be employed during the mining operation to minimize environmental damage.²⁹

State Regulation of Surface Mining

State efforts to legislate strip mining regulation have met with considerably

22. S. 425, 93d Cong., 1st Sess. § 202 (1973). The Act would create an Office of Land Use Policy Reclamation and Enforcement within the Department, with a Director appointed by the President, with the advice and consent of the Senate.

23. If a state failed to develop such a program, the Secretary of the Interior would be required to do so. S. 425, § 205(a)(1), 93d Cong., 1st Sess. (1973).

24. S. 425, 93d Cong., 1st Sess. § 202(c)(5) (1973).

25. S. 425, 93d Cong., 1st Sess. § 204 (1973) specifies:

- 1) There must be a state law which provides for the regulation of surface mining in accordance with the requirements of the Federal Act;
- 2) There must be a state law which provides appropriate sanctions for violations of mining laws, regulations or conditions on permits;
- 3) The State must have a regulatory authority with sufficient administrative and technical personnel and sufficient funding to adequately enforce the Act;
- 4) The State must demonstrate effective implementation, maintenance and enforcement of a permit system;
- 5) The State must coordinate the review and issuance of permits for surface mining with any other applicable Federal or State permit processes.

26. S. 425, 93d Cong., 1st Sess. §§ 207, 208 (1973). *See also*, KAN. STAT. ANN. § 49-401-24 (Supp. 1973); MONT. REV. CODES ANN. § 50-1039 (Supp. 1974).

27. S. 425, 93d Cong., 1st Sess. § 205(4)(b) (1973).

28. S. 425, 93d Cong., 1st Sess. § 212(2), (3), (4) (1973) provides that reclamation plans must include, for example:

- (2) A description of the full range of uses to which the land was put prior to any mining and the uses proposed following reclamation;
- (3) A detailed description of the manner in which mining operations will be conducted and the actions taken or planned to prevent adverse environmental effects;
- (4) A detailed description of the reclamation activities that will be undertaken to return the mined area to a condition consistent with the proposed postmining use and in accordance with the environmental standards.

29. S. 425, 93d Cong., 1st Sess. § 212(b) (1973), requires, for example, that an operator control possible water pollution by avoiding acid mine drainage and specifies ways in which this is to be accomplished.

more success than the federal attempts. Beginning with West Virginia in 1939,³⁰ a number of eastern coal mining states were the first to enact such statutes.³¹ In the 1960's and early 1970's, a number of other states followed. But by this time the public had become more aware of the environmental problems involved, and these later statutes are often more stringent than the earlier ones.³² Moreover, many of the early statutes have been amended or superseded within the last few years, bringing them more closely in line with current public attitudes. Certain features are common to most of these state acts. Most require a permit or a license before an operator may begin strip mining activities, and in order to obtain the permit the operator must file an application, along with a fee, post a performance bond, and submit a plan for reclamation of the affected land.

These statutes, however, vary considerably in the specificity of their regulations. Some statutes enumerate extensive details regarding the maximum slope allowed for grading, techniques which must be used for control of erosion, and recommended methods of disposing of refuse.³³ Other states have taken the approach of writing a statute with only general provisions, leaving the task of promulgating the specific regulations to an administrative agency.³⁴ The minerals included for regulation,³⁵ the extent of land subject to reclamation, and the reclamation requirements themselves, also vary from state to state. Some states require reclamation only for the land actually disturbed,³⁶ while others extend the definition of "affected land" to include surrounding areas disturbed by vehicles or structures.³⁷ Obviously, the narrower definitions severely limit the effectiveness of the bill in question, as strip mining operations, and the gigantic machinery associated therewith, often cause severe damage to the surrounding area.

30. W. Va. Laws 1939, ch. 84.

31. PA. STAT. ANN. tit. 52, § 1396 (1966); TENN. CODE ANN. § 58-1540 (1953).

32. Later statutes are generally much more stringent in the areas of reclamation requirements and penalties for violations. For a comparative study of state statutes, see generally the thesis by Carl A. Teinert, *Surface-Mine Land Reclamation Legislation: a Review*, presented to Division of Nat'l Resources and Environment, Univ. of Texas at Austin, Feb. 1975 (on file with the author).

33. *E.g.*, KAN. STAT. ANN. 49-408 (Supp. 1974); OHIO LAWS 1975, § 1513, at 4-145; PA. STAT. ANN. tit. 52, § 1396.4 (Supp. 1975); TENN. CODE ANN. § 58-1544(i) (Supp. 1974).

34. N.M. STAT. ANN. § 63-34-10 (Supp. 1973); TENN. CODE ANN. § 58-1543(g) (Supp. 1974).

35. *E.g.*, ALA. CODE tit. 26, § 166(117)(P) (Supp. 1973) (a limited number of minerals); ARK. STAT. ANN. § 52-903(c) (Supp. 1973) (all minerals); N.M. STAT. ANN. § 63-34-1 (Supp. 1973) (coal only).

36. ALA. CODE tit. 26, § 166(117)(A) (Supp. 1973); ARK. STAT. ANN. § 52-903(h) (Supp. 1973).

37. PA. STAT. ANN. tit. 52, § 1396.3 (Supp. 1975). The Wyoming statute requires restoration of "all other lands whose natural state has been or will be disturbed as a result of the operations." WYO. STAT. ANN. § 35-502.3(e)(xvi) (Supp. 1975).

Though statutory regulation at the state level is currently the approach most widely used, there are other alternatives to this method of protecting land from the ravages of strip mining. Local zoning can be employed to prohibit or limit strip mining activities, as well as private contracts between the landowner and the mine operator, requiring reclamation of the affected land.³⁸

The early state statutes regulating surface mining met with mixed treatment by the courts. The earliest case which tested the power of the states in this area was *Northern Illinois Coal Corp. v. Medill*,³⁹ in which the Illinois Supreme Court held the state statute unconstitutional. The statute was deemed discriminatory, since it related solely to coal mining.⁴⁰ The following year the Pennsylvania Supreme Court upheld that state's statute, holding that a registration fee applicable only to those engaged in strip mining does not violate the constitutional requirement of uniformity in taxation since there are substantial differences between strip mining and other methods of mining or quarrying.⁴¹ To date, there have been no further state supreme court cases testing the constitutionality of strip mining regulation,⁴² and apparently for that reason, as well as favorable public opinion, most courts are now willing to accept such regulation as a valid exercise of a state's police powers, subject always to the criterion of reasonableness.⁴³

THE TEXAS SURFACE MINING STATUTE

The adoption of the Texas surface mining statute followed a study undertaken by the Joint Interim Committee for the Study of Surface Mining in Texas.⁴⁴ In stating general policy the statute specifically declares that unregulated strip mining can have such effect on the land as to be "inimical to the public interest and destructive to the public health, safety, welfare,

38. Benoit, *Strip Mining: Methods of Control by the Three Levels of Government*, 8 URBAN L. ANN. 143, 153 (1974). See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

39. 72 N.E.2d 844 (Ill. 1947).

40. *Id.* at 848.

41. *Dufour v. Maize*, 56 A.2d 675, 677-78 (Pa. 1948).

42. In a more recent case, *State v. Elder*, 165 S.E.2d 108 (W. Va. 1968), the question of the constitutionality of the statute was not presented to the court; however, the court strongly suggested that it favored such legislation and would uphold the statute in question. The court observed that "[f]or too many years our state has permitted its hills and vales to be ravaged by the steel jaws of the behemoth-like shovel." *Id.* at 112.

43. Note, *Constitutional Law—Governmental Regulation of Surface Mining Activities*, 46 N.C.L. REV. 103, 105 (1967).

44. JOINT INTERIM COMM. FOR THE STUDY OF SURFACE MINING IN TEXAS, 63d LEGISLATURE OF TEXAS, FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE (1975). The committee responded to pressures from both industry and environmental groups in compiling its report, but ultimately failed to recommend its own draft to the legislature. The bill in its final form was a further compromise between the interests of these two groups.

and economy of the State of Texas."⁴⁵ The statute also admits that complete restoration of mined lands will not always be possible,⁴⁶ but it asserts that some lands, because of their unique qualities, may be totally unsuitable for surface mining.⁴⁷

The definition of "affected land" which the Texas statute is designed to protect is as broad as those of the most expansive state acts. It includes not only the area of the actual mining operation and the haul roads and "impoundment basins" within the surface mining area, but also "all other land whose natural state has been or will be disturbed as a result of the surface mining operations."⁴⁸

Administrative Structure of the Texas Act

The Texas Railroad Commission, which is entrusted with the regulation of two of the state's most important commodities, oil and gas,⁴⁹ is authorized by the Texas Surface Mining and Reclamation Act to administer the regulation of strip mining as well.⁵⁰ Critics point out that the commission has often been accused of favorable treatment toward the oil and gas industries, and that the effect of the Act will be considerably weakened if the commission fails to administer it zealously. The statute, like those in a number of other states, was purposefully designed to be general in its provisions, leaving a great deal of discretion in the hands of the administrative agency. Thus, the promulgation and publication of the rules and regulations by which the Act is to be effectuated is entirely within the province of the commission.

The Act was designed to protect Texas land from the hazards of strip mining⁵¹ and in doing so, to balance that goal as nearly as possible with the often conflicting economic goals of the state as reflected in the needs of the mining industry. In order to accomplish this, it would seem that the agency entrusted with administering such an act should be carefully structured to represent all of the legitimate interests involved.

The Railroad Commission, established in 1891⁵² consists of three elected commissioners,⁵³ but because of the scope of the commission's regulatory powers these commissioners primarily supervise and review the decisions made within the administrative hierarchy.⁵⁴ Though the policy of electing

45. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 2(5) (Supp. 1976).

46. *Id.* § 2(4).

47. *Id.* § 2(6).

48. *Id.* § 4(4). The minerals to be regulated under the Act are coal, lignite, uranium and uranium ore. Sand and gravel quarrying were not included.

49. TEX. REV. CIV. STAT. ANN. art. 6023 (1962).

50. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 6 (Supp. 1976).

51. *Id.* § 2(5).

52. Tex. Laws 1891, ch. 51, at 55, 10 H. GAMMEL, LAWS OF TEXAS 57 (1898).

53. TEX. REV. CIV. STAT. ANN. art. 6447 (1925).

54. *Symposium—Current Problems—Administrative Government in Texas*, 47 TEXAS L. REV. 805, 818 (1969).

commissioners is designed to assure their non-partisanship, the practice has been for the retiring commissioner to resign before the end of his term; the governor then appoints a replacement who may run in the next election as an incumbent, virtually assured of re-election.⁵⁵ The statute specifies that a candidate for commissioner may not have any direct interest in a railroad,⁵⁶ but because there are no similar provisions restricting associations with the even more vulnerable areas of oil and gas, as well as the newly-added area of strip mining, this provision is hardly an adequate safeguard against conflicts of interest.

Administrative agencies in general have often been criticized for being too closely identified with the industries which they are designed to regulate.⁵⁷ Some states have sought to avoid this problem by creating new agencies to regulate surface mining which are carefully composed to reflect the interests of both the industry and the public. Ohio, for instance, establishes a reclamation review board which includes representatives of the mining industry and of the public, as well as experts in forestry, agronomy, and earthgrading.⁵⁸ Others, such as New Mexico, have commissions comprised entirely of representatives of the state's environmental agencies.⁵⁹ These commissions have an additional advantage in that their entire function is to administer the surface mining statute; the Texas Railroad Commission, in contrast, is already burdened with other vital responsibilities.

Other states have dealt with the administrative problem differently, enacting bills which are specific in their regulatory details, leaving little discretion to the administrative agency. Such a statute is less susceptible to being weakened by an industry-dominated agency, but the regulations are often so detailed that they lack the flexibility necessary to meet varying conditions. One state act, for example, forbids any surface mining within 500 feet of any road.⁶⁰ This specific language and its purpose cannot be abused by a lax administering agency, unlike the more general Texas provision which states that an operator will be denied a permit if his mining operation will have an adverse effect on any public road.⁶¹

55. *Id.* at 839.

56. TEX. REV. CIV. STAT. ANN. art. 6447 (1925).

57. Binder, *A Novel Approach to Reasonable Regulation of Strip Mining*, 34 U. PITT. L. REV. 339, 355-56 (1973).

58. OHIO REV. CODE ANN. tit. 15, § 1513.05 (1971).

59. The New Mexico Coal Surfacing Act creates a Coal Surfacing Commission to administer its provisions. The commission is to consist of: (1) the director of the bureau of mines and mineral resources; (2) the director of the department of game and fish; (3) the director of the environmental improvement agency; (4) the chairman of the soil and water conservation committee; (5) the director of the agriculture experimental station of New Mexico State University; (6) the state engineer; and (7) the commissioner of public lands. N.M. STAT. ANN. art. 34, § 63-34-3A (1973).

60. ARK. STAT. ANN. § 52-906(c), (d), (e) (Supp. 1973).

61. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 12(6) (Supp. 1976).

Unfortunately, the Texas Surface Mining and Reclamation Act makes neither of these attempts to protect the spirit of its provisions. Instead, the statute gives broad discretionary powers of enforcement to the already overburdened and industry-oriented Railroad Commission. To revive the defunct State Mining Board,⁶² or to create a new agency with a carefully balanced composition, would seem to have been more prudent.

"Persons Affected": Standing to Challenge the Issuance of a Permit to Strip Mine

One provision of the Texas strip mining statute which has been criticized by environmentalists is the designation of which persons may challenge an application for a permit to engage in strip mining activities. The statute provides that when an application is received, a public hearing will be ordered by the commission, and "[a]ny person affected may intervene prior to such public hearing by filing allegations of facts with supporting evidence"⁶³ But the statute's definition of a "person affected" is narrow:

[A]ny person who is a resident of a county or any county adjacent or contiguous to the county in which a mining operation is or is proposed to be located Such person affected shall also demonstrate that he has suffered or will suffer *actual injury or economic damage*.⁶⁴

The Joint Interim Study Committee, adopting a more liberal view, provided in its original draft that any resident of the state should be able to file a written objection to a permit application.⁶⁵ In order to guard against frivolous or last-minute objections, the statute defines a "party to the administrative proceedings" as "any person who has participated in a public hearing or filed a valid petition or timely objection pursuant to any provision of this Act."⁶⁶ Another section provides that any person may petition to have an area declared completely unsuitable for surface mining,⁶⁷ but only a "person affected" can challenge a particular permit application.⁶⁸ In either case, the Railroad Commission must ultimately determine whether or not the objections contains sufficient allegations to justify a hearing.⁶⁹

62. In 1953 the State Mining Board and the Office of State Mining Inspector were abolished and their rights and duties transferred to the Commissioner of Labor Statistics. TEX. REV. CIV. STAT. ANN. art. 5900, § 1 (1953). According to the statute, the board was abolished because:

Coal mining has been of little significance as an industry in Texas since the development of the petroleum industry . . . [and] the State Mining Board and the Office of State Mining Inspector . . . have been largely inactive for many years.

Id.

63. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 16(b) (Supp. 1976).

64. *Id.* § 4(11) (emphasis added).

65. JOINT INTERIM SURFACE MINING OPERATIONS STUDY COMMITTEE, 63d LEGISLATURE OF TEXAS, FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 40 (1975).

66. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 4(17) (Supp. 1976).

67. *Id.* § 13(d).

68. *Id.* § 16(b).

69. *Id.* § 13(d).

In *Sierra Club v. Morton*,⁷⁰ a landmark case of the United States Supreme Court regarding standing to sue in environmental issues, the Court held that the plaintiff-conservationist society lacked standing to sue for an injunction prohibiting the construction of a ski resort in the Sequoia National Forest. The Court reasoned that the plaintiff had failed to show that it or its members were users of the area in question and would be harmed by the development.⁷¹ Requiring the plaintiff to have a personal economic stake in the outcome continues to be the standard by which the Supreme Court determines standing. Some lower courts, on the other hand, appear to be moving toward acceptance of the proposition that independent groups which have demonstrated an interest in the area should be permitted to bring litigation on environmental issues affecting the area.⁷² Thus, the Texas Act is technically in accord with the United States Supreme Court position, but if the residents in the county, or even of contiguous counties, are likely to benefit economically from the strip mining operation, they are unlikely to challenge the application for a permit. Citizen and environmental groups might be concerned more realistically with the inadequacies of a particular reclamation plan. In several states, statutes provide for public participation in reviewing an application for a mining permit, and in these states, any interested person may submit objections to a proposed mining operation.⁷³

Reclamation Requirements

One aspect of the Texas Surface Mining and Reclamation Act in which environmentalists have prevailed is that of the requirements for reclamation of strip-mined lands. They are more stringent than even those of the proposed federal bill.⁷⁴ The crucial question regarding reclamation requirements is how long the mining operator should be held responsible for the land after it is "reclaimed." This is important because often the affected land is so seriously disturbed that, although the operator may technically fulfill the requirements by hastily planting a crop of grass, for instance, the

70. 405 U.S. 727 (1972). The court relied heavily upon *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) and *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) stating that actual injury was the test of standing to seek judicial review.

71. *Sierra Club v. Morton*, 405 U.S. 727, 734-5 (1972).

72. See, e.g., *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970) (citizen group has standing if it has been actively engaged in administrative process and thereby shown special interest in area of controversy); *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965) (unincorporated conservation society had standing to challenge permit for power plant); *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967).

73. E.g., TENN. CODE ANN. § 58-1544(h) (Supp. 1974); W. VA. CODE ANN. § 20-6-8 (1973); WYO. STAT. ANN. § 35-502.24(f) (Supp. 1975).

74. Compare S. 425, § 212, 93d Cong., 1st Sess. (1973) with TEX. REV. CIV. STAT. ANN. art. 5920-10, § 11 (Supp. 1976).

land may not support the crop. Within a year or two, the area may once again be barren of vegetation. The Texas statute provides that the operator is responsible for assuring that the vegetation continue for four years after the first full year in which it has been successfully established.⁷⁵ The success of the revegetation is to be evidenced by the land being used as anticipated in the reclamation plan.⁷⁶ For instance, if the landowner and the mining operator agree that the land is to be restored as suitable for grazing cattle, the operator is held responsible for the land for four years beyond the time that an expert is satisfied that the grass has been successfully supporting the cattle for one year. Most state statutes simply set a time period within which reclamation must be completed, and that period is usually relatively brief.⁷⁷ The operator is then relieved of further responsibility.

The costs to the industry of such reclamation may be great; however, the surface mining industry is a resilient one, and operations have continued to increase in states with strong regulatory legislation, despite industry prediction to the contrary.⁷⁸ Moreover, much of the cost will be passed on to the consumer.⁷⁹ It may not be economically desirable, even if it were possible, to eliminate all of the external effects of strip mining. Instead, a balancing of social and private benefit may be a better test.⁸⁰

Confidentiality of Application Information

Under the Texas Act, certain information included on the application for strip mine permits must not be made public,⁸¹ in order to protect the position of the applicant with regard to his competitors in the industry. Conservationists argue that effectively, under this provision, they may be prevented from obtaining necessary details if they wish to challenge a particular permit application or reclamation plan. This provision of the statute, if challenged in the courts by conservation groups, is likely to be

75. *Id.* § 11(18).

76. *Id.* § 11(18).

77. *E.g.*, ARK. STAT. ANN. § 52-906(i) (Supp. 1973) (2 years); IOWA CODE § 83A.19 (Supp. 1975) (24 mos.); KAN. STAT. ANN. § 49-411 (Supp. 1974) (12 mos.).

78. Binder, *A Novel Approach to Reasonable Regulation of Strip Mining*, 34 U. PITT. L. REV. 339, 365 (1973).

79. Clyde, *Legal Problems Imposed by Requirements of Restoration and Beautification of Mining Properties*, 13 ROCKY MT. M.L. INST. 187, 225 (1970).

80. Brooks, *Strip Mine Reclamation and Economic Analysis*, 6 NATURAL RESOURCES J. 13, 33-34 (1966).

81. The statute states:

[I]nformation . . . pertaining to mineral deposits, test borings, core samplings, or information concerning trade secrets or privileged commercial or financial information that relates to the competitive rights of the applicant
TEX. REV. CIV. STAT. ANN. art. 5920-10, § 24 (Supp. 1976). If this information is designated by the applicant as confidential and the commission determines that the material is "not essential for any public review," it is confidential. *Id.*

considered in the light of the new Open Records Act, which requires public disclosure of certain types of information.⁸² The statute also specifically excludes certain types of information, and some of these exclusions seem to cover the particular data involved here; information which would give advantage to competitors, trade secrets, and geological or geophysical data, for instance, are mentioned as exceptions.⁸³

Though there are as yet no cases, the Attorney General of Texas has issued a number of opinions in response to specific inquiries concerning what information must be made public under the Open Records Act. One opinion seems to suggest that the information elicited by the applications for strip mining permits may not fall within an exception to the Open Records Act. In an opinion concerning confidentiality of building plans submitted to the city for a building permit, the Attorney General stated that the exception dealing with competitive information did not apply once a contract was in effect.⁸⁴ Another opinion states that "the very act of submission to the city would seem to imply an operative contract between the builder and his client."⁸⁵ This reasoning would also seem to hold true for the strip mine operator. Once the operator has submitted an application for a permit to begin operations, he has already reached agreement with the landowner; that is, no other operator is competing with him for permission to mine the same area.⁸⁶

Penalties for Violation of the Texas Strip Mining Statute

The penalties which the Texas Surface Mining and Reclamation Act provide for operators who violate its provisions are as severe as those of any other state.⁸⁷ An operator who willfully and knowingly violates the provisions of the Act and fails to bring his operation into compliance within 30 days after notice of his violation may be subject to a maximum civil penalty of \$5,000 for each day of the violation, and to a criminal penalty of

82. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (1975) specifies that: All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public

83. *Id.*

84. TEX. ATT'Y GEN. OP. NO. H-75 (1975).

85. TEX. ATT'Y GEN. OP. NO. H-109 (1975).

86. How the courts will hold on this issue cannot be predicted with certainty, but it is true that the Open Records Act itself provides that the Act should be liberally construed. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Supp. 1975).

87. *E.g.*, S.C. CODE ANN. § 63-728 (Supp. 1974) (fine of not less than \$100 or more than \$1,000 for each willful violation); VA. CODE ANN. § 45.1-214(a) (1974) (person mining without permit or willfully disobeying regulations is guilty of a misdemeanor punishable by fine of not more than \$1,000). The penalties provided in the Texas Act compare favorably with those in the proposed federal bill. S. 425, 93d Cong., 1st Sess. § 224(i) (1973).

up to \$10,000 and/or imprisonment for one year.⁸⁸ The commission is also empowered to order immediate cessation of surface mining operations which create an imminent danger to the public or to the environment.⁸⁹

Less dramatic violations will be brought to the attention of the operator, and if he fails to abate the violation within 30 days, a hearing will be set if the operator so requests. Thereafter, the commission may order cessation of that portion of the operation which it determines to be in violation.⁹⁰ In setting a penalty, the commission is urged to consider the seriousness of the violations and the negligence of the operator, as well as his history of previous violations and the size of his business.⁹¹

Violations are to be detected by inspectors employed for this purpose by the Railroad Commission; however, the statute provides only that inspections "shall occur on an irregular basis at a frequency necessary to insure compliance with the intent and purposes of this Act"⁹² This provision typifies the broad language of the Texas statute; such language would permit variations in procedure to suit individual cases. The commission might, for instance, order more frequent inspections for an operator who has a history of violations.

Revocation of a permit, and with it the forfeiture of the performance bond required of each operator, are other sanctions which can be imposed on violators.⁹³ Most states provide for the posting of such bonds by a licensed strip mine operator, and ideally the bonding system should serve to ensure that reclamation plans are properly carried out so that if they are not, the state will not have to bear the cost, either of finishing the reclamation or of being left with land of severely diminished value. Some states, however, have set the bond amounts by statute;⁹⁴ if these amounts are sufficiently low, it is considerably cheaper for an operator to forfeit rather than to reclaim the land. This is an instance in which the broad language of the Texas Act is clearly adequate to avoid such a possibility. The Texas statute does not specify an amount for these bonds, but requires that they approximate as nearly as possible the cost to the state of completing the reclamation if the operator should forfeit.⁹⁵

88. TEX. REV. CIV. STAT. ANN. art. 5920-10, §§ 20(b), 21(a), (b) (Supp. 1976).

89. *Id.* § 20(b). The cessation order must also set the time and place for a hearing. *Id.* § 20(b).

90. *Id.* § 20(b).

91. *Id.* § 21(a).

92. *Id.* § 19(c).

93. *Id.* § 6(b).

94. *See, e.g.,* ALA. CODE tit. 26, § 266(123) (Supp. 1973) (\$150 for each acre covered by the permit); VA. CODE ANN. § 45.1-206(a) (1974) (\$200-\$1,000 for each acre affected).

95. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 14(a) (Supp. 1976).

The amount of the bond required for each bonded area shall depend on the reclamation requirements of the approved permit and shall be determined by the com-

CONCLUSION

The Texas Surface Mining and Reclamation Act is a carefully drafted and potentially effective statute. It compares favorably with the most stringent strip mining legislation in other states, and meets the requirements of the proposed Federal Act. But it is in the rules and regulations which the Railroad Commission will promulgate and in the zealouslyness of its enforcement that the bill's true effectiveness will lie. The penalties provided for in the Texas Act are strong enough to be meaningful, but only if the mining industry knows they will be imposed and enforced. The possibilities for public input are there, but only if the commission is sensitive to public opinion. The broad language of the statute and the discretionary powers of the commission may be used to give life to the spirit of the Act if the Railroad Commission shows itself ready to meet its responsibilities in protecting Texas resources.

Possibilities for abuse are concomitant with great discretion. If the doubts of the commission's critics prove warranted, then the creation of a new agency, with a balanced composition and delegated with the sole responsibility of administering the Texas Surface Mining and Reclamation Act, would ensure that the public could look to the future continued growth of the Texas mining industry without ravaged lands inevitably accompanying such growth.

mission on the basis of at least two independent estimates . . . and shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by a third party in the event of forfeiture
Id.