Remining and the Water Quality Act of 1987: Operators Beware!*

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I. Introduction

In 1977, the Abandoned Mine Reclamation Fund created under the Surface Mining Control and Reclamation Act (SMCRA)[1] was seen as a major breakthrough towards cleaning up environmental hazards generated from abandoned mines. Recently, however, it

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1. 30 U.S.C. § 1231 (1982).

has become apparent that only 10 to 20 percent of abandoned coal lands will be reclaimed under SMCRA.[2] As a result, the cry is no longer to reclaim; the cry today is "Remine!"

Ironically, remining can lead to a reduction in the amount of pollution generated by a site.[3] Remining also can result in reclamation of abandoned mine lands at no cost to the government. Further, it can lead to better water quality and the recovery of coal from what are currently unproductive lands.[4] Over 1,000,000 acres of abandoned mine lands exist,[5] and of these, forty to forty-five percent contain extractable coal reserves.[6] The Pennsylvania Department of Environmental Resources has estimated that in Pennsylvania alone, remining could result in the reclamation of 10,000 acres of unreclaimed lands and improve the water quality of over 100 miles of streams.[7] In theory, the call for greater remining, for the first time in history, appears to bridge the gap between two conflicting lobbying groups, one calling for increased coal production, the second calling for greater environmental protection.

Recognizing this unique opportunity, Congress recently enacted the Water Quality Act of 1987 (WQA or Act),[8] amending the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA).[9] The Act includes a provision on remining.[10] According to the drafters, this provision is "intended to provide an incentive to the coal industry to remine abandoned coal mine lands" by precluding potential liability incurred upon purchasing or leasing abandoned mine sites.[11]

Although a provision promoting remining is definitely a step in the right direction, the new Act may not provide the freedom

2. 132 CONG. REC. H10,935 (daily ed. Oct. 15, 1986) (statement of Rep. Rahall).

3. Reed, *Remining Previously Mined Lands—The Most Effective Form of Reclamation*, 7 E. Min. L. Inst. ch. 8, § 8.03[2][b] (1986).

4. *Id.* § 8.01, at 8-3.

5. 131 CONG. REC. H6038 (daily ed. July 23, 1985) (statement of Rep. Rahall).

6. 132 CONG. REC. H10,935 (daily ed. Oct. 15, 1986) (statement of Rep. Clinger). The Pennsylvania Department of Environmental Resources believes many unreclaimed surface mines in Pennsylvania still contain an average of 3,000 tons of recoverable reserves per acre. Reed, *supra* note 3, § 8.01, at 8-3 (citing 14 Pa. Admin. Bull. 236 (Jan. 21, 1984)).

7. Reed, *supra* note 3, § 8.01, at 8-3 (citing 15 Pa. Admin. Bull. 2381 (June 29, 1985)).

8. For the text of this Act, see 133 CONG. REC. H191-216 (daily ed. Jan. 8, 1987), Pub. L. No. 100-4, 101 Stat. 7 (1987).

9. 33 U.S.C. §§ 1251-1376 (1982).

10. For the text of this provision, see *infra* text accompanying note 131.

11. 132 CONG. REC. H10,935 (daily ed. Oct. 15, 1986) (statement of Rep. Rahall).

from liability that the drafters claim. The Act does preclude liability for failure to meet effluent limitation standards under the CWA, but it does not preclude liability for other acts associated with remining.

This Article will explore first the disincentives to remining, specifically the possibility of incurring statutory and common law liability when working previously mined areas. The recent amendments to the CWA will then be analyzed to determine whether the pertinent provisions in the amendments afford sufficient protection to overcome the disincentives to remining by making it possible to remine without responsibility for abatement of preexisting conditions.

II. LIABILITY

A. *Background*

During surface mining, coal is extracted after removing or blasting open an overburden of soil and rocks. After the coal is removed, "the surrounding land is frequently left scarred by gashes and piles of deposited overburden, aptly called spoils."[12] Without prompt efforts to reclaim, the land often has no productive use.[13]

Surface mining creates many environmental problems, including acid mine drainage, soil erosion, widespread flooding, stream sedimentation, underground mine fires, destruction of wildlife and loss of aesthetic value.[14] Each of these problems may result in potential liability for the current operator to abate the condition, even if the condition existed prior to beginning operations.

Acid mine drainage is one of the most serious environmental problems related to bituminous coal mining.[15] Acid drainage is

12. Comment, *Pennsylvania Surface Mining Legislation: A Regulatory Mire*, 47 U. PITT. L. REV. 517, 518 (1986).

13. *Id.* at 518-19.

14. *Id.* at 519. *See also* Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 302-05 (1983). Surface mines, erosions of spoil piles and acid mine drainage have adversely affected up to 11,000 miles of streams and seventy reservoirs. 2 COAL LAW AND REGULATION § 30.20 (P. McGinley & D. Vish eds. 1985).

15. McGinley & Sweet, *Acid Coal Mine Drainage: Past Pollution and Current Regulation*, 17 DUQ. L. REV. 67, 68-69, (1979); Begley & Williams, *Coal Mine Water Pollution: An Acid Problem with Murky Solutions*, 64 KY. L.J. 507, 511 (1976); 2 COAL LAW AND REGULATION, *supra* note 14, § 30.21[4] ("acid and toxic mine drainage is one of the most significant causes of water quality degradation in Appalachia").

the product of a chemical reaction of sulfide minerals, oxygen, and water.[16] Many commentators and courts have discussed in detail the chemical process that generates the acid that subsequently drains from mines into surrounding soil and groundwater.[17] Their discussions will not be repeated here. Nevertheless, the damage that results from acid drainage should not be underestimated.

In 1969, the Appalachian Regional Commission (Commission) conducted a substantial and highly influential study that documented the effects of acid mine drainage. The Commission found that mine drainage pollution affected approximately 10,500 miles of streams in the Appalachian Region.[18] The estimated annual cost of damage from acid mine drainage in this region was nearly ten million dollars.[19] Acid drainage impairs municipal water supplies. It corrodes barges, boats, bridge piers and dam structures and kills fish and other aquatic life.[20] Moreover, acid mine drainage produces a soluble iron hydroxide known as "yellow boy,"[21] which colors the water reddish-brown. This discoloration is aesthetically unappealing and an eyesore for fishermen, boaters, swimmers and water skiers and others who use the effected waters for recreation.[22]

Acid mine drainage poses a unique problem because the drainage can arise long after a mine has been closed.[23] Seventy-eight percent of the total drainage comes from inactive mines and re-

16. Note, *A Legislative New Approach to the Control of Acid Drainage*, 17 GA. L. REV. 969, 969-70 (1983).

17. *See, e.g.*, Broughton, Koza & Selway, *Acid Mine Drainage and the Pennsylvania Courts*, 11 DUQ. L. REV. 495, 497 (1973) [hereinafter Broughton]; Begley & Williams, *supra* note 15 at 509-12; Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 124 n.9, 371 A.2d 461, 465-66 n.9 (1977) (citing Broughton, *supra*, at 496-97).

18. 2 COAL LAW AND REGULATION, *supra* note 14, § 31.01 (citing APPALACHIAN REGIONAL COMMISSION, ACID MINE DRAINAGE IN APPALACHIA (1969)).

19. Comment, *Environmental Law—Acid Mine Drainage*, 76 W. VA. L. REV. 508 (1973-74) (citing APPALACHIAN REGIONAL COMMISSION, *supra* note 18).

20. Broughton, *supra* note 17, at 499.

21. *Id.* at 497.

22. *Id.* at 499. For a discussion of state court decisions addressing water pollution from mining operations, see Knodell, *Liability for Pollution of Surface and Underground Waters*, 12 ROCKY MTN. MIN. L. INST. 33, 35-91 (1967).

23. 2 COAL LAW AND REGULATION, *supra* note 14, § 62.04[2][g]; McGinley & Sweet, *supra* note 15, at 70; Edwards, *Legal Problems in Closing A Mine*, 27A ROCKY MTN. MIN. L. INST. 961, 975 (1982); 46 Fed. Reg. 3144 (1981) ("In the absence of proper reclamation, runoff from post-mining areas can contain unacceptable levels of solids and metals, and be highly acidic, during reclamation and for years thereafter").

fuse piles.[24] Mine drainage may continue indefinitely after all mining operations have ceased, even increasing in intensity after mine closure.[25]

Today, acid mine drainage from inactive sites can be treated effectively,[26] but the cost of treatment can be prohibitive. The estimated cost to abate acid mine drainage pollution in 1969 was more than six billion dollars.[27] Today, although the coal industry will pay nearly three billion dollars into the Abandoned Mine Reclamation Fund, this money will never be sufficient to reclaim all "eligible lands and water."[28] "Eligible lands and water" generally include only lands or water mined before August 3, 1977.[29] Consequently, no public funds exist to reclaim land mined after August 3, 1977.[30]

Crucial to plans for abatement of abandoned mine areas is greater surface remining in a manner that will lead to a reduction in the quantity of pollutants leaving a site.[31] In addition to remining abandoned surface mine areas, increased surface remining over abandoned underground mines in which coal reserves lie close to the surface could lead to abatement of acid drainage from inactive underground mines, a major source of acid mine drainage.[32] Reduction of pollutants "can be achieved either by removing the source of the pollution (e.g., old spoil [from abandoned surface mines] or deep mine pillars [from underground mines]) or reducing the amount of water which can come in contact with potential pollutants . . . ."[33]

24. Begley & Williams, *supra* note 15, at 511. *See also* Comment, *supra* note 19, at 520 (citing BITUMINOUS COAL RESEARCH INC., STUDIES ON LIMESTONE TREATMENT OF ACID MINE DRAINAGE, OPTIMIZATION AND DEVELOPMENT OF IMPROVED CHEMICAL TECHNIQUES FOR THE TREATMENT OF COAL MINE DRAINAGE 3 (1970)); Note, *Toward Strict Liability for Abandoned Mine Drainage*, 71 KY. L.J. 193, 215 (1982) ("Drainage from abandoned coal mines presently poses a greater threat to the environment than that from active mining.").

25. 48 Fed. Reg. 48,832 (1975).

26. For discussions of treatment of acid mine drainage, see Broughton, *supra* note 17, at 499-503; McGinley & Sweet, *supra* note 15, at 75-77; Note, *supra* note 24, at 195-96.

27. McGinley & Sweet, *supra* note 15, at 70 (citing Begley & Williams, *supra* note 15, at 512; J. STACKS, STRIPPING 71 (1972)).

28. Reed, *supra* note 3, § 8.01 (citing 30 U.S.C. § 1234 (1982)).

29. *Id.*

30. *Id.*

31. *Id.* § 8.03[2][b].

32. Inactive underground mines contribute 52.5% of the total acid mine drainage. Broughton, *supra* note 17, at 498.

33. Reed, *supra* note 3, § 8.03[2][b].

Many courts and commentators have tried to answer the question, "Who is responsible for the treatment of abandoned mine sites?"[34] Probably the greatest disincentive to remining is that no one can provide a definitive answer to this question. Thus, a current operator could be held responsible for abatement of conditions created years earlier when previous operators were free of regulation or under less stringent regulations than today.[35]

The parties liable for cleanup and the law under which liability can be compelled are not always clear. Liability imposed upon past and current operators and owners stems from state and federal statutory law and from common law. The remainder of Part II examines common law liability, particularly the potential for liability under traditional nuisance theories, and statutory liability under SMCRA, the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[36]

B. *Common Law*—Caveat Emptor

Fear of liability triggered by buying, leasing and remining previously mined property stems from the known and unknown. One fact is apparent in the case law and commentaries: owners and operators have been held liable, and more recently strictly liable, for abandoned mine drainage resulting from the activities of previous owners.[37] However, application of common law prin-

34. *See, e.g.*, Broughton, *supra* note 17, at 503. *See also* Note, *supra* note 24. *See generally* McGinley & Webber, *Pandora in the Coal Fields: Environmental Liabilities, Acquisitions and Dispositions of Coal Properties*, 87 W. VA. L. REV. 665 (1985).

35.

> Potential problems and liability can be devastating. According to one commentary, the presence of an environmental hazard on the land may result in a regulatory agency's refusal to issue required permits or a later administrative decision to revoke or suspend the buyer's permit. In such an event, the buyer would have the choice of accepting the cost of abatement or losing the entire investment because of the inability to obtain the required permits. If such a scenario is not bleak enough, the buyer also may be required to abate and yet still be refused permission to engage in mining activities.

McGinley & Webber, *supra* note 34, at 666.

36. 30 U.S.C. §§ 1201-1328 (1982); 33 U.S.C. §§ 1251-1376 (1982); 42 U.S.C. §§ 9601-9657 (1982). It should be noted that many other statutes may also be applicable. *See, e.g.*, Resource Conservation and Reclamation Act, 42 U.S.C. §§ 6901-6991 (1982).

37. Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974), and 472 Pa. 115, 371 A.2d 461 (1977); McGinley & Webber, *supra* note 34, at 672 ("liability may be incurred notwithstanding the fact the buyer or lessee has done absolutely nothing to create the nuisance condition"); Note, *supra* note 24, at 215. *See also* 4 AMERICAN LAW OF MINING § 132.05[5][b] (2d ed. 1986); Annotation, *Pollution of Stream by Mining Operations*, 39 A.L.R. 891 (1925) and cases cited therein. *See also* Philadelphia Chewing Gum Corp. v.

ciples—to coal mining in particular—has not been uniform. Whether liability in a specific case arises under nuisance, negligence, trespass or some aspect of water law is not always clear.[38] Courts often use a case-by-case method of analysis, emphasizing the particular facts rather than legal principles. This method of analysis creates further uncertainty.[39] Frequently in these cases, however, state nuisance law provides the primary basis for determining liability.[40] Unfortunately, nuisance theories of liability also create ambiguity and uncertainty.

The word "nuisance" signifies the most "impenetrable jungle" in the law.[41] The first question to answer is whether the drainage is creating a private or public nuisance. This distinction may affect the parties' right to sue, the elements of a cause of action and the relief granted.

A private nuisance is an interference with the use and enjoyment of land.[42] Five elements are required to sustain a private nuisance claim: (1) a substantial interference, (2) intentional in origin, (3) unreasonable in character,[43] (4) with a person's prop-

Pennsylvania Dep't of Environmental Resources, 35 Pa. Commw. 443, 451, 387 A.2d 142, 150 (1978) (current owner can be ordered to take corrective measures for prior owners actions, leaking oil into ground water where current owner permitted or authorized the creation of the condition on his land), *aff'd sub nom.* National Wood Preservers, Inc. v. Commonwealth, 489 Pa. 221, 414 A.2d 37 (1980).

38. 2 COAL LAW AND REGULATION, *supra* note 14, § 31.02[1]. *See also* Annotation, *Landowner's Right to Relief Against Pollution of His Water Supply by Industrial or Commercial Waste*, 39 A.L.R.3d 910, 921-25 (1971).

39. 2 COAL LAW AND REGULATION, *supra* note 14, § 31.02[1].

40. Note, *supra* note 24, at 199 ("State nuisance law may still play a major role in determining liability for pollution from abandoned mines."). For a more comprehensive discussion of nuisance law, see Sobel, *The Impact of Common-Law Pollution Claims Upon Real Estate Transactions*, 4 CORP. L. REV. 195, 196-210 (1981) (discussing case law on nuisance pollution claims).

41. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) [hereinafter PROSSER].

42. *Id.* § 87, at 619. Philadelphia Elec. Co. v. Hercules, 762 F.2d 303, 315 (3d. Cir. 1985), *cert. denied*, 106 S. Ct. 384 (1986) (private nuisance requires an invasion of another's interest in the private use and enjoyment of land).

43. Although the mining company's behavior may be reasonable, the intentional interference with the neighboring owner's use of its property can be unreasonable. For example, a coal burning electric generator which exercises the utmost care in the utilization of known scientific techniques to minimize any harm from emission may still be required to pay for the inevitable harm caused to neighboring property owners. PROSSER, *supra* note 41, § 88, at 629 (citing Wheat v. Freeman Coal Mining Corp., 23 Ill. App. 3d 14, 319 N.E.2d 290 (1974)). "This is a simple decision that the harm thus intentionally inflicted should be regarded as a cost of doing the kind of business in which the defendant is engaged." *Id. See also*, Hughes v. Emerald Mines Corp., 303 Pa. Super. 426, 438, 450 A.2d 1, 7 (1982) (" 'Unreasonable', however, is a term of art, a legal definition rather than a moral

erty right to use and enjoy land, (5) caused by another's conduct in action or omission of action.[44] Pollution of a stream or underground water supply interferes with the physical condition of land and has been held to be an invasion of the interest in use and enjoyment of land.[45]

With respect to future increased drainage from a mine, it is important to note that a threat of future injury may be deemed a present menace and interference with enjoyment, even though no use is being made of the plaintiff's land at the time.[46] The depreciation in the use value of the plaintiff's property because of the nuisance condition or activities is sufficient interference on which to base an action for damages.[47]

In contrast to a private nuisance claim, a public nuisance is a much broader concept, encompassing a wider range of conduct

judgment on the good sense of a party. Utility of an act must be balanced against the bad effects resulting from that act in determining its reasonableness.").

44. *See* Sobel, *supra* note 40, at 197 (citing Copart Indus., Inc. v. Consol. Edison Co., 394 N.Y.S.2d 169, 173, 362 N.E.2d 968, 972 (1977)). *See also* Hughes v. Emerald Mines Corp., 303 Pa. Super. 426, 429, 450 A.2d 1, 4 (1982) (citing RESTATEMENT (SECOND) OF TORTS § 822 (1979) and holding mining company liable for polluting wells).

45. Muncie Pulp Co. v. Martin, 23 Ind. App. 558, 55 N.E. 796 (1899) (nuisance if water is impaired for the ordinary uses by reason of any foreign substance imparted by another from artificial causes); Masonite Corp. v. Steede, 198 Miss. 547, 23 So. 2d 756 (1945) (damages awarded against a masonite plant for discharging its effluent into river resulting in practical destruction of fishery); Bana v. Pittsburgh Plate Glass Co., 76 N.E.2d 625 (Ohio App. 1947) (damages awarded against chemical plant for discharging effluent rendering land unsuitable for farming or gardening); Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956) (liability for polluting streams); Rose v. Standard Oil Co., 56 R.I. 272, 185 A. 251 (1936) (nuisance claim for oil, gasoline and other substances escaping into and through claimant's land by unknown underground courses); Annotation, *supra* note 38, at 910 and cases cited therein. RESTATEMENT (SECOND) OF TORTS § 849 (1979) provides:

> (1) An interference with the use of water caused by an act or conduct that is not itself a use of water but that affects the quality or quantity of the water may subject the actor to liability if the act or conduct
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> (a) constitutes a nuisance,
>
> (b) constitutes a trespass, or
>
> (c) is negligent, reckless or abnormally dangerous with respect to such use.
>
> (2) The pollution of water by a riparian proprietor that creates a nuisance by causing harm to another person's interest in land or water is not the exercise of a riparian right.

46. PROSSER, *supra* note 41, § 87, at 620.

47. *Id. Cf.* West v. National Mines Corp., 336 S.E.2d 190, 192 (W. Va. 1985) (court "reluctantly" affirmed jury verdict for no damages although testimony presented on the severity of the dust problem, including frequency of household cleaning, damage to vegetables in the garden, boiling of drinking water and wearing surgical masks, but reversed trial court and reinstated injunction requiring mining company to treat roads and operate trucks at speeds to reduce dust).

and interference.[48] Section 821B of the *Restatement (Second) of Torts* defines a public nuisance as "an unreasonable interference with a right common to the general public."[49] Consequently, "the pollution of a stream which merely inconveniences a number of riparian owners is a private nuisance only, but it may become a public one if it kills the fish."[50]

Once it has been determined that a private or public nuisance exists, the common law provides that the present owner or occupier of the land can be held responsible to abate the nuisance, even though that person had no connection with its creation. The reasoning often cited as supporting this view is that the landowner permitted the nuisance to continue and, therefore, should be held liable for its abatement.[51]

The *Restatement (Second) of Torts* reflects the majority view that liability may be imposed without fault:[52]

> A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land, if the nuisance is otherwise actionable, and
>
> (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and
>
> (b) he knows or should know that it exists without the consent of those affected by it, and
>
> (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.[53]

However, many courts have held that when the landowner does not create the nuisance, no liability for damages resulting from

48. A public nuisance is "an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all." PROSSER, *supra* note 41, § 90, at 643. *See also* Sobel, *supra* note 40, at 206-07.

49. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). *See also* Philadelphia Elec. Co. v. Hercules, 762 F.2d 303, 315 (3d. Cir. 1985) (citing RESTATEMENT).

50. PROSSER, *supra* note 41, § 90, at 645 nn. 29-30 (citing Smith v. City of Sedalia, 152 Mo. 283, 53 S.W. 907 (1899); Hartung v. County of Milwaukee, 2 Wis. 2d 269, 86 N.W.2d 475 (1958) (quarry); State *ex rel.* Wear v. Springfield Gas & Elec. Co., 204 S.W. 942 (Mo. Ct. App. 1918)).

51. *See, e.g.*, Hasapopoulos v. Murphy, 689 S.W.2d 118, 120 (Mo. Ct. App. 1985) (proof of landowner's creation of nuisance, planting trees, is not an essential element for damages); Philadelphia Chewing Gum v. Commonwealth, 35 Pa. Commw. 493, 387 A.2d 142 (1978) (where condition created by an individual, owner or occupier can be liable where he knew or should have known of the condition), *aff'd sub nom.* National Wood Preservers, Inc. v. Commonwealth, 489 Pa. 221, 414 A.2d 37 (1980).

52. *See* McGinley & Sweet, *supra* note 15, at 67; Reed, *supra* note 3, § 8.03[1].

53. RESTATEMENT (SECOND) OF TORTS § 839 (1979).

the nuisance will arise until actual or constructive notice is given to the landowner.[54] In addition, some courts have placed restrictions or limitations on this liability. For example, the Supreme Court of Pennsylvania requires the state to prove the feasibility of abatement before liability for cleanup will be imposed.[55]

The most famous case, *Commonwealth v. Barnes & Tucker Co.* (*Barnes & Tucker I*),[56] illustrates the ramifications of potential liability for past mining activities. Mine No. 15, located in Cambria and Indiana Counties in Pennsylvania near the head waters of the West Branch of the Susquehanna River, contains approximately 6,600 acres. The mine was first opened in 1915 and, following a series of different operators, Barnes & Tucker took over operation of the mine in 1939. Mining operations ceased in 1969.[57] In June, 1970, a substantial discharge prompted the Sanitary Water Board to issue an order suspending Barnes & Tucker's mine drainage permit. The suspension was to remain in effect until (1) the borehole was plugged, (2) satisfactory treatment facilities were placed in operation, and (3) satisfactory plans for prevention of pollution after cessation of mining had been submitted.[58]

In determining whether Barnes & Tucker was responsible for abating the discharge emanating from Mine No. 15, the Pennsylvania Supreme Court in *Barnes & Tucker I* specifically addressed the issue of whether the mine water discharge constituted a common law public nuisance.[59] The court held that

54. District of Columbia v. Fowler, 497 A.2d 456, 462 (D.C. 1985) (defendant held liable only for damages which occurred after it was given notice of defect and nuisance); Tennessee Coal, Iron & R.R. v. Hartline, 244 Ala. 116, 122, 11 So. 2d 833, 837 (1943) ("It is the one who creates a nuisance, or who knowingly continues it if created by another, that is answerable for the consequences. The bare fact of occupancy or of ownership imposes no responsibility."). *See also* Clarke v. Boysen, 39 F.2d 800, 819 (10th Cir.), *cert. denied*, 282 U.S. 869 (1930); Ahern v. Steele, 115 N.Y. 203, 210, 22 N.E. 193, 196 (1889).

55. *See* Commonwealth v. Wyeth Laboratories, 12 Pa. Commw. 227, 315 A.2d 648 (1974) (trial court correct in requiring more concrete abatement proposals given conflicting testimony and evaluations of feasibility of abatement). *See also* Moore v. Mobil Oil Co., 331 Pa. Super. 241, 249, 480 A.2d 1012, 1020 (1984) (citing RESTATEMENT (SECOND) OF TORTS § 839 comment f (1979)) (holding defendant was not required to assure that gasoline and other contaminants in the soil and groundwater did not continue to pollute because evidence that a workable and scientifically proven solution was uncertain).

56. 455 Pa. 392, 319 A.2d 871 (1974).

57. *Id.* at 403, 319 A.2d at 873 (1974).

58. Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 120, 371 A.2d 461, 463 (1977).

59. Commonwealth v. Barnes & Tucker Co., 455 Pa. 403, 408, 319 A.2d 873, 878 (1974).

> "the controversy . . . is controlled by one fact and a single equitable principle—the fact that the stream has been polluted, and the principle that this creates an enjoinable nuisance if the public uses the water." We find this an accurate precis of public nuisance law and apposite to the present case.[60]

The court explained that "the public has a sufficient interest [on which to base injunctive relief] in clean streams alone regardless of any specific use."[61] Consequently, Barnes & Tucker was responsible for abatement of the entire condition.[62]

The case was remanded,[63] and Barnes & Tucker again appealed the decision of the Commonwealth Court of Pennsylvania, arguing that the commonwealth court's order that it take affirmative steps to treat the drainage was an unreasonable exercise of police power and a taking in violation of the Fourteenth Amendment of the United States Constitution (*Barnes & Tucker II*).[64] The Supreme Court of Pennsylvania rejected these arguments in *Barnes & Tucker II*, even though the evidence demonstrated that of the 7.2 million gallons of water from Mine No. 15 which were required to be treated each day, 6 million gallons were fugitive mine water coming from other mines in the complex.[65] Finally,

60. *Id.* at 412, 319 A.2d at 882 (quoting Pennsylvania R.R. v. Sagamore Coal Co., 281 Pa. 233, 238, 126 A. 386, 387 (1924)) (citation omitted). Moreover, the court continued stating that "[t]he absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance." *Id.* at 413, 319 A.2d at 883.

61. *Id.* at 412, 319 A.2d at 882 (citing PA. CONST. art. I, § 27, which provides that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. *Pennsylvania's public natural resources are the common property of all the people* . . . . [T]he Commonwealth shall conserve and maintain them for the benefit of all the people." (emphasis added)).

Interestingly, Barnes & Tucker's mine drainage permit was considered only "a limited privilege to discharge untreated [acid mine drainage]." *Id.* at 417, 319 A.2d at 885. According to the court, the "permit holders were . . . forewarned [under Pennsylvania law] of the possibility of future regulations of mine drainage." *Id.*, 319 A.2d at 885.

62. *Id.*, 319 A.2d at 885. *See also* Philadelphia Chewing Gum Corp. v. Commonwealth, 35 Pa. Commw. 443, 454, 387 A.2d 142, 152 (1978) (lessors sufficiently associated themselves with the existence of a waste disposal well by receiving rents from the creator to render reasonable their participation in abatement), *aff'd sub nom.* National Wood Preservers, Inc. v. Commonwealth, 489 Pa. 221, 414 A.2d 37 (1980).

63. 23 Pa. Commw. 496, 353 A.2d 471 (1976).

64. Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977). *See generally* Note, *Commonwealth v. Barnes & Tucker Co.—The Burden of Treating Acid Mine Drainage*, 80 W. VA. L. REV. 519 (1978).

65. Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 122-29, 371 A.2d 461, 464-67. For further discussion of the takings issue, *see* Broughton, *supra* note 17, at 520-28; McGinley & Webber, *supra* note 34, at 673; Rogers, *Acid Coal and Mine Drainage—The Perpet-*

the court stated, "the fact that the present condition arises only from past activities [does not] affect the appropriateness of invoking the police power to dispel the immediately dangerous condition."[66] Consequently, Barnes & Tucker was required to incur a monthly liability of $30,000 to $50,000.

The decisions in *Barnes & Tucker I* and *II* represent the culmination of a change in Pennsylvania case law from no liability for effluent discharge from mining operations[67] to liability extending beyond the current owner's and operator's activities. A few commentators predict that this trend will be followed in other jurisdictions, if it has not already.[68]

Fear of liability similar to that imposed in *Barnes & Tucker I* and *II* cannot be anything but a disincentive to remining. Because other means of self-protection are limited, the only sure way to avoid liability is to not touch the property. For example, although environmental audits can aid in discovering hazards that exist on the property,[69] it is very difficult to minimize responsibility through contractual allocation of liabilities.[70] Insurance against potential liability is very expensive and not easy to acquire.[71] Suing the prior owner for indemnification can be a difficult, if not impossible, task.

Recently, the Court of Appeals for the Third Circuit in *Philadelphia Electric Co. v. Hercules, Inc.*[72] held that a purchaser of land later found to require clean-up action has no cause of action for private nuisance, public nuisance or common law indemnity against a corporation whose predecessor in interest had owned the prop-

ual Treatment Problem, 1 E. MIN. L. INST. § 6.08 (1980). *See also* National Wood Preservers, Inc. v. Commonwealth, 489 Pa. 221, 414 A.2d 37 (1980).

66. Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 126, 371 A.2d 461, 467.

67. For a discussion of the historical development of Pennsylvania case law, see McGinley & Sweet, *supra* note 15, at 72-73; Broughton, *supra* note 17, at 503-04.

68. *See, e.g.*, Note, *supra* note 24.

69. "Environmental auditing is a systematic, documented, periodic objective review by regulated entities of facility operations and practices related to meeting environmental requirements." 50 Fed. Reg. 46,504 (1985) *cited in* Little, *Environmental Self-Assessments: The Compliance Audit*, 7 E. MIN. L. INST. § 2.02 (1986). Environmental audits can aid a potential remining operator in determining "the impact of past activities, especially the past on-site and off-site disposal of wastes, in terms of assessing the potential for remedial activity and providing reserves therefore." Little, *supra*, § 2.02[2].

70. *See generally* Slaughter & Barr, *Environmental Rights and Liabilities Associated with the Sale and Acquisition of Coal Mining Properties: Do They Run with the Land?*, 4 E. MIN. L. INST. ch. 12 (1983).

71. *Id.* § 12.03[2].

72. 762 F.2d 303 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 384 (1986).

erty. Prior to October, 1971, the Pennsylvania Industrial Chemical Corporation (PICCO) owned the property in question, which was located in Chester, Pennsylvania abutting the Delaware River. The evidence at trial "tended to show" that PICCO had deposited or buried various resins and industrial chemical by-products in a pond and possibly in other locations on the property.[73] In 1971, PICCO sold the land to Gould, Inc. (Gould), which conducted limited operations on the land. In 1973, Gould and Hercules, Inc. (Hercules) acquired PICCO's remaining assets; PICCO was dissolved on January 6, 1976.[74]

The Philadelphia Electric Company (PECO) acquired the property in 1974.[75] In response to inquiries and the threat of legal action from the Pennsylvania Department of Environmental Resources, PECO cleaned up the site at a cost of $338,328.69. PECO filed suit against Gould and Hercules to recover the cleanup costs.

Rejecting PECO's argument that principles of *caveat emptor* were not applicable, the court in *Hercules* stated, "where, as here, corporations of roughly equal resources contract for the sale of an industrial property, and especially where the dispute is over a condition on the land rather than a structure, *caveat emptor* remains the rule."[76] The court also precluded PECO from suing Hercules and Gould, the "vendor's successors," under a private nuisance theory, explaining that this theory was available only to neighboring land owners.[77] The court found that PECO had no standing to sue under a public nuisance theory; the only right invaded was the right to "pure water," and PECO had failed to allege that it used the water or suffered any particular damage in the exercise of a right common to the general public.[78] Even more devastating to PECO was the court's ruling that PECO was not entitled to indemnification. The court reasoned that "the same policy considerations that counsel adherence to the rule of *caveat emptor* in this situation militate against shifting the loss . . . on an indemnity theory."[79]

73. *Id.* at 306.
74. *Id.* at 307.
75. *Id.* at 306-07.
76. *Id.* at 313.
77. *Id.* at 314.
78. *Id.* at 316.
79. *Id.* at 318.

The same lessons which follow from the declaration of "Buyer Beware!" also apply to operators who want to remine property. The common law theories applied in *Hercules* could apply analogously to a case in which a subsequent operator is required, at its own expense, to abate a preexisting environmental problem. As with PECO, mining companies will not be protected from the rule of *caveat emptor*, particularly if the property is purchased or leased from another corporation or mining company. As in *Hercules*, the companies would have equal bargaining power and therefore, liability for any preexisting conditions would fall on the subsequent owner or lessee. If the new operator acquires an interest in the land from a private landowner, who could not negotiate on the same level or with the same resources as the mining operator, a court would probably be even more inclined to protect the landowner, imposing all responsibility for cleanup on the mining company. Finally, because an operator may be deemed to have contributed to the problem, chances of it being held liable for preexisting conditions are even greater.

Consequently, to create an effective incentive program for remining, potential liability under common law theories for preexisting environmental hazards must be addressed. Legislation which provides incentives for remining without addressing common law problems does not provide a viable solution.

C. *Statutory Law*

1. Surface Mining Control and Reclamation Act

Surface mining can help to abate pollution from abandoned mine areas. Ironically, although designed to protect the environment from the adverse effects of mining,[80] SMCRA creates a number of disincentives to remining. As one author has succinctly stated,

> Fear over the costs associated with highwall elimination, revegetating barren land and post-mining water treatment, coupled with concerns over bond release and adverse permit actions, litigation and civil penalties arising from problems the

80. *See* Dunlap, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975*, 21 ROCKY MTN. MIN. L. INST. 12 (1975). *See also* Comment, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

operator did not create, cause all but the most intrepid operators to avoid remining previously mined lands.[81]

SMCRA established a comprehensive regulatory scheme for surface mining and reclamation operations.[82] SMCRA mandates compliance with general performance standards which "require the operations as a *minimum* to . . . restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to *any* mining."[83] SMCRA also requires "[c]omplete backfilling with spoil material . . . to cover completely the highwall and return the site to the appropriate original contour."[84]

In a mining area where a large portion of a mountain has been removed years earlier during previous mining, SMCRA could impose the costly obligation of rebuilding the mountainside. What configuration of the mountainside constitutes the basis from which to determine the "appropriate original contour" (AOC) is not clear. AOC is defined as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area . . . closely resembles the general surface configuration prior to mining."[85] No one has addressed the issue of whether AOC of a mining site, mined intermittently for years, is measured as of the last mining operation or the first. It is conceivable, however, that under this definition, what constitutes the original contour of a mining area could be based upon the contour prior to any mining operations.

Operators considering remining an area with a preexisting highwall "must proceed with great caution."[86] According to the Office of Surface Mining (OSM), "an operator who affects any portion of a highwall may properly be required to . . . eliminate the highwall to the maximum extent technically practical."[87] According to one author, this statement suggests that the OSM fol-

81. Reed, *supra* note 3, § 8.02[2].

82. For a discussion of SMCRA and its regulatory scheme, see Seiberling, *Perspective on the Effectiveness of SMCRA: How Effective is the Federal Stripmining Law?*, 88 W. VA. L. REV. 509 (1986). *See also* Short, *Abandoned Mine Reclamation: Its Mechanics and Its Problems*, 3 E. MIN. L. INST. ch. 8 (1982).

83. 30 U.S.C. § 1265(b)(2) (1982) (emphasis added).

84. *Id.* § 1265(d)(2). The constitutionality of § 1265(d) was upheld in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 283-87 (1981) (holding that § 1265(d) did not violate the Tenth Amendment).

85. 30 U.S.C. § 1291(2) (1982).

86. Reed, *supra* note 3, § 8.04.

87. 50 Fed. Reg. 24,881 (1985).

lows the position that "you touch it, you bought it."[88] The bottom line is that the costs of eliminating a preexisting highwall and returning the area to its appropriate original contour are often too high to justify the remining operation, and thus no incentive exists to remine abandoned areas.[89]

Finally, returning to the problem of acid mine drainage, SMCRA requires surface discharges from mining operations to meet the Environmental Protection Agency's (EPA) effluent limitation standards established for the industry under the CWA.[90] The problem with this requirement is that,

> [n]either EPA nor OSM draws any distinction between remining and first mining and all remining must meet the new point source effluent limitations of the Clean Water Act. As a result, *operators must be extremely careful in selecting sites for remining operations*. Unless remining will bring the premining quality of any pollutional discharge up to current effluent limitations, *the operator may have acquired a perpetual water treatment liability*.[91]

The penalties imposed under SMCRA reinforce the need for caution. For example, under Pennsylvania law, operators who affect previously mined areas with preexisting discharges may be confronted with the forfeiture of bonds unless they eliminate the polluting discharges.[92] Moreover, following a cessation order that has not been cured, the Pennsylvania Department of Environmental Resources (DER) must assess a fine of at least $750 per day for failure to abate.[93] The economic devastation resulting from strict enforcement of SMCRA is a reality for some coal operators that inherit preexisting polluting conditions.[94]

One Pennsylvania coal operator, who inherited many environmental problems, entered into a consent decree with the DER in 1981.[95] The consent decree enumerated many violations, including the failure to implement soil erosion and sedimentation control measures properly failure to vegetate the land upon completion of backfilling properly and failure to control acid mine discharge effectively. According to the author documenting

88. Reed, *supra* note 3, § 8.04[2] n.8.
89. *Id.* § 8.04[5][a] (citing 47 Fed. Reg. 928-29 (1982)).
90. *Id.* § 8.04[4] (citing 30 C.F.R. § 816.42 (1985)).
91. *Id.* § 8.04[4] (emphasis added).
92. Comment, *supra* note 12, at 531.
93. 25 PA. ADMIN. CODE §§ 86.192-86.194 (Shepard's 1982).
94. *See* Comment, *supra* note 12, at 532-34.
95. *Id.* at 532.

this case, a strict timetable was designated and no new permits were to be issued absent strict compliance with the timetable.[96]

The operator filed a petition with the United States Bankruptcy Court for Chapter ll reorganization.[97] The DER then filed a complaint against the company for failing to cure the violations.[98] Ultimately, no reorganization was filed; the operator claimed that its assets had been so depleted that reorganization was not possible.[99]

SMCRA may not impose on the first operator reclamation costs that are greater than the benefit and income to be generated from mining the property. However, when remining land, where the operator may be liable for reclamation of land that prior operators left barren and eroded years earlier, the potential costs of reclamation may outweigh the benefits of remining. As with liability imposed under the common law, to encourage remining, potential problems arising under SMCRA must be addressed. A program is needed to tip the balance in favor of remining.

2. Clean Water Act

The CWA[100] has been criticized[101] for failing to regulate inactive mine drainage.[102] The critics argue that permitting acid mine drainage from abandoned mines to pour into lakes, rivers and streams is inconsistent with the CWA's goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[103]

To state the problem simply, the CWA focuses its control mechanisms on regulating the discharge of pollutants at their "point source." A "point source" is defined under the CWA as "any discernible, confined and discrete conveyance, including but not lim-

96. *Id.* at 533. Noncompliance in this case would result in civil penalties and immediate suspension of the operator's license to mine and surface mining permits. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 534.

100. 33 U.S.C. §§ 1251-1376 (1982).

101. *See, e.g.*, Note, *supra* note 16, at 976-81.

102. This article does not attempt to offer an exhaustive explanation of the CWA. Many authors offer comprehensive discussions of the CWA. *See, e.g.*, McGinley & Sweet, *supra* note 15, at 78-84; Begley & Williams, *supra* note 15, at 514-22. *See generally* Ipsen, *Water Quality Management Plans and Their Impact on Mining Operations*, 23 ROCKY MTN. MIN. L. INST. 551 (1977); Keppler, *Mining and the Federal Water Pollution Control Act Amendments of 1972*, 20 ROCKY MTN. MIN. L. INST. 501 (1975).

103. 33 U.S.C. § 1251(a) (1982).

ited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[104] Under the CWA, all point sources must achieve certain effluent limitation standards which the states regulate through the issuance and monitoring of National Pollution Discharge Elimination System (NPDES) permits.[105]

The problem arises, however, because much of the discharge from coal mining areas is from "nonpoint sources." "A nonpoint source, undefined but often used in the [CWA], should be understood as any source of water pollution not identifiable as a point source."[106] In essence, a nonpoint source includes all water quality problems not subject to the permit program under the CWA.[107] For example, one court has held that runoff from a coal storage pile is a nonpoint source.[108] Nonpoint source discharges do not require an NPDES permit; instead, state planning agencies are required to establish waste treatment management plans.[109]

Potential liability of an operator remining an area under the CWA, however, does exist. The implication of regulating only active mine sites[110] is that once remining operations begin, the operator must obtain a permit for any point source discharge from that site[111] and comply with all regulations under the NPDES permit program. Permit violations may result in fines and imprison-

104. *Id.* § 1362(14).

105. *See id.* §§ 1314(b), 1342.

106. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 190 (Supp. 1984).

107. National Wildlife Federation v. Gorsuch, 693 F.2d 156, 166 (D.C. Cir. 1982) (a nonpoint source includes all water quality problems not subject to the permit program under § 402 of the CWA).

108. Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976) (runoff from a coal storage pile held to be from a nonpoint source). *But see* Sierra Club v. Abston Constr. Co., 620 F.2d 41, 44-45 (5th Cir. 1980) (pollution from natural erosion from mining may be from a point source); O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 655 (E.D. Pa. 1981) ("surface runoff of contaminated waters, once channeled or collected, constitutes discharge by a point source"). For a discussion of additional case law on mining pollution, point sources and nonpoint sources, see Begley & Williams, *supra* note 15, at 525-26; Note, *supra* note 24, at 203-10.

109. *See* 33 U.S.C. § 1288(b)(6) (1982). The plans have never been implemented effectively because of a lack of federal funding and the "fragmentary nature of projects planned." Note, *supra* note 16, at 979.

110. An "active mining area" is "the area on and beneath land, used or disturbed in activity related to the extraction, removal, or recovery of coal from its natural deposits." 40 C.F.R. § 434.11(b) (1986).

111. See *supra* note 108 for cases holding that discharge from mining sites is from point sources.

ment, injunctions, permit revocation or suspension and citizen suits.[112] Moreover, intent is not a consideration when determining liability for violations under the CWA. "The regulatory provisions of the [CWA] were written without regard to intentionality, . . . making the person responsible for the discharge of any pollutant strictly liable . . . . The Act would be severely weakened if only intentional acts were proscribed."[113] Furthermore, civil liability under the CWA is based upon either "responsibility for or control over the performance of the work."[114] Thus, it is conceivable that an operator remining a site could face responsibility for cleanup based upon its "control over the performance of the work."

It has been argued that a trend toward holding owners of abandoned mine sites strictly liable under the CWA for preexisting drainage is developing.[115] This trend seems even more likely to apply to operators who assume "responsibility for or control over" the site and the accompanying environmental violations, bringing themselves under NPDES permit regulations.

3. Comprehensive Environmental Response, Compensation, and Liability Act

Whether active and inactive mining sites are subject to the provisions of CERCLA[116] is not an easy question to answer. Commentators have filled many law review pages debating this question.[117] One important point can be gleaned from this debate: liability under CERCLA for control and cleanup of hazardous conditions at an active or abandoned mine site is a possibility for current owners and operators. One recent development illustrates how varying interpretations of CERCLA may result in the imposition of liability on remining operators.

112. McGinley & Sweet, *supra* note 15, at 78.

113. United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). *See also* Sierra Club v. Abston Constr. Co., 620 F.2d 41, 46 (5th Cir. 1980); United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (holding construction company liable for failure to obtain permits, although company believed that third party had obtained permits).

114. United States v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274 (S.D. Fla. 1981).

115. Note, *supra* note 24, at 208.

116. 42 U.S.C. §§ 9601-9657 (1982).

117. *See, e.g.*, Graham & Lopatto, *Hazardous and Solid Waste Law and Regulations: Effects on the Mining of Coal and Other Minerals*, 88 W. VA. L. REV. 587 (1986); Note, *supra* note 16, at 984-89.

In 1985, several mining and electric companies (petitioners) challenged the EPA's inclusion of their facilities on the National Priorities List (NPL)[118] under CERCLA.[119] Specifically, the petitioners argued that CERCLA was not intended to authorize EPA to place sites that produce mining wastes on the NPL.[120] The Court of Appeals, District of Columbia Circuit, in *Eagle-Picher Industries, Inc. v. United States* held that the EPA did, indeed, have the necessary authority.[121]

Petitioners claimed that mining wastes are not "hazardous substances" within the meaning of CERCLA. They based their claim on the definition of "hazardous substances" in CERCLA,[122] which expressly incorporates in its structure definitional provisions from other statutes, including the Solid Waste Disposal Act (SWDA).[123] Under the SWDA, both fly ash and mining wastes have been suspended from regulation.[124] This exclusion led the petitioners to conclude that mining wastes were excluded from CERCLA's definition.

Rejecting this argument, the court stated that the petitioners were ignoring the plain meaning of the entire statute: "As EPA notes, a substance is a 'hazardous substance' within the meaning of CERCLA if it qualifies under *any* of the several subparagraphs of section 101(14)."[125] Thus, according to the court, EPA was acting within its power when it construed mining wastes produced by the petitioners as "hazardous substances."[126]

The significance of this decision is that under section 107 of CERCLA,[127] the owner or operator of a facility may be liable for cleanup of a release of a hazardous substance. Consequently, an operator who begins remining a site which later is included on the

118. 42 U.S.C. § 9605(8)(B) (1982). The National Contingency Plan is the primary component of CERCLA. *Id.* § 9605. The NPL is encompassed in this plan. The EPA must publish a list of at least 400 of the highest priority sites which may require a response to clean up an imminent hazard posed by a release or threatened release of a hazardous substance or pollutant which may present an imminent and substantial danger to the public health or welfare.

119. Eagle-Picher Indus., Inc. v. United States, 759 F.2d 922, 925-26 (D.C. Cir. 1985).

120. *Id.* at 926.

121. *Id.* at 931-32.

122. 42 U.S.C. § 9601(14) (1982).

123. *Id.* §§ 6901-6987.

124. *Id.* §§ 6921(3)(A)(i), 6921(3)(A)(ii).

125. *Eagle-Picher Indus.*, 759 F.2d at 927.

126. *Id.* at 931.

127. 42 U.S.C. § 9607 (1982).

NPL and which requires remedial action may be held liable for cleanup costs.

Finally, as with the common law, it is difficult to allocate potential risks arising under CERCLA in a contract. Because the CWA, SMCRA and CERCLA are so broad in their scope, "it is unlikely that a buyer and seller could draft a liability contract which would bind a regulatory agency enforcing one of the statutes to proceed against only one otherwise liable party."[128]

III. Coal Remining and Section 307 of the Water Quality Act of 1987

On July 8, 1987, Congress enacted the WQA, amending the CWA and overriding President Reagan's veto.[129] Section 307, entitled "Coal Remining Operations," authorizes the states to modify permit requirements with respect to the pH level of any preexisting discharge.[130] The section also authorizes the states to modify permit requirements regarding preexisting discharges of iron or manganese from the remined area and regarding the pH level or level of iron or manganese in any preexisting discharge affected by the remining operation.

Section 307 provides as follows:

> SEC. 307. COAL REMINING OPERATIONS.
>
> Section 301 is amended by adding at the end thereof the following:
>
> (p) MODIFIED PERMIT FOR COAL REMINING OPERATIONS.—
>
> (1) IN GENERAL.—Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 402(b), may issue a permit under section 402 which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

128. Slaughter & Barr, *supra* note 70, § 12.03[2], at 12-22.

129. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

130. Begley & Williams, *supra* note 15, at 511.

(2) LIMITATIONS.—The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from or affected by the remining operation shall exceed State water quality standards established under section 303 of this Act.

(3) DEFINITIONS—For purposes of this subsection—

(A) COAL REMINING OPERATION.—The term "coal remining operation" means a coal mining operation which begins after the date of the enactment of this subsection at a site on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(B) REMINED AREA.—The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before the effective date of the Surface Mining Control and Reclamation Act of 1977.

(C) PRE-EXISTING DISCHARGE.—The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) APPLICABILITY OF STRIP MINING LAWS.—Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 to any coal remining operation, including the application of such Act to suspended solids.[131]

Rather than imposing the national standards set forth in section 301(b)(2)(A) of the CWA,[132] this section imposes a requirement to apply the best available technology economically achievable (BATEA) to set specific numerical effluent limitations in each permit. "Best professional judgment" provides the basis for determining the BATEA. Interestingly, to acquire a modified permit, the applicant need only demonstrate that the coal remining operation will result in the potential for improved water quality. The only real limitation is that the pH level of the discharge after

131. Water Quality Act of 1987, § 307, Pub. L. No. 100-4, 101 Stat. 7, 37 (1987).
132. 33 U.S.C. § 1311(b)(2)(A) (1982).

remining cannot exceed the level of discharge prior to remining nor can it exceed the standards under section 303 of the CWA.[133]

The history of section 307 can be traced to 1984 when Congressman Nick Rahall (D. W.Va.), the author of the current version, first introduced a similar provision to the House.[134] Congressman Rahall commented at that time that the provision was "aimed at giving the coal industry an incentive to remine and reclaim abandoned coal mine lands."[135] In seeking support for his provision, he asserted that its intent was to counteract the disincentive that liability for preexisting discharges had, in the past, created.[136] The Congressman noted that "through the use of best professional judgment, an incentive will be provided to the applicant to remine abandoned mine sites."[137]

Contrary to Congressman Rahall's beliefs, the 1984 provision was not well received by environmentalists, and although the provision passed the House, it died when the 98th Congress adjourned.[138]

In 1985, Congressman Rahall again introduced remining legislation.[139] The 1985 provision was virtually identical to the provision finally adopted the following year. At that time, Congressman Rahall reiterated, verbatim, his remarks offered in support of the 1984 provision.[140] Again, the legislation was not enacted.

On October 26, 1986, Congressman Rahall again spoke in favor of the remining legislation stating that "[t]his coal remining provision will enable industry to enter abandoned coal mine sites

133. *Id.* § 1313.

134. 130 CONG. REC. H6909 (daily ed. June 26, 1984). *See also* Reed, *supra* note 3, § 8.05[2].

135. 130 CONG. REC. H6909 (daily ed. June 26, 1984).

136. Specifically, he stated that,

> Industry in many instances has not been prone to remine abandoned coal mine sites because it would then become liable for treating the preexisting discharges. Treating these discharges are [sic] often technically or economically infeasible, especially for the small coal operator.
>
> The provision on remining being offered today is intended to provide the incentive the industry needs to remine and reclaim abandoned coal mine sites.

Id.

137. *Id.* at H6910.

138. Reed, *supra* note 3, § 8.05[2][c].

139. 131 CONG. REC. H6038-39 (daily ed. July 23, 1985).

140. In addition to his remarks with respect to the provision governing remining, Rep. Rahall also commented upon a provision for funding cleanup of acid drainage. *Id.* at H6039.

and engage in mining under modified water quality standards on a case-by-case basis. The end result . . . will be the reclamation of the site."[141] This time the provision was enacted as part of the WQA, but that Act was vetoed by President Reagan.

Although Congressman Rahall did not speak in support of the bill when, on January 8, 1987, the House voted to override President Reagan's veto, two members did discuss this provision in the House prior to the vote. Congressman Howard (D. N.J.) briefly discussed the provision, asserting that,

> the amendment ensures careful analysis of environmental concerns by requiring an applicant to demonstate [sic] that the coal remining operation would result in the potential for improved water quality. The conferees specifically agreed to retain the phrase "potential for" so that applicants would not face the unreasonable burden of showing actual improvement in every instance.[142]

Finally, Congressman Clinger (D. Pa.) commented in support of the provision, stating:

> What this bill provides is that [an operator] will not be responsible for the entire cleanup, for reducing the pollution in that mine to zero, but [an operator] will be required to maintain the water quality at the same level. But the result will be, I am convinced, a massive amount of cleanup which otherwise will not occur in these old sites.[143]

IV. SECTION 307—APPLICATION

A. *Common Law*

As Congressmen Rahall and Clinger have asserted, section 307 is intended to preclude liability for cleaning up prior mining damage. However, this Act in no way limits liability for nuisance actions. Prior to the enactment of the WQA, state law nuisance claims were permitted under the CWA and nothing in the new Act changes this situation.

141. 132 CONG. REC. H10,935 (daily ed. Oct. 15, 1986). Rep. Clinger, who assisted Rep. Rahall, noted also that the provision would "allow a producer to go into an abandoned mine site to re-mine that coal and not assume the crushing liability for cleaning up the whole site." *Id.*

142. 133 CONG. REC. H171 (daily ed. Jan. 8, 1987).

143. *Id.* at H178.

In *City of Milwaukee v. Illinois*[144] and subsequent case law,[145] the Supreme Court of the United States has held that the CWA preempts federal common law nuisance.[146] Consequently, federal common law will not provide a remedy for mine drainage. However, as discussed, state common law nuisance can provide a remedy for intrastate pollution. Section 505 of the CWA expressly precludes preemption of state causes of action,[147] and the language of this section has been interpreted to preserve state common law actions.[148]

Consequently, section 307 does not protect against common law liability for creating or continuing a nuisance. Although compliance with the permit may be evidence that the activity is reasonable, under a claim of nuisance, reasonableness may not preclude liability for abatement.[149]

B. *Statutory Law*

1. Surface Mining Control and Reclamation Act

Section 307 does provide an effective remedy to preclude liability for violating the hydrology requirements under SMCRA. As one author commented prior to the enactment of the WQA, "[i]f the . . . Amendment were to become law, one of the biggest disincentives to remining reclamation, fear over perpetual postmining water treatment liability, would be significantly lessened."[150] However, section 307(4) specifically states that "nothing in this subsection shall affect the application of [SMCRA] to any coal remining operation."

144. 451 U.S. 304 (1981).

145. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (CWA preempts the federal common law of nuisance); New England Legal Foundation v. Costle, 666 F.2d 30 (2d Cir. 1981); United States v. Kin-Buc, Inc., 532 F. Supp. 699 (D.N.J. 1982). *See also* Note, *supra* note 24, at 196-199 & n.40 and cases cited therein. For a disscussion of earlier case law, see Annotation, *Right to Maintain Action to Enjoin Public Nuisance as Affected by Existence of Pollution Control Agency*, 60 A.L.R.3d 665 (1974).

146. Note, *supra* note 24, at 198.

147. Section 505 of the CWA provides that: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ." 33 U.S.C. § 1365(e) (1982).

148. Note, *supra* note 24, at 199 (citing Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 n.31 (1981)).

149. *See supra* note 43.

150. Reed, *supra* note 3, § 8.05[2][c].

a. The Problem

The implication of subsection (a) is that the 307(4) remining operator must still comply with many requirements under SMCRA. For example, after remining, the operator is still required "to restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to *any* mining . . ."[151] and to "[c]omplete backfilling with spoil material . . . to cover completely the highwall and return the site to the appropriate original contour."[152] Section 307 fails to address the reclamation requirements under SMCRA.

If, prior to "any" mining, the land was prime farm land, reclamation costs may override any incentive to remine. Returning the land to its "appropriate original contour," if determined from the time when mining was initially commenced, imposes too great a burden to justify remining.[153] A viable solution to promote remining requires legislation that would permit clarification and modification of the reclamation requirements under SMCRA. In this regard, section 307 falls short of its drafters goal of promoting remining.

b. The Solution

In an effort to promote remining, two states, Kentucky and Pennsylvania, have adopted legislation which modifies reclamation requirements.[154] The Kentucky statute requires the promulgation of regulations that provide for special permits for remining. According to the statute, the permits may vary not only water quality requirements "where there are preexisting discharges resulting from previous mining," but also revegetation, topsoil, bonding, premining data collection requirements and any "other provisions which may encourage remining."[155] In 1986

151. 30 U.S.C. § 1265(b)(2) (1982) (emphasis added).

152. *Id.* § 1265(d)(2).

153. *See supra* text accompanying notes 85-89.

154. KY. REV. STAT. ANN. § 350.075 (Baldwin 1986); PA. STAT. ANN. tit. 52, § 1396.4f (Purdon Supp. 1987). Wyoming has adopted regulations in an effort to promote remining. Wyoming Surface Mining and Reclamation Rules, ch. 5.7. SMCRA permits states to adopt programs to obtain primary jurisdiction over the regulation of surface mine reclamation. 30 U.S.C. § 1253 (1982). To obtain primary jurisdiction or "primacy" the state must submit its program to the Secretary of the Interior for approval. *Id.* Approval transfers to the state independent responsibility for regulating mining and reclamation; "the federal agency would exercise only oversight authority." Comment, *supra* note 12, at 523.

155. KY. REV. STAT. ANN. § 350.075(1) (Baldwin 1986).

regulations were promulgated, modifying backfilling and grading requirements.[156] Although the regulations require some backfilling and grading, the standard is based upon promoting stability and limiting harm to the public welfare and the environment, not upon the contour and use of the land prior to any mining operations.

The Pennsylvania statute[157] is even more comprehensive and provides a foundation from which a viable solution to encourage remining can be developed. The statute permits an operator who proposes to remine an area to request "special authorization" from the DER to conduct mining activities.[158] The DER will grant special authorization if the authorization is part of a general mining permit[159] or a permit revision. The authorization under a permit revision is only granted if the operator affirmatively demonstrates that:

> (A) the operator has discovered pollutional discharges within the permit area that came into existence after its permit application was approved;
>
> (B) the operator has not caused or contributed to the pollutional discharges;

156. 405 KY. ADMIN. REGS. 16:190.7, 18:190.5 (1986). Regulation 16:190.7 modifies a number of definitions for remining operations and provides in pertinent part:

> (3) Variances to backfilling and grading requirements for remining operations. The requirements within . . . this regulation to completely eliminate highwalls shall apply to remining operations, except for situations in which the volume of all reasonably available spoil is demonstrated, to the satisfaction of the cabinet in the permit application, to be insufficient to completely backfill and eliminate the pre-existing or modified highwall. The highwall shall be eliminated to the maximum extent technically practicable in accordance with the following criteria:
>
> (a) All reasonably available spoil shall be used to backfill the area.
>
> (b) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability . . . .
>
> . . .
>
> (d) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The permittee shall demonstrate, to the satisfaction of the cabinet in the permit application, that the postmining highwall remnant will be stable. . . .
>
> (e) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbance will cause instability of the remaining spoil or otherwise increase the hazard to the public health or safety or the environment.

157. PA. STAT. ANN. tit. 52, § 1396.4f (Purdon Supp. 1987).

158. *Id.* § 1396.4f(a). See 25 PA. ADMIN. CODE § 88.504 (Shepard's 1985) for specific requirements to apply for special authorization.

159. Before any person can proceed to mine minerals by surface mining in Pennsylvania, he or she must apply to the DER for a permit. PA. STAT. ANN. tit. 52, § 1396.4f(a) (Purdon Supp. 1987).

(C) the proposed pollution abatement area is not hydrologically connected to any area where surface mining activities have been conducted pursuant to the permit;

(D) the operator has not affected the proposed pollution abatement area by surface mining activities; and

(E) the [DER] has not granted a bonding authorization and mining approval for the area.[160]

The statute calls for modification of water quality treatment requirements,[161] bond release provisions[162] and reclamation requirements.[163] In addition, the statute provides a monetary incentive for the operator granted special authorization by crediting to the bond amount required to be posted by the operator any funds paid into the SMCRA fund "as a result of a prior forfeiture of the area."[164] The area is also exempted from permit reclamation fees.[165]

Like the Kentucky regulations, the Pennsylvania statute provides not only an incentive for cleanup by modifying reclamation requirements, but also assurance that some cleanup will occur. In particular, the Pennsylvania statute requires that the operator granted special authorization: (1) implement the approved water quality and quantity monitoring program for the pollution abatement area, (2) implement the approved abatement plan, (3) notify the DER immediately prior to the completion of each step of the abatement plan and (4) provide progress reports to the DER within 30 days after the completion of each step of the abatement program.[166]

Although Congressmen Rahall and Clinger were correct in stating that section 307 of the WQA does limit liability for preexist-

160. *Id.* § 1396.4f(b)(2). The statute sets forth additional requirements which the operator must satisfy before the special authorization will be granted, including proof that neither the operator, nor any officer, principal shareholder, agent, partner, associate, parent corporation, contractor or subcontractor or any related party has any legal responsibility for treating the pollutional discharges. *Id.* § 1396.4f(c)(1).

161. *Id.*, § 1396.4f(f), (g).

162. *Id.* § 1396.4f(i).

163. *Id.* § 1396.4f(j), which provides:

For reclamation plans approved as part of a grant of special authorization under this section, the standard of success for revegetation shall be, as a minimum, the establishment of ground cover of living plants not less than can be supported by the best available topsoil or other suitable material in the reaffected area, shall not be less than the ground cover existing before disturbance, and shall be adequate to control erosion . . . .

164. *Id.* § 1396.4f(k).

165. *Id.*

166. *Id.* § 1396.4f(e).

ing drainage problems under the CWA and SMCRA, other requirements under SMCRA that can impose considerable costs for cleanup cannot be ignored. The Kentucky and Pennsylvania legislatures have attempted to address many of the other requirements imposed under SMCRA to encourage remining, while monitoring the remining operations to ensure that some cleanup does occur. The next step is for Congress to follow this example. Alone, section 307 does not provide the necessary incentives to encourage remining, and a blanket statement that section 307 eliminates all liability is simply not correct.

2. Clean Water Act

Although section 307 does not preclude all liability, it does provide a step in the right direction to limit liability for preexisting acid mine drainage. Moreover, as stated earlier, acid mine drainage from nonpoint sources has not been regulated effectively. The WQA also contains a new program for nonpoint source management.[167]

According to the drafters, central to section 307's effectiveness in providing an incentive to remine is that no showing of actual improvement is required. Although remining will lead to some abatement, it is peculiar that the section requires no evidence of improvement in water quality, only evidence of the "potential" for improvement. The objective is to provide incentives for remining, but underlying this objective is the goal that proper remining will lead to abatement of environmental hazards. Modifying the permit requirements, in addition to providing some incentive or requirement to improve water quality, would have achieved both of these goals.

3. Comprehensive Environmental Response, Compensation, and Liability Act

Section 307 also does not preclude possible liability under CERCLA. Admittedly, modifications of obligations under CERCLA are normally not made under the CWA. The point, however, is that in this regard, too, section 307 is limited in scope.

In addition, a few commentators have argued recently that federal common law liability should not be precluded under CER-

167. Water Quality Act of 1987, § 316, Pub. L. No. 100-4, 101 Stat. 7, 52-61 (1987).

CLA.[168] The basis for this argument is that unlike the CWA, CERCLA has a broad savings clause preserving remedies under federal and state law.[169] The implication here is that with the recent holding in *Eagle-Picher*,[170] owner and operator liability under CERCLA for cleanup of mining sites is even more likely.

V. CONCLUSION

Operators who want to mine abandoned mine areas may expose themselves to substantial liability. This potential liability constitutes an enormous disincentive to remining. Although the drafters of section 307 of the WQA recognized this problem, they did not provide a comprehensive solution. While section 307 does limit liability under the CWA, liability imposed under other areas of the law must be addressed.

Moreover, in their effort to provide an incentive for remining, the drafters of section 307 failed to provide a mechanism to ensure that some cleanup does occur. Most likely, as stated, proper remining will lead to abatement. Whether failing to provide a requirement for at least some improvement will open an escape hatch, permitting careless remining, remains to be seen. The gamble will have been worth the risk if some improvement in water quality is achieved.

168. *See, e.g.*, Note, *supra* note 16, at 995-1002; Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157, 1180-82 (1982).

169. 42 U.S.C. § 9652(d) (1982).

170. Eagle-Picher Indus., Inc. v. United States, 759 F.2d 922 (D.C. Cir. 1985). *See supra* text accompanying notes 118-26.