

## **CHAPTER 5**

# **Unsuitability Designations and Anticipated Post-Mining Environmental Problems**

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### **§ 5.01. Introduction.**

As suggested by its Statement of Purpose, the federal Surface Mining Control & Reclamation Act of 1977<sup>(1)</sup> (SMCRA) (and the regulations promulgated thereunder<sup>(2)</sup>) establishes one of the most comprehensive and detailed regulatory schemes ever directed towards a particular industry. Despite a controversial history and continuing challenges to various aspects of SMCRA's regulatory program, it is clear that, with sufficient resources and a proper level of commitment to the enforcement of its provisions, SMCRA provides the framework for very effective and complete regulation of the environmental impacts of surface and underground coal mining operations in the United States.

This Chapter addresses the unsuitability designation process under Section 522(c)<sup>(3)</sup> of SMCRA, which applies to areas that are not subject to the *per se* prohibitions in Section 522(e).<sup>(4)</sup> Through this provision, Congress established a procedure for the complete prohibition of mining in areas that are the subject of public petitions meeting certain criteria, if mining (or certain types of mining) in those areas should not be permitted under *any* terms, in order to allow for "competing uses of higher benefit."<sup>(5)</sup> In practice, this means that an owner's or a lessor's right to recover the value of its mineral interests can be extinguished through a non-adjudicatory process equivalent to national zoning.

With limited exceptions, SMCRA's permit requirements dictate that any person who proposes to conduct surface coal mining operations<sup>(6)</sup> must first demonstrate that the potential environmental impacts of the proposed operation have been thoroughly investigated and effective measures to prevent adverse impacts have been incorporated into the mining plan. In order to obtain a permit, an applicant must demonstrate, *inter alia*, that a thorough determination of the probable hydrologic consequences (PHC) of the mining and reclamation operations (both on and off the mine site) has been conducted. This PHC study is required so that the regulatory authority<sup>(7)</sup> can assess the probable cumulative impacts of all anticipated mining activities in the relevant area (known as a Cumulative Hydrologic Impact Assessment or CHIA).<sup>(8)</sup> Permit applicants must also provide information as to the various strata of overburden and the characteristics of the coal seam to be mined (and rider seams); land use information detailing the condition, capability, and productivity of the land within the proposed permit area; information on fish and wildlife resources; an adequate soil survey delineating the characteristics of the different soils at the proposed permit area; and a description and identification of cultural, historic, and archeological resources within the proposed permit area and adjacent areas.<sup>(9)</sup>

In addition, a complete permit application must include a detailed description of the proposed operations (operations plan), a reclamation plan demonstrating precisely how the applicant will restore the affected land to a condition capable of supporting the uses that it had been capable of supporting before any mining, a hydrologic reclamation plan, a groundwater monitoring plan, an air pollution control plan, and numerous other site-specific mitigation plans.<sup>(10)</sup> Finally, if a permit is issued, an operation becomes subject to innumerable technical performance standards, the enforcement of which are likely to reveal within a very limited time whether or not the permittee's plans for protecting the values established in SMCRA are adequate and workable.<sup>(11)</sup>

SMCRA, however, does not stop there. In Section 522 of the Act, to certain limited exceptions, Congress both: (1) prohibited the issuance of permits for any coal mining operation within certain federal and state park systems, forests, and similar areas, as well as within certain distances of public roads, occupied dwellings, public buildings, and cemeteries<sup>(12)</sup> and (2) established a designation process under which interested persons may petition the appropriate state or federal regulatory authority to have other areas declared "unsuitable" for surface coal mining operations and, thereby, deleted from the inventory of land on which mining operations may be allowed.<sup>(13)</sup>

While the designation process has been employed relatively infrequently in the fifteen years since SMCRA was enacted, it may be invoked more often as implementation of other parts of the Act matures and exploration of SMCRA's provisions for new ways to limit mining continues.<sup>(14)</sup> This creates the potential for the complete prohibition of mining in more areas, and raises questions as to the proper role of the regulatory authority in administering this unique aspect of SMCRA. The purpose of this Chapter is to review the procedures that apply to petitions to declare lands unsuitable for mining, to consider the concept of mandatory designations based on predicted post-mining environmental problems, and to suggest ways of