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Stefan R. Hughes
University of Kentucky

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STEFAN R. HUGHES*

INTRODUCTION

On August 3, 1977 Congress and President Jimmy Carter enacted a set of laws that was not only vetoed twice by President Gerald Ford[1] but was unwelcome by the surface mining industry at large.[2] The bill, H.R. 2, more commonly known as the Surface Mining Control and Reclamation Act (SMCRA),[3] sought to prevent further degradation of the surface of lands and to correct the past destruction from surface mining. Congress intended SMCRA to cover a wide range of environmental effects of surface mining.[4]

Since Congress did not define the words "surface" or "mining" in the Surface Mining Control and Reclamation Act (hereinafter SMCRA),[5] the definition of surface mining as to its scope

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* Senior staff member, JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW; J.D., University of Kentucky, Class of 1993. B.A., Transylvania University, 1990.

[1] John D. Edgcomb, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 311 (1983).

[2] *Id.* at 299-300.

[3] Surface Mining Control and Reclamation Act of 1977 [hereinafter cited as SMCRA], Pub. L. No. 95-87, §§ 101-908, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201-1328).

[4] SMCRA § 101(c), 30 U.S.C. § 1201(c) (1988) provides:

> many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property[,] by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

[5] SMCRA § 101(c)-908, 30 U.S.C. §§ 1201-1328 (1988).

has been a debated issue. Considering the continual advancements in mining technology and the diverse geography, topography, and geology of the United States, surface mining may take the form of several seemingly unrelated techniques.

When confronted with mining techniques on or below the earth, the word "surface" requires closer scrutiny. Only a few cases have attempted to apply SMCRA to the dredging of coal, a form of underwater excavation.[6] Coal dredging recovers coal that has been carried through the waterways and eventually deposited on the bottoms of streams, rivers, or lakes.[7] This Comment reviews the surface mining definition under SMCRA and demonstrates how coal dredging fits into that framework.

I. *CUMBERLAND RECLAMATION CO. V. SECRETARY, U.S. DEPT. OF INTERIOR*

A recent case dealing with this issue was *Cumberland Reclamation Company v. Secretary, United States Department of the Interior*.[8] Cumberland conducted a dredging operation beginning in 1982 on the Cumberland River in Knox County, Kentucky. The operation consisted of a floating barge with a dredge pump, a device which pumps water and solid wastes from the riverbed and separates the coal from the other materials. The excavation conducted by Cumberland's dredge did not penetrate into the riverbed, but vacuumed tons of river sediment.[9]

In 1985, after Cumberland had been operating three years, the Office of Surface Mining Reclamation and Enforcement (OSMRE) from its field office in Lexington, Kentucky notified Cumberland that since its facility fell within the scope of SMCRA, the company owed reclamation fees. Cumberland disagreed and appealed to the U.S. Department of the Interior Board of Land Appeals (IBLA) that affirmed the OSMRE decision. The dredging company then appealed to the United States District Court for the Eastern District of Kentucky, which affirmed the IBLA decision and assessed reclamation

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[6] Cumberland Reclamation Co. v. Secretary, United States Dept. of Interior, 925 F.2d 164 (6th Cir. 1991); United States v. H.G.D. & J. Mining Co., 561 F.Supp. 315 (S.D. W.Va. 1983); Brentwood, Inc., 90 I.D. 421 (1983).

[7] *Brentwood*, 90 I.D. at 422-23.

[8] *Cumberland Reclamation*, 925 F.2d at 164.

[9] *Id.* at 165-167.

fees,[10] interest, and penalties of $13,338.45.[11]

The Court of Appeals for the Sixth Circuit reviewed the case[12] pursuant to the "substantial evidence" standard set forth in the Administrative Procedure Act.[13] Cumberland argued on appeal that its operation did not correspond to the definition of surface mining under SMCRA.[14] The reclamation fees assessed under section 1232(a) apply only to coal operators subject to the provisions of the Act.[15] Cumberland asserted its work was below the surface of the water and not an activity on the surface of the lands, and thus did not qualify as a surface mining operation under SMCRA.

Cumberland's particular activities did not penetrate the riverbed.[16] The legislative history and statutory language of SMCRA, however, along with relevant case law, cut against Cumberland's argument.

II. APPLYING THE SURFACE MINING CONTROL AND RECLAMATION ACT TO COAL DREDGING

Important in the consideration of applying SMCRA to this set of facts is the Act's general purpose. In the statute's findings and policy, Congress demonstrates that it considered a broad range of environmental, social, and economic factors when it decided to regulate surface mining.[17] The reclamation fees collected under section 1232 go to the abandoned mine reclamation fund established under 30 U.S.C 1231.[18] The funds under sub-

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[10] SMCRA § 402(a), 30 U.S.C. § 1232(a) (1988) provides:

> All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, . . . (emphasis added).

[11] *Cumberland Reclamation*, 925 F.2d at 165.

[12] *Id.* at 164.

[13] 5 U.S.C. § 706(2)(E) (1988). Generally, substantial evidence is the quality of evidence for a court to affirm an administrative agency's decision based upon whether a reasonable mind could come to such a conclusion.

[14] *Cumberland Reclamation*, 925 F.2d at 166.

[15] SMCRA § 402(a), 30 U.S.C. § 1232(a) (1988).

[16] *Cumberland Reclamation*, 925 at 169 (the court refused affidavits concerning this issue, but said that they would not have changed the ruling).

[17] SMCRA § 101, 30 U.S.C. § 1201 (1988).

[18] SMCRA § 401(c)(1), 30 U.S.C. § 1231(c)(1)(amended 1990) provides in part:

> Use. Moneys in the fund may be used for the following purposes: (1) reclamation and restoration of land and water resources adversely affected by past coal mining . . . .

section (c) are to reclaim and restore those land and water resources damaged by previous mining.[19] In coal dredging, even if the activity does not upset the riverbed, resedimentation is a result.

Congress stated its concern for water damage in the statute; the disturbance need not be limited to hard earth damage.[20] Water quality was an important goal for Congress since no states before 1977 conducted water sampling or hydrologic testing in relation to the consequences of mining.[21] A comment from the legislative history states "[t]he impact of coal mining on water resources has been well documented. A number of studies provide insight into potential water resource impacts of mining . . ."[22] and "the bill sets attainable standards to protect the hydrologic balance of impacted areas within the limits of feasibility."[23]

The most important statutory language relied on in Cumberland Reclamation is the definition of surface mining appearing in section 1291(28).[24] Broad in its scope, the language lists several

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[19] SMCRA § 401(c), 30 U.S.C. § 1231(c) (1988).

[20] SMCRA § 101(c), 30 U.S.C. § 1201(c) (1988); SMCRA § 401(c)(1), 30 U.S.C. § 1231(c)(1) (1988).

[21] Edgcomb, *supra* note 1, at 299.

[22] H.R. REP. No. 281, 95th, 1st. Sess., 1977, reprinted in 1977 U.S.C.C.A.N. 593, 643.

[23] *Id.*

[24] SMCRA § 701(28), 30 U.S.C. § 1291(28) provides:

"*surface coal mining operations*" means-

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 1262 of this title; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the contruction of new roads or the improvement or use of existing

mining processes. Cumberland argued since dredging is absent from the list, Congress did not intend dredging to be regulated as surface mining; therefore section 1232 reclamation fees would not apply to Cumberland's type of operation.[25] Section 1291 uses the word "including", which under statutory construction is interpreted as illustrative, not inclusive.[26] Hence, arguing that the definition of surface mining is limited ignores the statutory language. The statute broadly states that "[s]uch activities include excavation for the purpose of obtaining coal . . . ."[27] Since dredging is a form of excavation that occurs underwater, the statute's broad language does not exclude this type of coal recovery.[28]

SMCRA allows exemptions to certain surface mining operations. Under 30 U.S.C. 1278[29] and 30 U.S.C. 1291(28)(A),[30] for example, the Act specifically enumerates the activities to which SMCRA does not apply. Two exclusions under section 1278 are the private landowner mining for noncommercial use and the incidental extraction of coal from federal, state, or local regulated construction.[31] However, Cumberland used the two acre rule,[32] a *de minimis* exception which Congress deleted in 1987, but still applies to reclamation fees assessed before 1987.[33] The rule states that surface mining for commercial purposes affecting

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roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, faciltities, or other property or materials on the surface, resulting from or incident to such activities; and . . .

[25] *Cumberland Reclamation*, 925 F.2d at 166. The dissent agrees with this argument of using strict statutory construction. *Id.* at 169.

[26] *Brentwood*, 90 I.D. at 423.

[27] SMCRA § 701(28), 30 U.S.C. § 1291(28).

[28] *Id.*

[29] SMCRA § 528, 30 U.S.C. § 1278 (1988) (amended 1987) provides in full:

Surface mining operations not subject to this chapter

The provisions of this chapter shall not apply to any of the following activities:

(1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him; and

(2) the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority.

[30] SMCRA § 701(28), 30 U.S.C. § 1291(28).

[31] SMCRA § 528, 30 U.S.C. § 1278 (1988).

[32] *Cumberland Reclamation*, 925 F.2d at 167.

[33] SMCRA § 528, 30 U.S.C. § 1278 (1988).

two acres or less is exempt from SMCRA.[34] According to the court, Cumberland failed to carry its burden of proof to fall under the exemption because it "never substantiated its assertions."[35]

The third exclusion found in the last sentence of section 1291(28)(A) deals with the incidental removal of coal during the extraction of other minerals. If the coal does not exceed 16 2/3 % of the total tonnage of minerals for commercial use or sale then, for purposes of the statute, the activity is not considered a surface mining operation.[36] Cumberland asserted it produced 88% per cent sand and 12% coal.[37] Since Cumberland's affidavit covered only volume of production and not value of sales, Cumberland also failed to carry the burden of proof on this exception to fees.[38]

III. CASES DEALING WITH COAL DREDGING

Two other cases have struggled with the definition of surface mining under SMCRA and the problem of including coal dredging in that definition: *United States v. H.G.D. & J. Mining Co.*[39] and *Brentwood, Inc.*[40] In both cases, the Secretary of the Interior deemed the dredging activities to be surface mining operations under SMCRA.[41]

A. United States v. H.G.D. & J. Mining Co.

In *H.G.D. & J. Mining* the court said that "the term 'surface lands,' as used in the Act, clearly means the surface of the earth, including the waters thereon."[42] Nevertheless, *H.G.D. & J. Min-*

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[34] *Id.*

[35] *Cumberland Reclamation*, 925 F.2d 167-168. Clarification is needed because the District Court found that "Cumberland did not substantiate its assertions by submitting facts to the IBLA, and thus the summary proceedings by IBLA was proper." The Court of Appeals agreed with this conclusion. *Id.*

[36] SMCRA § 701(28), 30 U.S.C. § 1291(28)(A). *See supra* note 22 and accompanying text.

[37] *Cumberland Reclamation*, 925 F.2d at 167.

[38] *Id.* at 168. The IBLA explained that Cumberland could have easily calculated the amount removed for commercial sale. *Id.*

[39] *United States v. H.G.D. & J. Mining*, 561 F.Supp. 315 (S.D.W.Va. 1983).

[40] *Brentwood*, 90 I.D. at 421.

[41] *H.D.G. & J. Mining*, 561 F.Supp. at 323; *Brentwood*, 90 I.D. at 424.

[42] *H.G.D. & J. Mining*, 561 F.Supp. at 323. This definition distinguishes surface coal mining operations from underground mining. *Id.*

ing is distinguishable from *Cumberland Reclamation* in the type of dredging operations conducted. H.G.D. & J. cut into the river bottom a depth of approximately fifteen feet and a width of two hundred yards.[43] Cumberland asserted that its operation did not disturb the surface of the river bottom.[44] The courts in both cases point to the broad language in the statute's definition of surface mining that includes related activities such as coal processing or preparation, loading, and *in situ* distillation,[45] activities which do not necessarily cut into the earth's surface. Distinguishing Cumberland's dredging from H.G.D.& J.'s dredging thus does nothing in limiting SMCRA's definition of surface mining.

The court in *H.G.D. & J. Mining* draws two further conclusions on coal dredging. First, the court points out that according to the regulations promulgated by the Secretary of the Interior,[46] the coal recovered from an activity like dredging is reclaimed coal.[47] Reclaimed coal is not in its original deposit. Dredging recovers coal not naturally occurring, but coal washed upstream from loading docks, mining operations, abandoned coal mines or exposed coal seams.[48] The regulations further state "[r]eclaimed coal operations are considered to be surface coal mining operations for fee liability and calculation purposes."[49]

A policy reason for this stance on reclaimed coal may be to internalize the costs to the environment.[50] While the original

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[43] *Id.* at 316. This cut in the river bottom captured the coal that escaped from "loading or mining operations, abandoned coal mines or exposed coal seams." *Id.* at 316.

[44] Cumberland argued that their activity "does not penetrate into the natural river bottom but only vacuums sedimentary material which lies on the river bottom." *Cumberland Reclamation*, 925 F.2d at 167.

[45] *Id.* at 318; *Cumberland Reclamation*, 925 F.2d at 169; *See id.* at 169 (Wellford, J. dissenting); *H.G.D. & J. Mining*, 561 F.Supp. at 318.

[46] 30 C.F.R. § 870.5 (1991); 30 U.S.C. § 1211(c)(2) gives the Secretary of the Interior the power to enact rules and regulations that enhance the provisions of the SMCRA.

[47] *H.G.D. & J. Mining*, 561 F.Supp. at 324.

[48] *Id.*

[49] 30 C.F.R. § 870.5 (1991) provides:

> Reclaimed coal means coal recovered from a deposit that is not in its original geological location, such as refuse piles or culm banks or retaining dams and ponds that are or have been used during the mining or preparation process, and stream coal deposits. Reclaimed coal operations are considered to be surface mining operations for fee liability and calculation purposes.

[50] Edgcomb, *supra* note 1, at 312. The court held, "The SMCRA places the

mining operator did not pay a reclamation fee on the lost coal, environmental harm, i.e., despoiling of the lands, still occurred. By forcing those who recover previously mined coal to pay the lost reclamation fees, SMCRA internalizes into the market the external benefits (selling surface mined coal with no reclamation fees ever assessed in a market with other surface mined coal having fees assessed) and the external costs (a damaged environment from the original excavation). Such an argument meshes well with one of the Act's purposes discussed earlier—namely, to correct present and past harms from mining.[51]

The second analysis compares coal dredging with placer mining. Both types of mining operations are similar. Placer mining involves the use of dredges to recover heavy metals, usually gold and tin-bearing minerals, from gravel areas in alluvial or marine areas.[52] The metals recovered are much like reclaimed coal, i.e., they are not in their original geological location, but were eroded and sent upstream where they become deposited among sand and gravel.[53] The placer mining process of metal recovery is similar to what happens to coal in the coal dredging process. Placer mining is also established by definition as a surface mining activity. The court relied on one engineering publication that stated placer mining using dredges was a surface mining activity.[54]

B. Brentwood, Inc.

Brentwood is similar to *Cumberland Reclamation* in the type of dredging involved. Brentwood, Inc. had not begun mining activities, instead, its appeal dealt with a rejection of its application for a coal lease from the Bureau of Land Management (BLM).[55] Brentwood sought to mine the Cumberland River and Cumberland Lake inside the Daniel Boone National Forest with a floating dredge and tipple operation that would not cut into

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environmental and aesthetic cost of surface mining on the most deserving, the mining industry and its customers." *Id.*

[51] 30 U.S.C. § 1231(c)(1) (1988).

[52] *H.G.D. & J. Mining*, 561 F.Supp. at 321.

[53] *Id.* at 320-21. *See also* Reynolds v. Iron Silver Mining Co., 116 U.S. 687, 695 (1986); Gregory v. Pershbaker, 14 P. 401, 402 (Cal. 1887).

[54] *Id.* at 321, n.8 (relying on Society of Mining Engineers of the American Institute of Mining, Metallurgical, and Petroleum Engineers, Inc., *Surface Mining*, at 4 (1st Ed., 1968)).

[55] *Brentwood*, 90 I.D. at 422.

the river or lake bottom.[56] The Secretary of the Interior issues leases allowing surface coal mining within a national forest only upon the satisfaction of certain criteria.[57]

Brentwood claimed its planned activities were not surface mining and the process was "clean" and environmentally safe.[58] Similarly, Cumberland's operation did not disturb the river bottom, yet was still considered a surface mining operation under SMCRA.[59] The Interior Board of Land Appeals (IBLA) stated that SMCRA's definition of surface mining was inclusive enough for dredging to be within the Act's grasp.[60] The Board also quoted a Senate Report from SMCRA's legislative history that specifically says that the Senate contemplated dredging to be a surface mining activity.[61] With clear legislative intent and statutory language, the IBLA rejected Brentwood's application for a coal mining lease in the national forest.

C. Kanawha Dredging and Minerals Co., Ltd. v. United States

Another case, *Kanawha Dredging and Minerals Co., Ltd. v. United States*, applied the Internal Revenue Code definition of surface mining to coal dredging.[62] The district court in *Kanawha*, using 26 U.S.C. 4121, which imposes the Black Lung Excise Tax on surface mining operations, decided that coal dredging, as applied to the federal tax code, is not surface mining under that statute.[63] The statute requires that the geological material above the coal be completely removed.[64] In coal dredging the only

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[56] Brentwood contended that they wanted to recover coal that had been transported by the rivers and streams and then settled on the lake's bottom. *Id.*

[57] *Id.* Leases must be approved by the Department of Agriculture. Brentwood must also meet certain guidelines under the SMCRA and 43 C.F.R. § 3461(a)(2)(1). *Id.*

[58] *Id.* The process consisted of pumping the coal to the surface, separating it from the water, and returning it. *Id.*

[59] *See supra* note 45 and accompanying text.

[60] *Id.* at 423-24 (relying on *H.G.D. & J. Mining Co.*, 561 F.Supp. 315).

[61] *Id.* at 424 (citing S. REP. No. 128, 1st Sess. 98 (1977); S.REP. No. 28, 94th Cong., 1st Sess. 224 (1975); S.REP. No. 402, 93rd Cong., 1st Sess. 74 (1973)). Congress used the House version of the Bill.

[62] Kanawha Dredging and Minerals Co., Ltd., v. U.S., 1987 U.S. Dist. LEXIS 15144 (S.D. W.Va. Dec. 1, 1987). In 1985, the IRS assessed Kanawha Dredging with a Black Lung Excise Tax, interest and penalties pursuant to 26 U.S.C. § 4121 of the Internal Revenue Code. The basis of the tax was that Kanawha Dredging participated in a surface mining operation. *Id.* at 1-2.

[63] 26 U.S.C. § 4121 (I.R.C.) (1981).

[64] *Kanawha Dredging*, 1987 U.S. Dist. LEXIS 15144, at *5 (citing I.R.C. § 4121(d)(1)).

significant thing above the coal is water. The court also considered the nature of the activity, which does not present a meaningful danger of the operation's employees contracting black lung disease.[65] The different policies operating behind the Internal Revenue Code and SMCRA help explain the divergent holding of *Kanawha Dredging*.

IV. RELATED APPLICATIONS OF SMCRA'S DEFINITION OF SURFACE COAL MINING

Subsequent applications of the surface mining definition under SMCRA further demonstrate its breadth. The Department of the Interior, using 30 U.S.C. §1291(28)[66] and 30 C.F.R. §870.5,[67] has applied SMCRA to such things as refuse piles, stockpiles, anthracite silt, and culm banks all that have been deemed surface mining operations for the assessment of reclamation fees. The use of SMCRA in each of these activities may help develop an understanding of SMCRA's application to coal dredging. The following cases deal with reclaimed coal,[68] the same type of coal recovered in dredging operations such as *Cumberland*'s which was described earlier.

A. Refuse Piles

In *United States v. Kennedy*, appellant Kennedy bought property that contained an abandoned mine, some buildings, and a sizeable refuse or "gob" pile that was composed of material technically classed as coal.[69] Kennedy planned to construct a shopping center on the property, and decided to move the pile away. Using standard earthmoving equipment, Kennedy loaded the refuse into trucks without cutting into the earth and sold the burnable material to a power company.[70]

The court faced the issue of whether Kennedy's activities constituted a surface coal mining operation as defined in section

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[65] *Id.* at *6.

[66] *See supra* note 24 and accompanying text.

[67] *See supra* note 49 and accompanying text.

[68] *See generally* United States v. Tri-No Enterprises, Inc., 819 F.2d 154 (7th Cir. 1987); United States v. Kennedy, 806 F.2d 111 (7th Cir. 1985); United States v. Devil's Hole, Inc., 747 F.2d 895 (3d Cir. 1984); Ginter Coal Co. v. Environmental Hearing Board, 9 Pa. Commw. 263 (1973).

[69] *Kennedy*, 806 F.2d at 112. "Technically classed as coal" means that the substance is at least fifty percent carbonaceous matter. *Id.*

[70] *Id.*

1291(28) of SMCRA. If so, the appellant would be liable for reclamation fees.

Under the Act, Congress authorized the Secretary of the Interior to promulgate rules and regulations necessary for carrying out the provisions of SMCRA.[71] The Secretary has stated in the regulations that reclaimed coal operations are surface mining; these regulations also specifically include refuse piles as reclaimed coal.[72]

Kennedy argued that his operation did not harm the environment, asserting that the Secretary extended the definition of surface mining in the regulations beyond what Congress intended in the statute.[73] However, the court reasoned that because Congress specifically allowed the Secretary to promulgate regulations, then it must only be consistent with the statute's purpose.[74] Since Congress wished to correct the past effects of surface mining on the environment, reclaimed coal cannot escape unassessed. Producers and users of the coal must bear the costs, and Kennedy's coal should not enter the market without contributing to the coal reclamation fund. Considering the broad purpose of SMCRA, the court held Kennedy liable for fees upon moving and selling the refuse pile.[75]

B. Stockpiles

In another case, *United States v. Tri-No Enterprises, Inc.*, the court again upheld the Secretary's definition of surface mining.[76] Tri-No bought land from a coal company that contained a large stockpile of coal and commenced removing it. The excavations of Tri-No did not disturb the surface of the land nor was the coal treated or processed in any way.[77] Nevertheless, the government deemed the operation to be surface mining and assessed reclamation fees.

Tri-No claimed that its activities were not surface mining,[78] despite the specific listing of stockpiles in section 1291(28)(B).[79]

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[71] 30 U.S.C. § 1211(c)(2) (1988).
[72] 30 C.F.R. § 870.5 (1988).
[73] *Kennedy*, 806 F.2d at 113.
[74] *Id.*
[75] *Id.* at 114.
[76] 819 F.2d 154 (7th Cir. 1987).
[77] *Id.* at 156.
[78] *Id.*
[79] *See supra* note 22.

Tri-No also asserted that its activities caused no harm to the environment and that removal of large piles of coal mitigates harm to the surrounding land and begins the reclamation process.[80] The court used a similar rationale as used in Kennedy, which stated the purpose of SMCRA was to remedy the past harms of mining activities. Once again, the court noted the ultimate cost of reclamation cannot be escaped and must be borne by producers and eventually consumers.[81]

C. *Anthracite Silt*

Another case dealing with reclaimed coal in the form of anthracite silt upheld the Secretary's broad definition of surface mining in the regulation. In *U.S. v. Devil's Hole, Inc.*,[82] for example, the Court of Appeals for the Third Circuit heard primarily two arguments from Devil's Hole.

First, the company argued that anthracite silt is not coal, and thus its activity is not a surface mining operation.[83] Anthracite silt forms when anthracite coal is washed and the mixture of water and waste is held in silt dams. Over the years the water evaporates, leaving behind dried anthracite silt. Devil's Hole recovered the dried, combustible material on its property and sold it to a power company. Relying on expert testimony, the court decided that anthracite silt was coal.[84]

Second, Devil's Hole argued the government should encourage environmentally desirable activity rather than assessing reclamation fees.[85] Devil's Hole argued this bias for activities less damaging to the environment was already in the statute. The fee assessed on surface mining is thirty-five cents per ton of coal, and the fee assessed on underground mining with surface effects is only fifteen cents.[86] Devil's Hole argued the difference arises because surface mining has more detrimental effect on the environment than underground mining with surface effects, and consequently surface mining pays higher fees. Based on this

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[80] *Tri-No*, 819 F.2d at 157.

[81] *Id.* (In dictum, the court also recognized that the regulations and subsequent fees may make removal of refuse piles or stockpiles, which is beneficial to the environment, unprofitable).

[82] 747 F.2d 895 (3d Cir. 1984).

[83] *Id.* at 897.

[84] *Id.*

[85] *Id.* at 898.

[86] 30 U.S.C. § 1232 (a) (1988).

difference and the implication of an environmental rationale, Devil's Hole asserted that since its operation was environmentally desirable, it should not be assessed fees.[87]

The court held that the Congressional intent with regard to the divergence in fee rates was not based on environmental effects, but the high economic and social costs involved in underground mining.[88] With equivalent fees, coal mined underground would not be competitive with coal mined from the surface of the lands. The court further held that the Secretary assessed these particular fees not to prevent present and future harm, but to correct past environmental harms from coal mining.[89]

D. Culm Banks

Culm banks further demonstrate the scope of the surface mining definition. Before the passage of SMCRA, Pennsylvania state courts considered whether the recovery of coal from culm banks constituted surface mining, which, if so, would require the operation to seek a mining permit. In *Ginter Coal Co. v. Environmental Hearing Board*,[90] the Commonwealth Court of Pennsylvania, applying a state reclamation statute[91] similar to the federal SMCRA,[92] found the activity to be within the definition of surface mining. The culm banks in question were residual waste or slack from anthracite coal mining operations over several years. The statute specifically describes surface mining to include minerals recovered from waste or stockpiles, an activity similar to Ginter's operation.[93]

Ginter also argued the policy effect of requiring permits for the excavation of reclaimed coal, noting that the type of activity that it conducted along with certain other surface mines has a long-term beneficial impact on the environment. Rather than encouraging the removal and initiating reclamation, the court recognized the government is discouraging the recovery of culm banks.[94] The court acknowledged the effect, but stated that it

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[87] *Devil's Hole*, 747 F.2d at 898.
[88] *Id.* at 898.
[89] *Id.*
[90] *Ginter*, 9 Pa. Commw. 263.
[91] 52 Pa. Cons. Stat. Ann. §§ 1396.1-1396.21 (West 1966 & Supp. 1992).
[92] 30 U.S.C. § 1201 et seq. (1988).
[93] *Ginter*, 9 Pa. Commw. at 264.
[94] *See Id.* at 267.

must carry out the plain language of the legislation, which was to require permitting.[95] Ginter's arguments failed, its operation was considered surface mining, and it consequently had to apply for a permit.

CONCLUSION

The definition of surface mining coal operations found in SMCRA is broad in its scope,[96] just as the purpose of SMCRA is expansive in its concerns for the environment.[97] The language used in the Act, "surface of the lands," arguably applies also to the surface of waters, and if not to the surface of waters, at least to the surface of stream, river, or lake bottoms. To correct past harms and prevent future harms to the environment, SMCRA must be flexible enough to apply to a wide range of mining activities in order to accomplish its wide-reaching statutory purpose.

Coal dredging cases have adopted a broad definition of surface coal mining operation. The court in *Cumberland Reclamation*, relying heavily on *H.G.D. & J. Mining*,[98] and *Brentwood*,[99] decided that the absence of digging or cuts into the riverbed (no damage to the environment) was of no consequence when deciding whether SMCRA applied.[100] The test does not seem to hinge upon the operation affecting environmental damage. Instead, courts look at activities and areas listed in the statute and apply those to coal dredging. Courts deciding the three dredging cases also emphasized SMCRA's correction of past mining harms, instead of the prevention of future mining damage.

The coal recovered using dredging techniques is reclaimed coal, which is a class of coal regulated under SMCRA[101] and the subject of several cases.[102] Under SMCRA, stockpiles, refuse piles, anthracite silt, and culm banks are all considered surface mining operations. Activities involved in the recovery of those

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[95] *Id.* at 268.
[96] 30 U.S.C. § 1291 (28) (1988).
[97] 30 U.S.C. § 1202(a) (1988).
[98] 561 F.Supp. 315.
[99] 90 I.D. 421.
[100] *Cumberland Reclamation*, 925 F.2d at 167.
[101] 30 C.F.R. 870.5 (1988).
[102] *See supra* note 68 and accompanying text.

types of coal often do not upset the land. An argument has been made that these activities are actually beneficial, and thus should not be assessed a reclamation fee. The argument ignores the fact that reclaimed coal was often derived from an activity damaging to the environment in the past. Allowing reclaimed coal to escape the assessment of fees would provide it an unfair competitive edge in the market with coal properly assessed a fee.

The dredging of coal, even without disturbing the surface of the lands, is just one of the sweeping range of activities falling into SMCRA's grasp. The statutory definition of surface coal mining, the regulatory definition of reclaimed coal, the relevant case law, and policy arguments place coal dredging squarely within the ambit of SMCRA.