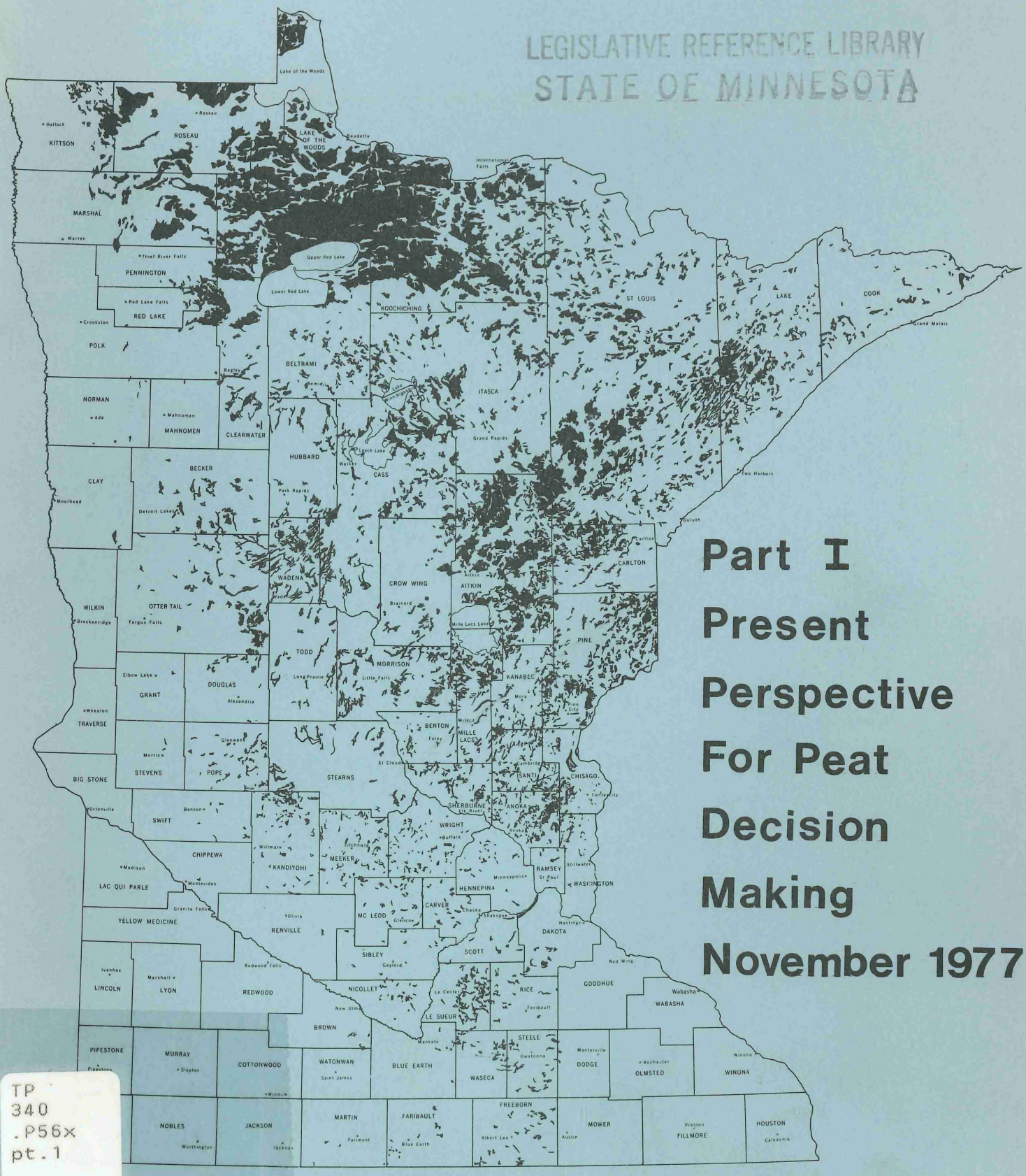
P OF PEAT AS A POWER PLANT FUEL



Part I
Present Perspective For Peat Decision Making
November 1977

TA DEPARTMENT OF NATURAL RESOURCES

STATE OF MINNESOTA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINERALS

POTENTIAL OF PEAT AS A POWER PLANT FUEL
PART I - PRESENT PERSPECTIVE FOR PEAT DECISION MAKING

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I. LCMR Work Plan

LCMR ENERGY RESEARCH: Potential of Peat as a Power Plant Fuel ML 75, Chapter 204, Subd. 10

On December 1, 1976, the Legislative Commission on Minnesota Resources approved the work program for a $29,670 project entitled "Potential of Peat as a Power Plant Fuel" as one of five submitted by the Minnesota Energy Agency on alternative energy sources. The Department of Natural Resources is the principal investigator on this two part project. Part I consists of gathering information relating to peatland leasing procedures and policies, the legal classifications of peat, alternatives to leasing, and the royalties charged for peat.

Part I--Alternative Procedures for Peat Decision Making.
This part of the project will attempt to provide answers to some questions pertinent to the manner in which State peatlands are made available for large-scale development.

Should leasing continue to be the mechanism by which the State-owned peat resources are made available to developers? Should leasing be supplemented or replaced entirely by another mechanism? Should the kind of mechanism be determined by the size and type of development? Presently, there are 3500 acres of State peatland leased for wild rice production and three leases approximating 4100 acres for horticultural peat production. Recently,

a private firm has made application for leasing 200,000 acres of State land for gasification of peat. Another company has made application for leasing 19,000 acres of State land and 7,000 acres of county land for horticultural peat production. These acreages are considerably larger in magnitude than any of the acreages of the active leases. Different types of development involve different units of measurement, as well as, different sizes of acreage and different types of peat. Horticultural production usually involves six cubic foot bales of sphagnum peat, whereas, direct-burning fuel or gasification development would involve tonnages of reed-sedge peat.

Should the State choose to develop peat under an alternative system to leasing? Since the State owns or administers approximately 90 percent of Minnesota's peatlands, it can direct the utilization of the resource in a way not possible for copper-nickel or iron ore. The State could choose to hire a private firm to manage the development of its peat resource, with the distribution of the final product controlled by the State. Or it could use this system for large-scale development only and continue to lease small acreages of peatland for horticultural peat and wild rice production. What would be the effect on peat revenues if an alternate system is utilized? Since the value and magnitude of the peat resource is great, prudent management of this resource is very important.

What will be the impacts on the environment and land use if new large-scale uses of peat such as direct burning, gasification, and some industrial uses are permitted to be developed? Since large-scale uses will be of a greater magnitude in terms of tonnages and acreages than existing uses of peat, environmental and land use concerns associated with these developments may be expected to be larger also. Should an operation plan including a reclamation plan be required prior to leasing? This would help in determining whether the mining or harvesting procedures would be consistent with environmental constraints. The reclamation plan might require a bonding compliance consistent with the development plan. Monitoring might be required to insure against air and water pollution and against improper land use. This type of information will help policy-makers determine the adequacy of present methods and help to provide a basis for making new policy to deal with this situation.

What kind of recognition should be given to the value and magnitude of the peat resource? A thorough reevaluation of the manner in which peatlands have been leased in the past will be helpful in providing a basis for a structure for the future use of the peat resource.

What is the legal definition or classification of peat in Minnesota? In other states? Is it a mineral? What are the federal legal definitions? Various land management groups in the federal government (Bureau of Land Management, Forest Service, etc.) use differing definitions of peat. What

are these definitions and how and why are they used? In some cases the classification of peat will determine how the revenue is distributed. For example, if peat is not a "mineral", the revenue from leases on tax forfeited lands goes to the county in which the peatland is located. However, if peat is a "mineral", the revenue from leases on tax forfeited lands is distributed as follows:

1) 20 percent to State general revenue
2) 80 percent to the appropriate county (the county's share is further subdivided as follows: 2/9 to the city, village, or town; 3/9 to the county; and 4/9 to the school district).

What are the land classifications used for ownership of State lands? How do the various classifications affect the DNR's ability to lease these lands? How are the revenues from these various leased areas distributed? This information will reveal some of the constraints involved. The information gathered from other states and the federal government will provide a partial perspective against which to gauge Minnesota's present system of leasing. However, Minnesota is probably the first state in the U.S.A. to deal with the problems of large-scale peatland development so existing information from other states and the federal government cannot be expected to completely satisfy our needs.

What are prudent charges for peatland rents and royalties? What is the basis for the figures used in Minnesota, in other states, in Canadian provinces, and in European countries? What do rents and royalties charged for

Minnesota peatlands mean to a peatland utilizer? What percent of production costs are composed of peatland rents and royalties (horticultural producers, wild rice farmers, etc.)? What are alternative methods for computing rents and royalties and how might these costs be periodically updated to reflect the changes in the economy? The data from other states and foreign countries would provide a perspective for Minnesota's system and may provide insight into potential modifications of it. The data on production costs, escalation clauses, etc. would be used to determine whether existing rents and/or royalties could be increased or not.

Based on the above and other information as required, what are some alternatives to the DNR's present leasing procedure? If leasing continues to be the method of making the peat resource available for development, what formalized procedure could be recommended? Should lease application fees be charged to cover the cost of evaluating the proposal? If so, how large should they be? What information should be required to evaluate a lease application, e.g., a plan of development, mining or harvesting procedures, reclamation plan, environmental monitoring, etc.?

Examination of the above data will aid policymakers in making important decisions regarding peatland development. If the legislature were to decide that large-scale peatland development is in the best interest of the State, part of the decision will deal with the methods to accomplish it.

It will be necessary to decide whether peatland leasing is the most advantageous way of facilitating the desired development. In order to make such a decision, data on the advantages and disadvantages of leasing as well as methods of modifying present lease procedures must be available. In addition, methods other than leasing should be available for consideration at the same time. In other words, in order to make an informed decision necessary information on leasing and alternatives to it must be available. Part I is an attempt to provide such information.

Recommendations for further study will be formulated as a part of the final report.

II. Introduction: Minnesota on the Brink of Development.

Minnesota, due to a variety of economic and social factors, today finds itself on the brink of peat development on a scale unprecedented in the United States.

Corporate planners, whose job it is to formulate long-range strategies to ensure their company's survival, growth, and expansion have recently expressed strong interest in developing Minnesota peatlands. Interest at this time comes from two diverse sectors of the business community.

Horticultural peat firms, based primarily in other states, see their present reserves diminishing and their chances for expansion in their present areas either limited or non-existent. This is occurring at the precise time the horticultural peat industry is entering an era of increasing growth and profitability. Minnesota, with the largest peat deposits of the contiguous forty-eight states, represents the logical area in which these firms can expand to ensure continued supply.

Traditional gas and oil producers, forced to deal with all the ramifications brought on by the energy crisis have come to regard themselves as "total energy suppliers" in the broadest possible sense. Successful Soviet and European use of peat for fuel, and the potential of technology transfer, have prompted several of these firms to seriously consider peat as an adjunct to their product line. Minnesota, combining a vast reed

sedge peat resource with an extensive transportation network represents the prime area for industrialization of this type.

III. Peat - Occurrence, Classification, Supply-Demand Relationships.

Known reserves of peat in the United States, exclusive of Alaska, as estimated on an air-dry basis by the U.S. Geological Survey in 1974, total 13.8 billion tons. Approximately nine-tenths of this total occurs in the states of Florida, Michigan, Wisconsin, and Minnesota. Minnesota, having by conservative estimates, approximately 7 billion tons, accounts for more than one-half of the U.S. total.

Peat produced in the United States is generally categorized, for commercial purposes, according to its biological origin and its degree of decomposition. Three broad designations are used: (1) Moss Peat, formed from sphagnum, hypnum, and other mosses; (2) Reed-sedge, formed from reeds, sedges, and other swamp plants; and (3) Humus, peat so decomposed that all trace of its biological origins are lost. Another term commonly used in the horticultural peat industry, though a misnomer, is "peat moss." This is a term erroneously applied to all types of peat.

Twenty-one of the 42 states having peat deposits produced peat in some form in 1976. Production of peat reached an all time high in 1976, of 969,000 tons. This represented an increase of 32.6% over 1974 production. (See Appendix A) Most of the production from the 102 plants was used for general soil improvement. Among the principal markets for peat were nurseries and greenhouses, which use peat as a mulch and as a medium for growing plants and shrubs; landscape gardeners and contractors, who use peat for building lawns and golf course greens; and garden, hardware, and variety stores which sell peat to homeowners who wish to improve their lawn and garden soil.

Commercial sales of peat in the United States in 1976, by use

Use	In bulk		In packages		Total	
	Quantity short tons	Value 000's	Quantity short tons	Value 000's	Quantity short tons	Value 000's
Soil improvement	181,860	$2,198	633,453	$12,591	815,313	$14,790
Seed inoculant	175	2	—	—	175	2
Packing flowers, shrubs, etc	25,679	356	4,548	64	30,227	420
Potting soil	47,260	898	12,325	265	59,585	1163
Mushroom beds	2,831	61	—	—	2,831	61
Earthworm culture	4,919	59	9	½	4,928	59
Mixed fertilizers	20,232	188	—	—	20,232	188
Other	8,545	256	5,626	158	14,171	414
TOTAL	291,501	$4,018	655,961	$13,078	947,462	$17,096

Of the various peat types, sphagnum is the most uniform, easiest to compress, and has the greatest capacity to retain moisture and ventilate soil. As a result of these qualities, sphagnum is highly valued horticulturally relative to other types of peat. Due to climatic conditions, sphagnum growth in the United States is limited to an area north of a line reaching from south central Maine through north central New York to north central Minnesota and into British Columbia. Almost all of the commercially harvestable sphagnum in the lower 48 states is located in Minnesota.

Demand for peat, particularly sphagnum, has always exceeded domestic supply in the United States. In 1974, for example, approximately 456,000 tons of sphagnum was available for U.S. consumption. Of this total, 129,890 tons or 28.5% was produced

domestically. Canada, the main exporter of peat to the U.S., supplied approximately 312,000 tons, comprising an additional 68%. The balance was provided by nine countries, led by West Germany with 13,000 tons. By 1976 U.S. production of moss peat had increased to 215,341 tons, a gain of 66% over 1974. In spite of this increase, domestically produced moss peat comprised only about 39% of all moss peat sold.

In 1976 imports amounted to 26% by weight of all peat sold in the United States. Canada, exporting primarily sphagnum, accounted for 97% of these imports. The economic impacts of imported peat were far greater than the above numbers would indicate. Due to a variety of factors, but owing in large measure to the fact that sphagnum is easily compressed and sold on a volume rather than a weight basis, the average value of imported peat was 4 times that of domestically produced peat. Receipts from imports, totaling $29,492,000 represented 63.3% of U.S. commercial sales in 1976.

The success of Canadian sphagnum in the United States can be explained in two ways. First, and most important, the U.S. supply has always fallen short of demand. Second, through the years Canadian sphagnum has come to be associated, in the minds of large institutional purchasers, with quality. Although Minnesota's bogs produce both sphagnum and reed-sedge which is the equal of any peat in the world, this resource is largely undeveloped, with only one sphagnum bog, the Corona bog near Cromwell, currently under production.

IV. Marketing Opportunity for U.S. Sphagnum.

Because of peat's low bulk density, (oven-dry sphagnum generally weighs between 3-5 lbs per cubic foot), transportation expenses constitute a significant portion of its total marketing cost. In spite of this most of the sphagnum

consumed in this country is of Canadian origin. Today, American producers, seeing an enormous new market opening up in the Sunbelt, are seeking to capitalize on their one greatest advantage - lower transportation costs. Their projected strategy seems to be to market American sphagnum, wherever possible, at a price equal to or below those charged for Canadian. Since most peat bought by homeowners is purchased using price as the prime determinant, this strategy has every chance of success. Convincing institutional buyers that their product is of equal quality may prove more difficult and time consuming but this can be accomplished through skillfull marketing campaigns. In some areas of the country, the "made in America" label may also work to the advantage of an American producer.

The first step toward implementing such a strategy would be to secure a source of quality sphagnum whose supply would be guaranteed over a period of years. A twenty-five year lease of a prime Minnesota sphagnum bog would satisfy this requirement.

Given the feasibility of the aforementioned strategy and that Minnesota represents the prime area for this type of development, it follows that control of Minnesota's sphagnum resource could conceivably result in the holder wresting a dominant share of the American peat market.

V. Peat for Fuel

Although not utilized commercially for fuel anwhere in North America, peat is used extensively in parts of Europe and the USSR. The Soviet Union is the

worlds largest producer of fuel peat, harvesting approximately 70 million tons annually. The present capacity of their peat-fired electric generation plants is about 3500 megawatts (MW) with an increase to about 6300 MW planned.

Peat accounts for more than 25% of Ireland's energy supply. It is burned directly in condensation power plants to generate electricity and is formed into briquettes for household use.

In Finland the use of peat to generate electricity is being rapidly expanded. Since peat covers 60% of northern Finland, government planners hope to lessen their nations's dependence on Polish coal and Russian oil through use of this indigenous resource.

Closer to home, energy suppliers are actively investigating alternate fuel sources which will supplement their dwindling supplies and perhaps even open new markets. A major area of recent interest are the vast peatlands of northern Minnesota.

Minnesota Gas Company, with additional funding from the Energy Research and Development Administration (ERDA), is currently sponsoring peat gasification research. Minnegasco proposes to remove peat from a 200,000 acre site in northern Minnesota to produce 250×10^6 cubic feet of synthetic natural gas (SNG) per day. In order to produce gas in such quantities 50,000 tons of peat would be needed daily. This daily figure is more than double the amount of peat produced in Minnesota in all of 1974!

Three technological obstacles remain before the gasification process is feasible on a large scale. First, techniques must be developed to extract peat in the tremendous quantities needed to operate the plant efficiently; second, the peat must be dewatered to the required moisture content quickly and economically; and finally, the peat must be placed in the size and form needed for gasification.

Pending results of the study and the consent of the State, it is Minnegasco's plan to have a full-scale gasification plant operating sometime in the 1980's.

VI. Peatland "Policies"

Until recently peat has not been regarded as a sufficiently valuable resource in this country to merit close public scrutiny and, as a result, no state in the Union now has a formal "peatland policy". Even in those states with major peat deposits and production, little attention is paid by government to managing the peat resource in any active sense.

In Michigan, the nations largest peat producing state, the Lands Division of the Department of Natural Resources (DNR) exerts some initial control by stipulating which state lands may be sold for developmental purposes. Presumably, if private peatlands are utilized no control exists. Furthermore, once state land is returned to private ownership state controls cease since reclamation of peatland is not covered by Michigan's Mine Reclamation Act. These facts prevent any serious "management" of peat in Michigan.

In Wisconsin, a state with 2.8 million acres of peatland and the potential for substantial development, a similiar pattern emerges. Wisconsin does not now have a procedure for leasing state-owned peatland nor do they expect to

be developing one. Inquiries concerning peat on state-owned land are referred to the private sector. As in Michigan, peatland reclamation is not a requirement of Wisconsin law.

Some states having peat deposits have had regulation come in "through the back door" under the blanket of broadly worded environmental legislation. These statutes cover mineral mining and, generally speaking, consider minerals as being "any solid material or substance found in natural deposits on, or in the earth". Legislation of this type has come about, not through any concerted effort to regulate peat per se, but rather through the desire of the states to enact environmental legislation after the passage of the National Environmental Protection Act.

A. Legal Classifications of Peat

1. Other States
Contact was made with 19 peat-producing states, which together account for approximately 95% of the peat produced in the United States. The rate of response to requests for information was 89%. Sixty-five percent of the states responding have a "legal" classification of peat. The breakdown is as follows:

a) 41% regard peat as a <u>mineral</u>

S. Carolina New York California Ohio Maine Montana* Pennsylvania	These states produced more than 12.4% of the total U.S. production in 1974. *Montana producers elected to withhold production figures in 1974.

b) 18% regard peat as a <u>horticultural product</u>

New Jersey Colorado Vermont	These states produced 8.5% of total U.S. production in 1974.

c) 6% (one state) responded by saying that peat would be classified as a mineral if production would be on state land (production is currently on private land): Florida
Florida produced 9.2% of total U.S. production in 1974.

d) 35% are either unclear or have no classification for peat.

Illinois	These states produced more than 61.6% of
Michigan	total U.S. production in 1974.
Indiana	
New Mexico	*Wisconsin producers elected to withhold
Washington	production figures in 1974.
*Wisconsin	

2. Other Jurisdictions
Contact made with eight Canadian Provinces with a 50 percent response rate.

a) Quebec with 44 percent of total Canadian production classifies peat as a mineral. Peat is subject to the Mining Act, Chapter 34 of the statutes of 1965.

b) Manitoba regards peat as a mineral. Peat is subject to Manitoba Regulation 226/76.

c) **Ontario classifies peat according to its use. "Peat" is defined by policy as a substance suitable for fuel purposes. If located on Crown Land it is subject to section 127 of the Mining Act. "Peat Moss", used for horticultural purposes is dealt with under the Public Land Act.**

d) Saskatchewan has no clearly defined classification of peat.

Note: Manitoba, Ontario and Saskatchewan combined produce less than 13% of Canada's total peat production.

B. Where are peat operations located?

There were 102 peat operations in the U.S. in 1974. All production from these plants was for horticultural purposes. The various states were were asked "where" their peat operations were located.
The results are listed below:

State/# of Plants		Where Located (Land ownership)	
Michigan	(16)	Private	(16)
Illinois	(6)	Private	(6)
Florida	(9)	Private	(9)
Pennsylvania	(9)	Private	(9)
New Jersey	(3)	Private	(3)
Colorado	(12?)	Private	(11?) State (1)
S. Carolina	(1)	Private	(1)
New York	(7)	Private	(7)
Washington	(5)	Private	(5)
California	(3)	Private	(3)
Ohio	(11)	Private	(11)
Maine	(3)	Private	(3)

N. Mexico	(unknown)	?	
Indiana	(9)	Private	(9)
Vermont	(1)	Private	(1)
Wisconsin	(?)	Private	(All)
Montana	(6)	Private	(4) State (2)

One hundred one peat operations were reported to be located in the states responding. Of these, 97 percent were located on private land. Three percent were located on state land. Montana reports having two peat operations on state land. In Montana peat is regarded as a mineral and is administered by the Department of State Lands. Peat extraction is governed by the Hard Rock Mining Law, Title 50, Chapter 12, RCM 1947 and Title 81, Chapter 7, RCM 1947. Montana operators elected to withhold production figures in 1974.

C. Summarization of How States Regulate Peat.

State	Agency	Statute	Mechanism
Montana	Dept of State-land	Hardrock Mining law RCM 1947	Lease, Permit
S. Carolina	S.C. Land Resources Conservation Commission	S. C. Mining	Permit
New York	NYS Dept of Environmental Conservation Bureau of Mineral Resources	Environmental Conservation Las NYS Mined land Reclamation law	Permit
California	-Not regulated specifically-		
Vermont	Dept of Environmental Conservation	Act 250 Title 10	Permit
N. Mexico	-No Regulation		
Ohio	ODNR Div of Reclamation	Ohio Surface Mine Law	Permit
Maine	Bureau of Geology	Title 12 Chapter 201	Lease (state land: never used)
New Jersey	None- Local Zoning	None	-
Colorado	State Land: State Land Board	-	Permit

State	Agency	Statute	Mechanism
Illinois	Dept of Mines & Minerals ILL EPA	Surface-mined Land Conservation & Reclamation Act	-
Florida	FDNR Div of Resource Management	Reclamation Law May be applicable	None
Michigan	Treats proven reserves of peat as a permanent taking of surface values. For this reason, Michigan has elected to dispose of title by exchange rather than lease.		
Wisconsin	Has no leasing procedure and does not expect to be developing one. Inquires concerning peat on State-owned land are directed to the private sector.		
Indiana	The laws of the State of Indiana do not cover peat.		
Washington	The laws of the State of Washington do not cover peat.		

STATE OF MINNESOTA

DEPARTMENT of Revenue

Office Memorandum

TO : ARTHUR C. ROEMER
Commissioner of Revenue

DATE: May 16, 1977

FROM : Mary Bochnak MB
Research Office

PHONE: 296-5135

SUBJECT: TAXATION OF PEAT

1. Minnesota

The total number of peat producers in Minnesota is difficult to estimate. Michigan Peat and Power O' Peat are the 2 largest producers, and operate year round. Michigan Peat apparently bought the assets of Red Wing Peat on liquidation in 1975, Michigan Peat is a subsidiary of Bay Houston Towing Co. (a Texas incorporated barge line), and currently operates in Minnesota near Cromwell in Carlton county on 2,800 acres of land. In 1976 they produced 300,000 bales of peat moss. Power O' Peat is a sole proprietorship owned by Joseph Leoni near Gilbert. In 1975 they shipped at least 15,000 short tons of peat moss. Both companies are wholesalers and have extensive distribution systems outside the state.

There are at least 2 other smaller, marginal producers: Midwest Peat and the Operations of the Mackie Brothers near Floodwood. There are undoubtedly others even smaller.

Current interest in the taxation of peat has been caused by applications for state and county peat mining leases for substantial portions of St. Louis County by Bay Houston and Power O' Peat. Minnesota has the largest known reserves of peat in the US - 7 1/2 million acres. Currently (and under all lease applications) Minnesota peat is used for horticultural purposes; in fact peat is not commercially used for fuel anyplace in North America. Under Minnesota law, title to peat is transferred with the surface interest. Under federal definitions, however, peat would be a mineral, as are sand and gravel for federal purposes. Currently, Minnesota applies no special taxes to peat production. The companies would pay property, income and sales taxes, as would any manufacturing company. Bay Houston estimates it paid $1.66/acre in real estate taxes in 1976. In income taxes, peat producers are allowed a 5% percentage depletion allowance and income apportionment. As the larger companies are virtually national distributors and 70% of the income apportionment factor is based on sales, total income taxable in Minnesota is probably quite small. As wholesalers, peat producers would pay no sales and use tax themselves, although an ultimate consumer in Minnesota would pay sales tax on any peat purchased.

2. Other Jurisdictions
   A. United States

None of the states producing larger amounts of peat than Minnesota in 1974 (see attachment) apply any special taxes for peat. Peat producers are taxed as manufacturing operations and would pay income, sales and/or property taxes according to local statute. In states that have income taxes paralleling the federal system, 5% percentage depletion would be

allowed. Most of these states do have special taxes applying to other minerals. Florida initiated a solidminerals severance tax in 1971 that specifically imposes a tax of 5% (currently) of the value at the point of severance for clay, gravel, shells, and other minerals. A credit against any severance tax liability is allowed for any property taxes paid on mineral interests (limited to 20% of the tax otherwise payable). As originally administered, peat was considered a solid mineral and taxed accordingly. However, for whatever reasons, peat is no longer administratively classified as a solid mineral.

B. Canada

Under Quebec law, producers of peat are subject to the general mining duties act in addition to provincial and federal income taxes and local property taxes. The Mining Duties Act applies to private lands granted by the Crown after January, 1966 and apparently to all public lands. Tax rates are based on net mining profits per the following table; the first $150,000 of net profit is tax exempt.

Tax Rate	Mining Profits
15%	$ 150,000 - $ 3,150,000
20	3,150,001 - 10,150,000
25	10,150,001 - 20,150,000
30	20,150,001 and over

The profits of all mines of "related" operators are combined to apply the tax rates. There is a 3 year income averaging provision with the lesser of the 3 year average mining profits on the current year's profits used as the tax base. The following deductions are allowed to gross income (the market price of minerals sold or shipped):

1) Salaries + Benefits
2) General and Administrative costs + Research Directly Connected with mining
3) Transportation, insurance, power, supplies, and maintenance
4) Donations - limited to 10% profit without this deduction
5) 100% current exploration and development
6) Local property taxes
7) Allowances

   a) Depreciation: Mine and Beneficiation Plant
      15% pre 4/75 assets
      30% post 4/75 assets

   b) Development
      Unamortized 1964-75 costs
      limited to amount of current development

   c) Investment
      New (post 4/75) manufacturing and beneficiation plant and offsite Quebec Exploration costs not previously allowed
      Limit 1/3 of profit without this allowance

d) Treatment
8-15% original cost processing assets
8% for taconite beneficiation plant
Limited to 65% profit without this allowance

8) Mine Loss
15% loss for 2 following years

Royalties, interest and other taxes are not deductible.

In New Brunswick peat is not subject to the general mining income tax act. However, under the quarriable substances act, peat is subject to a tax of 1¢/bale (6 cu. ft) and 5¢/acre. In addition peat producers here pay provincial income taxes and general property taxes.

In British Columbia, of all the mining taxes, peat is only subject to the Mineral Land Tax Act. This applies only to private lands and imposes an average tax graduated by the amount of land held. The tax is 25¢/acre for less than 50,000 acres; 40¢ for 50,000 to less then 100,000 acres; 55¢ for 100,000 to 250,000 acres; 70¢ for 250,000 to 500,000 acres; 85¢ for 500,000 to 1,000,000 acres, and $1 for a million or more acres. Additionally producers would be subject to provincial income and property taxes.

MB:ccc

cc: Ellwood Rafn

VII. Land Classifications in Minnesota

It is estimated that about 90% of Minnesota's peat is to be found on State or County land. How revenue from peat leases is to be disbursed depends upon the particular fund to which the land belongs and the classification given to peat. An explanation of the various land classifications is presented below.

State Natural Resource Lands

State natural resource lands are usually identified in land records or related reports in one of three ways:

- Designated areas or management areas
- Administrative or management categories
- Acquisition categories

Designated Areas or Management Areas. Natural resource land areas which have been established by legislation (for example, State Forests) are called "designated areas". These lands, as well as any other land area managed as a specific land holding, are also called "management areas". The most common examples are State forests, State parks and wildlife management areas. These areas usually have common names (such as Savanna Portage State Park or Whitewater Wildlife Management Area), which are familiar to most people.

Some State natural resource lands are not within designated areas or management areas. They fall into the following catagories:

1. Forestry Lands Outside State Forests. These lands (1.5 million acres) are managed by the Forestry Division, but are not designated by legislation as State Forests. Most of these lands are trust fund lands.

2. Fish Lands. 26,000 acres of fisheries are managed by the Fish Section of the Fish and Wildlife Division. These lands include uses such as spawning areas.

3. Water, Soils and Mineral Lands. 2,000 acres are managed by the respective Divisions.

4. Law Enforcement Lands. Primarily public access lands but also includes a few small parcels of land used for law enforcement land by the DNR.

5. Other lands under DNR Administration. These lands have not yet been catagorized for management purposes. New acquisitions are included in this catagory until they are assigned to a division of the DNR for Management.

Administrative or Management Categories. Centralized State natural resource land record systems usually do not use common names as identifiers. Rather, the lands are aggregated into general land categories. Administrative or management categories refer to the division of DNR responsible for managing the land. There are eight divisions in DNR which manage natural resource lands including: (1) Forestry Division, (2) Parks and Recreations, (3) Wildlife Section, (4) Fish Section of the Fish and Wildlife Division, (5) Minerals Division, (6) Water Division, (7) State Soil and Water Conservation Board, and (8) Enforcement Division.

Acquisition Categories. Acquisition categories generally refer to the means by which the land came into State ownership. Lands may be: (1) acquired directly from private owners through purchase or gift, (2) acquired from private owners through tax forfeiture, (3) transferred or acquired directly from

another governmental agency, (4) granted to the state by the federal government for a specific purpose (usually called "trust lands"), or (5) tax-forfeited land for which the State holds a "tax title" (these lands are held in trust by the State for the taxing districts). The various acquisition categories found in State natural resource lands are described below.

Trust Fund Lands. Trust fund lands are lands which were given to the State of Minnesota by the federal government through land grants. These lands were given to the State with requirements that receipts from the land be used permanently for certain specific purposes. Trust fund lands are included in various management units of the Department of Natural Resources, although most such lands are managed by the Forestry Division. The various types of trust fund land are described below.

1. School Lands. School trust lands consisted of two sections in each township in the State and were granted to Minnesota for public school purposes. This federal grant amounted to approximately 2.9 million acres of land, and any revenue from these lands must be used for public school purposes. There are about 959,000 acres of school trust land land remaining in public ownership in Minnesota.
2. Swamp Lands. Swamp lands were defined by the U.S. Congress as the whole of those swamps or overflowed lands which were, or might be, found unfit for cultivation. The State was originally granted approximately 4.7 million acres of land under this legislation. Income from swamp lands is deposited into the school trust fund, which must be used for public school purposes. There are about 1.6 million acres of swamp land remaining in public ownership in Minnesota.

3. Other Trust Fund Lands. There are about 33,000 acres of other types of trust fund lands administered by the Department of Natural Resources. These include: (1) University Lands, (2) Territorial University Lands, and (3) Internal Improvements Lands. Territorial University Lands consisted of 72 sections granted to Minnesota by the United States in 1851. The purpose of the land grant was to support a university in the territory. University Land consisted of 72 sections granted for use in support of a State University. The State also received a grant of 500,000 acres for highway development and other similar public improvements. These lands are called internal improvement lands.

Lands Transferred from Other Government Agencies. Two land categories have been defined which are lands transferred from the federal government to Minnesota without trust requirements. These include:

1. Volstead Lands. 33,200 acres of lands were purchased from the federal government by the State in 1963. Approximately 32,000 acres of these lands remain in State ownership. Most of the lands are managed by the Division of Forestry. Since these lands were not taxable at the time of acquisition, they are not included in the category of "acquired" land. The name Volstead comes from the 1908 federal "Volstead Act", which authorized the federal acquisition of these lands.
2. Salt Spring Lands. Salt Spring Lands were given to Minnesota by the federal government. They are not considered trust land because the State Legislature was given complete freedom of distribution and allocation of receipts from the lands. In 1873, the Legislature transferred these lands and their revenues to the University. Since the lands are managed by the University, they are not considered natural resource lands and are not included in natural resource land records.

Lands Acquired Through Tax Forfeiture. "Conservation Area Lands" include the Red Lake Game Preserve in Koochiching, Beltrami and Lake of the Woods Counties, and several reforestation areas in Aitkin, Mahnomen, Roseau, and Marshall Counties. They were lands originally forfeited for non-payment of ditch bond assessments. The State acquired clear title by paying the delinquent assessments, thus preventing county bankruptcies. Revenues from these lands form the Consolidated Conservation Fund, which must be accounted for in a separate land category. There are approximately 1.6 million acres of these lands remaining in Minnesota. Conservation Area Lands are managed by the Forestry Division, the Wildlife Section and the Parks and Recreation Division.

Acquired Lands. All remaining natural resource land is considered "acquired" land. Lands may be acquired from private owners by purchase or gift. About 1 million acres of State natural resource lands (20 percent) in Minnesota have been acquired by the State for specific management purposes.

Tax-Forfeited Lands. Tax-forfeited lands are lands which were forfeited to the State through non-payment of taxes and are held in trust by the State for the taxing districts. Title to the land is a "tax title" and is not considered a clear, legal title of ownership. While title to the land is held by the State, tax-forfeited lands are administered by the counties. Most counties have scattered parcels of tax-forfeited lands, but 19 counties in the State have over 5,000 acres of tax-forfeited land. Twelve of these counties have Land Commissioners whose primary responsibility is the management and sale of tax-forfeited lands.

MSA 282.01 states, ". . .it is the general policy of this State to encourage return of tax-forfeited lands to private ownership and the tax rolls through

sale. . . .". Chapter 282 also sets forth guidelines for the classification and sale of tax-forfeited lands. Counties may, by resolution of the County Board, set aside tax-forfeited lands as "memorial forests" which are managed for forestry purposes. Land may be withdrawn from memorial forests for the purposes of sale, if approved by the County Board and the Commissioner of the Department of Natural Resources.

In addition, all other tax-forfeited land must be classified by the County Board as "conservation" or "non-conservation" land. While the same terminology is used, these lands are not the same as Conservation Area Lands, described previously, which are fully owned by the State of Minnesota and managed by the Department of Natural Resources. Not all counties have classified their tax-forfeited lands into these respective categories.

The State exercises considerable control over the sale of tax-forfeited land, though its stated policy is to encourage sale. DNR is required to review all proposed sales of tax-forfeited land to assure that: (1) no State land is involved, (2) the tax-forfeited land does not border a water body or water course, (3) the tax-forfeited land is not in a DNR mineral unit, (4) the tax-forfeited land is not within a State park (if so, it goes automatically to the State Park), (5) the timber value is appraised by the county, and (6) the land is not in a memorial forest (if so, it must be removed from such status by the Commissioner of DNR before it can be sold). If the DNR approves the proposal, the land is sold at public auction. It may not be sold for less than its appraised value. Except in the case of State Parks and those conditions stated above, the State may acquire full title to these lands only through direct purchase from the county or through gift of the county to the State.

VIII. Current Statutes Pertaining to Peat in Minnesota

The sale and leasing of state-owned peatlands presently are governed by two Minnesota statutes: § 92.461 (Subdivisions 1 and 2) and § 92.50 (Subdivision 1). These two statutes delegate to the Commissioner of Natural Resources the responsibility for determining which state-owned peatlands are eligible for sale, which peatlands are not eligible for sale, and what terms should apply to the leasing of peatlands which are considered valuable by reason of deposits of peat in commercial quantities.

> § 92.461 Peat lands
> Subdivision 1. Peat lands withdrawn from sale. All lands now or hereafter owned by the state which are chiefly valuable by reason of deposits of peat in commercial quantites are hereby withdrawn from sale.
> Subdivision 2. Before any state land is offered for sale the Commissioner of Natural Resources shall cause such land to be examined to determine whether the land is chiefly valuable by reason of deposits of peat in commercial quantities.

Until 1935, state-owned peatlands could be sold under the same provisions which applied to the sale of other state-owned land. In 1935, however, the state legislature passed a law (1935, Chapter 322) which withdrew from sale all state-owned lands that were determined to be chiefly valuable by reason of deposits of peat in commercial quantities. § 92.461 now gives to the Commissioner of Natural Resources the responsibility and authority to determine whether any state-owned lands are valuable by reason of deposits of peat in commercial quantities. If that determination is positive, the Commissioner of Natural Resources is required under § 92.461 to prohibit the sale of those lands.

§ 92.50 Unsold lands subject to sale may be leased
Subdivision 1. The Commissioner of Natural Resources may, at public or private vendue and at such prices and under such terms and conditions as he may prescribe, lease any state-owned lands under his jurisdiction and control for the purpose of taking and removing sand, gravel, clay, rock, marl, peat, and black dirt therefrom, for storing thereon ore, waste materials from mines, or rock and tailing from ore milling plants, for roads or railroads, or for any other uses not inconsistent with the interests of the state. No such lease shall be made for a term to exceed ten years, except in the case of leases of lands for storage sites for ore, waste materials from mines, or rock and tailings from ore milling plants, or for the removal of peat, which may be made for a term not exceeding 25 years, provided that such leases for the removal of peat shall be approved by the executive council. All such leases shall be made subject to sale and leasing of the land for mineral purposes under legal provisions and contain a provision for their cancellation at any time by the commissioner upon three months written notice, provided that a longer notice period, not exceeding three years, may be provided in leases for storing ore, waste materials, from mines or rock or tailing from ore milling plants; provided further, that in leases for the removal of peat, the commissioner may determine the terms and conditions upon which the lease may be canceled. All money received from leases under this section shall be credited to the fund to which the land belongs.

The leasing of state-owned peatland for the removal of peat was first addressed by the state legislature in 1917. In 1915 the legislature passed a law (1915, Chapter 192, Subdivision 1) which allowed the State Auditor to lease unsold state-owned school, improvement, or swamp land for removing sand, gravel, or black dirt. In 1917 this law was amended to allow the leasing of unsold state-owned land for removing clay, rock, marl, and peat, as well as sand, gravel, and black dirt. The amended law (1917, Chapter 31) set a maximum term of 1 year on leases for taking clay, rock, marl, sand, dirt, and peat. The law was amended in 1919 (1919, Chapter 405, Subdivision 1) to extend the term for leasing state-

owned lands for removal of clay, rock, marl, sand, dirt, and peat to 10 years. In 1945 the leasing authority described in § 92.50 Subdivision 1 was shifted from the State Auditor to the Commissioner of Conservation.

§ 92.50 Subdivision 1, as amended in 1959, now allows a maximum term of 25 years on leases of state-owned lands for the removal of peat, provided that such leases for removing peat are also approved by the Executive Council. The amendment passed in 1959 also clearly places the responsibility for determining the terms and conditions under which a peat lease could be canceled upon the Commissioner of Natural Resources.

§ 92.50 specified that "all money received from leases under this section shall be credited to the fund to which the land belongs." Most of the state-owned lands under the jurisdiction of the Commissioner of Natural Resources are either Trust Fund Lands or Consolidated Conservation Land and "belong" to those two funds. Money received from leasing Trust Fund Lands is deposited in the state's trust fund. The interest on the fund is distributed to all school districts in the state on a per-pupil basis. Money received from leasing Consolidated Conservation Lands is split 50-50 between the state government and the county in which the leased land is located. All Consolidated Conservation Lands are located in the following seven counties: Aitkin, Beltrami, Koochiching, Lake of the Woods, Marshal, Mahnomen, and Roseau.

Minnesota statues § 92.461 and § 92.50 (as they apply to peat development), can be summarized as follows:

§ 92.461

1. Withdraws from sale all state-owned land which are chiefly valuable by reason of deposits of peat in commercial quantities.
2. Delegates responsibility to the Commissioner of Natural Resources for determining whether or not state-owned lands have deposits of peat in commercial quantities.

§ 92.50

1. Authorizes Commissioner of Natural Resources to lease state-owned lands under his jurisdiction for the removal of peat.
2. Authorizes Commissioner of Natural Resources to prescribe terms and conditions of leases for removing peat from state-owned lands under his jurisdiction.
3. Allows a maximum term of 25 years on leases for the removal of peat.
4. Specifies that the Executive Council must approve such leases for the removal of peat.
5. Authorizes Commissioner of Natural Resources to determine terms and conditions upon which leases for the removal of peat may be canceled.
6. Specifies that all money received from the leasing of land for the removal of peat shall be credited to the fund to which the land belongs.

While § 92.461 and § 92.50 clearly delegate specific authority and responsibilities to the Commissioner of Natural Resources pertinent to the leasing of state-owned peatlands, neither statute lays out management priorities, addresses the issue of reclamation, or specifies a mechanism for determining the value of the peat deposits.

The state policy pertaining to tax-forfeited peatlands is outlined in § 282.04, Subdivision 1. (See Appendix C.)

IX. Statutory and Regulatory Aspects of Mined Land Reclamation.

The 10th Amendment to the U.S. Constitution confers upon the states all powers "not delegated to the United States. . .or to the people." This

is known as the ~~supremacy~~ reserved powers clause. Powers remaining to the states are generally known as "police powers" which confer upon the state the right "to prescribe regulations to promote the health, peace, morals, education and good order of the people." Language most commonly used in state laws and court decisions is "health, welfare, and safety." A police power regulation, e.g., state mined land reclamation requirements, must meet two basic tests: (1) be for a legitimate health, welfare, or safety purpose; and (2) be applied equitably and reasonably.

Given this constitutional base, there are four distinct types of legal controls of mined land reclamation at the State level:

*Statutes - laws passed by a legislative body.

*Regulations - controls adopted by administrative agencies.

*Executive Orders - a directive from an elected official.

*Judicial opinions - interpretations of law by a legal body.

Certain requirements for implementation, e.g., application forms, also appear as de facto "regulations" imposed by administrators in lower levels of authority.

Key Components of Reclamation Legislation and/or Regulations.

Most mined land reclamation statutes recently enacted have been directed at rehabilitating land disturbed by coal mining. Of the twenty-seven states with surface minable coal resources, all have enacted some type of mine land reclamation law ranging from very liberal to extremely stringent, with the exception of Arizona and Alaska.

Although these statutes do not deal with the specific problems of peatland reclamation, their philosophical base and general framework do provide valuable insights into some of the problems and challenges inherent in the formulation of effective peatland legislation.

A comparison of the various mined land reclamation acts yields the following common denominators:

*State Policy: State policy declarations sometimes provide indications as to how an act might be implemented and enforced. New Mexico has no policy declaration whatever while Montana sets forth six specific environmental theses. Colorado and Wyoming make routine statements about wildlife and water resources although Colorado adds an economic objective: "to protect and perpetuate the taxable value of the property. ."

*Land Eliminated From Mining Activity: No specifically designated lands, ecosystems, or other values are protected from surface mining in most states. However, elimination of surface mining from areas of "critical environmental concern" that are defined in various ways is a definite trend in Federal legislation and can be expected to be copied by many of the states. In Wyoming, for example, land use and revegetation objectives could be interpreted to mean that reclaimed lands incapable of sustaining "grazing by wildlife and domestic livestock in a quantity at least comparable to that which the land previously supported" cannot be mined. The Montana act leaves no doubt that neither prospecting nor mining permits will be approved on lands that have "special, exceptional, critical, or unique characteristics."

*Permit Requirements: All of the states with reclamation laws require the issuance of a surface mining permit. The period of validity, however, varies widely. Permits can be revoked for non-compliance with permit conditions in most states. Few states include conditions and circumstances under which a permit can be issued, not be issued, or revoked for non-compliance.

*Notice, Hearings, Public Participation: Public hearings are often required for rules and regulations promulgated by state agencies, although detailed requirements vary widely.

*Time Constraints on Performance: Again, criteria varies significantly from state to state. Montana requires reclamation performance as rapidly and as effectively as modern technology will allow. Other states, like New Mexico, call for completion

within a "reasonable" time.

*Bonding Requirement: No reclamation legislation is going to be credible to the public without a bonding requirement. Also, there is a lack of credibility where determination of a bond is strictly a matter of discretion with the administrative agency. Rather than selecting arbitrary per acre figures or minimums that can be either unreasonable high or unreasonably low, it would be desireable to establish a bonding amount that bears a reasonable relationship to the probable actual cost of reclamation if the state had to do it.

*Performance Standard: The vast majority of state reclamation laws focus on revegetation as the prime objective of the reclamation process. The emphasis has been on such performance criteria as number and type of trees to be planted per acre, the height the grass is supposed to grow the first year, and the contour of the reclaimed land. Requirements of this type not only ignore alternative land-use options, but also fail to deal with the site-specific nature of most mining operations. In terms of peatland reclamation, performance requirements should be specific in intent rather than specific in detail so as to afford maximum discretion to the administrative agency in dealing with the ecological distinctions that occur between peatlands.

A review of various state statutes and an analysis of their subsequent effectiveness proved to be an invaluable tool in determining which provisions would be transferable to Minnesota's peatland situation.

Conclusions and Recommendations

Peat is essentially a non-renewable resource that is currently supporting a large portion of Minnesota's wilderness. It is also an increasingly valuable resource which is suitable for a variety of uses.

Left in it's natural state peatlands provide natural habitat for a host of wildlife species. Over sixty different mammals, nearly two hundred species of birds, and over thirty aquatic invertebrates inhabit Minnesota peatlands.

Preservation of this natural environment is a valid "use" which many Minnesotans advocate. The Red Lake Indians, almost certain to be impacted by any peat gasification project, have stated their position through Tribal Chairman Roger Jourdain as follows:

> "Peat utilization? We are using the peat right now. Peat provides habitat for our wildlife. Much of our forests grow on peat. Water for our Lakes comes from peat bogs. The wildlife, timber, and fish are our greatest resource. We harvest over a million and a half pounds of fish out of the Lakes a year. The sawmill produces five million feet of lumber a year. These are the primary source of employment and income for the Tribe. Our people hunt and fish for much of their food. We are using the peat in the best possible manner now - maintaining our vital resources."[1]

Coming from a slightly different perspective are those who support preservation of peatlands for <u>scientific and educational purposes</u>. As Professor H. E. Wright of the University of Minnesota points out, much of our peatland is "one of the last large areas in the country that is almost totally undisturbed. The Red Lake peatland is the largest continuous bog on the continent

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[1] Walter Butler Company, <u>Peat Utilization and the Red Lake Indian Reservation</u>, p. 191.

and perhaps the world, with a spectacular development of vegetation patterns that is unique for an area so far south."[2] Dr. Wright goes on to say that our peat bogs represent an ideal area in which to learn many valuable "ecological lessons" relating to vegetation patterns and water chemistry.

Peatlands are also suitable for agriculture. A great many crops can be grown successfully on properly drained and cleared peatland. Root and vegetable crops, berries, forage for horses and cattle, and sod farms are among the principal agricultural utilizations.

At present, horticulture is the main developmental use peat is put to. Proponents of this type of development point out the they are supplying an important commodity to the market place and when reserves are exhausted will return the land to "productive" use.

Chemical-Industrial uses of peat, though presently in the embryonic stage in this country, represent a potentially significant utilization of peat for the future. Dr. Charles Fuchsman in his report The Industrial Chemical Technology of Peat[3] states: "The chemical utilization of peat can be grouped into four catagories, three of which require low to moderate processing temperatures and are

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[2] H. E. Wright, "Red Lake Peatland" The Minneapolis Tribune, November 1977.

[3] Charles Fuchsman, The Industrial Chemical Technology of Peat p. v.

based on three corresponding components of peat. The fourth category is high-temperature processing.

The three main groups of chemically important components and their potential industrial products are:

1) Peat bitumens, which yield waxes and related lubricants, and from which steroids and other pharmaceutically valuable intermediates are obtainable.

2) Peat carbohydrates, which when suitably treated, provide a superior nutrient material on which to raise yeast for high-quality protein supplements in livestock feed. By-products useful in the plastics and metallurgical industry can also be produced from this fraction.

3) Peat humic acids, which can generate oil-well drilling mud additives as well as a substance useful in the plastics and rubber industries.

The high temperature treatment of peat generates:

4) Peat coke useful for electrodes in the heavy chemical industry, for the production of specialty ferro-alloys, and for the conversion to activated carbon absorbents. By-product peat tars furnish valuable wood preservatives and related products.

Plants to produce these commodities require relatively small commitments of land (from a few hundred to a few thousand acres) for economic viability."

The technology of <u>direct combustion</u> is well known with Finland, Ireland, and the Soviet Union all burning peat directly to produce electricity.

Ekono Inc., a Finnish engineering firm recognized as a leader in this field has recently completed a study for the Minnesota Department of Natural Resources entitled "Utilizing Peat as a Fuel". Since costs for fuel peat in Minnesota are not known, Ekono approached the feasibility question by determining what price peat would have to be in order to be competitive with other fuels.

Four study sites in northern Minnesota were selected and generally speaking it was found that, under present circumstances, peat would have to be between 20¢ to 40¢ cheaper than coal per million BTU to be competitive.[4]

Gasification of peat represents another potential use. Research is being conducted, as noted earlier in this report, at the Institute of Gas Technology in Chicago. Tests are also planned to investigate the feasibility of using existing technology (the Mudcat Dredge and the Vari-nip Press) for peat mining and dewatering. The ultimate goal of these experiments is to develop a "one-pass" mining technique to be used in the gasification process.

Peat gasification, on a commercial scale, requires a much larger land commitment that other utilizations to be economically feasible. Minnegasco estimates that the area required to operate their proposed gas plant would be in excess of 250,000 acres.[5]

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[4]Ekono Inc., Consulting Engineers, Utilizing Peat as a Fuel, p. 2

[5]Energy Research and Development Administration, Experimental Program for the Development of Peat Gasification, p. 3

Regulatory Background:

Historically, the State of Minnesota has made state-owned peatland available for private development through leases. These leases call for rental and royalty fees and can be for as long as twenty-five years if approved by the Executive Council. In the past the State has been content to react to requests for peat leases. In this regard our policy was similar to that of Federal leasing of coal prior to 1970.

Our present system provides no built-in requirements for submission of engineering plans, exploration permits, environmental protection, bonding and reclamation. No effective measures are available to mitigate the threat of speculation and no provisions limit the amount of land that can be leased. The state is limited in it's ability to manage the resource though it is clearly charged with the task.

Given the multiple uses peat can be put to and considering the socio-economic setting for a particular locality at a given point in time, it becomes apparent that a resource allocation system of some type is essential if peat is to be utilized in the public interest.

Any new policy adopted should reflect ecological concern by requiring environmental protection to the greatest extent practicable while simultaneously providing the state with a reasonable

rate of return for any resources exploited. The state should be able to direct the timing, extent, location, and type of development in an orderly and even-handed manner.

Much of the data base required to implement such a policy effectively is being gathered by the Peat Program Phase II. What remains to be done is to determine the regulatory framework necessary to facilitate prudent management.

Some elements worthy of consideration in peat policy formulation are presented below:

Exploration Permits:

The extent of the peat reserves is not well known and even after the Peat Inventory is completed there will be a need for prospective developers to completely evaluate any bogs under their consideration. A system of exploration permits in which no obligation to lease arises for either the state or the permittee would serve a three-fold purpose:

1) it would enable a prospective developer to enter an area considered leaseable to determine the economic viability of the proposed operation.

2) it will provide additional, detailed information to supplement data gathered by Peat Inventory.

3) there will be appropriate environmental safeguards built in to protect the resource and the adjacent areas.

Work Proposals:

Work proposals should be required of the operator prior to the issuance of a lease. In this way the various regulatory agencies would be able to evaluate the possible effects of the operation, determine which permits would be required, and, if necessary, suggest alternate approaches before actual work begins.

Reclamation Plans:

Reclamation Plans should be required along with the Work Proposals. Together these documents will provide the basis for any EAW or EIS prepared. Subsequent approval or denial of the lease request will be based on these evironmental reviews.

Peat Mining Permits:

Although the vast majority of our peat occurs on public lands, privately owned peatland should not be neglected in any management plan. Mandatory peat mining permits should be considered which would contain provisions to protect the environment. These permits should be suspendable or revocable for non-compliance.

Bond:

A bond calculated annually and in an amount equal to the estimated

cost of reclaiming the land to be affected in the coming year should be required of the operator to ensure reclamation in accordance with the approved reclamation plan.

Environmental Monitoring:

The Department should have the right to enter upon, inspect, and monitor any peat operation at any time during normal business hours.

Annual Reports:

Annual reports describing the operations of the preceeding year and plans for the ensuing period should be required on the anniversary date of the lease.

Diligent Development:

The Department should investigate Federal regulations requiring "diligent development" in coal leasing as a possible way to discourage speculation.

Acreage Limitations:

The desireability of limiting the acreage allocated to a single lease should be investigated.

Rents and Royalties:

Rents on a per-acre basis should be retained due to their ease and economy of administration. Royalties should be tied to production and be expressed as a percent of the FOB plant site

price of the product. This system is most applicable to horticultural peat operations. Other utilizations need to be investigated further.

APPENDIX A-1

The horticultural peat industry in the United States is dominated by a handful of large producers. The trend toward oligopoly in this industry has accelerated sharply since 1974 with 9 plants now producing over 25,000 tons annually. The top nine producers accounted for over 62 percent of total U.S. production while the lower 37 percent contributed a mere 1.6%.

RELATIVE SIZE OF PEAT OPERATIONS IN THE U.S.

	1974				1976			
	Active plants		Production		Active plants		Production	
	#	% of total	tons	% of total	#	% of total	tons	% of total
Under 500 tons	21	20.6	4,384	0.6	23	22.5	3,393	0.4
500—999	9	8.8	6,035	0.8	15	14.7	11,460	1.2
1000—4 999	40	39.2	94,899	13.0	32	31.4	83,336	8.6
5000—14 999	22	21.6	201,206	27.5	16	15.7	135,614	14.0
15 000—24 999	5	4.9	89,278	12.2	7	6.9	126,342	13.2
Over 25 000	5	4.9	335,202	45.9	9	8.8	607,314	62.6
	102	100.0	731,004	100.0	102	100.0	969,459	100.0

Minnesota ranked eighth in peat production in 1976. It's four active plants, Bay-Houston in Cromwell, Power-O-Peat in Central Lakes, and the Maki Brothers and Midwest Peat near Floodwood produced 26,429 tons of peat or 2.7% of the U.S. total.

APPENDIX A-2

Production of Peat by State, 1976*

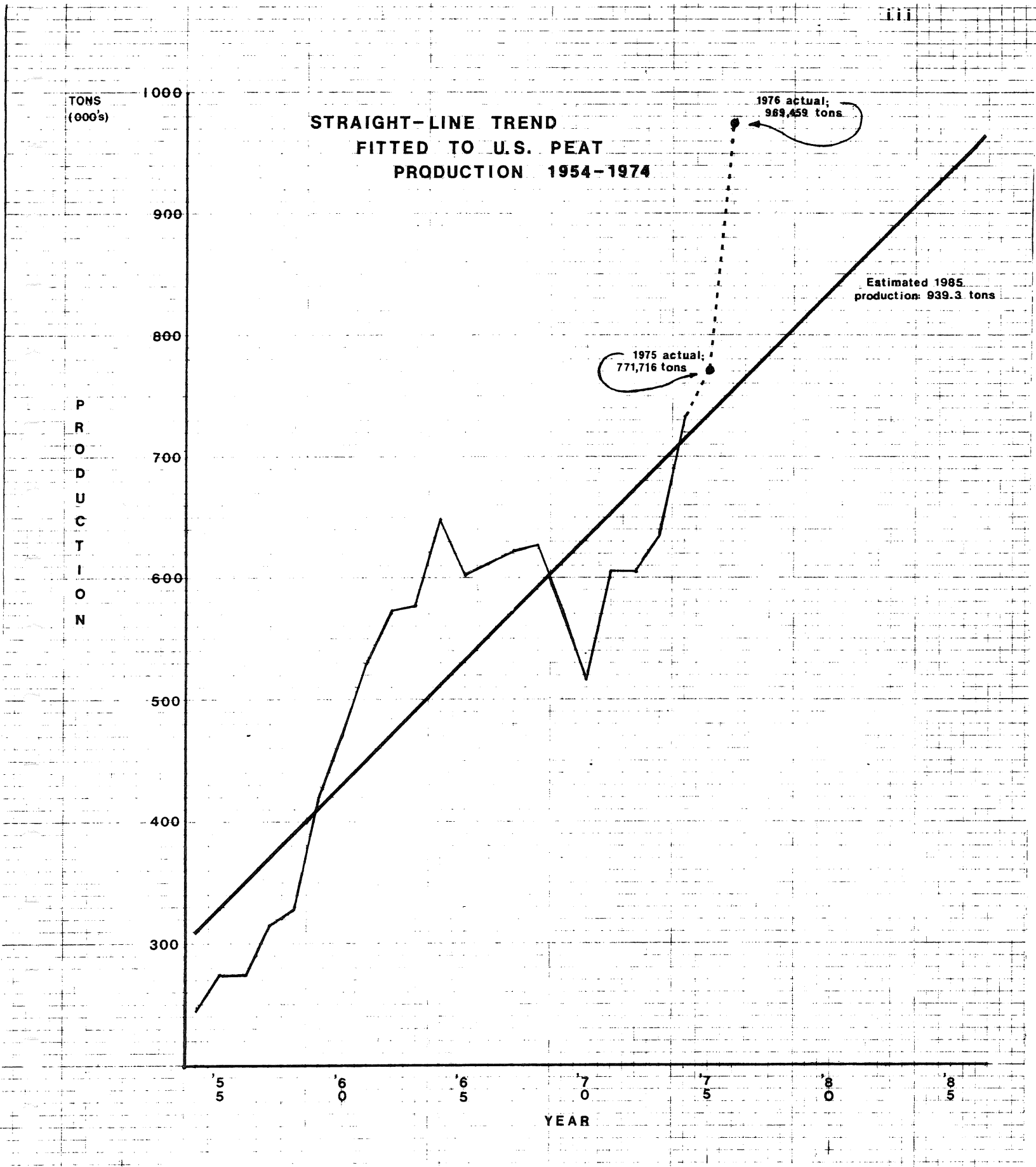
State/Plants	Tonnage	% Change From 1974	% of Total
MI 16	300,103	+ 10.3	31.0
IN 14	145,661	+128.1	15.0
IL 4	84,662	- 11.6	8.7
FL 7	82,652	+ 22.8	8.5
NY 5	34,075	+110.2	3.5
CO 9	33,201	+ 7.1	3.4
MN 4	26,429	+ 29.6	2.7
NJ 4	26,298	- 15.7	2.7
SC 1	15,015	- 15.6	1.5
WA 5	14,060	- 3.0	1.4
WI 4	9,742	NA[1]	1.0
ME 4	4,781	+ 4.8	.5
OH 6	3,195	- 31.3	.3
MD 1	2,891	+ 0.6	.3
OTHERS[2]	186,694	------	19.3
TOTAL	969,459	+ 32.6	99.8[3]

[1]Wisconsin withheld production figures in 1974

[2]Includes California, Georgia, Iowa, Masschusetts, Montana, North Datota, and Pennsylvania. Pennsylvania was the third largest producing state, behind Michigan and Indiana, in 1976.

[3]Does not add to 100.0 due to individual rounding.

*Source: Mineral Industry Surveys
U. S. Bureau of Mines
Advance Data on Peat in 1976


STRAIGHT-LINE TREND
FITTED TO U.S. PEAT
PRODUCTION 1954-1974
TONS
(000's)
1000
900
800
700
600
500
400
300
PRODUCTION
1976 actual;
969,459 tons
1975 actual;
771,716 tons
Estimated 1985
production: 939.3 tons
'55
'60
'65
'70
'75
'80
'85
YEAR

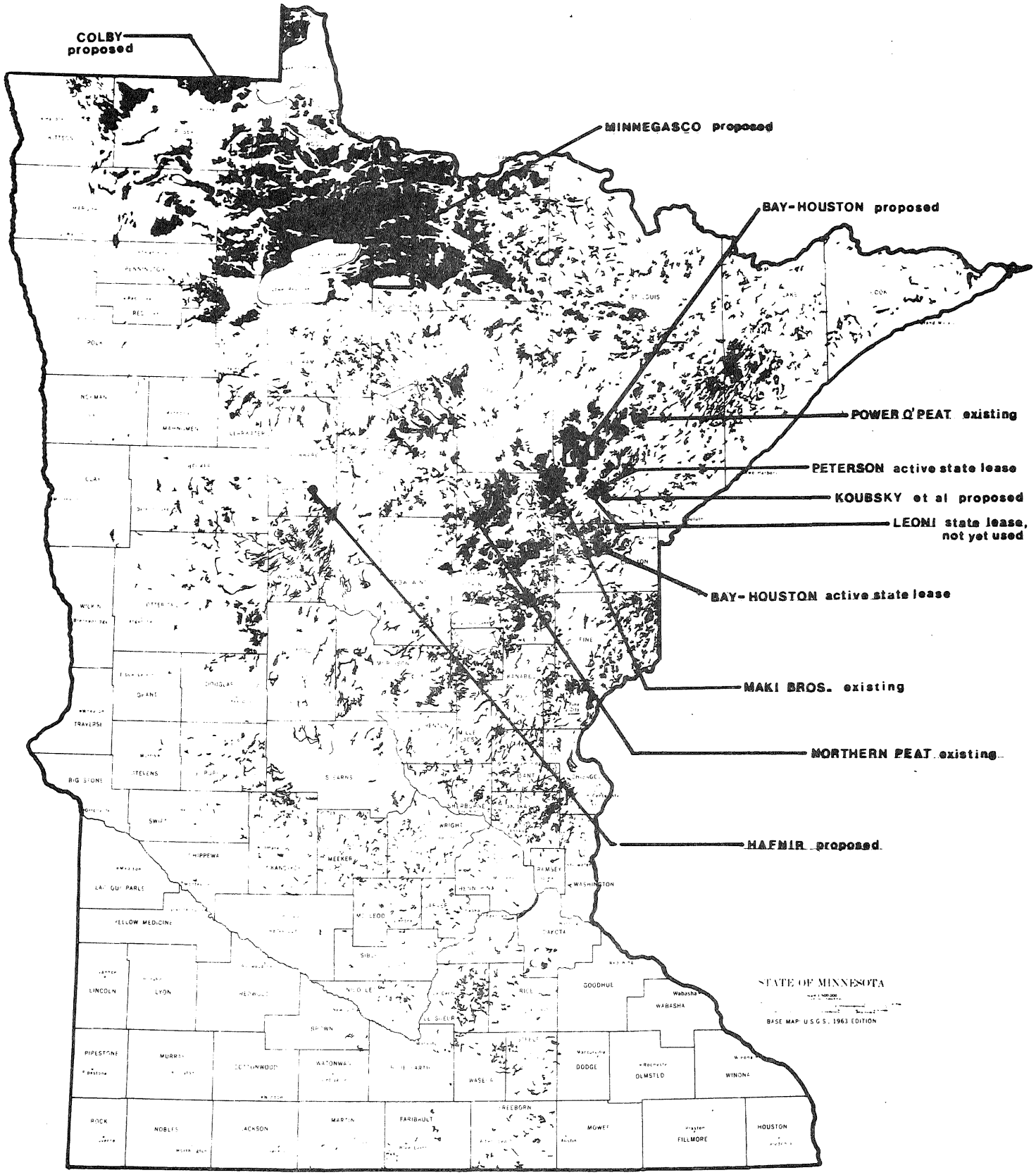
Straight-Line Trend Fitted to U.S. Production of Peat (tons) 1954-1974

Year	x	Y	xY	x^2	Y_t	% of trend $\frac{Y}{Y_t} \cdot 100$
1954	-10	244	-2440	100	310.0	78.71
1955	-9	274	-2466	81	330.3	82.95
1956	-8	273	-2184	64	350.6	77.87
1957	-7	316	-2212	49	370.9	85.20
1958	-6	328	-1968	36	391.2	83.84
1959	-5	419	-2095	25	411.5	101.82
1960	-4	471	-1884	16	431.8	109.08
1961	-3	531	-1593	9	452.1	117.45
1962	-2	572	-1144	4	472.4	121.08
1963	-1	579	-579	1	492.7	117.52
1964	0	649	0	0	513.0	126.51
1965	1	604	604	1	533.3	113.26
1966	2	611	1222	4	553.6	110.37
1967	3	617	1851	9	573.9	107.51
1968	4	619	2476	16	594.2	104.17
1969	5	572	2860	25	614.5	93.08
1970	6	517	3102	36	634.8	81.44
1971	7	605	4235	49	655.1	92.35
1972	8	607	4856	64	675.4	89.87
1973	9	635	5715	81	695.7	91.27
1974	10	731	7310	100	716.0	102.09
		10,774	15,666	770		
1985	21				939.3	

$$a = \frac{\Sigma Y}{n} = \frac{10,774}{21} = 513.0 \qquad b = \frac{\Sigma xY}{\Sigma x^2} = \frac{15,666}{770} = 20.3$$

$$Y_t = 513 + 20.3(x)$$

APPENDIX B



EXISTING AND PROPOSED PEAT OPERATIONS

APPENDIX C

MINNESOTA STATUTES PERTAINING TO PEAT*

88.16 STARTING FIRES; FIRE-BREAKS; UNAUTHORIZED FIRES. Subdivision 1. It shall be unlawful, when the ground is not snow-covered, in any place where there are standing or growing native coniferous trees, or in areas of ground from which native coniferous trees have been cut, or where there are slashings of such trees, or native brush, timber, slashings thereof, or excavated stumps, or where there is peat or peat roots excavated or growing, to start or have any open fire, or any back-fire, without the written permission of the commissioner, or other authorized forest officer.

Subd. 2. The occupant of any premises upon which any unauthorized fire is burning in the vicinity of forest lands, whether the fire was started by him or otherwise, shall promptly report the fire to the commissioner, or to the nearest forest officer or fire warden. Failure to make this report shall be deemed a violation of sections 88.03 to 88.21 and the occupant of the premises shall be deemed prima facie guilty of negligence if the unreported fire spreads from the premises to the damage, loss, or injury of the state or any person.

[1925 c 407 s 22; 1967 c 146 s 12; 1969 c 410 s 1] (4031-22)

88.17 PERMISSION TO START FIRES; PROSECUTION FOR UNLAWFULLY STARTING FIRES. Subdivision 1. Permission to set fire to any grass, stubble, peat, brush, raking of leaves, rubbish, garbage, branches, slashings or woods for the purpose of cleanup, clearing and improving land or preventing other fire shall be given whenever the same may be safely burned, upon such reasonable conditions and restrictions as the commissioner may prescribe, to prevent same from spreading and getting beyond control. This permission shall be in the form of a written permit signed by a regular forest officer or some other suitable person to be designated by him, as town fire warden, these permits to be on forms furnished by the commissioner. The commissioner, or any of his authorized assistants, may at his discretion in cases of extreme danger refuse, revoke, or postpone the use of permits to burn when such act is clearly necessary for the safety of life and property. Any person setting any fire or burning anything under such permit shall keep the permit on his person while so engaged and produce and exhibit the permit to any forest officer, when requested to do so. No permit is required for the burning of grass, leaves, rubbish, garbage, branches and similar combustible material under the following conditions: (1) The material shall be burned within an incinerator or burner constructed of fire resistant material having a capacity of not less than three bushels and maintained with a minimum burning capacity of not less than two bushels, a cover which is closed when in use, and maximum openings in the top or sides no greater than one inch in diameter; and (2) No combustible material shall be nearer than three feet to the burner or incinerator when it is in use.

Subd. 2. In any prosecution under sections 88.03 to 88.21 for unlawfully starting or setting or having or permitting the continuation or spread of any fire or back-fire, proof upon the part of the prosecution that such fire or back-fire originated upon, or was permitted to burn upon, or that it spread from, lands or premises occupied by the person charged with the offense, and that this person had knowledge of the fire and made no effort to put it out, shall be prima facie evidence that he is guilty. The burden of proof as to any matter in refutation of this prima facie guilt, or in extenuation or excuse, shall be and rest upon the person so appearing prima facie to be guilty.

[1925 c 407 s 23; 1967 c 146 s 13; 1969 c 410 s 2] (4031-23)

*Includes only those portions of statutory sections which relate to peat; the word "peat" is underlined where it appears.

89.17 **LEASES AND PERMITS.** The commissioner shall have power to grant and execute, in the name of the state, leases and permits for the use of any state forest lands for any purpose which in his opinion is not inconsistent with the maintenance and management of the state forest in which the land is situated, on forestry principles for timber production. Every such lease or permit shall be revocable at his discretion at any time subject to such conditions as may be agreed on in the lease. The approval of the commissioner of administration shall not be required upon any such lease or permit. No such lease or permit for a period exceeding ten years shall be granted except with the approval of the executive council.

Hunting of wild game is prohibited on any land which has been posted by the lessee to prohibit hunting. Such prohibition shall apply to all persons including the lessee.

[1931 c 263 s 6; 1957 c 136 s 1; 1959 c 473 s 1; 1961 c 223 s 10; 1965 c 382 s 2] (6513-6)

92.461 **PEAT LANDS.** Subdivision 1. **Peat lands withdrawn from sale.** All lands now or hereafter owned by the state which are chiefly valuable by reason of deposits of peat in commercial quantities are hereby withdrawn from sale.

Subd. 2. **Examination by commissioner of natural resources.** Before any state land is offered for sale the commissioner of natural resources shall cause such land to be examined to determine whether the land is chiefly valuable by reason of deposits of peat in commercial quantities.

[1935 c 322; 1949 c 453 s 1, 2; 1969 c 1129 art 10 s 2] (6433-1, 2)

92.47 [Repealed, 1963 c 567 s 6]

92.48 [Repealed, 1963 c 567 s 6]

92.49 [Repealed, 1963 c 567 s 6]

92.50 **UNSOLD LANDS SUBJECT TO SALE MAY BE LEASED.** Subdivision 1. The commissioner of natural resources may, at public or private vendue and at such prices and under such terms and conditions as he may prescribe lease any state-owned lands under his jurisdiction and control for the purpose of taking and removing sand, gravel, clay, rock, marl, peat, and black dirt therefrom, for storing thereon ore, waste materials from mines, or rock and tailings from ore milling plants, for roads or railroads, or for any other uses not inconsistent with the interests of the state. No such lease shall be made for a term to exceed ten years, except in the case of leases of lands for storage sites for ore, waste materials from mines, or rock and tailings from ore milling plants, or for the removal of peat, which may be made for a term not exceeding 25 years, provided that such leases for the removal of peat shall be approved by the executive council. All such leases shall be made subject to sale and leasing of the land for mineral purposes under legal provisions and contain a provision for their cancellation at any time by the commissioner upon three months written notice, provided that a longer notice period, not exceeding three years, may be provided in leases for storing ore, waste materials from mines or rock or tailings from ore milling plants; provided further, that in leases for the removal of peat, the commissioner may determine the terms and conditions upon which the lease may be canceled. All money received from leases under this section shall be credited to the fund to which the land belongs.

Subd. 2. The commissioner may grant leases and licenses for terms not exceeding 25 years, subject to cancelation at any time upon three years' notice, to deposit tailings from any iron ore beneficiation plant in any public lake not exceeding 160 acres in area, upon first holding a public hearing in the manner and under the procedure provided in Laws 1937, Chapter 468, as amended; and upon finding in pursuance of such public hearing

(a) that such use of each lake is necessary and in the best interests of the public, and

(b) that the proposed use will not result in pollution or sedimentation of any outlet stream;

Provided, further, that the commissioner may impose further conditions and restrictions with respect to use of said lake to safeguard the public interest, including the requirement that the lessee or licensee acquire suitable permits or easements from the owners of all lands riparian to such lake. Any money received therefrom shall be deposited in the permanent school fund.

[1915 c 192 s 1; 1917 c 31; 1919 c 405 s 1; 1945 c 321 s 1; 1947 c 323 s 1; 1953 c 328 s 1; 1959 c 473 s 2; 1969 c 1129 art 10 s 2] (6328)

NOTE: As to Volstead lands, see Laws 1961, Chapter 472, and Laws 1963, Chapter 390, Section 1.

111.03 POWERS GRANTED TO COURTS. The district court of any county in this state or any judge thereof in vacation is hereby vested with jurisdiction, power, and authority, upon the filing of a petition as specified in section 111.04, and the conditions stated therein are found to exist to establish a drainage and conservancy district and define and fix boundaries thereof, which may be entirely within or partly within and partly without any county and include the whole or any part of one or more counties, including the county in which the petition is filed, for all or any of the following purposes:

(1) For regulating streams, channels or watercourses, and the flow of water therein, by changing, widening, deepening, straightening the same or otherwise improving the use and capacity thereof;

(2) For reclaiming by drainage, or filling, diking or otherwise protecting lands subject to overflow;

(3) For providing for irrigation where it may be needed;

(4) For the prevention of fires in areas of agricultural lands or in peat areas subject to destruction and damage by fire and for the irrigation of agricultural lands needing the same by regulating, controlling, conserving, and applying the waters in any ditch or drain which has heretofore been or shall hereafter be established and constructed under any law of this state and in streams or watercourses connecting therewith;

(5) For regulation and control of flood waters and the prevention of floods, by deepening, widening, straightening, or diking the channels of any stream or watercourse, and by the construction of reservoirs or other means to hold and control such waters;

(6) For diverting, in whole or in part, streams or watercourses and regulating the use thereof; streams so diverted shall follow the natural course of drainage and terminate in the same natural outlet;

(7) For providing for sanitation and public health and regulating the use of streams, ditches or watercourses for purposes of disposing of waste materials; and

(8) As incident to and for the purpose of accomplishing and effectuating all the purposes of sections 111.02 to 111.42 may, under the conditions specified herein, straighten, widen, deepen, or change the course or terminus of any natural or artificial watercourse and build, construct, and maintain all necessary dikes, ditches, canals, levees, wall embankments, bridges, dams, sluiceways, locks, and other structures that may be found necessary and advisable to create, establish, and maintain the necessary reservoirs or other structures, to hold, control, and regulate any and all waters within the district, and to acquire title in the name of the district to all

272.38 STRUCTURES, STANDING TIMBER, OR MINERALS NOT TO BE REMOVED. Subdivision 1. Taxes to be first paid. No structures, standing timber, minerals, sand, gravel, peat, subsoil, or top-soil shall be removed from any tract of land until all the taxes assessed against such tract and due and payable shall have been fully paid and discharged. When the commissioner of finance or the county auditor has reason to believe that any such structure, timber, minerals, sand, gravel, peat, subsoil, or top-soil will be removed from such tract before such taxes shall have been paid, either may direct the county attorney to bring suit in the name of the state to enjoin any and all persons from removing such structure, timber, minerals, sand, gravel, peat, subsoil, or top-soil therefrom until such taxes are paid. No bond shall be required of plaintiff in such suit.

Subd. 2. Agreements for removal. The county auditor may enter into an agreement with the taxpayer for the removal of any structures, standing timber, minerals, sand, gravel, peat, subsoil, or top-soil from the property of the taxpayer upon which taxes are due and payable, which agreement shall provide that the entire sale price thereof, or the reasonable market value thereof, whichever is the greater, or if the property is not sold, then the fair market value thereof is to be paid to the county treasurer to be applied upon the taxes on the property, penalties, costs, and interests, in the inverse order to that in which such taxes were levied, to be applied as follows: (1) upon the penalties, costs and interest, (2) upon the taxes levied; and the same procedure shall be followed for each year's taxes until the entire sum so paid shall have been applied; provided, that if the judgment for any such delinquent taxes shall have been partially paid, it shall not affect the right of the state to forfeit the title to such lands in the event of the failure to redeem the same. The contract between the county auditor and the taxpayer shall provide that the contract shall be fully completed prior to the time that the title to the property would otherwise forfeit to the state. The county auditor may, if in his opinion it is necessary to protect the state, demand that the taxpayer make, execute, and deliver a bond to the state in such an amount as may be necessary in the opinion of the county auditor to protect the state, to insure the payment to the county treasurer of the purchase price or the reasonable market value of the property removed from the land under the agreements. Nothing herein shall be construed as prohibiting

the removal of such sand, gravel, peat, subsoil, or top-soil as may be incidental to the erection of structures on the land or the grading of the land when such removal or grading shall result in enhancing the value thereof; nor shall anything herein be construed as prohibiting the removal of the overburden on mine properties. The removal of any structures, standing timber, minerals, sand, gravel, peat, subsoil, or top-soil under such agreements with the county auditor shall not be construed to be in violation of this section.

[R L s 977; 1931 c 333 s 1; 1941 c 397 s 1; 1973 c 492 s 14] (2203)

272.39 STRUCTURES, TIMBER, OR MINERALS MAY BE SEIZED. Any structure, timber, minerals, sand, gravel, peat, subsoil, or top-soil removed from any tract of land upon which taxes are due and payable, as provided in this chapter, or so much thereof as may be necessary, may be seized by the commissioner of finance, by the county auditor, or by any person authorized by either of them in writing, and sold in the manner provided for sale of personal property in satisfaction of taxes. All moneys received from such sale in excess of the amount necessary to satisfy such taxes and the costs and expenses of seizure and sale shall be returned to the owner of such structure, timber, minerals, sand, gravel, peat, subsoil, or top-soil, if known, and, if unknown, shall be deposited in the county treasury subject to the right of the owner.

[R L s 978; 1931 c 333 s 2; 1941 c 397 s 2; 1973 c 492 s 14] (2204)

272.40 REMOVAL. Any person who shall remove or attempt to remove any structure, timber, minerals, sand, gravel, peat, subsoil, or topsoil from any tract of land contrary to the provisions of this chapter after such taxes become due and payable and before the same have been fully paid and discharged shall be guilty of a gross misdemeanor.

[R. L. s. 979; 1941 c. 397 s. 3] (2205)

282.04 TIMBER SALE; TAX FORFEITED LANDS, LEASE, PARTITION,

Provided, however, that no lease for the removal of peat shall be made by the county auditor pursuant to this section without first holding a public hearing on his intention to lease. One printed notice in a legal newspaper in the county at least ten days before the hearing, and posted notice in the court house at least 20 days before the hearing shall be given of the hearing.

282.35 OWNER OF FORFEITED LAND MAY REPURCHASE.

Subd. 9. Not to remove structures, timber, etc., until payment is made in full. When any forfeited lands are repurchased, as provided for in this section, no structure, minerals, sand, gravel, top-soil, subsoil, or peat shall be removed, nor shall any timber or timber products be cut and removed until the purchase price has been paid in full. Nothing in this subdivision shall be construed as prohibiting the removal of such sand, gravel, top-soil, subsoil, or peat as may be incidental to the erection of structures on such repurchased lands or to the grading of such lands whenever such removal or grading shall result in enhancing the value thereof.

[1943 c 164 s 1-9; 1973 c 582 s 3]

560.01 **ACTION FOR OPENING MINES, QUARRIES, BELONGING TO PLURALITY OF OWNERS.** Where veins, lodes, deposits of iron, iron ores, minerals or mineral ores of any kind, stone, coal, clay, sand, gravel, or peat are known to, or do exist on or in lands which are shown by properly executed deeds or leases having more than one year to run of record in the county in which the lands are situated, to belong to a plurality of owners, the owner or owners of an interest equal to one-half or greater in the lands, as shown by the deeds or leases so recorded, may bring action in the district court in the county where the lands are situated, for permission to open, operate, and develop these veins, lodes, or deposits of iron, iron ores, minerals, or mineral ores of any kind, stone, coal, clay, sand, gravel, or peat that are found in or on these lands.

[1907 c. 177 s. 1] (9593)

560.02 **COMPLAINT; HEARING.** The complaint shall describe the land to be affected, and there shall be an abstract of the lands thereto attached, showing the title thereof as appears by the deeds or leases recorded in the county where the land is situated. Upon the case being brought on for hearing, the court shall determine who are the owners of the property described in the complaint, as appears by the properly executed deeds or leases thereof of record in the county in which the same is situated.

[1907 c. 177 s. 2] (9594)

560.03 **ORDER; BOND.** If, upon the hearing, it appears that the complainant or complainants own one-half or more of the property, as shown by the properly executed deeds or leases of record in the county, the court shall make an order permitting and authorizing complainant or complainants, upon the filing in the office of the clerk of the court having jurisdiction of the action, of such bond, with such sureties as may be ordered and approved by the court, or a judge thereof, conditioned for the faithful, complete, and timely performance of all orders of the court made in the action or concerning the subject matter thereof, and for the faithful, complete, and timely performance of all the provisions of this chapter, to enter upon, open, develop, and operate these lands for the purpose of producing therefrom and from the veins, lodes, and deposits therein situate, the iron, iron ore, or other minerals or mineral ores of any kind, coal, clay, sand, gravel, and peat, that may exist thereon or therein.

[1907 c. 177 s. 3] (9595)

560.04 **ENTRY UPON LANDS; ACCOUNTING; APPLICATION OF RECEIPTS; EXPENSES.** The complainant or complainants may thereupon, after the filing and approval of the bond provided for in section 560.03, enter upon these lands and develop the same, and produce therefrom and from the lodes, veins, and deposits the iron, iron ore, minerals, mineral ores of any kind, coal, sand, clay, gravel, and peat that exist thereon or therein. A strict account shall be kept, by the party or parties operating these properties and workings, of all expenses of opening and working any and all such mines, or iron or iron ores, minerals or mineral ores of any kind, coal, or deposits of clay, sand, gravel, or peat; and a true and correct account of the output of these workings in tons and of the receipts from the sale or disposal of the output. A monthly statement of such expenses and the output shall be made by the parties operating these workings and properties and filed with the clerk of the court where the action was commenced or is pending. The parties operating such properties shall be entitled to use so much of the receipts from the sales of the total output as may be necessary for the payment of the expenses and charges of opening and operating such property, and the surplus of receipts over the amount so paid out for expenses and charges of opening and operating such property shall be divided pro rata among all the owners of such property according to their interests, and the amount to which any party is entitled shall be paid to him by the parties operating such property upon demand at any time after the filing of any monthly statement, as herein provided, which shows a surplus over the charges and expenses aforesaid. No part of the expenses or charges, and no claim for work or labor performed in or about the opening, operating, or improvement of such property shall be a lien upon or a charge against any portion of the property or interest therein not owned by the parties operating such property, and none of the owners of any part of or interest in the property who are not operating such property shall be liable for any of the charges or expenses of opening, operating, or improving such property.

[1907 c. 177 s. 4] (9596)

560.05 **SURFACE RIGHTS.** The parties operating these veins, lodes, and deposits, as herein provided, shall have the right to use the surface of the ground for placing machinery and coverings therefor, for roads, tramways, drains, water pipes, steam and electric plants, and all other appliances necessary in the operation and developing of the properties and workings, including buildings for offices and houses for men, and shelter for animals, engaged and employed in and by the workings, without charge from coowners.

[1907 c. 177 s. 5] (9597)

560.06 RIGHTS OF NON-OPERATING OWNERS. The owners of said property not engaged in operating the same shall have access to the property and workings therein at all reasonable times for the purpose of measuring up the workings and verifying thereby the accounts of operators thereof, and shall have access to the property for the purpose of removing and taking away the property delivered to them on the dump of the property as herein provided. This right must be so exercised as not to interfere with the parties operating the property and workings on or in the property, or of any of the hoisting or working apparatus, railroads, roads, tramways, or other appliances thereon, or of the workmen, servants of the operators of the property.

[1907 c. 177 s. 6] (9598)

560.07 ABANDONMENT OF WORK; RIGHTS OF MINORITY OWNERS. In case the parties owning one-half or more of the property and land on which these veins, lodes, or deposits of iron, iron ores, minerals, or mineral ores of any kind, or coal, clay, sand, gravel, or peat, are known to or do exist, fail or refuse to proceed under this chapter, or if, after commencing the work and operations hereunder, these parties abandon the work for one year, then the owners of less than a half interest of the property, lands and the title therein, as shown by properly executed deeds recorded in the county in which the same is situate, may proceed to open and work the property in the same manner and under the same restrictions as provided herein.

[1907 c. 177 s. 7] (9599)

560.08 LIENS, ATTACHMENT. No liens created by the statutes of this state, whether mechanics, materialmen, or laborers, or for supplies or any other liens except those of judgment against owners of interests in the lands, shall attach to the lands on or in which operations for producing from the veins, lodes, or deposits of iron, iron ores, minerals, or mineral ores of all kinds, coal, clay, sand, gravel, or peat are carried on under and in accordance with this chapter.

[1907 c. 177 s. 8] (9600)

560.09 ACTIONS APPLY ONLY TO OUTPUT; PARTITION. Actions for operation of property in all cases where lands are held by a plurality of owners, are opened, operated, and developed for the purpose of obtaining therefrom the products of the veins, lodes, and deposits of iron, iron ores, minerals, mineral ores of any kind, coal, clay, sand, gravel, and peat under the provisions of this chapter, shall be held to apply only to the output of the workings, and decree of partition shall be made by the courts to apply only to the division of the output of the workings of these lands, and the veins, lodes, and deposits aforesaid therein.

[1907 c. 177 s. 9] (9601)

John Helland
House Research
July, 1975

CHAPTER 282

TAX-FORFEITED LAND SALES

CLASSIFICATION OF LAND

282.01 TAX-FORFEITED LANDS. Subdivision 1. **Classification; use; exchange.** Except as ownership of particular tracts of land should be held by the state or its subdivisions for a recognized public purpose and public access, it is the general policy of this state to encourage return of tax-forfeited lands to private ownership and the tax rolls through sale, and classification of lands according to this chapter is not in contravention of this general policy. All parcels of land becoming the property of the state in trust under the provisions of any law now existing or hereafter enacted declaring the forfeiture of lands to the state for taxes, shall be classified by the county board of the county wherein such parcels lie as conservation or nonconservation. Such classification shall be made with consideration, among other things, to the present use of adjacent lands, the productivity of the soil, the character of forest or other growth, accessibility of lands to established roads, schools, and other public services, and their peculiar suitability or desirability for particular uses. Such classification, furthermore, shall aid: to encourage and foster a mode of land utilization that will facilitate the economical and adequate provision of transportation, roads, water supply, drainage, sanitation, education, and recreation; to facilitate reduction of governmental expenditures; to conserve and develop the natural resources; and to foster and develop agriculture and other industries in the districts and places best suited thereto. In making such classification the county board may make use of such data and information as may be made available by any office or department of the federal, state, or local governments, or by any other person or agency possessing information pertinent thereto at the time such classification is made. Such lands may be reclassified from time to time as the county board may deem necessary or desirable, except as to conservation lands held by the state free from any trust in favor of any taxing district. Provided that if any such lands are located within the boundaries of any organized town, with taxable valuation in excess of $20,000, or incorporated municipality, the

classification or reclassification and sale shall first be approved by the town board of such town or the governing body of such municipality insofar as the lands located therein are concerned. Any tax-forfeited lands may be sold by the county board to any organized or incorporated governmental subdivision of the state for any public purpose for which such subdivision is authorized to acquire property or may be released from the trust in favor of the taxing districts upon application of any state agency for any authorized use at not less than their value as determined by the county board. The commissioner of revenue shall have power to convey by deed in the name of the state any tract of tax-forfeited land held in trust in favor of the taxing districts, to any governmental subdivision for any authorized public use, provided that an application therefor shall be submitted to the commissioner with a statement of facts as to the use to be made of such tract and the need therefor and the recommendation of the county board. The deed of conveyance shall be upon a form approved by the attorney general and shall be conditioned upon continued use for the purpose stated in the application, provided, however, that if the governing body of such governmental subdivision by resolution determines that some other public use shall be made of such lands, and such change of use is approved by the county board and an application for such change of use is made to the commissioner, and approved by him, such changed use may be made of such lands without the necessity of the governing body conveying the lands back to the state and securing a new conveyance from the state to the governmental subdivision for such new public use.

Whenever any governmental subdivision to which any tax-forfeited land has been conveyed for a specified public use as provided in this section shall fail to put such land to such use, or to some other authorized public use as provided herein, or shall abandon such use, the governing body of the subdivision shall authorize the proper officers to convey the same, or such portion thereof not required for an authorized public use, to the state of Minnesota, and such officers shall execute a deed of such conveyance forthwith, which conveyance shall be subject to the approval of the commissioner and in form approved by the attorney general, provided, however, that a sale, lease, transfer or other conveyance of such lands by a housing and redevelopment authority as authorized by sections 462.411 to 462.711 shall not be an abandonment of such use and such lands shall not be reconveyed to the state nor shall they revert to the state. No vote of the people shall be required for such conveyance. In case any such land shall not be so conveyed to the state, the commissioner of revenue shall by written instrument, in form approved by the attorney general, declare the same to have reverted to the state, and shall serve a notice thereof, with a copy of the declaration, by registered mail upon the clerk or recorder of the governmental subdivision concerned, provided, that no declaration of reversion shall be made earlier than five years from the date of conveyance for failure to put such land to such use or from the date of abandonment of such use if such lands have been put to such use. The commissioner shall file the original declaration in his office, with verified proof of service as herein required. The governmental subdivision may appeal to the district court of the county in which the land lies by filing with the clerk of court a notice of appeal, specifying the grounds of appeal and the description of the land involved, mailing a copy thereof by registered mail to the commissioner of revenue, and filing a copy thereof for record with the county recorder or registrar of titles, all within 30 days after the mailing of the notice of reversion. The appeal shall be tried by the court in like manner as a civil action. If no appeal is taken as herein provided, the declaration of reversion shall be final. The commissioner of revenue shall file for record with the county recorder or registrar of titles, of the county within which the land lies, a certified copy of the declaration of reversion and proof of service.

Any city of the first class now or hereafter having a population of 450,000, or over, or its board of park commissioners, which has acquired tax-forfeited land for a specified public use pursuant to the terms of this section, may convey said land in exchange for other land of substantially equal worth located in said city of the first class, provided that the land conveyed to said city of the first class now or hereafter having a population of 450,000, or over, or its board of park commissioners, in exchange shall be subject to the public use and reversionary provisions of this section; the tax-forfeited land so conveyed shall thereafter be free and discharged from the public use and reversionary provisions of this section, provided that said exchange shall in no way affect the mineral or mineral rights of the state of Minnesota, if any, in the lands so exchanged.

Subd. 2. **Conservation lands under supervision of county board.** Lands classified as conservation lands, unless reclassified as non-conservation lands, sold to a governmental subdivision of the state, designated as lands primarily suitable for forest production and sold as hereinafter provided, or released from the trust in favor of the taxing districts, as herein provided, will be held under the supervision of the county board of the county within which such parcels lie.

The county board may, by resolution duly adopted, declare lands classified as conservation lands as primarily suitable for timber production and as lands which should be placed in private ownership for such purposes. If such action be approved by the commissioner of natural resources, the lands so designated, or any part thereof, may be sold by the county board in the same manner as provided for the sale of lands classified as non-conservation lands. Such county action and the approval of the commissioner shall be limited to lands lying within areas zoned for restricted uses under the provisions of Laws 1939, Chapter 340, or any amendments thereof.

The county board may, by resolution duly adopted, resolve that certain lands classified as conservation lands shall be devoted to conservation uses and may submit such resolution to the commissioner of natural resources. If, upon investigation, the commissioner of natural resources determines that the lands covered by such resolution, or any part thereof, can be managed and developed for conservation purposes, he shall make a certificate describing the lands and reciting the acceptance thereof on behalf of the state for such purposes. The commissioner shall transmit the certificate to the county auditor, who shall note the same upon his records and record the same with the county recorder. The title to all lands so accepted shall be held by the state free from any trust in favor of any and all taxing districts and such lands shall be devoted thereafter to the purposes of forestry, water conservation, flood control, parks, game refuges, controlled game management areas, public shooting grounds, or other public recreational or conservation uses, and managed, controlled, and regulated for such purposes under the jurisdiction of the commissioner of natural resources and the divisions of his department. In case the commissioner of natural resources shall determine that any tract of land so held by the state and situated within or adjacent to the boundaries of any governmental subdivision of the state is suitable for use by such subdivision for any authorized public purpose, he may convey such tract by deed in the name of the state to such subdivision upon the filing with him of a resolution adopted by a majority vote of all the members of the governing body thereof, stating the purpose for which the land is desired. The deed of conveyance shall be upon a form approved by the attorney general conditioned upon continued use for the purpose stated in the resolution. All proceeds derived from the sale of timber, lease of hay stumpage, or other revenue from such lands under the jurisdiction of the natural resources commissioner shall be paid into the general fund of the state. The county auditor, with the approval of the county board, may lease conservation lands remaining under the jurisdiction of the county board and sell timber and hay stumpage thereon in the manner hereinafter provided, and all proceeds derived therefrom shall be distributed in the same manner as provided in section 282.04.

Subd. 3. **Sale of non-conservation lands.** All such parcels of land classified, as non-conservation, except those which may be reserved, as hereinafter provided, shall be sold at public or private sale, as hereinafter provided, if it shall be determined, by the county board of the county wherein such parcels lie, that it is advisable to do so, having in mind their accessibility, their proximity to existing public improvements, and the effect of their sale and occupancy on the public burdens. Any parcels of land proposed to be sold shall be first appraised by the county board of the county wherein such parcels lie, and such parcels may be reappraised whenever the county board deems it necessary to carry out the intent of sections 282.01 to 282.13. In such appraisal the value of the land and any standing timber thereon shall be separately determined. Before any parcel of land is sold the appraised value of the timber thereon shall first have been approved by the commissioner of natural resources.

In any county wherein a state forest or any part thereof is located, the county auditor shall submit to the commissioner of natural resources at least 30 days before the first publication of the list of lands to be offered for sale a list of all lands included therein which are situated outside of any incorporated municipality. If at any time before the opening of the sale the commissioner notifies the county auditor in writing that he finds standing timber on any parcel of such land, such parcel shall not be sold unless the requirements of this section respecting the separate appraisal of such timber and the approval thereof by the commissioner shall have been complied with. The

commissioner may waive the requirement of the aforesaid 30 day notice as to any parcel of land which has been examined and the timber value approved as required by this section.

If any public improvement is made by a municipality after any parcel of land has been forfeited to the state for the non-payment of taxes and such improvement is assessed in whole or in part against the property benefited thereby, the clerk of such municipality shall certify to the county auditor, immediately upon the determination of the assessments for such improvement, the total amount that would have been assessed against such parcel of land if it had been subject to assessment; or if any such public improvement is made, as aforesaid, or is petitioned for, ordered in or assessed, whether such improvement is completed in whole or in part, at any time between the appraisal and the sale of any such parcel of land, the cost of such improvement shall be included as a separate item and added to the appraised value of any such parcel of land at the time it is sold; and no sale of any such parcel of land shall have any effect whatever to discharge or free such parcel of land from lien for the special benefit conferred upon it by reason of such public improvement until the cost thereof, including penalties, if any, shall be paid. The county board shall determine the amount, if any, by which the value of such parcel was enhanced by such improvement and shall include such amount as a separate item in fixing the appraised value for the purpose of sale. In classifying, appraising, and selling such lands, the county board may designate the tracts as assessed and acquired, or may by resolution provide for the subdivision of such tracts into smaller units or for the grouping of several such tracts into one tract when such subdivision or grouping is deemed advantageous for the purpose of sale, but each such smaller tract or larger tract must be classified and appraised as such before being offered for sale. If any such lands have once been classified, the board of county commissioners, in its discretion, may, by resolution, authorize the sale of such smaller tract or larger tract without reclassification.

Subd. 4. **Conduct of sale.** Such sale shall be conducted by the county auditor at the county seat of the county in which such parcels lie, provided that, in St. Louis and Koochiching counties, the sale may be conducted in any county facility within the county, and such parcels shall be sold for cash only and at not less than the appraised value, unless the county board of the county shall have adopted a resolution providing for their sale on terms, in which event such resolution shall control with respect thereto. When the sale is made on terms other than for cash only a payment of at least ten percent of the purchase price must be made at the time of purchase, thereupon the balance shall be paid in not to exceed ten equal annual instalments. No standing timber or timber products shall be removed from these lands until an amount equal to the appraised value of all such timber or timber products as may have been standing on such lands at the time of purchase has been paid by the purchaser; provided, that in case any parcel of land bearing standing timber or timber products is sold at public auction for more than the appraised value, the amount bid in excess of the appraised value shall be allocated between the land and the timber in proportion to the respective appraised values thereof, and no standing timber or timber products shall be removed from such land until the amount of such excess bid allocated to timber or timber products shall have been paid in addition to the appraised value thereof. When sales are made on such terms the interest rate on the unpaid portion shall be four percent per annum. The purchaser at such sale shall be entitled to immediate possession, subject to the provisions of any existing valid lease made in behalf of the state.

Subd. 5. **Sale on terms, certificate.** When sales hereafter are made on terms the purchaser shall receive a certificate from the county auditor in such form, consistent with the provisions of sections 282.01 to 282.13 and setting forth the terms of sale, as may be prescribed by the attorney general. Failure of the purchaser or any person claiming under him, to pay any of the deferred instalments with interest, or the current taxes, or to comply with any conditions that may have been stipulated in the notice of sale or in the auditor's certificate herein provided for, shall constitute default; and the state may, by order of the county board, during the continuance of such default, without notice, declare such certificate canceled and take possession of such lands and may thereafter resell or lease the same in the same manner and under the same rules as other lands forfeited to the state for taxes are sold or leased. When the county board shall have adopted a resolution ordering the cancelation of such certificate or certificates the cancelation shall be deemed complete and a reentry shall be deemed to have been made on the part of the state without any other act or deed, and

without any right of redemption by the purchaser or any one claiming under him; and the original purchaser in default or any person claiming under him, who shall remain in possession or enter thereon shall be deemed a willful trespasser and shall be punished as such.

When the cancelation of such certificate has been completed the county auditor shall cancel all taxes and tax liens, delinquent and current, and special assessments, delinquent or otherwise, imposed upon the lands described in the certificate after the issuance thereof by him.

Subd. 6. **Duties of commissioner of revenue; issuance of conveyance.** When any sale has been made by the county auditor under sections 282.01 to 282.13, he shall immediately certify to the commissioner of revenue such information relating to such sale, on such forms as the commissioner of revenue may prescribe as will enable the commissioner of revenue to prepare an appropriate deed if the sale is for cash, or keep his necessary records if the sale is on terms; and not later than October 31 of each year the county auditor shall submit to the commissioner of revenue a statement of all instances wherein any payment of principal, interest, or current taxes on lands held under certificate, due or to be paid during the preceding calendar years, are still outstanding at the time such certificate is made. When such statement shows that a purchaser or his assignee is in default, the commissioner of revenue may instruct the county board of the county in which the land is located to cancel said certificate of sale in the manner provided by subdivision 5, provided that upon recommendation of the county board, and where the circumstances are such that the commissioner of revenue after investigation is satisfied that the purchaser has made every effort reasonable to make payment of both the annual instalment and said taxes, and that there has been no wilful neglect on the part of the purchaser in meeting these obligations, then the commissioner of revenue may extend the time for the payment for such period as he may deem warranted, not to exceed one year. On payment in full of the purchase price, appropriate conveyance in fee, in such form as may be prescribed by the attorney general, shall be issued by the commissioner of revenue, which conveyance shall have the force and effect of a patent from the state subject to easements and restrictions of record at the date of the tax judgment sale, including, but without limitation, permits for telephone, telegraph, and electric power lines either by underground cable or conduit or otherwise, sewer and water lines, highways, railroads, and pipe lines for gas, liquids, or solids in suspension.

Subd. 7. **Sales, when commenced, how land offered for sale.** The sale herein provided for shall commence at such time as the county board of the county wherein such parcels lie, shall direct. The county auditor shall offer the parcels of land in order in which they appear in the notice of sale, and shall sell them to the highest bidder, but not for a less sum than the appraised value, until all of the parcels of land shall have been offered, and thereafter he shall sell any remaining parcels to anyone offering to pay the appraised value thereof. Said sale shall continue until all such parcels are sold or until the county board shall order a reappraisal or shall withdraw any or all such parcels from sale. Such list of lands may be added to and the added lands may be sold at any time by publishing the descriptions and appraised values of such parcels of land as shall have become forfeited and classified as non-conservation since the commencement of any prior sale or such parcels as shall have been reappraised, or such parcels as shall have been reclassified as non-conservation or such other parcels as are subject to sale but were omitted from the existing list for any reason in the same manner as hereinafter provided for the publication of the original list, provided that any parcels added to such list shall first be offered for sale to the highest bidder before they are sold at appraised value. All parcels of land not offered for immediate sale, as well as parcels of such lands as are offered and not immediately sold shall continue to be held in trust by the state for the taxing districts interested in each of said parcels, under the supervision of the county board, and such parcels may be used for public purposes until sold, as the county board may direct.

Subd. 8. **Minerals in tax-forfeited land designated as mining unit or subject to mining permit or lease; procedures.** In case the commissioner of natural resources shall notify the county auditor of any county in writing that the minerals in any tax-forfeited land in such county have been designated as a mining unit as provided by law, or that such minerals are subject to a mining permit or lease issued therefor as provided by law, the surface of such tax-forfeited land shall be subject to disposal and use for mining purposes pursuant to such designation, permit, or lease, and shall be withheld from sale or lease by the county auditor until the commissioner shall notify

the county auditor that such land has been removed from the list of mining units or that any mining permit or lease theretofore issued thereon is no longer in force; provided, that the surface of such tax-forfeited land may be leased by the county auditor as provided by law, with the written approval of the commissioner, subject to disposal and use for mining purposes as herein provided and to any special conditions relating thereto that the commissioner may prescribe, also subject to cancelation for mining purposes on three months written notice from the commissioner to the county auditor.

Subd. 9. **Tax-forfeited lands, sale of.** Where a sale of tax-forfeited land under Mason's Supplement 1940, Section 2139-15, was made prior to December 31, 1942, without first having the appraised value of the timber thereon approved by the commissioner of natural resources as therein provided, such sale may be ratified by the commissioner of revenue in the manner herein provided, if prior to the making of application therefor the entire purchase price of said tax-forfeited land has been paid.

Subd. 10. **Ratification of sale by county bonds.** The purchaser at such sale or the county auditor of the county in which said land is located shall file an application for the ratification of the sale with the board of county commissioners of said county, submitting therewith a statement of the facts of the case and satisfactory proof that the purchase price of such land at the sale has been paid in full. Such application shall be considered by the county board and shall thereafter be submitted by it to the commissioner of revenue with the recommendation of the county board and of the county auditor in all cases wherein he is not the applicant. The commissioner of revenue shall consider said application and if he determines that the conditions above referred to exist he shall make his order ratifying the sale of said tax-forfeited land and transmit a copy thereof to the county auditor of the county in which said tax-forfeited land is located. If any such sale be ratified by the commissioner of revenue, it shall not thereafter be subject to attack for failure to have the timber appraisal approved before the sale. If no conveyance by the state has theretofore been made, the county auditor, upon receipt of said order, shall request the issuance of an appropriate conveyance as provided for in said section 2139-15. If a conveyance has been made by the state of said land pursuant to said section 2139-15, said conveyance shall not thereafter be subject to attack on account of the failure to have the timber appraisal approved before the sale.

Subd. 11. **Pending actions not affected.** The provisions of subdivisions 9 to 11 shall not apply so as to prejudice the rights of any person in any action or proceeding heretofore commenced to the sale in any court of this state.

[*1935 c 386 s 1; Ex1936 c 105 s 1; 1939 c 328 s 1; 1941 c 394 s 1; 1941 c 511 s 1; 1943 c 37 s 1; 1943 c 204 s 1,2; 1943 c 627 s 1-3; 1945 c 99 s 1; 1945 c 150 s 1,2; 1945 c 574 s 1; 1947 c 140 s 1; 1949 c 251 s 1; 1949 c 359 s 1; 1953 c 144 s 1; 1953 c 316 s 1; 1953 c 493 s 1; 1953 c 549 s 1; 1957 c 667 s 1-3; 1959 c 348 s 1; 1969 c 399 s 1; 1969 c 1129 art 10 s 2; 1973 c 582 s 3; 1974 c 278 s 1; 1976 c 181 s 2*] *(2139-15)*

282.011 NON-AGRICULTURAL LANDS, CLASSIFICATION; SALE, CONDITIONS. Subdivision 1. Any lands which have become the absolute property of the state through forfeiture for nonpayment of taxes and which have been classified by the county board as conservation lands under the provisions of Minnesota Statutes 1945, Section 282.01, or have been classified as non-agricultural lands under the provisions of Minnesota Statutes 1945, Section 282.14, or any such lands which shall hereafter be so classified, may be designated by the county board of the county in which such lands lie, by resolution duly adopted, as appropriate and primarily suitable for either specific conservation purposes or for auxiliary forest lands. Any resolution so adopted, together with a list of the lands involved shall be forwarded to the commissioner of natural resources who shall promptly approve or disapprove the whole or any part thereof. He shall thereupon make his certificate showing the lands approved, transmit the same to the county auditor who shall note the same upon his records. Lands so designated and so approved shall thereupon be appraised and the whole, or any part thereof, may be offered for sale and sold in the same manner as provided for the sale of lands classified as non-conservation lands under Minnesota Statutes 1945, Section 282.01, or as agricultural lands under Minnesota Statutes 1945, Section 282.14, as the case may be, according to the status of such lands upon forfeiture. The right to a deed of conveyance to such property accorded the purchaser at any such sale shall be conditioned upon the lands being placed in an auxiliary forest or used for designated conservation purposes as designated by the resolution of the county board.

Subd. 2. The condition as to the placing of land into an auxiliary forest or for use for designated conservation purposes shall be a condition precedent. Any deed of conveyance of lands so placed shall be upon a form approved by the attorney general but such conveyance shall not be a fee determinable nor contain any conditions therein other than a reservation of the minerals and mineral rights to the state for its own use, or in trust for the appropriate taxing district as the case may be, according to the status of the land upon forfeiture. The land so placed, however, shall be subject to the requirements for withdrawal of lands from an auxiliary forest contained in Minnesota Statutes, Section 88.49, Subdivision 9. The procedure contained in that section shall also be applicable, so far as possible, to lands designated for conservation purposes other than an auxiliary forest.

Subd. 3. The commissioner of revenue shall, if requested by the purchaser or the county attorney of the county where all or a portion of the land is situated, deliver the deed to the county attorney for use by him under section 88.48, subdivision 5, but such delivery shall not be considered delivery to the purchaser. The county attorney shall be instructed in the transferral of the deed to him that said deed shall not be delivered to the purchaser unless the land involved is accepted as and placed into an auxiliary forest.

Subd. 4. All deeds executed and delivered by the state pursuant to this section before the effective date of Laws 1955, Chapter 389, containing conditions subsequent or conveying determinable fees, shall at the request of the purchaser, be returned to the commissioner who is herewith empowered to issue a new deed pursuant to subdivision 2.

[*1947 c 496 s 1; 1955 c 389 s 1; 1969 c 1129 art 10 s 2; 1973 c 582 s 3*]

282.012 PRIOR OWNER MAY PURCHASE; CONDITIONS. At any time not less than one week prior to the date of such sale, the person who was the owner of any included parcel at the time when it forfeited to the state for non-payment of taxes or his heirs, successors or assigns or any person to whom the right to pay taxes on such lands was given by statute, mortgage or other agreement, may purchase such parcel at the appraised value thereof, his title and right to be conditioned upon the primary use as designated by the resolution of the county board. The right of such purchaser to purchase shall be evidenced by his duly verified written application showing his qualifications as hereinabove prescribed and filed with the county auditor.

[*1947 c 496 s 2*]

282.013 PLACED IN AUXILIARY FOREST BY PURCHASER. Any purchaser under the provisions of section 282.012 or this section of lands sold upon condition that they be placed in an auxiliary forest shall furnish the county board, within six months from the date of purchase, satisfactory proof that he has complied with the provisions of Minnesota Statutes 1945, Section 88.48, pertaining to auxiliary forests, and that his application thereunder, including such lands, has been finally approved, provided that such 6-month period may be extended by resolution of the county board for good cause shown for an additional 6-month period. If such proof is not so furnished, the sale shall be deemed canceled and the purchase price or portion thereof paid shall be refunded.

[*1947 c 496 s 3*]

282.014 COMPLETION OF SALE AND CONVEYANCE. Upon compliance by the purchaser with the provisions of sections 282.011 to 282.015 and with the terms and conditions of the sale, and upon full payment for the land, the sale shall be complete and a conveyance of the land shall be issued to the purchaser as provided by the appropriate statutes according to the status of the land upon forfeiture.

[*1947 c 496 s 4*]

282.015 PROCEEDS OF SALE. The proceeds of each such sale shall be disposed of as provided in the case of sales of other lands becoming the property of the state in the same manner as the lands sold hereunder.

[*1947 c 496 s 5*]

282.016 PROHIBITED PURCHASERS. No county auditor, county treasurer, clerk of the district court, or county assessor or supervisor of assessments, or deputy or clerk or employee of such officer, and no commissioner for tax-forfeited lands or assistant to such commissioner may become a purchaser of the properties offered for

sale under the provisions of this chapter, either in his own behalf, or as agent or attorney for any other person, except that such officer, deputy, clerk, employee or commissioner for tax-forfeited lands or assistant to such commissioner may purchase lands owned by him at the time the state became the absolute owner thereof.

[*1959 c 280 s 1*]

282.017 CONVEYANCE OF INTERESTS IN TAX-FORFEITED LANDS TO STATE AND FEDERAL GOVERNMENTS. Notwithstanding any existing law to the contrary, the county auditor of any county, is hereby authorized on behalf of the state, for such price and on such terms and conditions, including provision for reversion in the event of nonuser, as the county board may prescribe, to convey to the United States or to the state of Minnesota upon tax-forfeited lands under the administration of the county, permanent or temporary easements for specified periods or otherwise for highways, roads and trails, flowage for development of fish and game resources, stream protection, flood control, and necessary appurtenances thereto.

[*Ex1967 c 21 s 2*]

282.018 TAX-FORFEITED LAND; MEANDERED LAKES; SALE; EXCEPTION. All land which is the property of the state as a result of forfeiture to the state for nonpayment of taxes, regardless of whether the land is held in trust for taxing districts, and which borders on or is adjacent to meandered lakes and other public waters and watercourses, and the live timber growing or being thereon, is hereby withdrawn from sale except as hereinafter provided. The authority having jurisdiction over the timber on any such lands may sell the timber as otherwise provided by law for cutting and removal under such conditions as the authority may prescribe in accordance with approved, sustained yield forestry practices. The authority having jurisdiction over the timber shall reserve such timber and impose such conditions as the authority deems necessary for the protection of watersheds, wildlife habitat, shorelines, and scenic features. Within the area in Cook, Lake, and St. Louis counties described in the Act of Congress approved July 10, 1930 (46 Stat. 1020), the timber on tax-forfeited lands shall be subject to like restrictions as are now imposed by that act on federal lands.

Of all tax-forfeited land bordering on or adjacent to meandered lakes and other public waters and watercourses and so withdrawn from sale, a strip two rods in width, the ordinary high-water mark being the water side boundary thereof, and the land side boundary thereof being a line drawn parallel to the ordinary high-water mark and two rods distant landward therefrom, hereby is reserved for public travel thereon, and whatever the conformation of the shore line or conditions require, the authority having jurisdiction over such lands shall reserve a wider strip for such purposes.

Any tract or parcel of land which has less than 50 feet of waterfront may be sold by the authority having jurisdiction over the land, in the manner otherwise provided by law for the sale of such lands, if the authority determines that it is in the public interest to do so. If the authority having jurisdiction over the land is not the commissioner of natural resources, the land may not be offered for sale without the prior approval of the commissioner of natural resources.

[*1973 c 369 s 1*]

NON-CONSERVATION AREA

282.02 LIST OF LANDS OFFERED FOR SALE. Immediately after classification and appraisal of the land and, in the case of timbered land, after approval of the appraisal of the timber by the commissioner of natural resources, the county board shall provide and file with the county auditor a list of parcels of land to be offered for sale. This list shall contain a description of the parcels of land and the appraised value thereof; provided that the description and appraised value may be omitted in the discretion of the county board. The auditor shall publish a notice of the forfeiture and intended public sale of such parcels of land and a copy of the resolution of the county board fixing the terms of the sale, if other than for cash only, by publication once a week for two weeks in the official newspaper of the county, the last publication to be not less than ten days previous to the commencement of the sale. A notice in substantially the following form shall be sufficient:

"Notice is hereby given that I shall sell to the highest bidder, at my office in the courthouse in the city of ....., in the county of ....., the

following described parcels of land forfeited to the state for nonpayment of taxes which have been classified and appraised as provided by law. Such sale will be governed, as to terms, by the resolution of the county board authorizing the same, and commence at ..... o'clock a.m., on the ..... day of ....., 19.....

Description ..... Appraised value

Subdivision	Sec. or Lot	Twp. or Block	Range	$

Given under my hand and seal this .... day of ..., 19..

.....
County Auditor,
..... County, Minnesota.''

The notice shall also indicate the amount of any special assessments which may be the subject of a reassessment or new assessment or which may result in the imposition of a fee or charge pursuant to sections 429.071, subdivision 4, 435.23, and 444.076.

If the county board of St. Louis or Koochiching counties determines that the sale shall take place in a county facility other than the courthouse, the notice shall specify the facility and its location.

[*1935 c 386 s 2; 1939 c 328 s 2; 1969 c 1129 art 10 s 2; 1973 c 123 art 5 s 7; 1974 c 278 s 2; 1976 c 259 s 4*] *(2139-16)*

282.03 LIMITATIONS IN USE OF LANDS. There may be attached to the sale of any parcel of forfeited land, if in the judgment of the county board it seems advisable, conditions limiting the use of the parcel so sold or limiting the public expenditures that shall be made for the benefit of the parcel or otherwise safeguarding against the sale and occupancy of these parcels unduly burdening the public treasury.

[*1935 c 386 s 3*] *(2139-17)*

282.031 NON-CONSERVATION OR AGRICULTURAL LAND, PURCHASE BY VETERANS; APPLICATION. Any veteran of World War I or II or any veteran who has had active service during the period June 27, 1950 to July 1, 1955, or after June 1, 1961, who is desirous of securing land for agricultural development may make application to the county board of the county in which the land is located to purchase not to exceed 320 acres of contiguous tax-forfeited land which has been classified as nonconservation or agricultural land and appraised as provided by law. Such land must be situated along a suitably maintained public road and near a public school or bus route and not in a restricted area established by the county board under a zoning ordinance. With this application he shall file a certified copy of his honorable discharge. Such application shall state the legal description of the land desired, the total acreage and the total acreage thereof which has been under cultivation; that the land is suitable for agricultural purposes and that he intends to develop it as such; that no additional public expenditures need be made for roads or schools by reason of the occupancy of such land; and that he is willing to pay therefor the appraised value of the land plus the appraised value of the improvements and standing timber thereon as determined by the county board, on such terms as may be fixed by the board subject to the conditions set forth in section 282.033.

[*1947 c 422 s 1; 1949 c 456 s 1; 1953 c 81 s 1; 1953 c 699 s 1; 1955 c 4 s 5; 1955 c 663 s 1; 1957 c 569 s 1; 1973 c 700 s 1*]

NOTE: The provisions of Laws 1973, Chapter 700, Section 1 expire January 1, 1976 pursuant to Laws 1973, Chapter 700, Section 2.

282.032 HEARING ON APPLICATION; RESOLUTION AUTHORIZING PURCHASE; PAYMENTS; INTEREST. Upon receipt of such application the county board shall set a date for hearing thereon. If on such hearing the board finds that the land described in the application meets the conditions prescribed in section 282.031 and, that the applicant is a veteran as defined in section 197.447, and qualified by such experience that he has a reasonable opportunity of making his living thereon, the board may authorize the purchase. In its resolution authorizing the purchase, the county board shall set forth the purchase price of the land, the amount of the down payment required, which down payment shall not be less than ten percent of the appraised value of the land and improvements plus the full value of the timber. The resolution shall prescribe the terms of payment. The rate of interest on any unpaid balance shall

be four percent per annum. The resolution shall further state that the number of acres which the board finds are cleared and suitable for cultivation at the time of the sale; and that the purchaser shall receive credit toward the purchase price, or a cash payment of the contract has been fully paid, for any additional land cleared and placed under cultivation within five years under the terms and conditions set forth in section 282.033.

[*1947 c 422 s 2; 1951 c 635 s 1; 1953 c 699 s 12; 1955 c 4 s 6*]

282.033 PAYMENT CREDIT FOR PAYMENT OF LAND. A purchaser under sections 282.031 to 282.037 shall, upon application to the county board made at any time within five years after the date of the contract, be allowed credit at the rate of $20 per acre up to but not exceeding the full amount of the purchase price, for all land which the county board shall determine has been cleared and placed under cultivation by the purchaser up to the date of the application for allowance. Such application shall be made by filing a verified claim with the county board and not more than one such application shall be filed on each contract. Upon allowance of the claim in whole or in part any credit allowed shall first be applied on any balance outstanding on the purchase contract and on taxes due on the property covered thereby. Any excess due the purchaser shall be paid upon order of the county board from the fund in which any payments heretofore made by the purchaser have been deposited and charged to the account of the taxing district interested therein.

[*1947 c 422 s 3*]

282.034 FINAL PAYMENT; COUNTY AUDITOR TO CERTIFY. Upon payment in full by cash or credit of the balance due on the purchase contract, the county auditor shall so certify to the commissioner of revenue, or to the commissioner of natural resources, as the case may be, who shall thereupon execute a deed in behalf of the state in the manner provided for in the sale of other tax-forfeited lands.

[*1947 c 422 s 4; 1969 c 1129 art 10 s 2; 1973 c 582 s 3*]

282.035 SALE BY PURCHASER; CREDIT LIMITATION. In the event a purchaser desires to sell his purchase contract, or fee interest if he has received a deed pursuant to section 282.034, to a third party prior to the expiration of the five-year period during which a claim may be filed, he shall previous to such sale notify the county board of the intended sale and file his claim for allowance as provided in section 282.033. No credit shall be allowed on the contract for additional land cleared and placed under cultivation after such sale.

[*1947 c 422 s 5; 1951 c 635 s 2*]

282.036 CANCELATION. Any contract made hereunder shall be subject to cancelation or termination for breach of the conditions thereof in the manner now provided by law for the cancelation of contracts for sale of tax-forfeited lands in the same area.

[*1947 c 422 s 6*]

282.037 AFFECTED LANDS WITHDRAWN FROM SALE. Upon receipt of an application for purchase of lands under the provisions of sections 282.031 to 282.037, the county auditor shall forthwith withdraw the affected lands from sale.

[*1947 c 422 s 7*]

282.04 TIMBER SALE; TAX-FORFEITED LANDS, LEASE, PARTITION, EASEMENTS. Subdivision 1. **Timber sold for cash.** The county auditor may sell dead, down and mature timber upon any tract that may be approved by the natural resources commissioner. Such sale of timber products shall be made for cash at not less than the appraised value determined by the county board to the highest bidder after not less than one week's published notice in an official paper within the county. Any timber offered at such public sale and not sold may thereafter be sold at private sale by the county auditor at not less than the appraised value thereof, until such time as the county board may withdraw such timber from sale. The appraised value of the timber and the forestry practices to be followed in the cutting of said timber shall be approved by the commissioner of natural resources. Payment of the full sale price of all timber sold on tax-forfeited lands shall be made in cash at the time of the timber sale. The county board may require final settlement on the basis of a scale of cut products. Any parcels of land from which timber is to be sold by scale of cut products

shall be so designated in the published notice of sale above mentioned, in which case the notice shall contain a description of such parcels, a statement of the estimated quantity of each species of timber thereon and the appraised price of each specie of timber for 1,000 feet, per cord or per piece, as the case may be. In such cases any bids offered over and above the appraised prices shall be by percentage, the percent bid to be added to the appraised price of each of the different species of timber advertised on the land. The purchaser of timber from such parcels shall pay in cash at the time of sale at the rate bid for all of the timber shown in the notice of sale as estimated to be standing on the land, and in addition shall pay at the same rate for any additional amounts which the final scale shows to have been cut or was available for cutting on the land at the time of sale under the terms of such sale. Where the final scale of cut products shows that less timber was cut or was available for cutting under terms of such sale than was originally paid for, the excess payment shall be refunded from the forfeited tax sale fund upon the claim of the purchaser, to be audited and allowed by the county board as in case of other claims against the county. No timber, except hardwood pulpwood, may be removed from such parcels of land or other designated landings until scaled by a person or persons designated by the county board and approved by the commissioner of natural resources. Landings other than the parcel of land from which timber is cut may be designated for scaling by the county board by written agreement with the purchaser of the timber. The county board may, by written agreement with the purchaser and with a consumer designated by him when the timber is sold by the county auditor, and with the approval of the commissioner of natural resources, accept the consumer's scale of cut products delivered at the consumer's landing. No timber shall be removed until fully paid for in cash. Small amounts of green standing, dead, down, dying, insect infected or diseased timber not exceeding $750 in appraised valuation may be sold for not less than the full appraised value at private sale to individual persons without first publishing notice of sale or calling for bids, provided that in case of such sale involving a total appraised value of more than $100 the sale shall be made subject to final settlement on the basis of a scale of cut products in the manner above provided and not more than two such sales, directly or indirectly to any individual shall be in effect at one time. As directed by the county board, the county auditor may lease tax-forfeited land to individuals, corporations or organized subdivisions of the state at public or private vendue, and at such prices and under such terms as the county board may prescribe, for use as cottage and camp sites and for agricultural purposes and for the purpose of taking and removing of hay, stumpage, sand, gravel, clay, rock, marl, and black dirt therefrom, and for garden sites and other temporary uses provided that no leases shall be for a period to exceed ten years; provided, further that any leases involving a consideration of more than $300 per year, except to an organized subdivision of the state shall first be offered at public sale in the manner provided herein for sale of timber. Upon the sale of any such leased land, it shall remain subject to the lease for not to exceed one year from the beginning of the term of the lease. Any rent paid by the lessee for the portion of the term cut off by such cancellation shall be refunded from the forfeited tax sale fund upon the claim of the lessee, to be audited and allowed by the county board as in case of other claims against the county. The county auditor, with the approval of the county board is authorized to grant permits, licenses, and leases to tax-forfeited lands for the depositing of stripping, lean ores, tailings, or waste products from mines or ore milling plants, upon such conditions and for such consideration and for such period of time, not exceeding 15 years, as the county board may determine; said permits, licenses, or leases to be subject to approval by the commissioner of natural resources. Any person who removes any timber from tax-forfeited land before said timber has been scaled and fully paid for as provided in this subdivision is guilty of a misdemeanor. The county auditor may, with the approval of the county board and the commissioner of natural resources, and without first offering at public sale, grant leases, for a term not exceeding 25 years, for the removal of peat from tax-forfeited lands upon such terms and conditions as the county board may prescribe.

Provided, however, that no lease for the removal of peat shall be made by the county auditor pursuant to this section without first holding a public hearing on his intention to lease. One printed notice in a legal newspaper in the county at least ten days before the hearing, and posted notice in the courthouse at least 20 days before the hearing shall be given of the hearing.

Subd. 2. **Rights before sale.** Until after the sale of a parcel of forfeited land the county auditor may, with the approval of the county board of commissioners, provide for the repair and improvement of any building or structure located upon such parcel,

if it is determined by the county board that such repairs or improvements are necessary for the operation, use, preservation and safety thereof; and, if so authorized by the county board, the county auditor may insure any such building or structure against loss or damage resulting from fire or windstorm; he may purchase worker's compensation insurance to insure the county against claims for injury to the persons therein employed by the county; and he may insure the county, its officers and employees against claims for injuries to persons or property because of the management, use or operation of such building or structure. Such county auditor may, with the approval of the county board, provide for the demolition of any such building or structure, which has been determined by the county board to be within the purview of section 299F.10, and for the sale of salvaged materials therefrom. The net proceeds from any sale of such salvaged materials, of timber or other products or leases made under this law shall be deposited in the forfeited tax sale fund and shall be distributed in the same manner as if the parcel had been sold.

Such county auditor, with the approval of the county board, may provide for the demolition of any structure or structures on tax-forfeited lands, if in the opinion of the county board, the county auditor, and the land commissioner, if there be one, the sale of such land with such structure or structures thereon, or the continued existence of such structure or structures by reason of age, dilapidated condition or excessive size as compared with nearby structures, will result in a material lessening of assessed values of real estate in the vicinity of such tax-forfeited lands, or if the demolition of such structure or structures will aid in disposing of such tax-forfeited property.

Before the sale of a parcel of forfeited land located in an urban area, the county auditor may with the approval of the county board provide for the grading thereof by filling or the removal of any surplus material therefrom, and where the physical condition of forfeited lands is such that a reasonable grading thereof is necessary for the protection and preservation of the property of any adjoining owner, such adjoining property owner or owners may make application to the county board to have such grading done. If, after considering said application, the county board believes that such grading will enhance the value of such forfeited lands commensurate with the cost involved, it may approve the same and any such work shall be performed under the supervision of the county or city engineer, as the case may be, and the expense thereof paid from the forfeited tax sale fund.

Subd. 3. **Partition.** Where an undivided portion of any parcel of land is forfeited to the state for taxes, the owner or owners of the portions of said parcel not forfeited, or the state of Minnesota, may in the manner provided by sections 558.01 to 558.32, maintain an action for the partition of said parcel making the state or other owners as their interests may appear a defendant in the action. If the state is made a defendant in the action, the summons shall be served upon the auditor of the county in which the land is located, and the county attorney shall appear for the state.

Subd. 4. **Easements.** The county auditor, when and for such price and on such terms and for such period as the county board prescribes, may grant easements or permits on unsold tax-forfeited land for telephone, telegraph, and electric power lines either by underground cable or conduit or otherwise, sewer and water lines, highways, recreational trails, railroads, and pipe lines for gas, liquids, or solids in suspension. Any such easement or permit may be canceled by resolution of the county board after reasonable notice for any substantial breach of its terms or if at any time its continuance will conflict with public use of the land, or any part thereof, on which it is granted. Land affected by any such easement or permit may be sold or leased for mineral or other legal purpose, but sale or lease shall be subject to the easement or permit, and all rights granted by the easement or permit shall be excepted from the conveyance or lease of the land and be reserved, and may be canceled by the county board in the same manner and for the same reasons as it could have been canceled before sale and in that case the rights granted thereby shall vest in the state in trust as the land on which it was granted was held before sale or lease. Any easement or permit granted before passage of Laws 1951, Chapter 203, may be governed thereby if the holder thereof and county board so agree. Reasonable notice as used in this subdivision, means a 90-day written notice addressed to the record owner of the easement at the last known address, and upon cancelation the county board may grant extensions of time to vacate the premises affected.

[*1935 c 386 s 4; 1939 c 328 s 3; 1941 c 355 s 1; 1943 c 627 s 4; 1945 c 92 s 1; 1945 c 93 s 1; 1951 c 203 s 1,2; 1951 c 534 s 1; 1953 c 141 s 1; 1955 c 653 s 1; 1957 c 346 s 1; 1959 c 453 s 1; 1959 c 454 s 1; 1961 c 594 s 1; 1961 c 718 s 1; 1963 c 415 s 1;*

1967 c 90 s 1; 1967 c 269 s 1; 1969 c 1129 art 10 s 2; 1973 c 285 s 1; 1975 c 359 s 23; 1976 c 141 s 1] (2139-18)

282.05 PROCEEDS TO BE APPORTIONED. The net proceeds received from the sale or rental of forfeited lands shall be apportioned to the general funds of the state or municipal subdivision thereof, in the manner hereinafter provided, and shall be first used by the municipal subdivision to retire any indebtedness then existing.

[*1935 c 386 s 5*] *(2139-19)*

282.06 EXEMPTION OF CERTAIN LANDS. Lands becoming the absolute property of the state embraced within any game preserve, created by and established under authority of sections 84A.01 to 84A.11, or any like act, or embraced within any reforestation or flood control project created by and established under authority of sections 84A.20 to 84A.30 or sections 84A.31 to 84A.40, except lands in cities, shall not be subject to the provisions of sections 282.01 to 282.13.

[*1935 c 386 s 6; 1973 c 123 art 5 s 7*] *(2139-20)*

282.07 AUDITOR TO CANCEL TAXES. Immediately after forfeiture to the state of any parcel of land, as provided by sections 281.16 to 281.27, the county auditor shall cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise. When the interest of a purchaser of state trust fund land sold under certificate of sale, or of his heirs or assigns or successors in interest, shall by reason of tax delinquency be transferred to the state as provided by law, such interest shall pass to the state free from any trust obligation to any taxing district and free from all special assessments and such land shall become unsold trust fund land.

[*1935 c 386 s 7; Ex1936 c 105 s 2; 1937 c 326 s 1*] *(2139-21)*

282.08 APPORTIONMENT OF PROCEEDS. The net proceeds from the sale or rental of any parcel of forfeited land, or from the sale of any products therefrom, shall be apportioned by the county auditor to the taxing districts interested therein, as follows:

(1) Such portion as may be required to pay any amounts included in the appraised value under section 282.01, subdivision 3, as representing increased value due to any public improvement made after forfeiture of such parcel to the state, but not exceeding the amount certified by the clerk of the municipality, shall be apportioned to the municipal subdivision entitled thereto;

(2) Such portion of the remainder as may be required to discharge any special assessment chargeable against such parcel for drainage or other purpose whether due or deferred at the time of forfeiture, shall be apportioned to the municipal subdivision entitled thereto;

(3) Such portion of the remainder as may have been theretofore levied on the parcel of land for any bond issue of the school district, town, city, or county, wherein the parcel of land is situated shall be apportioned to the municipal subdivisions in the proportions of the respective interest; and

(4) Any balance shall be apportioned as follows:

(a) Any county board may annually by resolution set aside not exceeding 30 percent of the receipts remaining to be used for timber development on tax-forfeited land and dedicated memorial forests, to be expended under the supervision of the county board. It shall be expended only on projects approved by the commissioner of natural resources.

(b) Any county board may annually by resolution set aside not exceeding 20 percent of the receipts remaining to be used for the acquisition and maintenance of county parks or recreational areas as defined in sections 398.31 to 398.36, to be expended under the supervision of the county board.

(c) If the board does not avail itself of the authority under paragraph (a) or (b) any balance remaining shall be apportioned as follows: county, 40 percent; town or city, 20 percent; and school district, 40 percent, and if the board avails itself of the authority under paragraph (a) or (b) the balance remaining shall be apportioned among the county, town or city, in the proportions in this paragraph above stated, provided, however, that in unorganized territory that portion which should have accrued to the township shall be administered by the county board of commissioners.

[*1935 c 386 s 8; 1939 c 328 s 4; 1941 c 394 s 2; 1947 c 553 s 1; 1949 c 27 s 1; 1949 c 401 s 1; 1963 c 519 s 1; Ex1967 c 35 s 1; 1969 c 9 s 73; 1969 c 1129 art 10 s 2; 1971 c 775 s 1; 1973 c 123 art 5 s 7*] *(2139-22)*

NOTE: See section 282.38.

282.09 FORFEITED TAX SALE FUND. Subdivision 1. **Moneys placed in fund.** The county auditor and county treasurer shall place all moneys received through the operation of sections 282.01 to 282.13 in a fund to be known as the forfeited tax sale fund and all disbursements and costs shall be charged against that fund, when allowed by the county board. Members of the county board may be paid a per diem pursuant to section 375.055, subdivision 1, and reimbursed for their necessary expenses, and may receive mileage as now or hereafter fixed by law. Compensation of a land commissioner and his assistants, if a land commissioner is appointed, shall be in such amount as shall be determined by the county board. The county auditor shall receive 50 cents for each certificate of sale, each contract for deed and each lease executed by him, and in counties where no land commissioner is appointed such additional annual compensation, not exceeding $300, as shall be fixed by the county board. Compensation of any other clerical help that may be needed by the county auditor or land commissioner shall be in such amount as shall be determined by the county board. All compensation provided for herein shall be in addition to other compensation allowed by law. Out of the gross proceeds in this fund there shall be paid to the state, in addition to any distribution of net proceeds therefrom, a fee of $3 for each and every state deed hereafter issued or reissued by the commissioner of revenue pursuant to the sale of any tax-forfeited lands. Fees so charged shall be included in the annual settlement by the county auditor as hereinafter provided. On or before February 1 in each year, the commissioner of revenue shall certify to the commissioner of finance, by counties, the total number of state deeds issued and reissued during the preceding calendar year for which such fees are charged and the total amount thereof. When disbursements are made from the fund for repairs, refundments, expenses of actions to quiet title, or any other purpose which particularly affects specific parcels of forfeited lands, the amount of such disbursements shall be charged to the account of the taxing districts interested in such parcels. The county auditor shall make an annual settlement of the net proceeds received from sales and rentals by the operation of sections 282.01 to 282.13, at the regular March settlement, for the preceding calendar year.

Subd. 2. **Expenditures.** In all counties, from said "Forfeited Tax Sale Fund," the authorities duly charged with the execution of the duties imposed by sections 282.01 to 282.13, at their discretion, may expend moneys in repairing any sewer or water main either inside or outside of any curb line situated along any property forfeited to the state for nonpayment of taxes, to acquire and maintain equipment used exclusively for the maintenance and improvement of tax-forfeited lands, and to cut down, otherwise destroy or eradicate noxious weeds on all tax-forfeited lands. In any year, the moneys to be expended for the cutting down, destruction or eradication of noxious weeds shall not exceed in amount more than ten percent of the net proceeds of said "Forfeited Tax Sale Fund" during the preceding calendar year, or $10,000, whichever is the lesser sum.

[*1935 c 386 s 9; 1939 c 328 s 5; 1943 c 472 s 1; 1945 c 158 s 1; 1945 c 294 s 1; 1947 c 346 s 1; 1949 c 46 s 1; 1951 c 468 s 1; 1963 c 518 s 1; Ex1967 c 23 s 1; 1969 c 1148 s 39; 1973 c 492 s 14; 1973 c 582 s 3; 1975 c 301 s 4*] *(2139-23)*

282.10 REIMBURSEMENT OF PURCHASE PRICE IN CERTAIN CASES. When, prior to the passage of Laws 1939, Chapter 328, the forfeiture to the state for taxes of any parcel of land heretofore sold pursuant to Laws 1935, Chapter 386, has been invalidated in a proceeding in court, the purchaser from the state, or his assigns, shall be reimbursed out of any money in the forfeited tax sale fund for the amount of the purchase price or the portion thereof actually paid, with interest at four percent. Application for such reimbursement shall be made to the county auditor of the county where such parcel is located and shall be accompanied by a certified copy of the judgment or decree invalidating such forfeiture and a quitclaim deed from the purchaser, or his assignee, running to the state in trust for its interested taxing districts as grantee. The county auditor shall present the instruments herein referred to, to the county attorney and, after receiving an opinion, in writing, from the county attorney that the applicant is entitled to reimbursements under this section, shall draw an order upon the county treasurer in favor of the applicant for the sum to which the applicant is en-

titled, which shall be paid by the treasurer out of the moneys in the forfeited tax sale fund. If there are not sufficient moneys in the fund to pay the order, money to care for the deficiency shall be temporarily transferred from the general revenue fund of the county. After such refundment is made any taxes or assessments heretofore canceled shall be reinstated and the amount of taxes and assessments that would have been levied subsequent to the date of the supposed forfeiture shall be assessed and levied against the land as omitted taxes, and the lien of the state for any such taxes or assessments may be enforced as in other cases where taxes are delinquent.

[*1939 c 328 s 8*] *(2139-27L)*

282.11 APPLICATION. Where, prior to the passage of Laws 1939, Chapter 328, any county has instituted proceedings leading to the sale of tax-forfeited lands pursuant to section 282.01, and has ordered the first publication under section 282.02, and the sale is to commence prior to May 15, 1939, the amendatory provisions of sections 282.01 to 282.13 shall not be construed to prohibit such county from proceeding with such sale, and using a publication, a classification, and an appraisal made pursuant to the law prior to its amendment by sections 282.01 to 282.13.

[*1939 c 328 s 9*] *(2139-27m)*

282.12 ALL MINERALS RESERVED. Any sale of such forfeited lands shall be subject to exceptions and reservations in this state, in trust for the taxing districts of all minerals and mineral rights.

[*1935 c 386 s 10*] *(2139-24)*

282.13 LAND COMMISSIONER; DUTIES; COMPENSATION; LAND EXCHANGES. The county board may appoint a land commissioner and necessary assistants, such land commissioner to perform any or all of the following duties as directed by the county board: to gather data and information on tax-forfeited lands; make land classifications and appraisals of land, timber and other products and uses; enforce trespass laws and regulations; seize and appraise timber and other products and property cut and removed illegally from tax-forfeited lands; assist the county auditor in the sale and rental of forfeited lands and the products thereon; and such other duties concerning tax-forfeited lands as the county board may direct. Such appointment shall be for such time as the county board may determine. The compensation of said land commissioner and assistants shall be fixed by the county board and their salaries and expenses shall be paid from the forfeited tax sale fund, except that in counties having more than 300,000 and less than 450,000 inhabitants if an officer or employee of a city of the first class situated therein is appointed he shall receive no additional compensation therefor. Any funds required by the commissioner of revenue for the purpose of cancelation of contracts, as provided in section 282.01, shall be paid by the county auditor upon the written order of the commissioner of revenue from moneys then available in the fund. When tax-forfeited lands have been acquired by a city of the first class for municipal purposes, and a privately-owned lot lies between such tax-forfeited land, and it is in the interest of the municipality that such privately-owned lot be acquired for the same municipal use to which the tax-forfeited lands have been devoted, such city of the first class may exchange on such basis as may be approved by the governing body thereof, a portion of the tax-forfeited lands acquired by the municipality for the privately-owned lot, and the officers of such municipality are hereby authorized to execute deeds to carry out such purpose.

[*1935 c 386 s 11; 1943 c 627 s 5; 1951 c 562 s 1; 1953 c 340 s 1; 1973 c 582 s 3*] *(2139-25)*

282.131 CERTAIN POWERS AND DUTIES MAY BE DELEGATED. All powers and duties concerning approval of appraised timber values, forestry practices and parcels of land from which timber may be sold which are conferred upon the commissioner of natural resources, by sections 282.01 to 282.13, may be delegated by the commissioner to competent forestry field officers of the natural resources department or such approval may be waived at the discretion of the commissioner in such manner as he shall prescribe shall be sufficient for the purposes of sections 282.01 to 282.13.

[*1943 c 627 s 6; 1947 c 369 s 1; 1969 c 1129 art 10 s 2*]

282.132 TIMBER DEFINED. As used in sections 282.01 to 282.13 inclusive, "timber" means trees and reproduction thereof of every size and species, which will or may produce forest products of value, whether standing or down, and including,

but not limited to, logs, bolts, posts, poles, cordwood, and decorative material.

[*1959 c 185 s 1*]

CONSERVATION AREA

282.14 CLASSIFICATION OF FORFEITED LANDS. All parcels of land becoming the absolute property of the state under the provisions of the 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 2139-2, and acts amendatory thereof or supplementary thereto, situated within any conservation or reforestation area created under the provisions of sections 84A.20 to 84A.30, or sections 84A.31 to 84A.42, shall be classified by the county board of the county wherein such parcels lie as agricultural and non-agricultural, which classification shall be approved by the commissioner of natural resources before any lands are offered for sale. The county board of the county wherein such parcels lie shall determine the appraised value of all lands classified and approved as agricultural and may reappraise annually if in their judgment it be deemed necessary to carry out the intent of sections 282.14 to 282.22. Any merchantable timber on such agricultural land shall be appraised separately, and such appraisal approved by the commissioner of natural resources. All such parcels of land, classified as agricultural, shall be sold by the state at public sale, as provided in sections 282.15 and 282.16, when it shall be determined by the county board of the county wherein such parcels lie that it is advisable to do so. No such lands shall be sold by the board of county commissioners without the approval of the commissioner of natural resources. All sales of land shall be made in accordance with the subdivisions thereof by the United States surveys unless the same shall have been subdivided into smaller parcels or lots, but no land shall be sold in larger quantity than 160 acres.

[*1939 c 320 s 1; 1969 c 1129 art 10 s 2*] *(2139-27b)*

282.15 SALES OF FORFEITED LANDS. Such sale shall be conducted by the auditor of the county wherein such parcels lie and shall be sold to the highest bidder but not for less than the appraised value. Such sales shall be for cash or on the following terms: The appraised value of all merchantable timber on such agricultural lands shall be paid for in full at the date of sale. At least 15 percent of the purchase price of the land shall be paid in cash at the time of purchase, and the balance in not to exceed 20 equal annual instalments, with interest at the rate of four percent per annum on the unpaid balance each year, both principal and interest to become due and payable on December 31 each year following that in which the purchase was made. The purchaser may pay any number of instalments of principal and interest on or before their due date. When the sale is on terms other than for cash in full the purchaser shall receive from the county auditor a contract for deed, in such form as shall be prescribed by the attorney general. The county auditor shall make a report to the commissioner of natural resources not more than 30 days after each public sale, showing the lands sold at such sales, and submit a copy of each contract of sale.

All lands sold pursuant to the provisions hereof shall, on the first day of May following the date of such sale, be restored to the tax rolls and become subject to taxation in the same manner as the same were assessed and taxed before becoming the absolute property of the state.

[*1939 c 320 s 2; 1945 c 381 s 1; 1969 c 1129 art 10 s 2*] *(2139-27c)*

282.151 COMMISSIONER AUTHORIZED TO SELL CERTAIN LANDS. In case the commissioner of natural resources shall determine, after investigation, that any lands now or hereafter forfeited to the state for non-payment of taxes in Township 49 North, Range 23 West, in the County of Aitkin, within the conservation area created under Minnesota Statutes 1945, Sections 84A.20 to 84A.30, are suitable for any lawful private use and are not suitable or necessary for public use, he may, on application of the county board, authorize and approve the classification and sale of such lands as non-conservation lands, and such lands may thereupon be sold in the manner provided for the sale of agricultural lands under the provisions of sections 282.14 to 282.21, and acts amendatory thereof.

[*1945 c 467 s 1; 1969 c 1129 art 10 s 2*]

282.16 PUBLIC SALE; NOTICE. Subdivision 1. **Offer; notice.** All lands so classified and appraised and remaining unsold shall be offered for sale at a public sale to be held by the county auditor at the time determined by the county board in a resolution fixing the date of the sale. The auditor shall publish a notice of the intended sale

by publication once a week for two weeks in an official newspaper of the county, the last publication to be not less than ten days previous to the commencement of the sale. Notice of the sale shall be given in substantially the following form:

"NOTICE OF SALE OF AGRICULTURAL LANDS

Notice is hereby given that I shall sell to the highest bidder at my office in the courthouse in the city of ..... in the county of ....., the following described parcels of land forfeited to the state for non-payment of taxes, which have been classified and appraised as provided by law. The sale will be governed by Laws 1939, Chapter 320, and will commence at ..... o'clock a.m., on the ..... day of ....., 19.....

Description Subdivision	Sec. or Lot	Twp. or Block	Range	Appraised Value of Land $	Appraised Value of Timber $

Given under my hand and seal this ..... day of ....., 19.....

.....
County Auditor
..... County, Minnesota.''

If the county board of St. Louis or Koochiching counties determines that the sale shall take place in a county facility other than the courthouse, the notice shall specify such facility and its location.

Subd. 2. **Lands not sold.** Any lands not sold at this sale may, at any time within four months following the opening of the sale, be sold by the county auditor at a price not less than the appraised value thereof. All lands remaining unsold shall be included in the notice of sale and offered for sale by the county auditor in each following year until the same shall be sold.

[*1939 c 320 s 3; 1941 c 59; 1973 c 123 art 5 s 7; 1974 c 278 s 3; 1976 c 2 s 99*] *(2139-27d)*

282.17 CANCELATION OF CONTRACTS. Failure of the purchaser to make any payment of any instalment or of any interest required under a contract within six months from the date on which such payment becomes due, or to pay before they become delinquent all taxes that may be levied upon the lands so purchased shall constitute a default, and thereupon the contract shall be deemed canceled, and all right, title, and interest of the purchaser, his heirs, representatives, or assigns in the premises shall terminate without the doing by the state of any act or thing whatsoever. A record of such default shall be made in the state land records kept by or under the direction of the commissioner of natural resources, and a certificate of such default may be made by or under the direction of the commissioner and filed with the county treasurer or recorded in the office of the county recorder of the county in which the premises are situated. Any such record or certificate shall be prima facie evidence of the facts therein stated, but the making of such record or certificate shall not be essential to the taking effect of such cancelation and termination, and thereupon the land described in the contract shall be subject to disposition as provided in sections 282.15 and 282.16, upon first having been reclassified and reappraised as provided by section 282.14. The county auditor shall report any such default to the commissioner of natural resources on or before June 30th of each year.

[*1939 c 320 s 4; 1945 c 381 s 2; 1947 c 484 s 1; 1969 c 1129 art 10 s 2; 1976 c 181 s 2*] *(2139-27e)*

282.171 CONTRACTS, MEMBERS OF ARMED FORCES, CANCELATION. No contract entered into by persons in the armed forces of the United States prior to their induction or enlistment for the purchase of tax-forfeited or other lands from the state of Minnesota on the instalment plan shall be terminated or canceled for nonpayment of instalments except as provided herein.

Any person in the armed forces of the United States, who, as vendee, in any contract with the state of Minnesota for the purchase of tax-forfeited or other lands, is in default on any instalment, or is unable to pay any instalment or instalments thereafter becoming due, and desires to retain his or her rights under said contract, and such

contract has not heretofore been canceled and the land sold, shall during the period of military service file, or cause to be filed by an adult, with knowledge of the facts, with the county auditor or other state agency, having charge of said contract, an affidavit, giving the legal description of said lands, and the number, if any, of said contract, and stating that the vendee in said contract is in the military service of the United States, the branch of the service, the date of enlistment or induction, and that said vendee desires to retain his or her rights under said contract. If said affidavit is filed within the time herein limited and provided, said contract shall remain in full force and effect, notwithstanding any default or non-payment of any instalment or instalments thereunder, for six months after the vendee's discharge from the military service. If said vendee fails to pay all delinquent instalments within six months after his or her discharge, then in such event said contract may be canceled and terminated as provided by law.

[*1943 c 341 s 1,2; 1945 c 75 s 1; 1951 c 34 s 1*]

282.18 COUNTY AUDITOR TO LEASE LANDS. Until after the sale of any parcel of forfeited land classified as agricultural, the county auditor may lease such land, as directed by the county board.

[*1939 c 320 s 5*] *(2139-27f)*

282.19 COUNTY TREASURER TO COLLECT PAYMENTS. The county treasurer shall collect all payments made under sections 282.14 to 282.22 and place the same in a special fund and forthwith submit to the natural resources commissioner a copy of the receipt specifying the name and address of the person making the payment and the date and amount thereof, whether for principal, timber, improvements or interest, the fund to which it is applicable, and the number of the certificate. Such receipt shall be countersigned by the auditor of such county, and shall have the same force and effect as if given by the state treasurer. The county treasurer shall report all collections to the commissioner of natural resources on June 30 and December 31 of each year and at such other times when requested by the commissioner. There shall be transferred from such special fund to the revenue fund of the county the cost of giving the notices herein required and there may be paid from such fund to the members of the county board, upon warrant of the county auditor, a per diem pursuant to section 375.055, subdivision 1 and mileage as now or hereafter fixed by law, and to the county auditor and the county treasurer for their additional duties such sums as the county board may by resolution determine, not to exceed to each annually one percent of the annual receipts under sections 282.14 to 282.22, and to help to defray the costs of equipment and supplies, and for additional clerk hire in the county auditor's office such amount as the county board may by resolution determine, not to exceed annually ten percent of the annual receipts under sections 282.14 to 282.22, but in any event not to exceed the sum of $1,000 for equipment, supplies and clerk hire in any fiscal year. Where a county board has appointed a land commissioner under the provisions of section 282.13 the actual expenses of the land commissioner, together with mileage reimbursement in accordance with section 43.328 for necessary travel in gathering data and information to assist the county board in making classifications and appraisals under sections 282.14 to 282.22, shall be paid from this fund upon warrant of the county auditor. The amount remaining in the fund shall be transmitted by the county treasurer to the commissioner of natural resources as of June 30 and December 31 each year, and at such other times when requested by the commissioner, and disposed of as provided by the laws governing the fund derived from the respective areas in which the lands sold were situated.

[*1939 c 320 s 6; 1945 c 381 s 3; 1945 c 466 s 1,2; 1947 c 484 s 2; 1949 c 524 s 1; 1961 c 523 s 1; 1963 c 387 s 3; 1969 c 1129 art 10 s 2; 1975 c 301 s 5*] *(2139-27g)*

282.20 MINERAL RIGHTS RESERVED. Any sale of such forfeited lands shall be subject to exceptions and reservations in this state of all minerals and mineral rights.

[*1939 c 320 s 7*] *(2139-27h)*

282.21 CONVEYANCE. Upon payment in full of the purchase price, appropriate conveyance in fee in such form as may be prescribed by the attorney general shall be issued by the commissioner of finance to the purchaser or his assigns and this conveyance shall have the force and effect of a patent from the state.

[*1939 c 320 s 8; 1973 c 492 s 14*] *(2139-27i)*

282.22 **NON-AGRICULTURAL LANDS TO BE RESERVED.** The lands classified as non-agricultural, as provided under section 282.14, shall be reserved and dedicated to conservation purposes to be managed as provided by the laws governing the respective areas in which the same are situated.

[*1939 c 320 s 9*] *(2139-27j)*

282.221 **FORFEITED LANDS.** Subdivision 1. **Classified and sold.** All lands which become the absolute property of the state under the provisions of section 84A.07, and are suitable for agricultural purposes, shall be classified as such by the county board of the county wherein the lands are situated. No lands shall be offered for sale under the provisions of sections 282.221 to 282.226 until their classification by the county board as agricultural lands shall have been approved by the commissioner. The county auditor may with the approval of the commissioner sell any parcel of tax-forfeited land or any portion thereof to any organized or incorporated governmental subdivision of the state for any public purpose for which the subdivision may acquire property at not less than the appraised value thereof as determined by the county board.

Subd. 2. **Appraisal.** All lands which have become the absolute property of the state under the provisions of section 84A.07 and are classified as agricultural lands shall be appraised by the county board of the county wherein the lands are situated, and this appraisal shall be filed in the office of the auditor of the county. Any merchantable timber on such lands shall be appraised separately and such appraisal shall be approved by the commissioner. The county board may reappraise any such lands when, in its judgment, the reappraisal is necessary in effectuating the provisions of sections 282.221 to 282.226, but no such lands shall be appraised more than once in any 12-month period.

[*1935 c 210 s 1,2; 1941 c 278 s 1,2*] *(5620-13 1/2, 5620-13 1/2a)*

282.222 **SALE.** Subdivision 1. **Held.** All lands so classified and appraised and remaining unsold shall be offered for sale at a public sale to be held by the county auditor at the time determined by the county board in a resolution authorizing the sale and fixing the date of the commencement thereof. The auditor shall publish a notice of the intended sale and the resolution authorizing same by publication once a week for two weeks in an official newspaper of the county, the last publication to be not less than ten days previous to the commencement of the sale. Notice of the sale shall be given in substantially the following form:

"NOTICE OF SALE OF AGRICULTURAL LANDS

Notice is hereby given that on ....., the ..... day of ....., 19....., at my office in ..... in the county of ....., I shall sell to the highest bidder the following described parcels of land in the county, which have been forfeited to the state for non-payment of taxes, and which have been classified as agricultural lands and appraised as provided by law. This sale will be governed by the provisions of sections 282.221 to 282.226 and by the resolution of the county board authorizing such sale, which resolution is as follows:

(Insert resolution)

Description Section or Lot	Twp. or Block	Range	Appraised value $.....
	.....		

Auditor of..... County.''

The land shall be described in the notice and offered for sale in parcels not exceeding one-quarter section in area.

If the county board of St. Louis or Koochiching counties determines that the sale shall take place in a county facility other than the courthouse, the notice shall specify such facility and its location.

Subd. 2. **Appraised value minimum price.** These lands shall be sold to the highest bidder and at a price not less than the appraised value thereof. Any lands not sold at this public sale may be sold by the county auditor at a price not less than the appraised value thereof. The sale shall continue until all parcels are sold or until the county board shall order a reappraisal or shall withdraw any or all such parcels from sale or until such time as the county board shall have determined by resolution

adopted before giving notice of sale. Any lands remaining unsold may be included in the notice of sale and offered for sale by the county auditor in each following year until the same shall be sold, or the original list of lands may be added to annually by publishing, in the same manner as provided for the publication of the original list, the descriptions and appraised values of such additional parcels which have been classified as agricultural and which classification shall have been approved as provided by law. The purchasers at such sale shall be entitled to immediate possession, subject to the provisions of any existing valid lease made in behalf of the state.

Subd. 3. **Who may purchase.** Any parcel of land described in any such notice of sale may, at any time not less than one week prior to the date of the sale, be purchased at the appraised value thereof by the person who is a bona fide federal entryman or patentee of any such land or by the person who was the record owner of the fee title thereto at the time the state became the absolute owner thereof.

Subd. 4. **Terms of sale.** All sales under sections 282.221 to 282.226 shall be for cash or on the following terms: at least 15 percent of the purchase price shall be paid in cash at the time of the sale, and the balance thereof shall be paid in equal annual instalments over a period of 20 years, with interest at the rate of four percent per annum, payable annually, on the portion from time to time remaining unpaid, with privilege of prepayment of any instalment on any interest date. Sales on terms shall be evidenced by a certificate issued by the county auditor in such form as the attorney general shall prescribe, a copy of which shall be submitted to the commissioner of natural resources forthwith. The appraised value of all merchantable timber on such agricultural lands shall be paid for in cash in full at the time of sale. The county auditor shall report all sales to the commissioner of natural resources forthwith. Failure of the purchaser to make any payment of any instalment or of any interest required under any contract within six months from the date on which such payment shall become due, or to pay before they become delinquent all taxes that may be levied upon the land so purchased, shall constitute a default, and thereupon the contract shall be deemed canceled and all right, title, and interest of the purchaser, his heirs, representatives, or assigns in the premises shall terminate without the doing by the state of any act or thing whatsoever. A record of such default shall be made in the state land records kept by or under the direction of the commissioner of natural resources, and a certificate of such default may be made by or under the direction of the commissioner and filed with the county treasurer or recorded in the office of the county recorder of the county in which the premises are situated. Any such record or certificate shall be prima facie evidence of the facts therein stated, but the making of such record or certificate shall not be essential to the taking effect of such cancelation and termination, and thereupon the land described in the contract shall be subject to disposition as provided in this section, upon first having been reclassified and reappraised as provided by section 282.221. The county auditor shall report any such default to the commissioner of natural resources on or before June 30th of each year.

Subd. 5. **Cancelation validated.** In any case where a certificate of cancelation of any certificate of sale of lands sold pursuant to sections 282.221 to 282.226, has heretofore been made by either the commissioner of finance or the commissioner of natural resources and filed in the office of the officer executing the same or in the office of the commissioner of finance or recorded in the office of the county recorder of the county in which the land lies, such cancelation is hereby validated and made effective, and the certificate of sale shall be deemed canceled as if canceled by the proper officer and in the manner prescribed by law.

Subd. 6. **Abandonment presumed.** In any case where prior to the passage of Laws 1947, Chapter 484, the purchaser has defaulted in the payment of any instalment on the principal or interest due on a certificate of sale of land made pursuant to sections 282.221 to 282.226, or has failed to pay before they became delinquent all taxes levied upon the land so purchased, and where a certificate of cancelation has been made and filed or recorded as provided in subdivision 5, it shall be presumed that the purchaser, and all persons claiming under him, have left and abandoned the land and all right, title, and interest therein and claim thereto, and have released the same absolutely to the state and its assigns.

Subd. 7. **Right of action denied.** In any case where prior to the passage of Laws 1947, Chapter 484, the purchaser has defaulted in the payment of any instalment of the principal or interest due under a certificate of sale of land issued pursuant to sections 282.221 to 282.226, or has failed to pay all taxes that may have been levied upon the lands, and where a certificate of cancelation has been made and filed or recorded

as provided in subdivision 5, no action for the recovery or possession of the land or the enforcement of any right, title, or interest therein, or claim thereto shall be maintained by the purchaser or any one claiming under him unless such action is commenced within six months after the passage of Laws 1947, Chapter 484.

[*1935 c 210 s 6; 1939 c 328 s 6,7; 1941 c 278 s 3-5; 1947 c 484 s 3-6; 1969 c 1129 art 10 s 2; 1973 c 492 s 14; 1974 c 278 s 4; 1976 c 181 s 2*] *(5620-13 1/2b, 5620-13 1/2c, 5620-13 2d, 5620-13 1/2e)*

282.223 TAXES CANCELED. When any lands shall be sold under sections 282.221 to 282.226 all public liens thereon for taxes, special assessments, and other charges, whether extended on the tax lists or not, shall forthwith be canceled, and the county auditor, county treasurer, and county recorders shall note such cancelation upon the records of their respective offices.

[*1935 c 210 s 7; 1976 c 181 s 2*] *(5620-13 1/2f)*

282.224 CONVEYANCE. Upon payment in full of the purchase price appropriate conveyance in fee, in such form as may be prescribed by the attorney general, shall be issued by the commissioner of natural resources to the purchaser or his assignee, and the conveyance shall have the force and effect of a patent from the state.

[*1935 c 210 s 8; 1971 c 25 s 57*] *(5620-13 1/2g)*

282.225 MINERAL RIGHTS RESERVED. Every certificate of sale and instrument of conveyance issued under sections 282.221 to 282.226 shall state that the sale or conveyance does not include any right, title, or interest in or to any iron, coal, copper, gold, or other valuable minerals which may be upon the land therein described, and that these minerals are reserved by the state for its own use; but no instrument shall be effective to transfer any right, title, or interest in or to any such minerals, notwithstanding the failure of the proper officer to insert this statement.

[*1935 c 210 s 9*] *(5620-13 1/2h)*

282.226 FUNDS COLLECTED. The county treasurer shall collect all payments of principal and interest made under sections 282.221 to 282.226, place the same in a special fund, and forthwith submit to the natural resources commissioner a copy of the receipt specifying the name and address of the person making the payment and the date and amount thereof, whether for principal, timber, improvements or interest, the fund to which it is applicable, and the number of the certificate. Such receipt shall be countersigned by the auditor of such county, and shall have the same force and effect as if given by the state treasurer. The county treasurer shall report all collections to the commissioner of natural resources on June 30 and December 31 of each year and at such other times when requested by the commissioner. There shall be transferred from this special fund to the revenue fund of the county the cost of giving the notices required in section 282.222, subdivisions 1 and 2, and there shall be paid from this fund to the members of the county board upon warrant of the county auditor $10 per day for each day necessarily consumed in the classification and appraisal of the lands under sections 282.221 to 282.226 and mileage at the rate of six cents per mile for necessary travel and to the county auditor and the county treasurer for their additional duties such sums as the county board may by resolution determine, not to exceed to each annually one percent of the annual receipts under sections 282.221 to 282.226, and to help defray the costs of equipment and supplies, and for additional clerk hire in the county auditor's office such amount as the county board may by resolution determine, not to exceed annually ten percent of the annual receipts under sections 282.221 to 282.226. Where a county board has appointed a land commissioner under the provisions of section 282.13, instead of the amount provided for costs of equipment and supplies and additional clerk hire in the county auditor's office, such amount as the county board may by resolution determine, not to exceed annually ten percent of the annual receipts under sections 282.221 to 282.226, may be transferred from such fund to the tax-forfeited land fund to help defray expenses incurred by the county land department in administering such lands. The net amount remaining in this fund shall be transmitted by the county treasurer to the commissioner of natural resources as of June 30 and December 31 each year, and at such other times when requested by the commissioner, and credited to the Red Lake game preserve fund created by section 84A.03.

[*1935 c 210 s 10; 1941 c 278 s 6; 1947 c 484 s 7; 1969 c 1129 art 10 s 2; 1974 c 318 s 1*] *(5620-13 1/2i)*

282.23 SALE OF CERTAIN LANDS FORFEITED FOR TAXES IN 1926 AND 1927. In every case where the owner of a tract of land forfeited to the state for taxes for 1926 or 1927 has transferred, or shall hereafter transfer, to the state or to any municipal subdivision thereof all his right, title, and interest in such tract of land, the same shall be subject to sale in the usual manner provided by law for the sale of land acquired by the state for taxes.

[*1937 c 272 s 1*] *(2232-2)*

282.241 REPURCHASE AFTER FORFEITURE FOR TAXES. The owner at the time of forfeiture or his heirs, devisees, or representatives, or any person to whom the right to pay taxes was given by statute, mortgage, or other agreement, may repurchase any parcel of land claimed by the state to be forfeited to the state for taxes unless prior to the time repurchase is made such parcel shall have been sold under installment payments, or otherwise, by the state as provided by law, or is under mineral prospecting permit or lease, or proceedings have been commenced by the state or any of its political subdivisions or by the United States to condemn such parcel of land. Said parcel of land may be repurchased for a sum equal to the aggregate of all delinquent taxes and assessments computed as provided by section 282.251, together with penalties, interest, and costs, which did or would have accrued if such parcel of land had not forfeited to the state. Except for property which was homesteaded on the date of forfeiture, such repurchase shall be permitted during one year only from the date of forfeiture, and in any case only after the adoption of a resolution by the board of county commissioners determining that thereby undue hardship or injustice resulting from the forfeiture will be corrected, or that permitting such repurchase will promote the use of such lands that will best serve the public interest; provided further such repurchase shall be subject to any easement, lease or other encumbrance granted by the state prior thereto, and if said land is located within a restricted area established by any county under Laws 1939, Chapter 340, such repurchase shall not be permitted unless said resolution with respect thereto is adopted by the unanimous vote of the board of county commissioners.

[*1945 c 296 s 1; 1947 c 490 s 1; 1949 c 461 s 1; 1951 c 514 s 1; 1953 c 471 s 1; 1955 c 612 s 1; 1957 c 32 s 1; 1957 c 832 s 1; 1975 c 316 s 1*]

282.251 SPECIAL ASSESSMENTS REINSTATED UPON REPURCHASE. Upon the repurchase of land pursuant to section 282.241 any special assessments heretofore canceled because of forfeiture of said land for nonpayment of taxes shall be reinstated by the county auditor and any such special assessments so reinstated which are payable in the future shall be paid at the time and in the manner said special assessments would have been payable except for forfeiture, except that special assessments payable in the year in which repurchase is made, shall be paid in full at the time of repurchase. The sum of such special assessments that would, except for forfeiture, have been levied and assessed against such land between the date of forfeiture and the date of repurchase and which would have been payable prior to the year in which repurchase is made shall be computed by the county auditor and included in the purchase price hereunder. When an application to repurchase a parcel of land is made hereunder the county auditor shall compute and determine as in the case of omitted taxes, upon the basis of the assessed valuation of such parcel in effect at the time of forfeiture, the amount of taxes that would have been assessed and levied against such parcel between the date of forfeiture and the date of repurchase, and the amount so determined with penalties and costs, with interest at the rate fixed by law for the respective years shall be included in the purchase price hereunder. When the term "delinquent taxes" is used in section 282.241, it means the sum of taxes and assessments together with penalties and costs, with interest at the rate fixed by law for the respective years computed to the date of repurchase from the time such taxes and assessments became delinquent, and also the sum of taxes and assessments with penalties and costs, with interest at the rate fixed by law for the respective years to the date of repurchase from the time such taxes and assessments would have been delinquent that would have been levied and assessed against a parcel between the date of forfeiture and the date of repurchase, computed by the county auditor in the manner provided by this section. The county auditor shall levy taxes on the parcel as in the case of omitted taxes for all the years in which on account of the forfeiture no tax was levied.

[*1945 c 296 s 2; 1955 c 612 s 2*]

282.261 DOWN PAYMENT. A person repurchasing under section 282.241 shall pay at the time of repurchase not less than one-tenth of such repurchase price and shall pay the balance in ten equal annual instalments, with the privilege of paying the unpaid balance in full at any time, with interest at the rate of four percent on the balance remaining unpaid each year, the first instalment of principal and interest to become due and payable on December 31 of the year following the year in which the repurchase was made, the remaining instalments to become due and payable on December 31 of each year thereafter until fully paid. He shall pay the current taxes each year thereafter before the same shall become delinquent up to the time when he shall pay the repurchase price in full.

[*1945 c 296 s 3*]

282.271 NOTICE OF PAYMENTS DUE. The county auditor shall give notice by mail not later than November 30 of each year to the person or persons making such repurchase at the address given therein of the payment due under the repurchase on the following December 31. Failure to send or receive the notice shall not operate to postpone any payment or excuse any default under the repurchase.

[*1945 c 296 s 4*]

282.281 REPURCHASE SUBJECT TO EXISTING LEASES. Until repurchased all parcels of land subject to the provisions of this act shall be subject to lease under the provisions of Minnesota Statutes 1941, Sections 282.01 to 282.27, as amended, and any repurchase of such land under Laws 1945, Chapter 296, shall be subject to the provisions of any such existing lease.

[*1945 c 296 s 5*]

282.291 PAYMENTS, WHERE MADE. All payments under Laws 1945, Chapter 296, shall be made to the treasurer of the county in which the parcel of land upon which such payments are made is located. Such payments shall be deposited by the county treasurer in the forfeited tax sale fund and be distributed in the manner in which other moneys in said fund are distributed.

[*1945 c 296 s 6*]

282.301 RECEIPTS FOR PAYMENTS. The purchaser shall receive from the county auditor at the time of repurchase a receipt, in such form as may be prescribed by the attorney general. When the purchase price of a parcel of land shall be paid in full, the following facts shall be certified by the county auditor to the commissioner of revenue of the state of Minnesota: the description of land, the date of sale, the name of the purchaser or his assignee, and the date when the final instalment of the purchase price was paid. Upon payment in full of the purchase price, the purchaser or his assignee shall receive a quitclaim deed from the state, to be executed by the commissioner of revenue. Failure to make any payment herein required within 60 days from the date on which payment was due shall constitute default and upon such default the right, title and interest of the purchaser or his heirs, representatives, or assigns in such parcel shall terminate without the doing by the state of any act or thing.

[*1945 c 296 s 7; 1973 c 582 s 3*]

282.311 EXCEPTIONS. Laws 1945, Chapter 296, shall not apply to any lands which have been classified by the county board as conservation land or to lands within the game preserve established by section 84A.01, or conservation areas established by section 84A.20, or by section 84A.31, which included in the sum for which said lands were forfeited any ditch assessments, or to any lands sold to a governmental subdivision or released from trust upon application of a state agency, or devoted to and accepted for conservation or other purposes in behalf of the state, free from trust under section 282.01.

[*1945 c 296 s 8*]

282.321 LIMITATIONS. When any forfeited lands are repurchased, as provided for in Laws 1945, Chapter 296, no structure, minerals, sand, gravel, topsoil, subsoil, or peat shall be removed, nor shall any timber or timber products be cut and removed until the purchase price has been paid in full. Nothing in this section shall be construed as prohibiting the removal of such sand, gravel, topsoil, subsoil, or peat as may be incidental to the erection of structures on such repurchased lands or to the grading of such lands whenever such removal or grading shall result in enhancing the value

thereof.

[*1945 c 296 s 9*]

282.322 FORFEITED LANDS LIST. The county board of any county may at any time after the passage of Laws 1945, Chapter 296, file a list of forfeited lands with the county auditor, if the board is of the opinion that such lands may be acquired by the state or any municipal subdivision thereof for public purposes. Upon the filing of such list the county auditor shall withhold said lands from repurchase. If no proceeding shall be started to acquire such lands by the state or some municipal subdivision thereof within one year after the filing of such list the county board shall withdraw said list and thereafter the owner shall have one year in which to repurchase as otherwise provided in Laws 1945, Chapter 296.

[*1945 c 296 s 10*]

282.323 CAPITOL AREAS. Subdivision 1. [Repealed, 1969 c 1150 s 7; 1974 c 435 art 6 s 1]

Subd. 2. Laws 1945, Chapter 296, shall not apply to any parcel of land forfeited to the state for taxes which is within the boundaries of a capitol area.

Subd. 3. [Repealed, 1974 c 435 art 6 s 1]

[*1945 c 296 s 11*]

282.324 WHEN RIGHT OF REPURCHASE VESTS. No right of repurchase created or arising hereunder shall be deemed vested until consummation of the repurchase as provided in Laws 1945, Chapter 296.

[*1945 c 296 s 12*]

282.33 LOST OR DESTROYED DEEDS. Subdivision 1. Whenever an unrecorded deed from the state of Minnesota conveying tax-forfeited lands shall have been lost or destroyed, an application, in form approved by the attorney general, for a new deed may be made by the grantee or his successor in interest to the commissioner of revenue. If it appears to the commissioner of revenue that the facts stated in the petition are true, he shall issue a new deed to the original grantee, in form approved by the attorney general, with like effect as the original deed. The said application shall be accompanied by a fee of $3, payable to the commissioner of revenue, which shall be deposited with the state treasurer and credited to the general fund.

Subd. 2. All declarations or certificates heretofore issued by the commissioner of revenue relating to the issuance of state deeds to tax-forfeited lands which have been lost or destroyed are hereby ratified. Every such declaration or certificate and the record thereof shall be prima facie evidence of the facts therein stated.

[*1943 c 195; 1945 c 131 s 1; 1969 c 399 s 1; 1973 c 582 s 3; 1974 c 160 s 1*]

282.34 [Superseded by 282.341]

282.341 REINSTATEMENT OF TAX-FORFEITED CERTIFICATE. Subdivision 1. Whenever a county auditor's certificate of the sale of tax-forfeited lands upon instalments has been canceled for the failure to pay any of the deferred instalments and interest or the current taxes, the purchaser having paid 50 percent or more of the purchase price, if such lands have not been sold or zoned so as to restrict the sale thereof, the said purchaser may reinstate such certificate by depositing with the county auditor all delinquent instalments and interest due upon such certificate at the time of the cancelation thereof, those instalments and interest that would have accrued in the absence of such cancelation, together with an amount equal to all unpaid taxes, penalties, interest, and costs up to the date of the cancelation thereof, and have an amount equal to the taxes and assessments that would have been levied and payable but for the cancelation of such certificates; such taxes shall be computed by the county auditor as in the case of omitted taxes that would have been assessed between the date of the cancelation of such certificate and the reinstatement thereof.

Subd. 2. Thereupon the county auditor shall note the reinstatement upon his records and shall pay over to the county treasurer the amount deposited by the petitioner. If such reinstatement is made after May first the county auditor shall levy taxes for the year in which reinstatement is made on said land as in the case of omitted taxes.

[*1945 c 98 s 1,2*]

282.35 OWNER OF FORFEITED LAND MAY REPURCHASE. Subdivision 1. Time limitation. The owner at the time of forfeiture or his heirs or representatives, or any person to whom the right to pay taxes was given by statute, mortgage or other agreement, may repurchase any parcel of land claimed by the state to be forfeited to the state for taxes, if such repurchase is made prior to November 1, 1943, unless prior to the time repurchase is made such parcel shall have been sold by the state as provided by law, or proceedings which have been commenced by the state or any of the political subdivisions or by the United States to condemn such parcel of land, for a sum equal to the aggregate of all delinquent taxes and assessments computed as provided by subdivision 2, without penalties or costs, with interest at four percent from the time the taxes or assessments were or would have been delinquent.

Subd. 2. **Special assessments to be reinstated.** Upon the repurchase of land pursuant to subdivision 1 any special assessments heretofore canceled under sections 282.01 to 282.13, or any other law, shall be reinstated by the county auditor and any such special assessments so reinstated which are payable in the future shall be paid at the time and in the manner said special assessments would have been payable except for forfeiture, except that special assessments payable in 1943 shall be paid in full at the time of repurchase. The sum of such special assessments that would except for forfeiture have been levied and assessed against such land between the date of forfeiture and January 1, 1943, and payable before such date, shall be computed by the county auditor and included in the purchase price hereunder. When an application to repurchase a parcel of land under this section is made the county auditor shall compute and determine as in the case of omitted taxes, upon the basis of the assessed valuation of such parcel in effect at the time of forfeiture, the amount of taxes that would have been assessed and levied against such parcel between the date of forfeiture and the date of repurchase, and the amount so determined without penalties and costs, with interest at four percent, shall be included in the purchase price hereunder. When the term "delinquent taxes" is used in subdivision 1, it shall mean the sum of taxes and assessments without penalties or costs, with interest at four percent to the date of repurchase from the time such taxes and assessments became delinquent, accrued against a parcel at the time of forfeiture, and also the sum of taxes and assessments without penalties or costs, with interest at four percent to the date of repurchase from the time such taxes and assessments would have been delinquent that would have been levied and assessed against a parcel between the date of forfeiture and the date of repurchase, computed by the county auditor in the manner provided by this section. If the repurchase is made after May 1, the county auditor shall levy taxes for 1943 on the parcel as in the case of omitted taxes.

Subd. 3. **Payments to be made under this section.** A person repurchasing under subdivision 1 shall pay at the time of repurchase not less than one-tenth of such repurchase price and shall pay the balance in ten equal annual instalments, with the privilege of paying the unpaid balance in full at any time, with interest at the rate of four percent on the balance remaining unpaid each year, the first instalment of principal and interest to become due and payable on December 31 of the year following the year in which the repurchase was made, the remaining instalments to become due and payable on December 31 of each year thereafter until fully paid. He shall pay the current taxes each year thereafter before the same shall become delinquent up to the time when he shall pay the repurchase price in full.

Subd. 4. **Notice by county auditor.** The county auditor shall give notice by mail not later than November 30 of each year to the person or persons making such repurchase at the address given therein of the payment due under the repurchase on the following December 31. Failure to send or receive the notice shall not operate to postpone any payment or excuse any default under the repurchase.

Subd. 5. **Lands may be leased.** Until repurchased all parcels of land subject to the provisions of this section shall be subject to lease under the provisions of sections 282.01 to 282.13, and any repurchase of such land under this section shall be subject to the provisions of any such existing lease.

Subd. 6. **Payments to be made to the county treasurer.** All payments under this section shall be made to the county treasurer of the county in which the parcel of land upon which such payments are made is located. Such payments shall be deposited by the county treasurer in the forfeited tax sale fund and be distributed in the manner in which other moneys in said fund are distributed.

Subd. 7. **Form of receipt.** The purchaser shall receive from the county auditor at the time of repurchase a receipt, in such form as may be prescribed by the attorney general. When the purchase price of a parcel of land shall be paid in full, the following facts shall be certified by the county auditor to the commissioner of revenue: the description of land, the date of sale, the name of the purchaser or his assignee, and the date when the final instalment of the purchase price was paid. Upon payment in full of the purchase price, the purchaser or his assignee shall receive a quit claim deed from the state, to be executed by the commissioner of revenue. Failure to make any payment herein required within 60 days from the date on which payment was due shall constitute default and upon such default the right, title and interest of the purchaser or his heirs, representatives, or assigns in such parcel shall terminate without the doing by the state of any act or thing.

Subd. 8. **Application of this section.** This section shall not apply to lands zoned by any county board as nonagricultural lands, unless such repurchase is approved by the county board or to lands within the game preserve established by Laws 1929, Chapter 258, or conservation areas established by Laws 1931, Chapter 407, or by Laws 1933, Chapter 402, which included in the sum for which said lands were forfeited any ditch assessments, or to any lands classified as conservation lands under the authority of any existing law other than lands classified as conservation lands under Laws 1939, Chapter 328.

Subd. 9. **Not to remove structures, timber, etc., until payment is made in full.** When any forfeited lands are repurchased, as provided for in this section, no structure, minerals, sand, gravel, topsoil, subsoil, or peat shall be removed, nor shall any timber or timber products be cut and removed until the purchase price has been paid in full. Nothing in this subdivision shall be construed as prohibiting the removal of such sand, gravel, topsoil, subsoil, or peat as may be incidental to the erection of structures on such repurchased lands or to the grading of such lands whenever such removal or grading shall result in enhancing the value thereof.

[*1943 c 164 s 1-9; 1973 c 582 s 3*]

282.36 FEES PAYABLE TO REPURCHASER. Any person repurchasing land after forfeiture to the state for nonpayment of taxes under the provisions of a repurchase law shall at the time the certificate of repurchase is issued by the county auditor or before receiving quit claim deed pursuant thereto, pay to the county treasurer a fee of $3. Fees so collected during any calendar year shall be credited to a special fund and, upon a warrant issued by the county auditor on or before March 1 of the year following, shall be remitted to the state treasurer and credited to the general fund. The commissioner of revenue shall, on or before February 1 in each year, certify to the state treasurer the number of deeds issued during the preceding calendar year to which these fees apply, showing by counties the number of deeds so issued and the total fees due therefor. This section shall not apply to repurchases made under any law enacted prior to January 1, 1945.

[*1945 c 487 s 1; 1969 c 399 s 1; 1974 c 160 s 2*]

282.37 LANDS BORDERING LAKES AND STREAMS, EASEMENT TO STATE. The commissioner of revenue upon recommendation of the boards of county commissioners is hereby authorized to grant or convey permanent easements on tax-forfeited lands bordering lakes and streams, such easement to be held in the name of the state department of natural resources.

[*1961 c 691 s 1; 1969 c 1129 art 10 s 2; 1973 c 582 s 3*]

282.38 TIMBER DEVELOPMENT FUNDS. Subdivision 1. **Development.** In any county where the county board by proper resolution sets aside funds for timber development pursuant to Minnesota Statutes 1949, Section 282.08, Clause 4(a), or Minnesota Statutes 1949, Section 459.06, Subdivision 2, the Commission of Iron Range Resources may upon request of the county board assist said county in carrying out any project for the long range development of its timber resources through matching of funds or otherwise, provided that any such project shall first be approved by the commissioner of natural resources.

Subd. 2. **Tax levy.** In any county where the county board shall determine that insufficient moneys will be available from tax-forfeited funds to carry out the intentions of this section as set forth in the statutes enumerated in subdivision 1, the county board may levy a tax upon the real and personal property of the county for

that purpose, and the proceeds of said levy may be used in the same manner as funds set aside pursuant to Minnesota Statutes 1949, Section 282.08, Clause 4(a), and Minnesota Statutes 1949, Section 459.06, Subdivision 2.

Subd. 3. **Not to affect commissioner of Iron Range Resources.** Nothing herein shall be construed to limit or abrogate the authority of the commissioner of Iron Range Resources to give temporary assistance to any county in the development of its land use program.

[*1951 c 365 s 1-3; 1969 c 1129 art 10 s 2; 1973 c 583 s 19*]

TITLE 27—NEW YORK STATE MINED LAND RECLAMATION LAW [NEW]

Sec.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article" in item 23-2709.

§ 23-2701. Short title

This title shall be known and may be cited as the "New York State Mined Land Reclamation Law".

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2703. Declaration of policy

1. The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining and minerals industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices. The legislature further declares it to be the policy of this state to provide for the wise and efficient use of the resources available for mining and to provide, in conjunction with such mining operations, for reclamation of affected lands; to encourage productive use including but not restricted to: the planting of forests, the planting of crops for harvest, the seeding of grass and legumes for grazing purposes, the protection and enhancement of wildlife and aquatic resources, the establishment of recreational, home, commercial, and industrial sites; to provide for the conservation, development, utilization, management and appropriate use of all the natural resources of such areas for compatible multiple purposes; to prevent pollution; to protect and perpetuate the taxable value of property; to protect the health, safety and general welfare of the people, as well as the natural beauty and aesthetic values in the affected areas of the state.

2. For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, in subd. 2 substituted "title" for "article" in two instances.

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2705. Definitions

As used in this title, unless the context otherwise requires:

1. "Affected land" means the area of land from which overburden is to be or has been removed or upon which a spoil bank is to be or has been deposited; or lands disturbed by the construction or improvement of haulageways to or from a mine, or lands disturbed by storage areas, repair areas, shipping areas and areas in which equipment, machinery, tools or other personal property is situated.

2. "Applicant" means that person making application to the department for a permit to mine and who is responsible for fulfilling the requirements of the reclamation plan as stipulated in the law and all rules, regulations and orders promulgated thereunder.

3. "Debris" means rock fragments, sand, silt, earth, or organic matter in a heterogeneous mass; or the silt, sand and gravel generally associated with hydraulic mining commonly referred to as tailings, slums or slickens; or any loose material caused by a shot, fall, smash or explosion; or any accumulation of rubble resulting from a mining activity.

4. "Haulageway" means any road within the permitted area which receives substantial use and which has been constructed or improved by the operator or permittee. Trails or paths between parts of a mine shall not be considered haulageways.

5. "Mine" means any pits or underground workings from which any mineral is produced for sale, exchange, commercial or municipal use and all shafts, slopes, drifts or inclines leading thereto, and includes all equipment above, on or below the surface of the ground used in connection with such mines.

6. "Mined land-use plan" means the applicant's written proposal for accomplishing land-use objectives on the affected land including maps or other documents as required to describe the areas to be mined as well as a description of the ground surface. The mined land-use plan shall also include mining plans, reclamation plans, physiographic features and illustrative land-use maps.

7. "Mineral" means aggregate, cement rock, clay, coal, curbing, dimension stone, dolostone, emery, flagstone, garnet, gem stones, gravel, gypsum, iron, lead, limestone, marble, marl, metallic ore, paving blocks, peat, riprap, roadstone, salt, sand, sandstone, shale, silver, slate, stone, talc, titanium, trap rock, wollastonite, zinc or any other solid material or substance of commercial value found in natural deposits in or on the earth.

8. "Mining" means the extraction or removal of minerals from the ground or the breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, including any activities or processes or parts thereof for extraction or removal of minerals from their original location and the preparation, washing, cleaning or other processing of minerals at the mine location so as to make them suitable for commercial, industrial or construction use; but shall not include excavation or grading when conducted solely in aid of on-site farming or construction. Removal of limited amounts of overburden and mining of limited amounts of any minerals shall not be considered as mining when done only for the purpose of extracting samples or specimens for scientific purposes, or only for the purpose and to the extent necessary to determine the location, quantity or quality of any mineral deposit so long as no minerals removed during exploratory excavation are sold, processed for sale or consumed in the regular operation of a business.

9. "Operator" means any owner, lessee, or other person who operates, controls or supervises a mining operation. The operator may or may not be the applicant for a mining permit or the permittee.

10. "Overburden" means all of the earth and other materials which lie above or alongside natural mineral deposits and includes all earth, soil and other materials disturbed from their natural state in the process of mining exclusive of the mined minerals.

11. "Owner" means the person who has title to the mineral deposits on any given tract of land and who has the right to extract minerals for sale and to appropriate the minerals he extracts therefrom either for himself or others or for himself and others.

12. "Permittee" means any person who has been issued and who currently holds a valid permit to mine from the department.

13. "Person" means any individual, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, partnership, association, firm, trust, estate or any other legal entity whatsoever.

14. "Reclamation" means the conditioning of areas affected by mining to make them suitable for any uses or purposes consistent with those stated in section 23-2703 of this title.

15. "Reclamation plan" means the applicant's written proposal for reclamation of the affected areas including land-use objectives, maps or other documents as required to describe reclamation; and where relevant grading specifications and manner and type of revegetation.

16. "Refuse" means that material which is considered worthless or useless and has been or is to be rejected or discarded.

17. "Spoil" means any waste material removed from its natural place in the process of mining and all waste material directly connected with the cleaning and preparation of any minerals.

18. "Spoil bank" means the accumulation of spoil or underground refuse piled outside of the underground workings, or the place on the surface where spoil is piled, or the material commonly known as soil heap.

19. "Strip mining" means the extraction of mineral deposits lying near the surface of the earth by means of removing the overburden above the deposits in rows or strips, such process normally being moved from place to place and not involving the extraction of minerals at the same location over a substantial period of time.

20. "Surface mining" means the extraction of minerals by means other than strip mining, but excluding the extraction from beneath the surface of the earth of minerals to which access is gained by wells, shafts, slopes, drifts or inclines penetrating or connected with excavations penetrating mineral seams or strata.

21. "Tailings" means the parts, or a part, of any incoherent solid or fluid material separated as refuse, or separately treated as inferior in quality or value, such as remainders, leavings, or dregs; or the gangue and other refuse material resulting from the washing, concentration, or treatment of ground ore; or those portions of washed ore that are too poor to be treated further, used especially for the debris from ore dressing machinery, as distinguished from material to be smelted; or the inferior leavings or residue of any product, foots, or bottoms; or the residuum after most of the valuable ore has been extracted.

22. "Underground mining" means any operation which removes minerals by means of shafts, slopes, drifts, or inclined planes and transports the mined material to one or more points outside of the excavation.

23. "Waste" means the barren rock or gangue in a mine; or that part of the ore deposit that is too low in grade to be of commercial value under existing economic and technological conditions; or any

part of a mined material which is of no further utility to the particular process involved.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. Opening paragraph. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article."

Subd. 2. L.1976, c. 477, § 1, eff. June 29, 1976, substituted definition of "applicant" for "contiguous."

Subd. 4. L.1976, c. 477, § 1, eff. June 29, 1977, substituted "within the permitted area which receives substantial use and which has been constructed or improved by the operator or permittee" for "constructed or improved by the operator which enters or exits from a mine and which receives substantial use."

Subd. 5. L.1976, c. 477, § 1, eff. June 29, 1976, omitted sentence which read: "Mines that are adjacent to each other and controlled by the same operator, and which are administered as distinct units shall be considered as separate mines."

Subd. 6. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "applicant's" for "operator's."

Subd. 8. L.1976, c. 477, § 1, eff. June 29, 1976, inserted "at the mine location."

Subd. 9. L.1976, c. 477, § 1, eff. June 29, 1976, added "The operator may or may not be the applicant for a mining permit or the permittee."

Subds. 12 to 23. L.1976, c. 477, § 1, eff. June 29, 1976, added subd. 12, renumbered former subds. 12 to 22 as 13 to 23, and in subd. 15 substituted "applicant's" for "operator's."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2707. New York state advisory committee on the extractive mineral industry.

1. The commissioner shall appoint a New York state advisory committee on the extractive mineral industry of not to exceed nine members to serve at the pleasure of the commissioner. Such committee shall include representatives from the strip, surface and underground mining industries. The state geologist shall be an ex officio member of the committee. The commissioner or his designee shall convene all regular meetings of the committee. The members of the committee shall receive no compensation or reimbursement for expenses.

2. The committee shall be advised and notified of all hearings to be held pursuant to this title as soon as practicable after a decision to hold such a hearing has been reached.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "convene all regular" for "call and preside at all" in subd. 1, and substituted "title" for "article" in subd. 2.

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2709. Administration of title

1. The department shall have and be entitled to exercise the following powers and duties:

(a) to administer and enforce the provisions of this title and all rules, regulations and orders promulgated thereunder;

(b) to conduct or obtain investigations with respect to research experiments and demonstrations, and to collect and disseminate information regarding mining operations and reclamation of affected lands and control of pollution of the environment affected by mining, provided that the department shall guarantee the confidentiality of such information when requested to do so by the applicant or permittee;

(c) to examine and pass upon applications for permits, bonds, and mined land-use plans including mining and reclamation plans;

(d) to establish criteria for the operation of mining such that reasonable care is taken to prevent pollution;

(e) to establish criteria for acceptable reclamation of affected lands, such criteria to be reasonably adopted to reduce soil erosion to a minimum and to lessen the visual impact of discontinued or partially discontinued mining operations;

(f) to order, pursuant to section 71-0301 of the environmental conservation law, an immediate suspension of mining or reclamation operations or operations incidental or appurtenant thereto whenever such operations are being carried on in violation of this title or of rules, regulations and orders adopted pursuant thereto; and

(g) to accept grants or federal funds for purposes of research into the fields of mining and land reclamation.

2. This title shall not apply to the commissioner of general services acting with respect to lands under water pursuant to the public lands law.

3. The state geological survey shall continue to collect mineral production information for the state in association with the United States bureau of mines and the state geological survey shall make this data available to the department as requested. The state geological survey shall also continue to be the state agency conducting mineral resource investigations and inventories. The state geological survey shall have access to any records of the department collected during the administration of this title and shall guarantee confidentiality where required. Added L.1974, c. 1043, § 1; amended L.1974, c. 1044, § 1; L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article" wherever appearing, in subd. 1(b) substituted "applicant or permittee" for "operator," in subd. 1(c) substituted "and mined land-use plans including mining and reclamation plans" for "mining plans, reclamation plans and mined land-use plans submitted by operators", and in subd. 1(e) substituted "lands" for "areas" and "lessen the visual impact" for "heal the visual scars."

1974 Amendment. Subd. 1, par. (b). L.1974, c. 1044, § 1, eff. Apr. 1, 1975, deleted ", upon the approval of the commissioner," following "department".

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2711. Permits

1. It shall be unlawful after April first, nineteen hundred seventy-five for any operator who mines more than one thousand tons of minerals from the earth within twelve successive calendar months to engage in such mining unless a permit for such mining operation has first been obtained from the department as provided in this section.

2. Application for a mining permit shall be submitted annually, in writing on forms prescribed by the department and accompanied by a fee of one hundred dollars, provided that an applicant may secure a three year permit upon the payment of a fee of two hundred dollars. Every applicant or any of its officers or owners shall be required to furnish on the form information necessary to identify the applicant and the operation. In addition to such other information as may be required by the department, the application shall contain the following information:

(a) the common or commercial name and the geological description, where applicable, of the minerals to be extracted;

(b) an estimate of the number of surface acres of land that will be affected by mining;

(c) except with respect to underground mining operations, the name and address of the surface landowner;

(d) the name and address of the owner of the mineral to be mined;

(e) the permanent and temporary addresses of the applicant;

(f) the identification number of any mining permit now held by the applicant;

(g) if the applicant is a corporation, the name and address of the chief executive officer thereof;

(h) specification of such circumstances if the applicant has ever had a mining permit issued under the laws of this state revoked, or has ever had a reclamation bond or security deposited in lieu of bond forfeited; and

(i) a mined land-use plan, specifications, and maps as provided in section 23-2713 of this title and any rules, regulations, or orders adopted pursuant thereto.

3. The department shall prescribe rules and regulations requiring the applicant to provide notice of application to owners of property adjacent to the proposed mining site and to officials of local governments having jurisdiction over the proposed site or over areas likely to be affected by the operation, and providing for notification of such persons of the approval or disapproval of the application.

4. Upon approval of the application by the department and receipt of the reclamation bond or an appropriate substitute as provided in section 23-2717 of this title, a permit shall be issued by the department. The commissioner may include in permits such conditions as may be required to fulfill the purposes of this title.

5. A permittee wishing to have his permit amended may file an amended application with the department. Upon receipt of the amended application, which shall be accompanied by a fee of fifty dollars, and a bond or appropriate substitute therefor required under the provisions of this title, the department may issue an amendment to the original permit covering the change described in the amendment application.

6. A permit issued pursuant to this title or a certified copy thereof, must be publicly displayed by the operator at the mine and must at all times be visibe, legible, and protected from the elements.

7. Upon the written approval of the commissioner and subject to the provisions of subdivision eight of section 23-2717 of this title a permit issued pursuant to this section is transferable.

8. Permits shall expire either annually or triannually as provided in subdivision two of this section, and may be renewed upon application to the department within thirty days prior to the expiration date. The application to renew an annually expiring permit shall be accompanied by a fee of fifty dollars, and the application to renew a triannually expiring permit shall be accompanied by a fee of one hundred dollars.

9. The department may suspend or revoke a permit to mine for repeated or willful violation of any of the terms of the permit or provisions of this title or for repeated or willful deviation from those descriptions contained in the mined land-use plan as set forth in subdivision three of section 23-2713 of this title. The department may refuse to renew a permit upon a finding that the permittee is in repeated or willful violation of any of the terms of the permit, this title or any rule, regulation, standard, or condition promulgated thereto. The department shall notify the permittee by certified mail or personal service, specifying in writing the charges and grounds upon which the permit is to be suspended, revoked, or renewal refused. The permittee may within fifteen days request a hearing which shall be held within sixty days of the date of mailing or service of the notice. The permittee shall have the right of counsel and may produce witnesses and present statements, documents, maps, graphs and any other evidence and have witnesses and documentary or other evidence subpoenaed in his behalf. If, after a full investigation and hearing or opportunity to be heard, the permittee is found to have been repeatedly or wilfully violated any of the terms of the permit or provisions of this title or repeatedly or wilfully

deviated from those descriptions contained in the mined land-use plan as set forth in subdivision three of section 23–2713 of this title, the commissioner may execute, modify or cancel the proposed suspension or revocation of the permit. If, after a full investigation and hearing or opportunity to be heard, the permittee is found to be in repeated or willful violation of any of the terms of the permit, this title or any rule, regulation, standard or condition promulgated thereto the commissioner may refuse to renew the permit. Suspension or revocation of a permit shall become effective fifteen days after the mailing or service of notice to the permittee unless a hearing has been requested, in which case such suspension will be effective upon any date which an order of the commissioner made after such hearing may provide. When the department denies any application for renewal of a permit, the expiration date shall be the expiration date of the permit submitted for renewal. Should a permit expire after hearing procedures for renewal have been instigated under this section, the permit will be extended until a decision not to renew has been reached by the commissioner or until renewal is approved.

10. Nothing in this title shall be construed as exempting any person from the provisions of any other law or regulation requiring a permit.

11. Notwithstanding any other provision of law, counties, cities, towns and villages shall be exempted from the fees for the permit, application amendment and renewal required by this article.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1; L.1976, c. 774, § 1.

1976 Amendments. Subd. 2. L. 1976, c. 477, § 1, eff. June 29, 1976, in par. (b), substituted "affected" for "disturbed", and in par. (f) substituted "applicant" for "owner of the surface and/or the mineral rights."

Subd. 4. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "A permittee" for "An operator", deleted "to cover additional contiguous land" following "amended" and sentence reading: "A new separate application must be submitted for non-contiguous lands" and substituted "title" for "article" and "change" for "additional land."

Subds. 6, 7. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article" and in subd. 7 deleted "between operators" following "transferable."

Subd. 9. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article" and "permittee" for "operator" wherever appearing, in sentence beginning "The department may suspend" substituted "to mine" for "of any operator", and in sentences beginning "The department may refuse" and "If, after" substituted "permittee is in repeated or willful violation of any of the terms of the permit, this title" for "operator is in violation of the permit, this article."

Subd. 11. L.1976, c. 774, § 1, eff. July 24, 1976, added subd. 11.

Effective Date of 1976 Amendment; Retroactivity of Exemption. L.1976, c. 774, § 2 provided that: "This act [amending this section] shall take effect immediately [July 24, 1976] and the exemption allowed by this act shall be retroactive to April first, nineteen hundred seventy-five."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23–2713. Mined land-use plan

1. Every applicant for a permit pursuant to the provisions of this title shall submit a mined land-use plan. The mined land-use plan shall consist of a mining and reclamation plan to include both graphic and written descriptions illustrating the following items as they affect the surface:

(a) the land affected as it presently exists;

(b) an outline of the area of the minerals to be removed;

(c) the mining method to be used; and

(d) the proposed method of reclaiming the affected land as described in section 23–2715 of this title.

2. The descriptions required in clauses (a) and (b) of subdivision one of this section above shall be presented on a United States geological survey map or the equivalent as may be approved by the department on such scale as the department shall require. If such equivalent map is utilized, it shall be prepared by an engineer, geologist or licensed land surveyor. Such equivalent map shall show contours, existing streams, rivers, lakes, roads, or other relevant geographical or cultural features, be scaled to measurements in feet, be prepared in a neat, legible manner, and contain a title block or legend in such form as the department may prescribe.

3. The description required in clause (c) of subdivision one of this section above shall indicate any area of existing and proposed excavation, area of existing and proposed settling pond and washing plant facility, area of existing and proposed treatment facilities, area of proposed mineral storage area, area of existing or proposed spoil banks, and area proposed for stock piling overburden or topsoil. Such description of the mining method to be used shall also indicate:

(a) the proposed screening of all storage areas within the boundaries of the permitted area so as to confine dust and flying particles to the permitted area;

(b) the sequence of cuts or excavations to be made in the surface when they affect the reclamation plan;

(c) the location of haulageways to and from the operation to minimize intrusions into residential areas and shall include specifics regarding the treatment of such haulageways to minimize dust;

(d) planned drainage and water control for all affected areas so as to reduce to a minimum soil erosion damage to adjacent lands.

4. After approval of the mined land-use plan or any amendment thereof by the department, the permittee shall not deviate or depart therefrom without the department's written approval.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. Subd. 1. L.1976, c. 477, § 1, eff. June 29, 1976, in opening paragraph, substituted "applicant for a permit pursuant to the provisions of this title shall submit a mined land-use plan" for "operator who applies for a permit pursuant to the provisions of this article shall submit a mined land-use plan. The mined land-use plan shall consist of", and inserted "The mined land-use plan shall consist of a mining and reclamation plan to include", in par. (a) substituted "the land affected" for "the affected land", and in par. (d) substituted "the proposed method of reclaiming the affected land" for "a reclamation plan."

Subd. 3. L.1976, c. 477, § 1, eff. June 29, 1976, in opening paragraph, substituted "proposed" for "requested" in three instances, in par. (a) substituted "of the permitted" for "of the planned mining" and "to the permitted" for "to the operational", and omitted par. (e) which read: "any planned impoundment of water to provide lakes or ponds for wildlife, recreation or water supply purposes and shall indicate what useful purposes the impoundment will serve."

Subd. 4. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "permittee" for "operator."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2715. Reclamation plan

1. A reclamation plan required by section 23-2713 of this title shall consist of two parts. Part one thereof shall be a reclamation map prepared on the same basis as the mined land-use plan map described in section 23-2713 showing the proposed final stage of reclamation. Part two thereof shall be a written description of the planned reclamation method indicating whether lands are proposed for development for farming, pasture, forestry, recreation, industrial, commercial, residential or solid waste disposal purposes or other uses acceptable to the commissioner.

2. The reclamation plan shall indicate specifics covering revegetation, disposal of debris, refuse, tailings, waste, or spoil; planned water impoundments and grading plans conforming to the rules, regulations, and orders adopted pursuant to this title.

3. The reclamation plan where possible, shall provide for orderly, continuing reclamation concurrent with mining operations and all of the reclamation work shall be completed in accordance with the schedule accepted or designated by the department. The permittee shall file periodic reports within such times as the department shall require showing the areas for which reclamation has been completed. The department shall inspect such areas and notify the permittee whether the reclamation is accepted as being in accordance with the approved plan or whether there are deficiencies which must be corrected. Unless the department specifies otherwise, the permittee shall file an annual report in the manner prescribed by the department indicating the degree of reclamation.

4. In lieu of the department inspection required in subdivision three of this section, the department may contract with the soil and water conservation district in the county where the mine operation is located for the purpose of inspecting the mining operation and the reclamation work.

Added L.1974, c. 1043, § 1; amended L.1976, c. 476, § 1; L.1976, c. 477, § 1.

1976 Amendments. Subd. 2. L. 1976, c. 477, § 1, eff. June 29, 1976, corrected spelling of "revegetation", inserted "planned water impoundments", and substituted "title" for "article."

Subd. 3. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "permittee" for "operator" in three instances.

Subd. 4. L.1976, c. 476, § 1, eff. June 29, 1976, added subd. 4.

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2717. Reclamation bond

1. As a condition precedent to the issuance of any permit, the applicant, where required shall furnish a bond or appropriate substitute as hereinafter provided acceptable to the department conditioned upon the performance of the applicant's reclamation responsibilities with respect to the mine and naming the state as beneficiary.

2. The amount of the bond required shall be determined by the department based on the information contained in the permit application and upon such information as an investigation by the department may disclose.

3. The form and terms of the bond shall be as prescribed by the department. It shall be signed by the applicant as principal and by a good and sufficient corporate surety licensed to do business as such in the state of New York.

4. If the bond shall for any reason be cancelled by the surety, within thirty days after receiving notice thereof, the permittee shall provide a valid replacement under the same conditions as hereinabove described. Failure to provide a replacement bond within such period may, at the discretion of the commissioner, result in the immediate suspension of the mining permit by the department.

5. If, after notice and hearing relative thereto, the department determines that the permittee is in violation of the reclamation requirements relative to the mine, it may suspend the permit and if the permittee does not commence corrective measures within fifteen days after notice of determination, the department shall revoke the permit. In such event, the department may thereupon call upon the surety to complete the reclamation as provided for in the bond. In case of default of such completion by the surety, the department may, at its option, pro-

ceed to complete the work, either by day work or contract. In the latter event, the cost of completing the unfinished work shall be personal liability of the permittee and the bond or substitute and the materials, machinery, implements and the tools of every description which may be found at the mine or other assets of the permittee shall be subject to a lien of the department for the amount expended for such work and shall not be removed without the written consent of the department. Such lien may be foreclosed by the attorney general in the same manner as a mechanic's lien.

6. Whenever a permittee shall have completed all requirements under the provisions of his permit as to any affected land, he shall notify the department thereof. If the department determines that the permittee has satisfied the requirements of the reclamation plan, the department shall release the permittee from further obligations regarding such affected land. The release of liability under the surety bond shall be based upon faithful compliance by the permittee of all requirements relating to the reclamation of land affected by mining. A two-year period shall be allowed after completion of mining operations to complete the reclamation of an area affected by mining, unless the department shall deem it in the best interests of the people of the state to allow a longer reclamation period. At the discretion of the department the permittee shall be able to secure a release of a portion of the bond for acreage which he has reclaimed or a release of the full amount of the bond less the amount necessary to complete reclamation for acreage partially reclaimed.

7. Upon the approval of the department, in lieu of such bond, the applicant may deposit cash or negotiable bonds of the United States government of like amount in an escrow account conditioned upon the performance of said applicant's reclamation responsibilities with respect to said mine or furnish security of equal value acceptable to the commissioner. Any interest accruing as a result of the aforementioned escrow deposit or acceptable security shall be the exclusive property of the permittee.

8. The aforementioned bonding rquirements shall remain the obligation of the original permittee regardless of changes in permittees unless a subsequent permittee has furnished the appropriate bond or substitute as herein provided acceptable to the department and there has been an approval for the transfer of the reclamation obligation to the subsequent permittee by the department.

9. Political subdivisions or municipalities of the state are exempted from the bonding requirements of this section.

Added L.1974, c. 1043, § 1; amended L.1974, c. 1044, § 2; L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, in subds. 1, 3, 5 and 7 referred to "permittee" in lieu of "applicant" and in subd. 5 the reference indicated preceded "shall be subject", and otherwise substituted "permittee" for "operator" throughout the section.

1974 Amendment. Subd. 7. L.1974, c. 1044, § 2, eff. Apr. 1, 1975, in first sentence authorized the operator to furnish security of equal value acceptable to the commissioner, and in second sentence substituted "accruing" for "occruing" and inserted "or acceptable security" after "escrow deposit".

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2719. Cooperation

The department may use any of its powers for the purpose of cooperating with any other state or jurisdiction in regulating or otherwise affecting mining at any location where such mining may have a physical effect on mining in such other state or jurisdiction.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, reenacted section without change.

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2721. Rules, regulations, orders and hearings

1. The department shall have power to make rules and regulations necessary and appropriate to carry out the purposes of this title.

2. No rule or regulation or amendment thereof, shall be made by the department without a public hearing upon at least thirty days notice published in a newspaper or newspapers circulated in the area to be affected by such rule, regulation or amendment, exclusive of the date of service. The public hearing shall be held at such time and place as may be prescribed by the department and any interested person shall be entitled to be heard.

3. Any notice required by this section shall be given in the name of the department by the commissioner or a designee of the commissioner. Any such notice may be given by any one or more of the following methods:

(a) personal service;

(b) publication in one or more issues of a newspaper of general circulation in the county where the affected land or some part thereof is situated;

(c) registered or certified mail addressed, postage prepaid, to the last known mailing address of the person or persons affected. The date of service shall be the date on which service was made in the case of personal service, the date of first publication in the case of notice by publication, and the date of mailing in the case of notice by mail. The notice shall specify the time and place of the hearing, and shall briefly state the purpose of the proceeding. Should the department elect to give notice by personal service, such service may be made in the same manner as is provided by law for the service of process in civil actions in the courts of the state.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, among other changes, in subd. 3, omitted par. (d) which read: "Service by publication shall not be used, except as provided in subdivision two of this section, unless personal service or service by mail is impracticable."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2723. Enforcement

The provisions of this title and any rules and regulations promulgated thereunder shall be enforced pursuant to title thirteen, article seventy-one of the environmental conservation law.

Added L.1974 c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "act."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2725. Judicial review

Any act, omission, determination or order of the department or of any officer or employee thereof, pursuant to or within the scope of this title, may be reviewed in accordance with article seventy-eight of the civil practice law and rules.

Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article."

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

§ 23-2727. Severability

The provisions of this title shall be severable and if any phrase, clause, sentence or provision of this title, or the applicability thereof

to any person or circumstance shall be held invalid, the remainder of this title and the application thereof shall not be affected thereby. Added L.1974, c. 1043, § 1; amended L.1976, c. 477, § 1.

1976 Amendment. L.1976, c. 477, § 1, eff. June 29, 1976, substituted "title" for "article" in three instances.

Effective Date. L.1974, c. 1043, § 2, provided that this section shall take effect Apr. 1, 1975.

ARTICLE 24—FRESHWATER WETLANDS [NEW]

Title
1. General provisions and public policy.
3. Freshwater wetlands studies; notification and maps.
5. Local implementation.
7. Freshwater wetlands regulations.
9. Freshwater wetlands preservation program.
11. Appeal and review.
13. Miscellaneous provisions.

TITLE 1—GENERAL PROVISIONS AND PUBLIC POLICY

Sec.
24-0101. Short title.
24-0103. Declaration of policy.
24-0105. Statement of findings.
24-0107. Definitions.

§ 24-0101. Short title

This article shall be known as the "Freshwater Wetlands Act". Added L.1975, c. 614, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 614, § 5.

§ 24-0103. Declaration of policy

It is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state. Added L.1975, c. 614, § 1.

Effective Date. Section effective Sept. 1, 1975, pursuant to L.1975, c. 614, § 5.

§ 24-0105. Statement of findings

1. The freshwater wetlands of the state of New York are invaluable resources for flood protection, wildlife habitat, open space and water resources.

2. Considerable acreage of freshwater wetlands in the state of New York has been lost, despoiled or impaired by unregulated draining, dredging, filling, excavating, building, pollution or other acts inconsistent with the natural uses of such areas. Other freshwater wetlands are in jeopardy of being lost, despoiled or impaired by such unrelated acts.

3. Recurrent flooding aggravated or caused by the loss of freshwater wetlands has serious effects upon natural ecosystems.

4. Freshwater wetlands conservation is a matter of state concern since a wetland in one region is affected by acts on rivers, streams and wetlands of other regions.

APPENDIX C-3

CHAPTER 19
South Carolina Mining Act

SEC.

§ 48-19-10. Short title.

This chapter may be known and cited as "The South Carolina Mining Act."

HISTORY: 1962 Code § 63-711; 1973 (58) 314.

Editor's Note—

Section 2 of 1973 Act No 274 (1973 (58) 314) contains legislative findings relative to this chapter, and provides:

"The General Assembly finds that the extraction of minerals by mining is a basic and essential activity making an important contribution to the well-being of South Carolina and the nation. However, it is not practical to extract minerals required by our society without disturbing the surface of the earth and producing waste materials, and the very character of certain surface mining operations precludes complete restoration of the land to its original condition. It is possible to conduct mining in such a way as to minimize its effects on the surrounding environment. Proper reclamation of mined land is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety, beauty, and property rights of the citizens of the State. The

General Assembly finds that the conduct of mining and reclamation of mined lands as provided by this act will allow the mining of valuable minerals and will provide for the protection of the State's environment and for the subsequent beneficial use of the mined and reclaimed land."

Cross references—
As to the South Carolina Geological Survey, see §§ 13-5-10 to 13-5-50.

Research and Practice References—
54 Am Jur 2d, Mines and Minerals § 167.
58 CJS, Mines and Minerals § 229.

§ 48-19-20. Legislative declaration of purpose.

The purposes of this chapter are to provide:

(a) That the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration.

(b) That from July 1, 1974, no mining shall be carried on in the State unless plans for such mining include reasonable provisions for protection of the surrounding environment and for reclamation of the area of land affected by mining.

HISTORY: 1962 Code § 63-712; 1973 (58) 314.

§ 48-19-30. Definitions.

Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context:

(a) *"Mining"* means (1) the breaking of the surface soil in order to facilitate or accomplish the extraction or removal of ores or mineral solids for sale or processing or consumption in the regular operation of a business; (2) removal of overburden lying above natural deposits of ore or mineral solids and removal of the mineral deposits thereby exposed, or by removal of ores or mineral solids from deposits lying exposed in their natural state. Removal of overburden and mining of limited amounts of any ores or mineral solids shall not be considered mining when done only for the purpose of determining location, quantity, or quality of a natural deposit, so long as no ores or mineral solids removed during exploratory excavation or mining are sold, processed for sale, or consumed in the regular operation of a business and provided the land affected does not exceed one acre in area. It shall not include plants engaged in processing minerals except as such plants are an integral on-site part of the removal of ores or mineral solids from natural deposits. It shall not include excavation or grading when conducted solely in aid of on-site farming or of on-site construction. It shall not include dredging operations

where such operations are engaged in the harvesting of oysters, clams, or the removal of shells from coastal bottoms.

(b) *"Council"* means the Mining Council created by §§ 48-21-10 and 48-21-20.

(c) *"Department"* means the Land Resources Conservation Commission. Whenever in this chapter the Department is assigned duties, they may be performed by the director or by such of his subordinates as he may designate.

(d) *"Minerals"* means soil, clay, coal, stone, gravel, sand, phosphate, rock, metallic ore, and any other solid material or substance found in natural deposits on or in the earth.

(e) *"Affected land"* means (1) the area of land from which overburden or minerals have been removed or upon which overburden has been deposited or both, including any area on which is located a plant which is an integral part of the process of the removal of ores or mineral solids from natural deposits;

(2) stockpiles and settling ponds located on or adjacent to lands from which overburden or minerals have been removed.

(f) *"Neighboring"* means in close proximity, in the immediate vicinity, or in actual contact.

(g) *"Termination of mining"* means cessation of mining operations with intent not to resume, or cessation of mining operations as a result of expiration or revocation of the permit of the operator. Whenever the Department shall have reason to believe that a mining operation has terminated, it shall give the operator written notice of its intention to declare the operation terminated, and he shall have an opportunity to appear within thirty days and present evidence that the operation is continuing; where the Department finds that such evidence is satisfactory, it shall not make such a declaration.

(h) *"Operator"* means any person or persons, any partnership, limited partnership, or corporation, or any association of persons, engaged in mining operations, whether individually, jointly, or through subsidiaries, agents, employees, or contractors.

(i) *"Overburden"* means the earth, rock, and other materials that lie above the natural deposit of minerals.

(j) *"Refuse"* means all waste soil, rock, mineral, scrap, tailings, slimes, and other material directly connected with the mining, cleaning, and preparation of substances mined and shall include all waste materials deposited on or in the permit area from other sources.

(k) *"Spoil bank"* means a deposit of excavated overburden or refuse.

(l) *"Peak"* means overburden removed from its natural position and deposited elsewhere in the shape of conical piles or projecting points.

(m) *"Ridge"* means overburden removed from its natural position and deposited elsewhere in the shape of a long, narrow elevation.

(n) *"Reclamation"* means the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area. Although both the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, the basic objective will be to establish on a continuing basis the vegetative cover, soil stability, water conditions and safety conditions appropriate to the area.

(o) *"Reclamation plan"* means the operator's written proposal as required and approved by the Department for reclamation of the affected land, which shall include but not be limited to:

(1) Proposed practices to protect adjacent surface resources;

(2) Specifications for surface gradient restoration, including sketches delineating slope angle, to a surface suitable for the proposed subsequent use of the land after reclamation is completed, and proposed method of accomplishment;

(3) Manner and type of revegetation or other surface treatment of the affected areas;

(4) Method of prevention or elimination of conditions that will be hazardous to animal or fish life in or adjacent to the area;

(5) Method of compliance with State air and water pollution laws;

(6) Method of rehabilitation of settling ponds;

(7) Method of control of contaminants and disposal of mining refuse;

(8) Method of restoration of establishment of stream channels and stream banks to a condition minimizing erosion, siltation, and other pollution;

(9) Such maps and other supporting documents as may be reasonably required by the Department; and

(10) A time schedule that meets the requirements of § 48–19–70.

(p) *"Borrow pit"* means an area from which soil or other unconsolidated materials are removed to be used, without further processing, for highway construction and maintenance.

(q) *"Land"* shall include submerged lands underlying any river,

stream, lake, sound, or other body of water and shall specifically include, among others, estuarine and tidal lands.

HISTORY: 1962 Code § 63-713; 1973 (58) 314.

§ 48–19–40. Operating permits for mining required.

After January 1, 1975, no operator shall engage in mining without having first obtained from the Department an operating permit which covers the affected land which has not terminated, been revoked, been suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in § 48–19–60. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

No permit shall be issued except in accordance with the procedures set forth in § 48–19–50, nor modified or renewed except in accordance with the procedures set forth in § 48–19–60.

An appeal from the Department's denial of a permit may be taken to the Mining Council, as provided by § 48–19–150.

No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to § 48–19–80. If at any time the bond or other security, or any part thereof, shall lapse for any reason other than a release by the Department, and the lapsed bond or security is not replaced by the operator within thirty days after notice of the lapse, the permit to which it pertains shall automatically become void and of no further effect.

An operating permit shall be granted for a period not exceeding ten years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of such period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations which he has incurred under his approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan.

An operating permit may be renewed from time to time, pursuant to procedures set forth in § 48–19–60.

An operating permit may be suspended or revoked for cause, pursuant to procedures set forth in § 48–19–120.

HISTORY: 1962 Code § 63-714; 1973 (58) 314; 1974 (58) 2397.

Research and Practice References—
54 Am Jur 2d, Mines and Minerals § 175.
58 CJS, Mines and Minerals § 240.

§ 48-19-50. Application for and issuance or denial of permit; transfer.

Any operator desiring to engage in mining shall make written application to the Department for a permit. Such application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce this chapter.

The application shall be accompanied by a reclamation plan which meets the requirements of § 48-19-70. No permit shall be issued until such plan has been approved by the Department.

The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to § 48-19-130, the Department and its representatives and its contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation which the operator has failed to complete.

The Department shall grant or deny the permit requested as expeditiously as possible but in no event later than sixty days after the application form and any supplemental information required shall have been filed with the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials for highway maintenance or construction.

The Department shall deny such permit upon finding:

(a) That any requirement of this chapter or any rule or regulation promulgated hereunder will be violated by the proposed operation;

(b) That the operation will have unduly adverse effects on wildlife or fresh water, estuarine, or marine fisheries;

(c) That the operation will violate standards of air quality, surface water quality, or ground water quality which have been promulgated by the South Carolina Department of Health and Environmental Control;

(d) That the operation will constitute a substantial physical hazard to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property;

(e) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;

(f) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or

(g) That the operator has not corrected all violations which he may have committed under any prior permit and which resulted in

(1) revocation of his permit,

(2) forfeiture of part or all of his bond or other security,

(3) conviction of a misdemeanor under § 48–19–180, or

(4) any other court order issued under § 48–19–180.

In the absence of any such finding, a permit shall be granted.

Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with such further reasonable and appropriate requirements and safeguards as may be deemed necessary by the Department to assure that the operation will comply fully with the requirements and objectives of this chapter. Such conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds such screening to be feasible and desirable. Violation of any such conditions shall be treated as a violation of this chapter and shall constitute a basis for suspension or revocation of the permit.

Any operator wishing any modification of the terms and conditions of his permit or of the approved reclamation plan shall submit a request for modification in accordance with the provisions of § 48–19–60.

If the Department denies an application for a permit, it shall notify the operator in writing, stating the reasons for its denial and any modifications in the application which would make it acceptable. The operator may thereupon modify his application or file an appeal, as provided in § 48–19–150, but no such appeal shall be taken more than sixty days after notice of disapproval has been mailed to him at the address shown on his application.

Upon approval of an application, the Department shall set the amount of the performance bond or other security which is to be required pursuant to § 48–19–80. The operator shall have sixty days following the mailing of such notification in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

When one operator succeeds to the interest of another in any uncompleted mining operation, by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator from the duties imposed upon him by this chapter with reference to such operation and transfer the permit to the successor operator; *provided,* that both operators have complied with the requirements of this chapter and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security.

HISTORY: 1962 Code § 63-715; 1973 (58) 314.

§ 48–19–60. Modification and renewal of permits.

Any operator engaged in mining under an operating permit may apply at any time for modification of such permit, and at any time during the two years prior to its expiration date for renewal of the permit. Such application shall be in writing upon forms furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce this chapter. However, it shall not be necessary to resubmit information which has not changed since the time of a prior application, where the applicant states in writing that such information has not changed.

The procedure to be followed and standards to be applied in renewing a permit shall be the same as those for issuing a permit; *provided, however,* that in the absence of any changes in legal requirements for issuance of a permit since the date on which the prior permit was issued, the only basis for denying a renewal permit shall be an uncorrected violation of the type listed in subsection (g) of § 48–19–50, or failure to submit an adequate reclamation plan in light of conditions then existing.

A modification under this section may affect the land area covered by the permit, the approved reclamation plan coupled with the permit, or other terms and conditions of the permit. A permit may be modified to include land neighboring the affected land, but not other lands. The reclamation plan may be modified in any manner, so long as the Department determines that the modified plan fully meets the standards set forth in § 48–19–70 and that the modifications would be generally consistent with the bases for issuance of the original permit. Other terms and conditions may be modified only where the Department determines that the permit as modified would meet all requirements of §§ 48–19–40 and 48–19–50. No modification shall extend the expiration date of any permit issued under this chapter.

In lieu of a modification or a renewal, an operator may apply for a new permit in the manner prescribed by §§ 48-19-40 and 48-19-50.

No modification or renewal of a permit shall become effective until any required changes have been made in the performance bond or other security posted under the provisions of § 48-19-80, so as to assure the performance of obligations assumed by the operator under the permit and reclamation plan.

HISTORY: 1962 Code § 63-716; 1973 (58) 314.

§ 48-19-70. Reclamation plans.

The operator shall submit with his application for an operating permit a proposed reclamation plan. Such plan shall be furnished to the local soil and water conservation district in which such mining operation will be conducted. The plan shall include as a minimum, each of the elements specified in the definition of "reclamation plan" in § 48-19-30, plus such other information as may be reasonably required by the Department. The reclamation plan shall provide that reclamation activities, particularly those relating to control of erosion, shall to the extent feasible be conducted simultaneously with mining operations and in any event be initiated at the earliest practicable time after completion or termination of mining on any segment of the permit area. The plan shall provide that reclamation activities shall be completed within two years after completion or termination of mining on each segment of the area for which a permit is requested unless a longer period is specifically permitted by the Department.

The Department may approve, approve subject to stated modifications, or reject the plan which is proposed. The Department shall approve a reclamation plan (as submitted or as modified) only where it finds that it adequately provides for those actions necessary to achieve the purposes and requirements of this chapter, and that in addition, the plan meets the following minimum standards:

(a) The final slopes in all excavations in soil, sand, gravel, and other unconsolidated materials shall be at such an angle as to minimize the possibility of slides and be consistent with the future use of the land.

(b) Provisions for safety to persons and to adjoining property must be provided in all excavations in rock.

(c) In open cast mining operations, all overburden and spoil shall be left in a configuration which is in accordance with ac-

cepted conservation practices and which is suitable for the proposed subsequent use of the land.

(d) In no event shall any provision of this section be construed to allow small pools of water that are, or are likely to become, noxious, odious, or foul to collect or remain on the mined area. Suitable drainage ditches or conduits shall be constructed or installed to avoid such conditions. Lakes, ponds, and marsh lands shall be considered adequately reclaimed lands when approved by the Department.

(e) The type of vegetative cover and methods of its establishment shall be specified, and in every case shall conform to accepted and recommended agronomic and reforestation restoration practices as established by the South Carolina Agricultural Experiment Station of Clemson University and the South Carolina Forestry Commission. Advice and technical assistance may be obtained through the State Soil and Water Conservation Districts.

The Department shall be authorized to approve a reclamation plan despite the fact that such plan does not provide for reclamation treatment of every portion of the affected land, where the Department finds that because of special conditions such treatment would not be feasible for particular areas and that the plan takes all practical steps to minimize the extent of such areas.

An operator shall have the right to substitute an area mined in the past for an area presently being mined with the approval of the Department.

HISTORY: 1962 Code § 63-717; 1973 (58) 314.

Research and Practice References—
58 CJS, Mines and Minerals § 240.

ALR and L Ed Annotations—
Statutory or contractual obligation to restore surface after strip or other surface mining. 1 ALR2d 575.

§ 48-19-80. Bonds.

Each applicant for an operating permit, or for the renewal thereof, shall file with the Department following approval of his application and shall thereafter maintain in force a bond in favor of the State of South Carolina, executed by a surety approved by the Chief Insurance Commissioner, in the amount set forth below. The bond herein provided for must be continuous in nature and shall remain in force until cancelled by the surety. Cancellation by the surety shall be effectuated only upon sixty days' written notice thereof to the Department and to the operator.

The applicant shall have the option of filing a separate bond for

each operating permit or of filing a blanket bond covering all mining operations within the State for which he holds permits. The amount of each bond shall be based upon the area of affected land to be reclaimed under the approved reclamation plan or plans to which it pertains, less any such area whose reclamation has been completed and released from coverage by the Department pursuant to § 48–19–100. Where such area totals less than five acres, the bond shall be in the amount of two thousand five hundred dollars; where it is five or more, but less than ten acres, the bond shall be in the amount of five thousand dollars; where it is ten or more, but less than twenty-five acres, the bond shall be in the amount of twelve thousand five hundred dollars; where it is twenty-five or more acres, the bond shall be in the amount of twenty-five thousand dollars, *provided, however,* that where such area totals more than 25 acres, the Department may require a bond in excess of twenty-five thousand dollars where a greater bond is necessary to insure reclamation as provided by this chapter.

The bond shall be conditioned upon the faithful performance of the requirements set forth in this chapter and of the rules and regulations adopted pursuant thereto. Liability under the bond shall be maintained as long as reclamation is not completed in compliance with the approved reclamation plan unless released only upon written notification from the Department. Notification shall be given upon completion of compliance or acceptance by the Department of a substitute bond. In no event shall the liability of the surety exceed the amount of the surety bond required by this section.

In lieu of the surety bond required by this section, the operator may file with the Department a cash deposit, negotiable securities, a mortgage of real property acceptable to the Department, or an assignment of a savings account in a South Carolina bank on an assignment form prescribed by the Department.

If the license to do business in South Carolina of any surety upon a bond filed pursuant to this chapter should be suspended or revoked, the operator shall, within sixty days after receiving notice thereof, substitute for such surety a good and sufficient corporate surety authorized to do business in this State. Upon failure of the operator to make such substitution, his permit shall automatically become void and of no effect.

HISTORY: 1962 Code § 63-718; 1973 (58) 314.

§ 48–19–90. Required reports.

Within thirty days after completion or termination of mining on

an area under permit or within thirty days after each anniversary of the issuance of the operating permit, whichever is earlier, or at such later date as may be provided by rules and regulations of the Department, and each year thereafter until reclamation is completed and approved, the operator shall file a report of activities completed during the preceding year on a form prescribed by the Department, which shall:

(a) Identify the mine, the operator and the permit number;

(b) State acreage disturbed by mining in the last twelve-month period;

(c) State and describe amount and type of reclamation carried out in the last twelve-month period;

(d) Estimate acreage to be newly disturbed by mining in the next twelve-month period;

(e) Provide such maps as may be specifically requested by the Department.

HISTORY: 1962 Code § 63-719; 1973 (58) 314.

§ 48-19-100. Inspections; correction of deficiencies; effect of failure to carry out reclamation plan.

Upon receipt of the operator's annual report or report of completion of reclamation and at any other reasonable time the Department may elect, the Department shall cause the permit area to be inspected to determine whether the operator has complied with the reclamation plan, the requirements of this chapter, any rules and regulations promulgated hereunder, and the terms and conditions of his permit. Accredited representatives of the Department shall have the right at all reasonable times to enter upon the land subject to the permit for the purpose of making such inspection and investigation.

The operator shall proceed with reclamation as scheduled in the approved reclamation plan. Following its inspection, the Department shall give written notice to the operator of any deficiencies noted. The operator shall thereupon commence action within thirty days to rectify these deficiencies and shall diligently proceed until they have been corrected. The Department may extend performance periods referred to in this section and in § 48-19-70 for delays clearly beyond the operator's control, but only in cases where the Department finds that the operator is making every reasonable effort to comply.

Upon completion of reclamation of an area of affected land, the operator shall notify the Department. The Department shall make an inspection of the area, and if it finds that reclamation has been

properly completed, it shall notify the operator in writing and release him from further obligations regarding such affected land. At the same time it shall release all or the appropriate portion of any performance bond or other security which he has posted under § 48-19-80.

If at any time the Department finds that reclamation of the permit area is not proceeding in accordance with the reclamation plan and that the operator has failed within thirty days after notice to commence corrective action, or if the Department finds that reclamation has not been properly completed in conformance with the reclamation plan within two years, or longer if authorized by the Department, after termination of mining on any segment of the permit area, it shall initiate forfeiture proceedings against the bond or other security filed by the operator under § 48-19-130. In addition, such failure shall constitute grounds for suspension or revocation of the operator's permit, as provided in § 48-19-120.

HISTORY: 1962 Code § 63-720; 1973 (58) 314.

§ 48-19-110. Modification of reclamation plan and other terms and conditions of permit.

If at any time it appears to the Department from its inspection of the affected land that the activities under the reclamation plan and other terms and conditions of the permit are failing to achieve the purposes and requirements of this chapter it shall give the operator written notice of that fact, of its intention to modify the reclamation plan and other terms and conditions of the permit in a stated manner, and of the operator's right to a hearing on the proposed modification at a stated time and place. The date for such hearing shall be not less than thirty nor more than sixty days after the date of the notice unless the Department and the operator shall mutually agree on another date. Following the hearing the Department shall have the right to modify the reclamation plan and other terms and conditions of the permit in the manner stated in the notice or in such other manner as it deems appropriate in view of the evidence submitted at the hearing.

HISTORY: 1962 Code § 63-721; 1973 (58) 314.

§ 48-19-120. Suspension or revocation of permit.

Whenever the Department shall have reason to believe that a violation of (a) this chapter, (b) any rules and regulations promulgated hereunder, or (c) the terms and conditions of a permit, including the approved reclamation plan, has taken place, it shall serve written notice of such fact upon the operator, specifying the facts constituting such apparent violation and informing the opera-

tor of his right to a hearing at a stated time and place. The date for such hearing shall be not less than thirty nor more than sixty days after the date of the notice, unless the Department and the operator shall mutually agree on another date. The operator may appear at the hearing, either personally or through counsel, and present such evidence as he may desire in order to prove that no violation has taken place or exists. If the operator or his representative does not appear at the hearing, or if the Department following the hearing finds that there has been a violation, the Department may suspend the permit until such time as the violation is corrected or may revoke the permit where the violation appears to be willful.

The effective date of any such suspension or revocation shall be sixty days following the date of the decision. An appeal to the Mining Council under § 48-19-150 shall stay such effective date until the Council's decision. A further appeal to the court of common pleas under § 48-19-160 shall stay such effective date until the date of the court judgment. If the Department finds at the time of its initial decision that any delay in correcting a violation would result in imminent peril to life or danger to property or to the environment, it shall promptly initiate a proceeding for injunctive relief under § 48-19-180 hereof. The pendency of any appeal from a suspension or revocation of a permit shall have no effect upon such action.

Any operator whose permit has been suspended or revoked shall be denied a new permit or a renewal of the old permit to engage in mining until he gives evidence satisfactory to the Department of his ability and intent to fully comply with the provisions of this chapter, rules and regulations promulgated hereunder, and the terms and conditions of his permit, including the approved reclamation plan, and that he has satisfactorily corrected all previous violations.

HISTORY: 1962 Code § 63-722; 1973 (58) 314.

§ 48-19-130. Forfeiture of bond.

Whenever the Department determines the necessity of a bond forfeiture under the provisions of § 48-19-100, or whenever it revokes an operating permit under the provisions of § 48-19-120, it shall request the Attorney General to initiate forfeiture proceedings against the bond or other security filed by the operator under § 48-19-80; *provided, however,* that no such request shall be made for forfeiture of a bond until the surety has been given written notice of the violation and a reasonable opportunity to take corrective action. Such proceedings shall be brought in the

appeal may be taken from the Council's decision to the court of common pleas as provided in § 48–19–160.

HISTORY: 1962 Code § 63-725; 1973 (58) 314.

§ 48–19–160. Appeal of Mining Council's decision to court.

An appeal to the courts may be taken from any decision of the Mining Council, in the manner provided by Chapter 7 of Title 18. Such an appeal may also lie against the Department's refusal to release part or all of a bond or other security posed under § 48–19–80, as provided in § 48–19–100. Any such appeal may be filed in the Court of Common Pleas for Richland County or for the county in which the mining operation is to be conducted.

HISTORY: 1962 Code § 63-726; 1973 (58) 314.

§ 48–19–170. Promulgation of rules and regulations by Mining Council.

The Mining Council shall be responsible for promulgating rules and regulations respecting the administration of this chapter and in conformity herewith. Such rules and regulations shall set forth the duties of operators applying for permits under this chapter and also those of the Department Director, his subordinates, or designees. No such rules or regulations shall become effective until after public hearings thereon before the Council. Such public hearings are to be held after thirty days' notice of which has been published and sent to each person, firm, or corporation who has requested the Council to be notified of any such hearing and notice published for three weeks in a newspaper having circulation throughout the state of South Carolina.

HISTORY: 1962 Code § 63-727; 1973 (58) 314.

Research and Practice References—
54 Am Jur 2d, Mines and Minerals §§ 167, 173.

§ 48–19–180. Sanctions for violation of chapter.

In addition to other penalties provided by this chapter, any operator who engages in mining in willful violation of the provisions of this chapter or of any rules and regulations promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this chapter or willfully gives false information in any application or report required by this chapter shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense. Each day of continued violation after written notification shall be considered a separate offense.

name of the State of South Carolina. In such proceedings, the face amount of the bond or other security, less any amount released by the Department pursuant to § 48–19–100, shall be treated as liquidated damages and subject to forfeiture. All funds collected as a result of such proceedings shall be placed in a special fund and used by the Department to carry out, to the extent possible, the reclamation measures which the operator has failed to complete. If the amount of the bond or other security filed pursuant to this section proves to be insufficient to complete the required reclamation pursuant to the approved reclamation plan, the operator shall be liable to the Department for any excess above the amount of the bond or other security which may be required to defray the cost of completing the required reclamation.

HISTORY: 1962 Code § 63-723; 1973 (58) 314.

§ 48–19–140. Manner of giving notice.

Whenever in this chapter written notice is required to be given by the Department, such notice shall be mailed by registered or certified mail to the permanent address of the operator set forth in his most recent application for an operating permit or for a modification or renewal of such permit. No other notice shall be required.

HISTORY: 1962 Code § 63-724; 1973 (58) 314.

§ 48–19–150. Appeal to Mining Council.

An appeal may be taken to the Mining Council from any decision or determination of the Department refusing, modifying, suspending, revoking, or terminating an operating permit or reclamation plan, or imposing any term or condition on such permit or reclamation plan. The person taking such appeal shall within sixty days after the Department's decision give written notice to the Mining Council through its secretary that he desires to take an appeal, at the same time filing a copy of such notice with the Department. The Chairman of the Mining Council shall fix a reasonable time and place for a hearing, giving reasonable notice thereof to the appellant and to the Department. The Mining Council, or a committee thereof designated by the Council's rules of procedure, shall thereupon conduct a full and complete hearing as to the matters in controversy, after which it shall within a reasonable time give a written decision setting forth its findings of fact and its conclusions. The Council or its designated committee may affirm, affirm with modifications, or overrule the decision of the Department and may direct the Department to take such action as may be required to effectuate its decision. A further

In addition to other remedies, the Department may institute any appropriate action or proceedings to prevent, restrain, correct, or abate any violation of this chapter or of any rules and regulations promulgated hereunder.

HISTORY: 1962 Code § 63-728; 1973 (58) 314.

Research and Practice References—
58 CJS, Mines and Minerals §§ 241, 242.
24 Am Jur Pl & Pr Forms (Rev ed), Waters, Form 191 (complaint, petition, or declaration to enjoin pollution caused by strip-mining coal).
18 Am Jur Trials, Subterranean Water Pollution §§ 1 et seq.

ALR and L Ed Annotations—
Liability for pollution of subterranean waters. 38 ALR2d 1265.
Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices. 49 ALR3d 1239.

§ 48–19–190. Chapter shall not affect zoning regulations or ordinances.

No provision of this chapter shall be construed to supersede or otherwise affect or prevent the enforcement of any zoning regulation or ordinance duly adopted by an incorporated municipality or county or by any agency or department of this State, except insofar as a provision of any such regulation or ordinance is in direct conflict with this chapter.

HISTORY: 1962 Code § 63-729; 1973 (58) 314.

Cross references—
As to municipal zoning and planning, see §§ 5–23–10 et seq.

§ 48–19–200. Chapter shall not impair right to bring action.

No provisions of this chapter shall be construed to restrict or impair the right of any private or public person to bring any legal or equitable action for damages or redress against nuisances or hazards.

HISTORY: 1962 Code § 63-730; 1973 (58) 314.

Research and Practice References—
54 Am Jur 2d, Mines and Minerals §§ 174, 194.
58 CJS, Mines and Minerals § 237.
17 Am Jur Pl & Pr Forms (Rev ed), Mines and Minerals, Forms 41–45 (entry for inspection).

§ 48–19–210. Chapter shall not apply to certain activities and areas.

The provisions of this chapter shall not apply to those activities of the South Carolina State Highway Commission, nor of any person acting under contract with the Commission, on highway

rights-of-way or borrow pits maintained solely in connection with the construction, repair, and maintenance of the public road systems of South Carolina; *provided,* that this exemption shall not become effective until the State Highway Commission shall have adopted reclamation standards applying to such activities and such standards have been approved by the Mining Council. The provisions of this chapter shall not apply to mining on Federal lands under a valid permit from the U.S. Forest Service or the U.S. Bureau of Land Management.

HISTORY: 1962 Code § 63-731; 1973 (58) 314.

§ 48-19-220. Other powers of Department; cooperation with governmental agencies.

The Department, with the approval of the Governor, and in order to accomplish any of the purposes of the Department, may apply for, accept, and expend grants from the Federal government and its agencies and from any foundation, corporation, association, or individual; may enter into contracts relating to such grants; and may comply with the terms, conditions, and limitations of any such grant or contract. The Department may engage in such research as may be appropriate to further its ability to accomplish its purposes under this chapter, and may contract for such research to be done by others. The Department may cooperate with any Federal, state, or local government or agency, of this or any other state, in mutual programs to improve the enforcement of this chapter or to accomplish its purposes more successfully.

HISTORY: 1962 Code § 63-732; 1973 (58) 314.

§ 43-19-230. Lands to be included in reclamation plan.

All lands mined subsequent to July 1, 1974 shall be included in a reclamation plan.

HISTORY: 1962 Code § 63-733; 1974 (58) 2397.

APPENDIX C-4

Ohio Surface Mine Law

Ohio Department of Natural Resources
DIVISION OF RECLAMATION

OHIO REVISED CODE
CHAPTER 1514: SURFACE MINING AND RECLAMATION OF MINED LAND
and
Related Provisions

Section

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§ 1513.01 Definitions, strip mining.

As used in Chapter 1513. of the Revised Code:

(A) "Strip mining" means all or any part of the process followed in the production of coal from a natural deposit whereby the coal may be extracted after removing overburden, including mining by the auger method or any similar method which penetrates a mineral seam and removes coal directly through a series of openings made by a machine which enters the seam from a surface excavation, or the removing of overburden for the purpose of determining the location, quality, or quantity of a natural coal deposit; but does not include all or any part of a process whereby the extraction of coal is incidental to the extraction of other minerals, and the weight of coal extracted during the year is less than one-sixth the total weight of minerals removed during the year, including coal.

(B) "Overburden" means all of the earth and other materials which cover a natural deposit of coal, and also means such earth and other materials after removal from their natural state in the process of strip mining.

(C) "Spoil bank" means a deposit of removed overburden.

(D) "Area of land affected" means the area of land from which overburden has been removed, or upon which a spoil bank exists, or both, or beneath which augering has occurred.

(E) "Operation" or "strip mining operation" means all of the premises, facilities, and equipment used in the process of producing coal, by strip mining, from a designated pit or from a designated mining cut or opening, in the creation of which pit, cut, or opening overburden or coal is disturbed or removed, such pit, cut, or opening being located upon a single tract of land or upon two or more contiguous tracts of land.

(F) "Operator" means any person engaged in strip mining who removes or intends to remove more than two hundred fifty tons of coal from the earth by strip mining within twelve successive calendar months or who removes overburden for the purpose of determining the location, quality, or quantity of a natural coal deposit, but does not include persons whose coal extraction is incidental to the removal of other minerals as defined in division (A) of this section.

(G) "Person" means person, partnership, corporation, association, or other legal entity, or any political subdivision, instrumentality, or agency of the state.

(H) "Reclamation" means backfilling, grading,

resoiling, planting, and other work to restore an area of land affected by strip mining so that it may be used for forest growth, grazing, agricultural, recreational, or wildlife purpose, or some other useful purpose of equal or greater value.

(I) "Degrees" means inclination from the horizontal. Any requirement in Chapter 1513. of the Revised Code which is stated in degree is subject to a tolerance of five degrees.

(J) "Pollution" means placing any noxious or deleterious substances in any waters of the state or affecting the properties of any waters of the state in a manner which renders such waters harmful or inimical to the public health, or to animal or aquatic life, or to the use of such waters for domestic water supply, industrial or agricultural purposes, or recreation.

(K) "Deposition of sediment" means placing or causing to be placed in any waters of the state, in stream beds on or off the land described in an application for a strip mining license, or upon other lands, any organic or inorganic matter which settles or is capable of settling, to the bottom of such waters and onto such beds or lands.

(L) "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, which are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface or underground waters.

(M) "Contouring," and "contour" when used as a verb, means backfilling and grading the area of land affected, beginning at or beyond the top of the highwall and sloping to the toe of the spoil bank at an angle not to exceed the approximate original contour of the land, with no depressions to accumulate water and with adequate provision for drainage.

(N) "Terracing" means grading so that the steepest highwall slope is not greater than thirty-five degrees, with bench slope established by the chief, and the remaining overburden graded to the approximate original contour of the land or such other grading of the remaining overburden as the chief may approve or require, without depressions to hold water, and with adequate provision for drainage.

(O) "The prescribed period" means, in the case of an application for license or for an amendment, or a request for inspection, pertaining to twenty-five acres or less, sixty days; in the case of an application for license or for an amendment, or a request for inspection, pertaining to more than twenty-five acres but not more than one hundred twenty-five acres, ninety days; and in the case of an application for license or for an amendment, or a request for inspection, pertaining to more than one hundred twenty-five acres, one hundred twenty days.

§ 1513.03 Inspection Officers.

The chief of the division of reclamation shall designate certain employees of the division as inspection officers of strip and surface mining operations for the purpose of enforcing the strip mining laws and the surface mining laws. Such inspection officers shall have the right to enter upon and inspect any strip or surface mining operation at any time. They may serve and execute warrants and other processes of law issued in the enforcement of Chapters 1513. and 1514. of the Revised Code and rules adopted thereunder.

Such inspection officers, while in the normal, lawful, and peaceful pursuit of their duties, may enter upon, cross over, and remain upon privately owned lands for such purposes, and shall not be subject to arrest for trespass while so engaged or for such cause thereafter.

Before a person, other than a person who was an inspector of strip or surface mine operations on the effective date of this section, is eligible for appointment as an inspection officer, he shall pass an examination prepared and administered by the state department of personnel, and shall serve in a provisional status for a probationary period of one year to the satisfaction of the chief. A person serving in a provisional status has the same authority as a permanently appointed inspection officer. This section does not affect the status of any person employed as in inspector of strip or surface mining operations prior to April 10, 1972, if the person is a certified employee in the classified service of the state.

§ 1513.04 Conflict of interest.

No officer or employee in the department of natural resources, or in the office of the attorney general, having any direct, indirect, or supervisory responsibility or duty to enforce Chapter 1513. or 1514. of the Revised Code shall:

(A) Engage in strip or surface mining as a sole proprietor or as a partner;

(B) Be an officer, director, stockholder, owner, or part-owner of any corporation engaged in strip or surface mining.

(C) Be employed as an attorney, agent, or in any other capacity by any person engaged in strip or surface mining. Any person who violates this section shall be removed from office or dismissed from employment.

§ 1513.13 Appeals to the Reclamation Board of Review.

Any person claiming to be deprived of a right or protection afforded him by law by an order of the chief of the division of reclamation, except an order which adopts a rule, may appeal to the

reclamation board of review for an order vacating or modifying the order of the chief.

The person appealing to the board shall be known as appellant and the chief shall be known as appellee. Appellant and appelle shall be deemed to be parties to the appeal.

The appeal shall be in writing and shall set forth the order complained of and the grounds upon which the appeal is based. Such appeal shall be filed with the board within thirty days after the date upon which appellant received notice of the making of the order complained of, as required by section 1513.11 or 1514.07 of the Revised Code, or reasonably should have known of the order, whichever is earlier. Notice of the filing of an appeal shall be filed with the chief within three days after the appeal is filed with the board.

Within seven days after receipt of the notice of appeal the chief shall prepare and certify to the board at the expense of appellant a complete summary of the facts out of which the appeal arises.

Upon the filing of an appeal the board shall fix the time and place at which the hearing on the appeal will be held, and shall give appellant and the chief at least ten days' written notice thereof by certified mail. The board may postpone or continue any hearing upon its own motion or upon application of appellant or of the chief, but only if the order complained of has not been stayed or suspended.

The filing of an appeal provided for in this section does not automatically suspend or stay execution of the order appealed from, but upon application by the appellant the board may suspend or stay such execution pending immediate determination of the appeal without interruption by continuances, other than for unavoidable circumstances.

The board shall hear the appeal de novo, and either party to the appeal may submit such evidence as the board deems admissible.

For the purpose of conducting a hearing on an appeal, the board may require the attendance of witnesses and the production of books, records, and papers, and it may, and at the request of any party it shall, issue subpoenas for witnesses or subpoenas duces tecum to compel the production of any books, records, papers, or other material relevant to the inquiry, directed to the sheriff of the counties where the witnesses or materials are found which subpoenas shall be served and returned in the same manner as subpoenas issued by courts of common pleas are served and returned. The fees and mileage of sheriffs and witnesses shall be the same as those allowed by the court of common pleas in criminal cases. The fee and mileage expenses incurred at the request of appellant shall be paid in advance by appellant, and the remainder of the expenses shall be paid out of funds appropriated for the expenses of the division of reclamation.

In cases of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, the court of common pleas of the county in which such disobedience, neglect, or refusal occurs, or any judge thereof, on application of the board or any member thereof, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify therein.

Witnesses at such hearings shall testify under oath or affirmation, and any member of the board may administer oaths or affirmations to persons who so testify.

At the request of any party to the appeal, a stenographic record of the testimony and other evidence submitted shall be taken by an official court shorthand reporter at the expense of the party making the request therefor. The record shall include all of the testimony and other evidence and the rulings on the admissiblity thereof presented at the hearing. The board shall pass upon the admissibility of evidence, but any party may at the time object to the admission of any evidence. If the board refuses to admit evidence, the party offering the evidence may take a proffer thereof, and such a proffer shall be made a part of the record of the hearing.

If upon completion of the hearing the board finds that the order appealed from was lawful and reasonable, it shall make a written order affirming the order; if the board finds that the order was unreasonable or unlawful, it shall make a written order vacating or modifying the order appealed from and make the order which it finds the chief should have made. Every order made by the board shall contain a written finding by the board of the facts upon which the order is based. Notice of the making of the order shall be given forthwith to each party to the appeal by mailing a certified copy thereof to each such party by certified mail.

The order of the board is final unless vacated or modified by the court of common pleas ◆ in an appeal as provided in section 1513.14 of the Revised Code.

§ 1514.01 Definitions, surface mining.

(A) "Surface mining" means all or any part of a process followed in the production of minerals from the earth or from the surface of the land by surface excavation methods, such as open pit mining, dredging, placering, or quarrying, and includes the removal of overburden for the purpose of determining the location, quantity, or quality of mineral deposits, and the incidental removal of coal at a rate less than one-sixth the

total weight of minerals and coal removed during the year, but does not include test or exploration boring, nor mining operations carried out beneath the surface by means of shafts, tunnels, or similar mine openings.

(B) "Minerals" means sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, or other material or substance of commercial value excavated in a solid state from natural deposits on or in the earth, but does not include coal.

(C) "Overburden" means all of the earth and other materials which cover a natural deposit of minerals, and also means such earth and other materials after removal from their natural state in the process of surface mining.

(D) "Spoil bank" means a pile of removed overburden.

(E) "Area of land affected" means the area of land which has been excavated, or upon which a spoil bank exists, or both.

(F) "Operation" or "surface mining operation" means all of the premises, facilities, and equipment used in the process of removing minerals, or minerals and incidental coal, by surface mining from a mining area in the creation of which mining area overburden or minerals, or minerals and incidental coal, are disturbed or removed, such surface mining area being located upon a single tract of land or upon two or more contiguous tracts of land. Separation by a stream or roadway shall not preclude the tracts from being considered contiguous.

(G) "Operator" means any person engaged in surface mining who removes or intends to remove more than two hundred fifty tons of minerals, or of minerals and incidental coal, from the earth by surface mining within twelve successive calendar months or who removes overburden for the purpose of determining the location, quality, or quantity of a mineral deposit.

§ 1514.02 Application for a Surface Mine Permit.

(A) After the dates the chief prescribes by rule pursuant to section 1514.08 of the Revised Code, but not later than July 1, 1977 nor earlier than July 1, 1975, no operator shall engage in surface mining or conduct a surface mining operation without a permit issued by the chief of the division of reclamation.

An application for a permit shall be upon such form as the chief prescribes and provides, and shall contain:

(1) The name and address of the applicant, of all partners if the applicant is a partnership, or of all officers and directors if the applicant is a corporation, and any other person who has a right to control or in fact controls the management of the applicant or the selection of officers, directors, or managers of the applicant;

(2) A list of the minerals and coal, if any coal, sought to be extracted, an estimate of the annual production rates for each mineral and coal, and a description of the land upon which the applicant proposes to engage in a surface mining operation, which description shall set forth: the name of the counties, townships, and municipal corporations, if any, in which the land is located; the location of its boundaries; and a description of the land of sufficient certainty that it may be located and distinguished from other lands;

(3) An estimate of the number of acres of land that will comprise the total area of land to be affected and an estimate of the number of acres of land to be affected during the first year of operation under the permit;

(4) The name and address of the owner of surface rights in the land upon which the applicant proposes to engage in surface mining;

(5) A copy of the deed, lease, or other instrument which authorizes entry upon such land by the applicant or his agents, if surface rights in the land are not owned by the applicant.

(6) A statement of whether any surface mining permits or strip mining licenses are now held by the applicant in this state, and if so, the numbers of the permits or licenses;

(7) A statement of whether the applicant, any partner if the applicant is a partnership, any officer or director if the applicant is a corporation, or any other person who has a right to control or in fact controls the management of the applicant or the selection of officers, directors, or managers of the applicant has ever had a surface mining permit or strip mining license issued by this or any other state suspended or revoked or has ever forfeited a surface or strip mining bond, cash, or a security deposited in lieu of bond;

(8) A report of the results of test borings that the operator has conducted on the area or otherwise has readily available, including, to the extent that such information is readily available to the operator, the nature and depth of overburden and material underlying each mineral or coal deposit, and the thickness and extent of each mineral or coal deposit. All information relating to test boring results submitted to the chief pursuant to this section shall be kept confidential and not made a matter of public record, except that the information may be disclosed by the chief in any legal action in which the truthfulness of the information is material.

(9) A complete plan for mining and reclamation of the area to be affected, which shall include a statement of the intended future uses of the area and show the approximate sequence in which mining and reclamation measures are to

occur, the approximate intervals following mining during which the reclamation of all various parts of the area affected will be completed, and the measures the operator will perform to prevent damage to adjoining property and to achieve all of the following general performance standards for mining and reclamation:

(a) Prepare the site adequately for its intended future uses upon completion of mining.

(b) Where a plan of zoning or other comprehensive plan has been adopted which governs land uses or the construction of public improvements and utilities, for an area that includes the area sought to be mined, insure that future land uses within the site will not conflict with the plan.

(c) Grade, contour, or terrace final slopes, wherever needed, sufficient to achieve soil stability and control landslides, erosion, and sedimentation. Highwalls will be permitted if they are compatible with the future uses specified in the plan and measures will be taken to insure public safety. Where ponds, impoundments, or other resulting bodies of water are intended for recreational use, establish banks and slopes that will assure safe access to such bodies of water. Where such bodies of water are not intended for recreation, include measures to insure public safety, but access need not be provided.

(d) Resoil the area of land affected, wherever needed, with topsoil or suitable subsoil, fertilizer, lime, or soil amendments, as appropriate, in sufficient quantity and depth to raise and maintain a diverse growth of vegetation adequate to bind the soil and control soil erosion and sedimentation.

(e) Establish a diverse vegetative cover of grass and legumes or trees, grasses, and legumes capable of self-regeneration and plant succession wherever required by the plan.

(f) Remove or bury any metal, lumber, equipment, or other refuse resulting from mining, and remove or bury any unwanted or useless structures.

(g) Reestablish boundary, section corner, government, and other survey monuments that were removed by the operator.

(h) During mining and reclamation, insure that contamination, resulting from mining, of underground water supplies is prevented. Upon completion of reclamation, insure that any lake or pond located within the site boundaries are free of substances resulting from mining in amounts or concentrations that are harmful to persons, fish, waterfowl, or other beneficial species of aquatic life.

(i) During mining and reclamation, control drainage so as to prevent the causing of flooding, landslides, and flood hazards to adjoining lands resulting from the mining operation. Leave any ponds in such condition as to avoid their constituting a hazard to adjoining lands.

(j) Insure that mining and reclamation are carried out in the sequence and manner set forth in the plan and that reclamation measures are performed in a timely manner. All reclamation of an area of land affected shall be completed no later than three years following the mining of such area, unless the operator makes a showing satisfactory to the chief that the future use of such area requires a longer period for completing reclamation.

(k) During mining, store topsoil or fill in quantities sufficient to complete the backfilling, grading, contouring, terracing, and resoiling that is specified in the plan. Stabilize the slopes of and plant each spoil bank to control soil erosion and sedimentation wherever substantial damage to adjoining property might occur.

(l) During mining, promptly remove, store, or cover any coal, pyritic shale, or other acid producing materials in a manner that will minimize acid drainage and the accumulation of acid water.

(m) During mining, detonate explosives in a manner that will prevent damage to adjoining property.

(10) A map in triplicate, on a scale of not more than four hundred feet to the inch, or three copies of an enlarged United States geological survey topographic map on a scale of not more than four hundred feet to the inch.

The map shall:

(a) Be prepared and certified by a registered professional engineer or registered surveyor;

(b) Identify the area of land to be affected corresponding to the application;

(c) Show the probable limits of subjacent and adjacent deep, strip, or surface mining operations, whether active, inactive, or mined out;

(d) Show the boundaries of the area of land to be affected during the period of the permit and the area of land estimated to be affected during the first year of operation, name the surface and mineral owners of record of the area, and the owners of record of adjoining surface properties;

(e) Show the names and locations of all streams, creeks, or other bodies of water, roads, railroads, utility lines, buildings, cemeteries, and oil and gas wells, on the area of land to be affected and within five hundred feet of the perimeter of the area;

(f) Show the counties, municipal corporations, townships, and sections in which the area of land to be affected is located;

(g) Show the drainage plan on, above, below, and away from the area of land to be affected, indicating the directional flow of water, constructed drainways, natural waterways used for

drainage, and the streams or tributaries receiving or to receive this discharge;

(h) Show the location of available test boring holes that the operator has conducted on the area of land to be affected or otherwise has readily available;

(i) Show the date on which the map was prepared the north direction and the quadrangle sketch, and the exact location of the operation;

(j) Show the type, kind, location, and references of all existing boundary, section corner, government and other survey monuments within the area to be affected and within five hundred feet of the perimeter of the area.

The certification of the maps shall read: "I, the undersigned, hereby certify that this map is correct, and shows to the best of my knowledge and belief all of the information required by the surface mining laws of the state." The certification shall be signed and attested before a notary public. The chief may reject any map as incomplete if its accuracy is not so certified and attested.

(11) A certificate of public liability insurance issued by an insurance company authorized to do business in this state or obtain pursuant to sections 3905.30 to 3905.35 of the Revised Code covering all surface mining operations of the applicant in this state and affording bodily injury and property damage protection in amounts not less than the following:

(a) One hundred thousand dollars for all damages because of bodily injury sustained by one person as the result of any one occurrence, and three hundred thousand dollars for all damages because of bodily injury sustained by two or more persons as the result of any one occurrence;

(b) One hundred thousand dollars for all claims arising out of damage to property as the result of any one occurrence including completed operations, with an aggregate limit of three hundred thousand dollars for all property damage to which the policy applies.

(B) No permit application or amendment shall be approved by the chief if he finds that the reclamation described in the application will not be performed in full compliance with this chapter, or that there is not reasonable cause to believe that reclamation as required by this chapter will be accomplished.

The chief shall issue an order denying an application for an operating permit or an amendment if he determines that the measures set forth in the plan are likely to be inadequate to prevent damage to adjoining property or to achieve one or more of the performance standards required in division (A) (9) of this section.

No permit application or amendment shall be approved to surface mine land adjacent to a public road in violation of section 4153.11 of the Revised Code.

To assure adequate lateral support, no permit application or amendment shall be approved to engage in surface mining on land that is closer than fifty feet of horizontal distance to any adjacent land or waters in which the operator making application does not own the surface or mineral rights, unless the owners of the surface and mineral rights in and under the adjacent land or waters consent in writing to surface mining closer than fifty feet of horizontal distance. Such consent, or a certified copy thereof, shall be attached to the application as a part of the permanent record of the application for a surface mining permit.

The chief shall issue an order granting a permit upon the approval by him of an application, as required by this section, filing of the bond, cash, or certificates of deposit as required by section 1514.04 of the Revised Code, and payment of a permit fee in the amount of one hundred fifty dollars and an acreage fee in the amount of thirty dollars multiplied by the number of acres estimated in the application that will comprise the area of land to be affected within the first year of operation under the permit, but which acreage fee shall not exceed one thousand dollars per year.

The chief may issue an order denying a permit if he finds that the applicant, any partner if the applicant is a partnership, any officer or director if the applicant is a corporation, or any other person who has a right to control or in fact controls the management of the applicant or the selection of officers, directors, or managers of the applicant has substantially or materially failed to comply or continues to fail to comply with this chapter, which failure may consist of one or more violations thereof, a rule adopted thereunder, or an order of the chief, or failure to perform reclamation as required by this chapter and the chief may deny or revoke the permit of any person who so violates or fails to comply, or who purposely misrepresents or omits any material fact in the application for the permit or an amendment to a permit.

If the chief denies the permit, he shall state the reasons for denial in the order denying the permit.

Each permit shall be issued upon condition that the operator will comply with Chapter 1514. of the Revised Code and perform the measures set forth in his plan of mining and reclamation in a timely manner, and upon the right of the chief, division inspectors, or other authorized representatives of the chief to enter upon the premises of the operator at reasonable times for the purposes of determining whether or not there is compliance with Chapter 1514. of the Revised

Code.

(C) If the chief approves the application, the order granting the permit shall authorize the person to whom the permit is issued to engage as the operator of a surface mining operation upon the land described in the permit during a period that shall expire ten years after the date of issuance of the permit, or upon the date when the chief, after inspection, orders the release of remaining bond, cash, or other securities deposited to assure satisfactory performance of the reclamation measures required pursuant to this chapter, whichever occurs earlier.

(D) Before an operator engages in a surface mining operation on land not described in his permit, but which is contiguous to the land described in his permit, he shall file with the chief an application for an amendment to his permit. Before approving an amendment, the chief shall require the information, maps, fees, and bond, cash, or certificates as required for an original application under this section, and shall apply the same prohibitions and restrictions applicable to land described in an original application for a permit. If the chief disapproves the amendment, he shall state the reasons for disapproval in the order disapproving the amendment. Upon the approval of an amendment by the chief, the operator shall be authorized to engage in surface mining on the land described in his original permit plus the land described in the amendment until the date when the permit expires, or when the chief, after inspection, orders the release of remaining bond, cash, or other securities deposited to assure satisfactory performance of the reclamation measures required pursuant to this chapter, whichever occurs earlier.

(E) An operator may at any time, upon application therefor and approval by the chief, amend the plan of mining and reclamation filed with the application for a permit in order to change the reclamation measures to be performed, modify the interval after mining within which reclamation measures will be performed, change the sequence in which mining or reclamation will occur at specific locations within the area affected, mine acreage previously mined or reclaimed, or for any other purpose, provided that the plan, as amended, includes measures that the chief determines will be adequate to prevent damage to adjoining property and to achieve the performance standards set forth in division (A) (9) of this section.

The chief may propose one or more amendments to the plan in writing, within ninety days after the fifth anniversary of the date of issuance of the permit and upon a finding of any of the following conditions after a complete review of the plan and inspection of the area of land affected, and the plan shall be so amended upon written concurrence in the findings and approval of the amendments by the operator:

(1) An alternate measure, in lieu of one previously approved in the plan, will more economically or effectively achieve one or more of the performance standards.

(2) Developments in reclamation technology make an alternate measure to achieve one or more of the performance standards more economical, feasible, practical, or effective.

(3) Changes in the use or development of adjoining lands require changes in the intended future uses of the area of land affected, in order to prevent damage to adjoining property.

(F) The chief shall issue an order granting or denying an operating permit or amendment to a permit or approving or denying an amendment to the operator's plan of mining and reclamation, within ninety days after the filing of an application therefor. If the chief fails to act within such period with respect to a surface mining operation that existed prior to initial date by which the chief requires a permit to be obtained, the operator may continue such operation until the chief issues an order denying a permit for the operation, and if the operator elects to appeal such order pursuant to section 1513.13 of the Revised Code, until the reclamation board of review affirms the order of the chief denying the permit, and if the operator elects to appeal the order of the board pursuant to section 1513.14 of the Revised Code, until the court of common pleas affirms the order.

§ 1514.03 Annual or final report and fees; fee rotary fund

Within thirty days after each anniversary date of issuance of a surface mining permit, the operator shall file with the chief of the division of reclamation an annual report, on a form to be prescribed and furnished by the chief, which report shall, for the period covered by the report, state the amount of, and identify the types of minerals and coal, if any coal, produced, and shall state the number of acres affected and the number of acres estimated to be affected during the next year of operation. An annual report is not required to be filed if a final report is filed in lieu thereof.

Each annual report shall include a progress map indicating the location of areas of land affected during the period of the report and the location of the area of land estimated to be

affected during the next year. The map shall be prepared in accordance with division (A) (10) of section 1514.02 of the Revised Code, except that the map may be certified by the operator or authorized agent of the operator in lieu of certification by a registered professional engineer or registered surveyor.

Each annual report shall be accompanied by a filing fee in the amount of one hundred fifty dollars and an acreage fee in the amount of thirty dollars multiplied by the number of acres estimated in the report to be affected during the next year of operation under the permit. Such acreage fee shall be adjusted by subtracting a credit of thirty dollars per excess acre paid for the preceding year if the acreage paid for the preceding year exceeds the acreage actually affected, or by adding an additional amount of thirty dollars per excess acre affected if the acreage actually affected exceeds the acreage paid for the preceding year. No acreage fee shall exceed one thousand dollars per year.

With each annual report the operator shall file a surety bond, cash, or certificates of deposit in the amount of five hundred dollars multiplied by the number of acres estimated to be affected during the next year of operation under the permit, for which no bond, cash, or certificates were previously filed. Such bond shall be adjusted by subtracting a credit of five hundred dollars per excess acre for which bond was filed for the preceding year if the acreage for which the bond was filed for the preceding year exceeds the acreage actually affected, or by adding an amount of five hundred dollars per excess acre affected if the acreage actually affected exceeds the acreage for which bond was filed for the preceding year.

Within thirty days after the expiration of the surface mining permit, or completion or abandonment of the operation, whichever occurs earlier, the operator shall submit a final report containing the same information required in an annual report, but covering the time from the last annual report, to the expiration of the permit or completion or abandonment of the operation, whichever occurs earlier.

Each final report shall include a map indicating the location of the area of land affected during the period of the report and the location of the total area of land affected under the permit. The map shall be prepared in accordance with division (A) (10) of section 1514.02 of the Revised Code.

If the final report and certified map, as verified by the chief, show that the number of acres affected under the permit is larger than the number of acres for which the operator has paid an acreage fee or filed bond, cash, or certificates, upon notification by the chief, the operator shall pay an additional acreage fee in the amount of thirty dollars multiplied by the difference between the number of acres affected under the permit and the number of acres for which the operator has paid an acreage fee, and shall file additional bond, cash, or certificates in the amount of five hundred dollars multiplied by the difference between the number of acres affected under the permit and the number of acres for which the operator has filed bond, cash, or certificates.

If the final report and certified map, as verified by the chief, show that the number of acres affected under the permit is smaller than the number of acres for which the operator has paid an acreage fee or filed bond, cash, or certificates, the chief shall order release of the excess acreage fee and the excess bond, cash, or certificates. The release of the excess acreage fee shall be in an amount equal to thirty dollars multiplied by the difference between the number of acres affected under the permit and the number of acres for which the operator has paid an acreage fee. The release of the excess bond, cash, or certificates shall be in an amount equal to five hundred dollars multiplied by the difference between the number of acres affected under the permit and the number of acres for which the operator has filed bond, cash, or certificates. Refunds of excess acreage fees shall be paid by the treasurer of state out of a special fund hereby created to be known as the surface mining reclamation fee rotary fund. The treasurer of state shall place twenty thousand dollars from the fees collected pursuant to sections 1514.02 and 1514.03 of the Revised Code in such fund, and as required by the depletion thereof, place to the credit of such rotary fund an amount sufficient to make the total in the fund at the time of each such credit twenty thousand dollars. The balance of the fees collected pursuant to sections 1514.02 and 1514.03 of the Revised Code shall be deposited with the treasurer of state to the credit of the surface mining administration fund created under section 1514.11 of the Revised Code.

If upon inspection the chief finds that any filing fee, acreage fee, bond, or part thereof is not paid when due or is paid on the basis of false or substantially inaccurate reports he may request the attorney general to recover such unpaid amounts as are due the state, and the attorney general shall commence appropriate legal proceedings to recover the unpaid amounts.

§ 1514.04 Bond

Upon receipt of notification from the chief of the division of reclamation of his intent to issue an order granting a surface mining permit

or an amendment to a surface mining permit to the applicant, the applicant shall file a surety bond, cash, or certificates of deposit in the amount of five hundred dollars per acre of land to be affected.

In the case of a surface mining permit, the bond shall be filed for the number of acres estimated to be affected during the first year of operation under the permit. In the case of an amendment to a surface mining permit, the bond shall be filed for the number of acres estimated to be affected during the balance of the period until the next anniversary date of the permit.

A surety bond filed pursuant to sections 1514.02, 1514.03, and 1514.04 of the Revised Code shall be upon such form as the chief prescribes and provides, and shall be signed by the operator as principal, and by a surety company authorized to transact business in the state as surety. Such bond shall be payable to the state and shall be conditioned upon the faithful performance by the operator of all things to be done and performed by him as provided in Chapter 1514. of the Revised Code and the rules and orders of the chief adopted or issued pursuant thereto.

The operator may deposit with the chief, in lieu of surety bond, cash in an amount equal to the surety bond as prescribed in this section, or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association as defined in section 1151.01 of the Revised Code having a cash value equal to or greater than the amount of the surety bond as prescribed in this section. Cash or certificates of deposit shall be deposited upon the same terms as the terms upon which surety bonds may be deposited. If one or more certificates of deposit are deposited with the chief in lieu of surety bond, he shall require the bank or building and loan association which issued any such certificate to pledge securities of a cash value equal to the amount of the certificate, or certificates, which is in excess of the amount insured by any of the agencies and instrumentalities created by or under the following acts and amendments thereto:

(A) "Federal Deposit Insurance Act," 64 Stat. 873 (1950), 12 U.S.C. 1811;

(B) The act of June 27, 1934, creating the federal savings and loan insurance corporation, 48 stat. 1256, 12 U.S.C. 1725;

(C) Deposit Guaranty Association, sections 1151.80 to 1151.92 of the Revised Code. Such securities shall be security for the repayment of the certificate of deposit.

Immediately upon a deposit of cash or certificates with the chief, he shall deliver it to the treasurer of state who shall hold it in trust for the purposes for which it has been deposited. The treasurer of state shall be responsible for the safekeeping of such deposits. An operator making a deposit of cash or certificates of deposit may withdraw and receive from the treasurer of state, on the written order of the chief, all or any part of the cash or certificates in the possession of the treasurer of state, upon depositing with the treasurer of state cash or negotiable certificates of deposit issued by any bank organized or transacting business in this state or certificates of deposit issued by any building and loan association equal in value to the value of the cash or certificates withdrawn. An operator may demand and receive from the treasurer of state all interest or other income from any certificates as it becomes due. If certificates deposited with and in the possession of the treasurer of state mature or are called for payment by the issuer thereof, the treasurer of state, at the request of the operator who deposited them, shall convert the proceeds of the redemption or payment of the certificates into such other negotiable certificates of deposit issued by any bank organized or transacting business in this state, or such other certificates of deposit issued by any building and loan association, or cash, as may be designated by the operator.

§ 1514.05 Reclamation inspection request; reclamation approval or disapproval

(A) At any time within the period allowed an operator by section 1514.02 of the Revised Code to reclaim an area of land affected by surface mining, the operator may file a request, on a form provided by the chief of the division of reclamation, for inspection of the area of land upon which the reclamation, other than any required planting, is completed. The request shall include:

(1) The location of the area and number of acres;

(2) The permit number;

(3) The amount of bond, cash, or certificates of deposit on deposit to assure reclamation of such area;

(4) A map showing the location of the acres reclaimed, prepared and certified in accordance with division (A) (10) of section 1514.02 of the Revised Code.

The chief shall make an inspection and evaluation of the reclamation of the area of land for which the request was submitted within ninety days after receipt of the request or, if the operator fails to complete the reclamation or file the request as required, as soon as the chief learns of such default. Thereupon, if the chief approves the reclamation other than any required planting as meeting the requirements of this

chapter, rules adopted thereunder, any orders issued during the mining or reclamation, and the specifications of the plan for mining and reclaiming, he shall issue an order to the operator and the operator's surety releasing them from liability for one-half the total amount of their surety bond on deposit to assure reclamation for the area upon which reclamation is completed. If the operator has deposited cash or certificates of deposit in lieu of a surety bond to assure reclamation, the chief shall issue an order to the operator releasing one-half of the total amount so held, and shall promptly transmit a certified copy of such order to the treasurer of state. Upon presentation of the order to the treasurer by the operator to whom it was issued, or by the operator's authorized agent, the treasurer shall deliver to the operator or the operator's authorized agent the cash or certificates of deposit designated in the order.

If the chief does not approve the reclamation other than any required planting, he shall notify the operator by certified mail. The notice shall be an order stating the reasons for unacceptability, ordering further actions to be taken, and setting a time limit for compliance. If the operator does not comply with the order within the time limit specified, the chief may order an extension of time for compliance, if he determines that the operator's noncompliance is for good cause, resulting from developments partially or wholly beyond the operator's control. If the operator complies within the time limit or the extension of time granted for compliance, the chief shall order release of bond, cash, or certificates of deposit in the same manner as in the case of approval of reclamation other than planting by the chief, and the treasurer shall proceed as in such case. If the operator does not comply within the time limit and the chief does not order an extension, or if the chief orders an extension of time and the operator does not comply within the extension of time granted for compliance, the chief shall issue another order declaring that the operator has failed to reclaim and, if the operator's permit has not already expired or been revoked, revoking the operator's permit. The chief shall thereupon proceed under division (C) of this section.

(B) At any time within the period allowed an operator by section 1514.02 of the Revised Code to reclaim an area affected by surface mining, the operator may file a request, on a form provided by the chief, for inspection of the area of land upon which all reclamation, including the successful establishment of any required planting, is completed. The request shall include:

(1) The location of the area and number of acres;

(2) The permit number;

(3) The remaining amount of bond, cash, or certificates of deposit on deposit to assure reclamation of such area;

(4) The type and date of any required planting of vegetative over and the degree of success of growth;

(5) A map showing the location of the acres reclaimed, prepared and certified in accordance with division (A) (10) of section 1514.02 of the Revised Code.

The chief shall make an inspection and evaluation of the reclamation of the area of land for which the request was submitted within ninety days after receipt of the request, or, if the operator fails to complete the reclamation or file the request as required, as soon as the chief learns of such default. Thereupon, if the chief finds that the reclamation meets the requirements of this chapter, rules adopted thereunder, any orders issued during the mining and reclamation, and the specifications of the plan for mining and reclaiming, and decides to release any remaining bond, cash, or certificates of deposit on deposit to assure reclamation of the area upon which reclamation is completed, he shall, within ten days of completing his inspection and evaluation, order release of the remaining bond, cash, or certificates of deposit in the same manner as in the case of approval of reclamation other than planting, and the treasurer shall proceed as in such case.

If the chief does not approve the reclamation performed by the operator, he shall notify the operator by certified mail within ninety days of the filing of the application for inspection or of the date when he learns of the default. The notice shall be an order stating the reasons for unacceptability, ordering further actions to be taken, and setting a time limit for compliance. If the operator does not comply with the order within the time limit specified, the chief may order an extension of time for compliance, if he determines that the operator's noncompliance is for good cause, resulting from developments partially or wholly beyond the operator's control. If the operator complies within the time limit or the extension of time granted for compliance, the chief shall order release of the remaining bond, cash, or certificates of deposit in the same manner as in the case of approval of reclamation by the chief, and the treasurer shall proceed as in such case. If the operator does not comply within the time limit and the chief does not order an extension, or if the chief orders an extension of time and

the operator does not comply within the extension of time granted for compliance, the chief shall make another order declaring that the operator has failed to reclaim and, if the operator's permit has not already expired or been revoked, revoking the operator's permit. The chief shall then proceed under division (C) of this section.

(C) Upon issuing an order under division (A) or (B) of this section declaring that the operator has failed to reclaim, the chief shall make a finding as to the number and location of the acres of land which such operator has failed to reclaim in the manner required by this chapter. The chief shall order the release of that proportion of the bond, cash, or certificates of deposit which are on deposit to assure reclamation of those acres which he finds to have been reclaimed in the manner required by this chapter. Such release shall be ordered in the same manner as in the case of other approval of reclamation by the chief, and the treasurer shall proceed as in such case. If the operator has on deposit cash or certificates of deposit to assure reclamation of the area of the land affected, the chief shall at the same time issue an order declaring that the remaining proportion of the cash or certificates of deposit is the property of the state and is available for use by the chief in performing reclamation of the area, and shall proceed in accordance with section 1514.06 of the Revised Code.

If the operator has on deposit a surety bond to assure reclamation of the area of land affected, the chief shall notify the surety in writing of the operator's default and shall request the surety to perform the surety's obligation and that of the operator. The surety shall, within ten days after receipt of such notice, notify the chief as to whether it intends to perform such obligations.

If the surety chooses to perform, it shall arrange for work to begin within thirty days of the day on which it notifies the chief of its decision. If the surety completes the work as required by this chapter, the chief shall issue an order to the surety releasing the surety from liability under the bond in the same manner as if the surety were an operator proceeding under this section. If, after the surety begins the work, the chief determines that the surety is not carrying the work forward with reasonable progress, or that it is improperly performing the work, or that it has abandoned the work or otherwise failed to perform its obligation and that of the operator, the chief shall issue an order terminating the right of the surety to perform the work and demanding payment of the amount due as required by this chapter.

If the surety chooses not to perform and so notifies the chief, does not respond to the chief's notice within ten days of receipt thereof, or fails to begin work within thirty days of the day it timely notifies the chief of its decision to perform its obligation and that of the operator, the chief shall issue an order terminating the right of the surety to perform the work and demanding payment of the amount due, as required by this chapter.

Upon receipt of an order of the chief demanding payment of the amount due, the surety shall immediately deposit with the chief cash in the full amount due under the order, for deposit with the treasurer of state. If the surety fails to make such immediate deposit, the chief shall advise the auditor of state of the amount so that he may certify it to the attorney general for collection. When the chief has issued an order terminating the right of the surety, and has the cash on deposit, such cash is the property of the state and is available for use by the chief, who shall proceed as under section 1514.06 of the Revised Code.

§ 1514.06 Surface mining reclamation fund.

All cash that becomes the property of the state pursuant to section 1514.05 of the Revised Code shall be deposited in a fund designated as the "surface mining reclamation fund." Disbursements from such fund shall be made by the chief of the division of reclamation only for the purpose of reclaiming areas of land affected by surface mining operations on which an operator has defaulted.

Expenditures of moneys from the surface mining reclamation fund, except as otherwise provided by this section, shall be made pursuant to contracts entered into by the chief with persons who agree to furnish all of the materials, equipment, work, and labor, as specified and provided in such contracts for the prices stipulated therein, or, with the approval of the director of natural resources, the chief may reclaim the land in the same manner as he required of the operator who defaulted. Each contract awarded by the chief shall be awarded to the lowest responsible bidder after sealed bids are received, opened, and published at the time and place fixed by the chief. The chief shall publish notice of the time and place at which bids will be received, opened, and published, at least once at least ten days before the date of the opening of the bids, in a newspaper of general circulation in the county in which the area of land to be reclaimed under the contract is located. If, after so advertising for bids, no bids are received by the chief at the time and place fixed for receiving them, the chief may advertise again for bids, or he may, if he considers the public interest will be best served, enter into a contract for the

reclamation of the area of land without further advertisement for bids. The chief may reject any or all bids received, and again publish notice of the time and place at which bids for contracts will be received, opened, and published.

Each contract entered into by the chief shall provide only for the reclamation of land affected by the surface mining operation or operations of one operator and not reclaimed by the operator as required by this chapter. If there is money in the surface mining reclamation fund derived from the surety bond, cash, or certificates of deposit deposited with the chief by one operator to ensure the reclamation of two or more areas of land affected by the surface mining operation or operations of one operator and not reclaimed by him as required by this chapter, the chief may advertise for bids for and award a single contract for the reclamation of all such areas of land. The cost of the reclamation work done on each area of land under this section, shall be paid out of the money in the surface mining reclamation fund derived from the surety bond, cash, or certificates of deposit which were deposited with the chief to assure the reclamation of that area of land, and in no event shall the cost of such work exceed the amount of such money. In the event the amount of money is not sufficient to pay the cost of doing all of the reclamation work on the area of land which the operator should have done but failed to do, the attorney general shall bring an action, at the request of the chief, for the amount of money needed to complete reclamation to the standards required by this chapter. The operator is liable for such expense in addition to any other liabilities imposed by law. Moneys so recovered shall be deposited in the surface mining reclamation fund.

§ 1514.07 Chief's orders.

Each order of the chief of the division of reclamation affecting the rights, duties, or privileges of an operator or his surety or of an applicant for a permit or an amendment to a permit or a plan shall be in writing and contain a finding by the chief of the facts upon which the order is based. Notice of the order shall be given by certified mail to each person whose rights, duties, or privileges are affected.

If the chief finds that an operator has violated any requirement of this chapter, failed to perform any measure set forth in the approved plan of mining and reclamation that is necessary to prevent damage to adjoining property or to achieve, or has otherwise failed to achieve the performance standards of division (A) (9) of section 1514.02 of the Revised Code, or caused damage to adjoining property, the chief may issue orders directing the operator to cease violation, perform such measures, achieve such standards, or prevent or abate off-site damage. The order shall identify the operation where the violation occurs, the specific requirement violated, measure not performed, standard not achieved, or off-site damage caused, and where practicable prescribe what action the operator may take to comply with the order. The chief shall fix and set forth in the order a reasonable date or time by which the operator shall comply, and the order shall state that the chief may revoke the operator's permit if the order is not complied with by such date or time. If upon such date or time the chief finds that the operator has not complied with the order, he may issue an order revoking the operator's permit.

§ 1514.08 Adoption, amendment, and rescission of rules.

The chief of the division of reclamation may adopt, amend, and rescind rules in accordance with Chapter 119. of the Revised Code, in order to prescribe procedures for submitting applications for permits, and amendments to permits, amendments to plans of mining and reclamation, filing annual reports and final reports, requesting inspection and approval of reclamation, paying permit and filing fees, and filing and obtaining the release of bonds, cash, and certificates of deposit deposited with the state. For the purpose of preventing damage to adjoining property or achieving one or more of the performance standards in division (A) (9) of section 1514.02 of the Revised Code, the chief may establish classes of mining industries, based upon industrial categories, combinations of minerals produced, and geological conditions in which surface mining operations occur, and may prescribe different rules consistent with such performance standards for each such class. For the purpose of apportioning the workload of the division between the quarters of the year, the rules may require that applications for permits and annual reports be filed in different quarters of the year, depending upon the county in which the operation is located.

§ 1514.09 Reclamation Board of Review membership.

The reclamation board of review established pursuant to section 1513.05 of the Revised Code shall serve as the reclamation board of review pursuant to this chapter. However, whenever the reclamation board of review is considering any appeal pertaining to surface mining, as distinguished from coal strip mining, the member representing the coal strip mine operators shall be replaced by a person who, by reason of his previous vocation, employment, or affiliations, can be classed as a representative of surface mine operators. The appointment of said person shall be made in accordance with section 1513.05

of the Revised Code and his term shall be concurrent with that of the representative of the coal strip mine operators.

Notwithstanding section 1513.14 of the Revised Code, appeals from an order of the board pertaining to surface mining may be taken to the court of common pleas of the county in which the operation is located, or to the court of common pleas of Franklin county.

§ 1514.10 Violations

No person shall:

(A) Engage in surface mining without a permit;

(B) Exceed the limits of a surface mining permit or amendment to a permit by mining land contiguous to an area of land affected under a permit or amendment, which contiguous land is not under permit or amendment;

(C) Purposely misrepresent or omit any material fact in an application for a surface mining permit or amendment, an annual or final report, or in any hearing or investigation conducted by the chief of the division of reclamation or the reclamation board of review;

(D) Fail to perform any measure set forth in the approved plan of mining and reclamation that is necessary to prevent damage to adjoining property or to achieve a performance standard in division (A) (9) of section 1514.02 of the Revised Code, or violate any other requirement of this chapter, a rule adopted thereunder, or an order of the chief of reclamation.

§ 1514.11 Surface mining administration fund.

There is hereby created in the state treasury a fund to be known as the "surface mining administration fund." Permit fees and filing fees collected pursuant to sections 1514.02 and 1514.03 of the Revised Code shall be credited to such fund in accordance with said sections. Fines collected pursuant to section 1514.99 of the Revised Code shall be paid into the surface mining administration fund. At the end of each fiscal year an amount equal to that year's expenses of the division of reclamation incurred in the administration and enforcement of Chapter 1514. of the Revised Code shall be transferred from the surface mining administration fund to the credit of the general revenue fund.

§ 1514.99 Penalties.

(A) Whoever violates division (A) of section 1514.10 of the Revised Code may be fined not more than five thousand dollars plus not more than one thousand dollars per acre of land affected, and is responsible for achieving reclamation of the land as required pursuant to Chapter 1514. of the Revised Code.

(B) Whoever violates division (B) of section 1514.10 of the Revised Code may be fined not more than one thousand dollars per acre of land affected that is not under permit, and is responsible for achieving reclamation of the land as required pursuant to Chapter 1514. of the Revised Code.

(C) Whoever violates division (C) of section 1514.10 of the Revised Code may be fined not less than one hundred nor more than one thousand dollars, or imprisoned not more than six months, or both.

(D) Whoever violates division (D) of section 1514.10 of the Revised Code may be fined not less than one hundred nor more than one thousand dollars for a first offense. For each subsequent offense, on one or more permits held by such persons, such person may be fined not less than two hundred nor more than five thousand dollars, or imprisoned not more than six months, or both. The permit of any person convicted of a third offense may be revoked by the court at the time of such conviction, and such court at such time may further order that no permit or amendment to permit may be issued to such person under Chapter 1514. of the Revised Code for a period of five years from the date of such conviction. Nothing contained in this section shall be construed to limit or affect the authority of the chief granted by this chapter.

§ 4153.11 Mining near public roads.

(A) Unless a permit has been issued by the director of transportation, or the board of county commissioners, or the board of township trustees, or such other public authority that is charged by law with the maintenance of a public road, and the approval of the chief of the division of reclamation in the department of natural resources has been obtained, no person, firm, or corporation, engaged in mining or quarrying any mineral, coal, stone, or clay, shall:

(1) Extend any part of an open pit excavation closer than fifty feet of horizontal distance to any part of a public road;

(2) Deposit mine refuse or removed overburden:

(a) Closer to a public road than a line parallel to the boundary line of such road and fifty feet of horizontal distance away from such road and at the same elevation as the elevation of the crown of such road;

(b) Higher than a line beginning at a point fifty feet of horizontal distance away from such road and at the same elevation as the elevation of the crown of such road, and extending from such

beginning point upward and away from such road at an angle of forty degrees from the horizontal plane.

Any person, firm, or corporation desiring such a permit shall apply in writing therefor to the proper public authority, and shall describe in such application the excavating or depositing of mine refuse or removed overburden which it will do and for which it requests a permit. The applicant shall also furnish such public authority with such additional data and information concerning such work as such public authority may request and which shall be relevant, in making the determination which such public authority is required to make as to the amount of bond or other security the applicant shall be required to deposit before such a permit is issued to the applicant.

Upon receipt of such an application such public authority shall promptly consider what damage, if any, may be done to such public highway by the excavating or depositing of mine refuse or removed overburden for which the permit is requested, and estimate the reasonable cost of repairing such damage, if any should occur, and fix the amount of such estimate of cost as the amount of bond or other security which the applicant shall deposit with such public authority upon issuance of the permit requested, to ensure payment of the cost of repairing any such damage which might occur. Such public authority shall promptly notify the applicant of the amount of bond or other security it has so fixed.

Upon approval of the chief of the division of reclamation and deposit with the public authority of a surety bond signed by the applicant as principal, and by a surety company authorized to transact business in this state as surety, or of cash or other security satisfactory to such public authority, in the amount fixed by such authority, and conditioned upon the payment to such public authority by applicant of the cost of repairing any damage to such public road occurring as a result of the excavating or depositing of mine refuse or removed overburden for which the permit was issued, the public authority shall issue to the applicant the permit for which applicant applied.

If, at the end of three years after such excavation or deposit of mine refuse or removed overburden is made, the licensee shall have paid or caused to be paid all cost of repairing any damage to such public road occurring within such time as a result of such excavating or depositing for which such permit was issued, or, if within such period of time no such damage to such shall have occurred, the bond or cash or other security deposited with the public authority upon the issuance of such permit, shall be released and returned to such applicant.

(B) Any person, firm, or corporation owning any land containing mineral, coal, stone, or clay, and over any portion of which any state, county, or township road or public highway passes, may drill, excavate, mine, or quarry through or under such road. Before said work shall be commenced, such person, firm, or corporation shall execute and deliver to the director of transportation in case of state roads, to the board of county commissioners in case of county roads, or to the board of township trustees in case of township roads, a bond, with good and sufficient surety in such amount as shall be considered by the director, the board of county commissioners, or the board of township trustees, sufficient to cover any damages that may accrue by excavating, mining, or quarrying through or under any such road, the same to be approved by such director, board of county commissioners, or board of township trustees. Such bond shall be conditioned that while crossing over or mining or quarrying under any such road, a safe and unobstructed passageway or road shall be kept open by such person, firm, or corporation for the public use, and as soon as practicable, such road shall be fully restored to its original safe and passable condition. When such crossing is made by excavation at a depth of more than thirty feet below the surface of such road, the person, firm, or corporation making the same shall be liable to the director, board of county commissioners, or board of township trustees for any damage that may accrue by such excavation, and shall be held to fully repair any such damage and to restore such road to its original safe and passable condition. The right to mine or quarry across or under public highways as provided in this section, shall accrue to the owner, lessee, or agent of the land upon or through which such highway passes.

As used in this section, "road" or "highway" means the entire right of way as well as the improved portion thereof, and includes bridges, viaducts, grade separations, appurtenances, and approaches on or to such road or highway.

§ 5749.02 Excise tax on severance of natural resources.

For the purpose of providing revenue with which to meet the environmental management needs of this state and the reclamation of land affected by strip mining, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state. Such tax shall be imposed upon the severer and shall be:

(A) Four cents per ton of coal;
(B) Four cents per ton of salt;
(C) One cent per ton of limestone or dolomite;
(D) One cent per ton of sand and gravel;
(E) Three cents per barrel of oil;

(F) One cent per thousand cubic feet of natural gas.

The moneys received by the treasurer of state from the tax levied in this section shall be credited to the general revenue fund and shall be used for the ~~furtherance~~ of environmental protection activities of the state and for the reclamation of land affected by strip mining.

On the day fixed for the payment of the severance tax required to be paid by this section, such tax, with any penalties or interest thereon, shall become a lien on all property of the taxpayer in this state, whether such property is employed by the taxpayer in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors or stockholders. Such lien shall continue until such taxes, together with any penalties or interest thereon, are paid.

Upon failure of such taxpayer to pay such tax on the day fixed for payment, the tax commissioner may file, for which no filing fee shall be charged, in the office of the county recorder in each county in this state in which the taxpayer owns or has a beneficial interest in real estate, notice of such lien containing a brief description of such real estate. Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor whose rights have attached prior to the time such notice is filed in the county in which the real estate which is the subject of such mortgage, purchase, or judgment lien is located. Such notice shall be recorded in a book kept by the recorder called the "severance tax lien record" and indexed under the name of the taxpayer charged with such tax. When the tax, together with any penalties or interest thereon, has been paid, the tax commissioner shall furnish to the taxpayer an acknowledgment of such payment, which the taxpayer may record with the recorder of each county in which notice of the lien has been filed.

APPENDIX C-5

COMMENTS

WYOMING ENVIRONMENTAL QUALITY ACT OF 1973

INTRODUCTION

The Wyoming Legislature recently approved the Environmental Quality Act of 1973.[1] The Act recognizes that degradation of air, water and land resources is an important and pressing concern to the state. The statutory and administrative environmental protection systems were re-organized and updated to enable the state to "prevent, reduce and eliminate pollution."[2]

The legislature sought to retain state control of environmental protection efforts by setting standards comparable to minimum federal standards, and by providing flexible regulatory procedures capable of adjusting to changes in those minimum federal standards. The Act provides for elimination of present pollution and for planning to prevent future pollution.[3]

Two features of the Act are worthy of note. First is the disparity between the provisions of the land quality section, Article Four, and those of the other sections which deal with air, water, and solid waste management.[4] The Land Quality article contains fairly specific standards against which the performance of the administrators may be judged.[5] These standards also provide guidance for the formulation of new rules and regulations. The other three sections of the Act, however, establish an administrative structure without statutory guidelines. The emphasis which the legislature placed on land quality is doubtless a reflection of its concern about the magnitude of impending surface mining activities. The legislature did not deal directly with air and water quality

1. WYO. STAT. §§ 35-502.1 to .56 (Supp. 1973).
2. WYO. STAT. § 35-502.2 (Supp. 1973).
3. WYO. STAT. § 35-502.2 (Supp. 1973); 42 U.S.C. § 1857(b)(1) (1970). The Wyoming Act parrots language from the federal Clean Air Act.
4. Air Quality provisions are found in Article 2 of the Act, WYO. STAT. § 35-502.16 to .17 (Supp. 1973). Water Quality provisions are listed in Article 3, WYO. STAT. §§ 35-502.18 to .19 (Supp. 1973). Solid Waste management provisions are in Article 5, WYO. STAT. § 35-502.42 to .44 (Supp. 1973).
5. See WYO. STAT. §§ 35-502.21 and .25 (Supp. 1973).

standards because these areas are covered extensively under federal law.

Second, the Act completely reorganizes the state agencies which deal with environmental protection by transferring the powers and duties of pre-existing governmental entities to the new Department of Environmental Quality.[6] The department is headed by a director who is appointed by the governor. It is composed of an independent Environmental Quality Council, separate administrative divisions for land, air and water quality, and advisory boards for each of the three divisions. Each board will include a representative of industry, agriculture and political subdivisions and two members representing the public interest.[7] Their purpose is to assist the administrators of the divisions in formulating rules and regulation and to act as general consultants to the administrator. Members of the Council, the advisory boards and the director are all appointed by the governor.

The Act superimposes the seven-member Environmental Quality Council on the regular administrative structure.[8] The Council has both quasi-legislative and quasi-judicial authority. It is responsible for promulgating rules and regulations that have been recommended by the division administrators and their advisory boards. It also acts as a hearing examiner for cases arising under these rules and regulations and must approve cease and desist orders issued by the director. The Council may also prohibit surface mining in certain areas by designating them unique historical, archeological or scenic sites.[9]

The day-to-day administration of the Act is handled by the division administrators who are appointed by the director. They will issue all permits, and licenses, set bonds, determine specific pollution standards, conduct inspections and monitoring activities and recommend rules and regulations for promulgation by the Council.[10] The advisory board in each division will work in conjunction with the administrator in recom-

6. WYO. STAT. § 35-502.6.
7. WYO. STAT. § 35-502.13.
8. WYO. STAT. §§ 35-502.11 and. 12.
9. WYO. STAT. §§ 35-502.12(a)(v) and .24(g)(iv).
10. WYO. STAT. § 35-502.10.

mending the rules and regulations, preparing yearly reports to the governor and encouraging coordination with other departments and governmental agencies.

The director has the authority to carry out the general policies of the Act, conduct inspections and investigative activities, commission research projects, administer grants, issue emergency cease and desist orders, and perform all acts necessary to the enforcement of the Act and its pursuant regulations.[11]

This department structure grants the Council broad latitude to determine the quality of Wyoming's air, water and land. Implementing the spirit as well as the specific statutory provisions of the Act will require appointment to the Council and advisory boards of individuals who are environmentally concerned, knowledgeable , reasonable and who are willing to enforce it. This ultimately places a heavy responsibility on the governor for implementing the Act.

The following four comments contain an explanation of the practical workings of the Act and an analysis of its potential strengths and weaknesses. Section I of the comment concerns the air quality provisions of the Act and was written by Marilyn S. Kite. The water quality provisions are covered in Section II, which was written by Ted Orf. The provisions concerning land quality are discussed in Section III; this was written by Robert E. Brown. Section IV on solid waste management, Section V on granting of variances under the Act, Section VI on permits and Section VII on enforcement were written by J. Michael Morgan.

11. WYO. STAT. § 35-502.9.

SECTION I. AIR QUALITY

The Air Quality portion of the Wyoming Environmental Quality Act (EQA) supersedes the previous Air Quality Act passed during the 1967 legislative session.[1] It is the purpose of this comment to analyze the Air Quality division of the Act, to point out the changes made in the old Air Quality Act, to examine the effectiveness of enforcement of the Air Quality regulations, and to delineate some areas of weakness and possible improvements. As a general observation, the new Act has strengthened the powers of the Director and made tighter controls of air pollution possible in Wyoming.[2] This action of the Wyoming Legislature seems to demonstrate recognition of air pollution as a problem even in the wide open spaces, and the desire of the state to "prevent, reduce and eliminate"[3] air pollution. The magnitude of the national problem is demonstrated by the study that the Environmental Protection Agency (EPA) recently completed on the 1968 national costs of air pollution.[4] The costs totaled $6.1 billion, including damage estimates to residential property, materials, health, and vegetation. It was estimated that 18-20% of the $2 billion of national health costs resulted from air pollution. Provided that sufficient funding is available to allow adequate enforcement, the Air Quality portion of the Wyoming Environmental Quality Act can efficiently and effectively deal with air pollution in Wyoming.

Changes Made From 1967 Air Quality Act

Most of the significant alterations were made to bring the Wyoming Act into compliance with the federal requirements under the Clear Air Act. In 1972, the EPA rejected Wyoming's implementation plan on three points.[5] All of these contested areas were corrected by the 1973 Act.

First, the federal regulations require the state plans to show their legal authority to "prevent construction, modifi-

1. Ch. 234, § 1, [1973] Wyo. Sess. Laws 412. *See also* discussion of repealed act in Comment, *The Wyoming Air Quality Act*, 4 Land & Water L. Rev. 159 (1969).
2. The director is the head administrative officer of the Environmental Quality Department as explained in the introduction. Defined at Wyo. Stat § 35-502.3a(iii).
3. Wyo. Stat. § 35-502 (Supp. 1973).
4. 4 Environment Reporter 197 (June 8, 1973).
5. The Denver Post, June 2, 1972, at 38, col. 1.

cation or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard."[6] The previous implementation plan stated that Wyoming had no such authority to comply with this requirement.[7] This position was substantiated by an Attorney General's letter stating his opinion to that effect, in the appendix of the plan.[8] However, the 1973 EQA included in the Administrators's power the authority to recommend to the Director regulations to prevent construction, modification or operation of any stationary source.[9] The wording follows exactly the requirement of the regulation previously quoted. This provision can be used to prevent the entrance of new industries unwilling to meet the air standards or to prevent modification of an existing source causing it to violate the standards.[10] However it should be noted that, similar to the basic format of the Act, this is merely legal authority for such action, not a legal requirement. Whether such regulations are actually promulgated depends on the discretion of the Director, and the decisions of the Administrator, Advisory Boards, and Council.

A second change gives the administrator the authority to require operators to keep records and make reports.[11] This is also required of the state implementation plans by the federal regulations.[12] In conjunction with the record keeping requirement, the 1973 Act gives the authority to the Administrator to require operators to "install, use and maintain monitoring equipment,"[13] an additional requirement of the federal regulations.[14] The foregoing can be used to force self-regulation on the operators of pollution sources, and relieve some of the burden of enforcement from the Air Quality Division itself.

6. 42 U.S.C. § 1857 et seq., EPA Reg. § 410.11a(4), 36 Fed. Reg. 15489 (1971).
7. Air Quality Section, Wyoming Division of Health and Medical Services, IMPLEMENTATION PLAN FOR AIR QUALITY CONTROL, STATE OF WYOMING, § II B(4) (1972).
8. *Id.* at Appendix F.
9. WYO. STAT. § 35-502.17c (Supp. 1973).
10. Chuck Ward, *Wyoming's Air Quality Program—A Report to the Public,* Air Quality Section, Wyoming Division of Health and Medical Services, August, 1972, at 14.
11. WYO. STAT. § 35-502.10a (iii), (vii) (A) & (B) (Supp. 1973).
12. EPA Reg. § 420.11a(5), 36 Fed. Reg. 15489 (1971).
13. WYO. STAT. § 35-502.10a (vii) (C) & (D) (Supp. 1973).
14. EPA Reg. § 420.11a(6), 36 Fed. Reg. 15489 (1971).

A third change required by federal regulation[15] will make all records, reports, and regulations available to the public unless special circumstances are shown.[16] The earlier provision of the 1967 Air Quality Act required the owner or operator to consent before certain information could be made public, although compilations of the Air Quality Council were public.[17]

A fourth change was made, although not as a requirement of the EPA regulations. The old 1967 Wyoming Act provided that standards devised could not exceed federal standards.[18] In other words, Wyoming's requirements could not be any stricter than the federal ones. The 1973 Act simply deletes these words, and allows any regulations "as may be necessary to prevent, abate or control pollution."[19] Now, although Wyoming standards cannot be lower than national ones,[20] they can be higher. This would seem a significant change and could become a possible means of Wyoming staying ahead of the air pollution problem. With the use of strict standards, this state could be involved in prevention rather than cure. Thus, this state, with its relatively clean air, can attempt to learn from the experiences of the more populated areas and stop the pollution before it starts.

The changes made brought Wyoming's plan into compliance with the federal requirements. This made the federal intervention provided for in the Clean Air Act unnecessary.[21] At the present time, Wyoming's implementation plan has been approved, subject to new EPA regulations regarding non-degradation, which will be discussed later. Most of the changes made simply gave the Administrators and Director greater authority to exercise their discretion, rather than requiring such acts statutorily.

15. EPA Reg. § 420.11a(6), 36 Fed. Reg. 15489 (1971).
16. WYO. STAT. § 35-502.53a (Supp. 1973). If the administrator is convinced that exposure of the information would cause injury to the competitive position of those concerned, such as divulging trade secrets, he may keep the information confidential.
17. Ch. 186, § 13, [1967] WYO. SESS. LAWS 540.
18. Ch. 186, § 13, [1967] WYO. SESS. LAWS 535.
19. WYO. STAT. § 35-502.17a (Supp. 1973).
20. EPA Reg. § 420.11a(1), 36 Fed. Reg. 15489 (1971).
21. 42 U.S.C. § 1857c-5 (1970).

ENFORCEMENT AND EFFECTIVENESS

This section is not intended to be a scientific analysis of the adequacy of the ambient and emission standards. Rather, it will be directed to federal enforcement provisions as they relate to the Wyoming Act, and some of the logistics problems in enforcement itself.

The enforcement scheme set up by the Clean Air Act provides that the state shall have the primary responsibility.[22] However, various provisions of the Act provide for federal action if the state fails to meet its responsibility. For example, if the EPA becomes aware of a violation within the state of the state implementation plan, it notifies the violator and the state, then after 30 days, it issues a compliance order. Finally, the EPA can resort to injunctive action.[23] If the EPA believes the state is failing to enforce its own plan, after 30 day notice it will give public notice of a period of "federally assumed enforcement,"[24] thus putting pressure on local authorities to get the job done.

Although explicit federal powers of enforcement are spelled out in the 1970 amendments to the Clean Air Act, actual instances of federal enforcement are rare. As of January, 1973, only two thirty-day notices have been issued by the EPA.[25] In reality, federal action has generally been limited to establishing standards and passing on state implementation plans.[26]

State enforcement, as provided by the Wyoming Act, consists mainly of cease and desist orders and fines.[27] The policy of the Director of Environment Quality, Mr. Robert Sundin, is primarily one of conference, negotiation, and persuasion with the owners and operators of sources, coming to the desired result without the use of finers and orders. However,

22. 42 U.S.C. § 1957c-2(a) (1970).
23. 42 U.S.C. § 1857c-2(a) (1970); Keener, *A Current Survey of Federal Air Quality Control—Legislation and Regulation*, 5 NATURAL RESOURCE LAW 42, 46 (1972).
24. 42 U.S.C. § 1857c-8(a) (1970).
25. Jones, *Enforcement of Clean Air Amendments of 1970*, 48 NOTRE DAME LAW 921, 923 (1973).
26. *Id.*
27. Penalties, as they apply to the entire act are dealt with in detail in a separate section of this article.

cease and desist orders have been issued and brought about compliance with the regulations.[28]

The largest factor in effective enforcement is adequate manpower to serve as Air Quality Control engineers and qualified observers. No matter how well-drawn the regulations are, the Act will be ineffective without adequate enforcement. In most cases it will probably cost owners and operators of pollution sources money to comply with the Act. Thus, this compliance must be encouraged by adequate enforcement of the Act's penalties. As an example, it was estimated that to administer Indiana's Air Quality Plan, it would require 168 man-years of effort.[29] In contrast Wyoming's Air Quality Division currently consists of 5 persons. The Air Quality Division was budgeted $83,255 by the last legislative session. Some additional funding is provided by the EPA. Of course, equally as important as finances are the quality and dedication of the administrators and directors. Currently, the enforcement is being effectively carried out. However, with the size of the state and the increased industrial development, increasing numbers of enforcement officials will become more necessary. In the future, adequate protection of Wyoming's air will require an increased amount of money alloted to it.

At first glance, a possible loop-hole in enforcement of the regulations is the variance provision as it is discussed in a separate section of this article. However, this idea is quickly dispersed when it is learned that Wyoming has, as of September 1973, not granted a single variance.[30]

Potential Weaknesses of Wyoming Act

Although the air quality portion of Wyoming's EQA seems improved and strengthened over the 1967 law, there are several factors that have been omitted or could have been dealt with differently. As a result of the basic structure of the Act, many of these problems can be dealt with by regulation and do not require further legislation. The Act is basically an

28. *Supra* note 10, at 15.
29. *Supra* note 25, at 926. A man-year is a unit of measurement, being the work of one man for one year.
30. Interview with Robert A. Sundin, Director of the Department of Environmental Quality, in Cheyenne, Wyoming, Sept. 11, 1973.

formance for new sources. Since the State may well become involved in this area with federal action, it would strengthen its position to have these federal standards included in its regulations.

Another important problem with the 1973 Act is that there are no regulations or plans for the prevention of significant deterioration of existing air quality as required by EPA regulations.[39] The requirements of non-degradation clause have been debated and have resulted in a recent court decision which caused the Wyoming Implementation Plan to be in a state of limbo, waiting for EPA regulations to follow. A brief discussion of this case is necessary to understand Wyoming's position and the importance of this type of control.

In May 1972, the Sierra Club brought suit against the EPA trying to force its federal adimnistrator to require all state implementation plans to provide control strategy to prevent significant deterioration of relatively clean air.[40] The U. S. District Court of the District of Columbia held that an injunction would lie barring approval of any state plan which would conceivably allow significant deterioration of the air quality. The national ambient air standards set a maximum level that pollution cannot exceed. However, many areas of relatively clean air could be significantly more polluted and still be within the national requirements.[41] The court held that the combination of the purpose of the Act being "to protect and enhance" air quality, the regulations which allow states to set higher standards than the federal ones, and the specific regulation against allowance of significant deterioration of existing air quality,[42] make non-degradation part of the requirements of the Clean Air Act.[43] However, the EPA has not yet adopted guidelines for non-degradation plans. The Wyoming Act will be required to include such provisions when they are promulgated.

39. EPA Reg. § 410.2(c), 36 Fed. Reg. 8187 (1971).
40. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972). This was affirmed by a four-four tie of the Supreme Court. 41 U.S.L.W. 4825 (U.S. June 11, 1973).
41. Note, *The Clean Air Act and The Concept of Non-Degradation, Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1972).
42. *Supra* note 39.
43. *Supra* note 40, at 256.

This particular idea has special importance in Wyoming. As a relatively clean and sparsely populated state, the ambient levels coud seriousy increase in some areas and still meet federal and state requirements. Although these requirements could be covered by regulation, a general policy of non-degradation in the statute itself would considerably strengthen it. The Director, Mr. Sundin, has indicated that this will require considerable testing of present air conditions all over the state to develop a basis on which to apply the percentage increments of ambient levels that will be allowable.

There are several methods of controlling the degradation process and the actual effectiveness may depend on which method is chosen for Wyoming.[44] Four such plans have been suggested. 1) The Air Quality Increment plan would provide for a uniform national allowable increase in particulate and and sulphur dioride pollutant concentration over 1972 levels. 2) The Emission Limitation plan would set an average ceiling for only particulate and sulphur dioxide for an air quality region. 3) The Local Definition plan would allow each state to determine on a case-to-case basis if a new source would cause significant deterioration. 4) An Area Classification plan would allow zones to be drawn with varying degrees of pollution allowed.[45]

Some factors to consider in selecting such a plan are 1) that it deals with all pollutants and all significant sources, 2) that some sort of national, uniform limits be set, 3) that regulations apply to all pollution not just ground level, and 4) that some small sources may be exempted.[46] Non-degradation will probably be the area of the most significant change made in the Wyoming act in the near future.

A final aspect of the 1973 Act that may require additional attention is in the area of licensing and permits. No specific standards are set either in the act or the regulations for when licenses or permits are necessary and exactly what prerequisites must be met before granting them. It appears that li-

44. High Country News, Aug. 31, 1973, at 10, col. 4.
45. *Id.*
46. *Id.*
47. Note, *Legal Aspects of Air Pollution Control in Ohio, 1971*, 40 CINN. L. RE 511, 529 (1971).

censes may be discretionary as to when and if they are required. Although some discretion on the part of the Administrator and Director is desirable, more definite standards would be helpful to all parties. Enforcement may be aided if definite state licensing requirements must be met initially. Especially with the new provision that allows prevention of construction of a source if it would increase ambient levels beyond the limits, it would seem inherent that some type of licensing is necessary to provide the division with the opportunity to exercise its power and prevent construction. Licensing could easily be dealt with in the form of regulations, with all penalty provisions of the Act applying.

CONCLUSION

From the environmental standpoint, the Air Quality portion of the Wyoming EQA substantially strengthened the previous air quality laws. The increased authority of the Director to actually prevent construction of detrimental sources, and to require owners and operators to test, monitor and report their contributions to air pollution, creates a much firmer stand against the pollution of Wyoming air. The factor that is in greatest need of improvement is in the area of non-degradation. Wyoming is in a unique position with the quality of air that we presently enjoy. An effective program that would prevent significant deterioration of the air quality could make it possible for Wyoming to avoid the problems and expense that other areas of the country are undergoing. Strict non-degradation regulations may discourage incoming industry. However, if national standards are adopted, industry would face the same restrictions everywhere and would not specifically avoid Wyoming.

As a result of the structure of the Act, its success is greatly dependent on the discretion of the Director, Administrator, advisory boards, and council. In the air quality portion, the Administrator is given enabling authority to actually carry out the policy of the Act. To aid in this effort significant funding is essential in order to enforce and carry out the requirements of the Air Quality Division.

In comparison with other states, Wyoming's act appears to be more effective. For example, Ohio's does not even provide for cease and desist orders, or reports from pollutors themselves.[47] Thus, Wyoming has the tools in the 1973 Environmental Quality Act. It remains to be seen whether sufficient funding and effective administration can combine to keep the Wyoming air clean.

MARILYN S. KITE

SECTION II. THE WYOMING WATER QUALITY ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972: A COMPARISON

Article 3 of the Wyoming Environmental Quality Act[1] is primarily concerned with water quality. It is the first comprehensive water pollution control act in the state, replacing the provisions of the 1929 Public Health Chapter[2] which dealt with public drinking water supply. The water quality article cannot be considered alone, but must be read in conjunction with the administrative procedures of the act in its entirety.[3]

There is no question that the impetus for the act and its structure was a direct consequence of the Federal Water Quality Act Amendments of 1972.[4] The state act is brief and has few substantive provisions. Thus, the administration will have the flexibility to adapt state regulations to the ever-changing federal requirements. Hopefully, the administrator will be able to work closely with the regional administrator of the Environmental Protection Agency so that Wyoming water users will have a minimum of red tape.

The amendments to the Federal Water Pollution Control Act established a system called the National Pollutant Discharge Elimination System (hereafter referred to as NPDES).[5] This system makes it illegal to make discharges without a permit, and creates guidelines as to when permits will be issued.

The federal act authorizes the state to administer its own permit program, which must conform to the federal act.[6] The Wyoming administrator has been required by the Wyoming act to recommend such rules, regulations, standards, and permit systems authorized pursuant to the federal code.[7] In order Wyoming to administer its own permit system, the governor must submit to the E.P.A. a full and complete description of the program.[8] All procedures must be in the

1. WYO. STAT. § 35-502.18, 19 (1973).
2. WYO. STAT. § 35-184 to § 35-186, § 35-188 to § 35-195 (1957).
3. WYO. STAT. § 35-502.1 et. seq. (1973).
4. 33 U.S.C. § 1251 et. seq (1973).
5. 33 U.S.C. § 1342 (1973).
6. 33 U.S.C. § 1342 (b) (1973).
7. WYO. STAT. § 35-502.19 (a) (v) (1973).
8. 33 U.S.C. § 1342 (b) (1973).

form of valid state statutes and regulations, and must be certified by the attorney general as adequate to meet the requirements of the federal law.[9] The Environmental Protection Agency has released regulations on state program elements necessary for participation in the National Pollutant Discharge Elimination System.[10] This article discusses the compliance of the Wyoming act with these regulations and sets out regulations which the Wyoming administrator must adopt in order to meet the federal criteria.

EFFLUENT LIMITATION STANDARDS

Although the central feature of both the Wyoming act and the federal is the permit system, before a discussion of the mechanics of the permit system it might be helpful to discuss the standards against which a permit is to be judged. These are the effluent limitations and water quality standards.

Wyoming law states that the administrator shall recommend effluent standards and limitations, specifying the maximum amounts or concentrations of pollution and wastes which may be discharged into the water of the state.[11] This simple statement is all that corresponds to four long sections concerning effluent limitations in the federal act.[12] This is one area where Wyoming must make rather lengthy regulations in order to comply with the federal standards.

The two acts differ from the beginning in the aspect of what type of pollution is to be controlled. The federal act applies its limitations only to point sources of pollution.[13] Wyoming has in its statutes a definition of a point source[14] but it does not specifically restrict the application of effluent limitations to point sources. Therefore, theoretically, Wyoming would control more pollution than the federal government. Since it is not practical to control non-point sources at this time, Wyoming is not likely to venture into this area.

9. 40 C.F.R. (§ 124.3 (1972).
10. Regulations as authorized by 33 U.S.C. § 1314 (h) (2) (1973) are: 40 C.F.R. § 124; 37 Fed. Reg. 28390 (1973), *as amended* 38 Fed. Reg. 17999 (1973); and 38 Fed. Reg. 19894 (1973).
11. WYO. STAT. § 35-502.19 (a) (ii) (1973).
12. 33 U.S.C. § 1311, § 1312, § 1316 and § 1317 (1973).
13. 33 U.S.C. § 1311 (e) (1973).
14. WYO. STAT. § 35-502.3 (a) (x) (1973).

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13. 33 U.S.C. § 1311 (e) (1973).
14. WYO. STAT. § 35-502.3 (a) (x) (1973).

The federal government has set its goal to end discharges of pollutants into our waters by 1985.[15] To achieve this objective, Congress set up a timetable of limitations on effluents. By July 1, 1977, the following limitations will apply:

1. Effluents shall not be discharged in amounts that will cause water quality to fall below the applicable water quality standards.[16]
2. Publicly owned treatment facilities will meet secondary treatment requirements.[17]
3. Other sources will use the best available technology.[18] The E.P.A. will determine the best practicable control technology considering the cost in relation to the benefits of pollution reduction, and will also consider factors such as age of equipment and non-water quality environmental impact.[19] Any source discharging into a treatment plant must meet pre-treatment standards.[20]

By 1983 the following limitations will apply:

1. Public treatment works will use the best available technology including elimination of discharges.[21]
2. All other sources will achieve the best available technology economically available for the class of pollutants.[22]

One thing must be noted about the 1983 limitations: the best technology referred to is that for the class. Individual problems because of old equipment and other local factors will not be taken into account. This may conflict with the reasonableness provision of the Wyoming statute,[23] which seemingly requires individual leadership to be considered in all cases. This

15. 33 U.S.C. § 1251 (a) (1973).
16. 33 U.S.C. § 1311 (b) (1) (C) (1973).
17. 33 U.S.C. § 1311 (b) (1) (B) (1973); the EPA has set requirements for secondary treatment. They are contained in 40 C.F.R. § 133; 38 Fed. Reg. 22298 (1973.
18. 33 U.S.C. § 1311 (b) (1) (A) (1973).
19. 33 U.S.C. § 1314 (b) (1973).
20. The administrator of the EPA will set standards for pre-treatment of effluents discharged into public treatment works so that no new source will inject a pollutant that will interfere with or pass through a treatment work. 33 U.S.C. § 1317 (b), § 1316 (f) (1973).
21. 33 U.S.S. § 1311 (b) (2) (B) and § 1281 (g) (2) (A) (1973).
22. 33 U.S.C. § 1311 (b) (2) (A) (1973).
23. WYO. STAT. § 35-502.19 (vi) (1973).

provision must be narrowly construed in order to meet the federal requirements.

The standards for new sources of pollution are more stringent. New sources must meet the federal standards of performance as they are established.[24] These federal standards will limit effluents to the minimum amount achievable with the best process and best current available technology.

The act sets a goal that discharge of toxic pollutants in toxic amounts be prohibited.[25] The E.P.A. is authorized to set effluent standards for any toxic pollution.[26] Those regulations may prohibit any discharge of a toxic pollutant or combination of pollutants. The federal act absolutely forbids the discharge of any chemical or biological warfare agent or any high level radioactivity.[27] There is no such provision in the Wyoming statutes; this is another regulation that will be required.

As can be seen from this discussion, the Wyoming act is woefully vague. All of the specific limitations on effluents are required for the state to administer water quality, and none are spelled out in the act. Since there is little statutory framework, these standards must be set by regulation; however, the authority to make such regulations is very general. The administrator can set standards and regulations, and can set standards for construction, installation, modification and operation of public treatment works.[28] It would seem that some guidance for the formulation of these regulations, or at least the form they would take, should have been given by the legislature. The Environmental Quality Council has too great an authority for a body that is by nature both legislative and judicial. Perhaps, in this instance, the legislature has abdicated some of its responsibility.

WATER QUALITY STANDARDS

The administrator shall, after consultation with the advisory board, recommend water quality standards specifying

24. 33 U.S.C. § 1316 (1973).
25. 33 U.S.C. § 1251 (a) (3) (1973).
26. 33 U.S.C. § 1317 (a) (1973).
27. 33 U.S.C. § 1311 (f) (1973).
28. WYO. STAT. § 35-502.19 (a) (iii) (1973).

the maximum short term and long term concentrations of pollution, the minimum permissible concentrations of dissolved oxygen and other matter, and the permissible temperatures of waters of the state.[29] These standards are also required by the federal act.[30] Wyoming has had standards for interstate waters since 1968,[31] but as of October 1973, standards for intra-state streams had not been promulgated by the E.P.A. However, this is not significant, as most Wyoming waters are interstate waters, and as such the interstate standards are adequate.

According to the federal act, water quality standards shall consist of the designated uses of the waters involved and the water quality criteria for such uses.[32] Standards shall take into account such uses as public water supplies, propagation of fish and wildlife, recreational purposes, agriculture, industrial and other uses. Public hearings must be held at least every three years to review the state water quality standards.[33]

The state is required to have a continuous planning process which sets up a plan to combat water pollution.[34] The purpose of the continuous planning process is to provide states with the water quality assessment and program management information to make centralized and coordinated water quality management decisions.[35] Although a state water quality program will not be approved without such a plan, Wyoming has no provision for it in its water quality act.

The continuous planning process is directed toward attainment of water quality standards discussed above. Planning requires, as its basis, the inventory of all sources of pollution. Maximum loads of various pollutants that will meet the standards are determined, and areas are noted where these

29. WYO. STAT. § 35-502.19 (a) (i) (1973).
30. 33 U.S.C. § 1313 (a) (1973) requires standards for all navigable waters of the state.
31. Wyoming Department of Public Health Water Quality Standards for Interstate waters in Wyoming, adopted October 28, 1968. These have been adopted by the EPA in 40 C.F.R. § 120.10 (1973).
32. 33 U.S.C. § 1313 (c) (2) (1973).
33. *Id.* Regulations covering revisions are in 40 C.F.R. § 122 (1972).
34. 33 U.S.C. § 1313 (3) (1) (1973).
35. 40 C.F.R. § 130.1 (b); 38 Fed. Reg. 8034 (1973. Environmental Protection Agency Interim Regulations on the state continuing planning process under the federal water pollution control act.

loads are exceeded. More stringent effluent limitations are set for these areas until water quality standards are met.

Water quality standards give us a measure against which to check our waters to determine levels of pollution. Continued revision upward of the standards will give us steps toward the elimination of pollution.

THE PERMIT SYSTEM

The central provision of both the federal and Wyoming acts is the permit system. Any state program participating in the NPDES must have a statute (or regulations), enforceable in state courts, which prohibits discharges of pollutants by any person except as authorized pursuant to an NPDES permit.[36] The Wyoming statutes have almost exactly this provision, stating that no person, except when authorized by a permit issued pursuant to the provisions of this act shall cause, threaten or allow the discharge of any pollution or water into the waters of the state.[37]

However, Wyoming may be in danger of non-compliance with this section. The definition of pollution in the Wyoming act excludes waters diffused across meadow lands or croplands for irrigation purposes or return flows, whether diffused or collected in drains from such waters diffused across meadow or croplands.[38] More simply stated it means that irrigation return flows are not pollution and connot be regulated as such.

Federal regulations recognize irrigation flow as pollution, but generally exclude it from the application of the permit system as long as it is not a point source draining more than 3000 acres.[39] Irrigation return flows which the state or federal administrator determine to be a significant contributor of pollution may also be regulated by permit.[40]

Irrigation return flows are not pollution in Wyoming by statutory definition. The federal water pollution control act

36. 40 C.F.R. § 124.10 (1972).
37. WYO. STAT. § 35-502.18 (a) (i) (1973).
38. WYO. STAT. § 35-502.3 (c) (i) (1973).
39. 40 C.F.R. § 124.11 (h) (4) (1973).
40. 40 C.F.R. § 124.11 (h) (5) (1973).

requires irrigation return flows to be regulated in certain instances. Unless Wyoming changes its statute, this will constitute a non-conformity which would keep Wyoming from administering this portion of the NPDES.[41]

In addition to most irrigation return flows, federal regulations exempt certain other discharges from the necessity of a permit. It is to be anticipated that Wyoming regulations will make these same exclusions.

APPLICATIONS FOR PERMITS

Every applicant for a NPDES permit shall file his application on a NPDES application form.[42] Form A is for public wastewater treatment facilities. Short form A may be used unless the facility discharges more than 5,000,000 gallons any day, serves more than 10,000 people, or receives industrial waters of 50,000 gallons or toxic wastes of any amount. Form C is for manufacturing establishments and mining. Form D is for services, and wholesale and retail trade. Short form card D may be used unless the discharge is 50,000 gallons per day, or contains any toxic pollutants. Wyoming has adopted the federal forms.

Any one commencing discharges after July 16, 1973, must file application six months in advance of the first discharge.[44] The application must be signed by either the proprietor of a proprietorship, a general partner of a partnership, or a corporate official of at least vice presidential rank in a corpora-

41. It has been suggested that irrigation return flows could be regulated by the use of water appropriation statutes. The major problem in this area, of course, is salinity of the runoff. This might be alleviated by varying the amount of water and the manner in which it is put on the land. Drainage would have to be carefully controlled. The appropriation right is a vested property right. In view of the legal quagmire that might result from attempting to alter these rights with (probably) statutory changes, it would be easier to first amend the Environmental Quality Act.
42. 40 C.F.R. § 124.11; 37 Fed. Reg. 28390 (1972), *as amended*, 38 Fed. Reg. 17999 (1973) and 38 Fed. Reg. 19894 (1973). Included are: 1) sewerage from a boat; 2) water injected into or diverted from an oil or gas well, or disposed of in a state-approved disposal well; 3) approved aquaculture projects; 4) dredged or fill materials discharged in navigable waters; 5) current additions of sewerage to publicly owned treatment works; 6) uncontaminated storm runoff and 7) animal confinement facilities (*e.g.*, a feedlot) containing less than 1,000 feeder cattle, 700 dairy cattle, or 2,500 swine or 55,000 turkeys.
43. 40 C.F.R. § 124.21 (1973).
44. 40 C.F.R. § 124.21 (d) (1973).

tion.[45] Both these requirements are federal regulations that must be adopted by the state.

PUBLIC NOTICE AND PUBLIC PARTICIPATION

The federal regulations on state program elements necessary for participation in NPDES contain a very definite standard of public participation. There is no such standard in the Wyoming act.

Federal regulations require the state to make a proposed determination whether to grant or deny an application. If the determination is to issue a permit, proposed effluent limitations and a proposed schedule of compliance must be set. This shall be organized into a draft NPDES permit.[46]

Public notice of every complete NPDES permit shall be circulated by posting and publication near the source of the discharge and in the cities near it. Notice must be mailed to any group upon request; groups can request to be placed on a mailing list to receive all NPDES permit[47] public notices. A public notice will contain the name and address of each applicant, a brief description of the operation resulting in the discharge, a brief description of the affected waterway and whether or not the tentative determination was to issue the permit. At least 30 days will be allowed for public comment.

Every proposed discharge of over 500,000 gallons on any day shall require a fact sheet.[48] The fact sheet shall have a detailed description of the location, a detailed description of the dishcarge in pounds per day of pollutants, a description of the uses of the waters affected, and the procedures for requesting a public hearing. A mailing list to receive all fact sheets shall be established and any group may request to be on it.

In addition to public notice, as above, other government agencies must be satisfied.[49] Any other state whose waters may be affected has a right to receive notice and make objection.

45. 40 C.F.R. § 124.24 (1973).
46. 40 C.F.R. § 124.31 (1973).
47. 40 C.F.R. § 124.32 (a) (1973).
48. 40 C.F.R. § 124.33 (1973).
49. 40 C.F.R. § 124.34 (1973).

The district director of the Corps of Engineers also has this right.

The Wyoming Environmental Quality Act requires publication notice of an application for a strip mining permit, but there is no specific provision requiring notice for a water permit.[50] The power to require notice must come from the general power to make regulations.[51] Lack of requirement for public participation and notice would be serious grounds for holding the Wyoming act to be in non-compliance with NPDES requirements. The general power to recommend regulations may be enough, but one can only wish that the legislature had been more specific in the statute.

The state must allow opportunity for the applicant, any affected state, the regional adimnistrator of the E.P.A. or any person or group of person to request a public hearing with respect to an NPDES application.[52] A petition for public hearing must be received during the thirty day period for public comment. Public hearings shall be held if there is significant public interest in such a hearing. Instances of doubt should be resolved in favor of a public hearing.

Wyoming statutes require a hearing if an appicant's request for a permit is denied.[53] The rights of others to a hearing may not be quite so clear. The Wyoming Administrative Procedure Act gives guidelines for hearings in contested decisions;[54] there are provisions for hearings in the Strip Mine Act, but that provision does not apply to water quality questions;[55] There is sort of an inverse authorization for public hearing in the permit section: a decision on a permit does not have to be made in sixty days if the federal government requires public hearings.[56]

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50. WYO. STAT. § 35-502.24 (e) (1973).
51. WYO. STAT. § 35-502.10 (1973).
52. 40 C.F.R. § 124.40 (1973).
53. WYO. STAT. § 35-502.48 (1973).
54. WYO. STAT. § 9-276.25 (1973) provides for procedure in contested cases. WYO. STAT. § 9-276.19 (b) (1973) defines a contested case as a proceeding in which legal rights are determined after a hearing. Even if this section is applicable, there is still no requirement for a public hearing if it is not included in the Water Quality act.
55. WYO. STAT. § 35-502.24 (h) (1973).
56. WYO. STAT. § 35-502.47 (b) (1973).

The authority for requiring public hearings rests again on the general power of the administrator to recommend regulations.[57] It would seem that the legislature did not wish to give the public any more input into water pollution control than is absolutely required by the federal government. This may result in the danger that Wyoming statutes will not comply with federal requirements.

The final requirement under public participation is that the public must have access to any NPDES forms for inspection and copying.[58] The state must insure the availability of a reasonably priced copy machine, or coordinated duplicating services. Some information may be found to be confidential; this is information that would divulge trade secrets or secret processes. The information held confidential will not be disseminated outside the department. Effluents are not considered confidential information.

There is a Wyoming statute that parallels these requirements almost verbatim.[59] In this area of public participation requirements Wyoming complies with federal standards.

Terms and Conditions of Permits

The state cannot issue a permit which allows the discharge of any radiological, chemical, or biological warfare agent or high level radioactive waste into the waters.[60] Discharges that would impede navigation and those in violation of the continuous planning process are also forbidden. The administrator must recommend regulations that will prohibit such permits.

The terms of permits must not exceed authorized discharges under the applicable effluent standards and limitations.[61] The standards of performance for new sources must be met for all applications for new discharges. More stringent requirements must be included if necessary to meet water quality standards.

57. WYO. STAT. § 35-502.19 (1973).
58. 40 C.F.R. § 124.35 (1973).
59. WYO. STAT. § 35-502.58 (1973).
60. 40 C.F.R. § 124.41 (1973).
61. 40 C.F.R. § 124.42 (1973).

Effluent liimtations in permits will be expressed in average number of pounds per day allowed and maximum number of pounds per day.[62] Temperature will be stated in amount of effluent to be discharged at a specified maximum temperature. Regulations approximating these must be adopted by Wyoming.

The Wyoming statutes have no provisions concerning the length of time a permit may be in force. Federal regulations provide that permits may not be in force for a period of time to exceed five years.[63] Any permit, prior to re-issuance, must not only comply with the applicable effluent limitations and water quality standards, but must have complied with the requirements of the permit the entire time it was in force.[64] Monitoring and reporting data must be up to date. Wyoming has no specific provisions for renewal in its statutes, and regulations will be needed to bring Wyoming law into compliance in this area.

All permits under the Wyoming Environmental Quality Act allow variances, with the exception of the Water Quality permits.[65] This provision will bring Wyoming into compliance with the federal regulations, which do not allow variances, but have "schedules of compliance."[66] If the discharge is not within the applicable effluent standard or water quality standard, it will be given the shortest possible time to come into compliance with them. If this period is in excess of nine months, a schedule will be included in a permit showing interim dates for completion of various requirements. A schedule of compliance may be modified for good cause, *i.e.*, an act of God which prevents compliance.[67]

Other terms and conditions that must be included in a permit are listed in federal regulations.[68] These provide that a permit may be modified or revoked for cause, including violation of terms, misrepresentation in application, a change in

62. 40 C.F.R. § 124.43 (1973).
63. 40 C.F.R. § 124.51 (1973).
64. 40 C.F.R. § 124.52 (1973).
65. WYO. STAT. § 35-502.45 (1973).
66. 40 C.F.R. § 124.44 (1973).
67. 40 C.F.R. § 124.72 (b) (1973).
68. 40 C.F.R. § 124.45 (1973).

conditions allowing a reduction in the discharge. The Wyoming act has no corresponding provisions.

Any increased or additional discharge must be covered by a new application for a separate permit.[69] The Wyoming act has a similar provision forbidding an increased discharge without a permit.[70]

Another condition of a permit is that the state must be allowed access to the pollution works for official monitoring procedures.[71] Wyomng provides for this inspection by giving power to the director to appoint inspectors who will have access to plants and records.[72] This provision should be adequate to insure compliance.

Federal regulations require that the state be able to monitor discharges if necessary.[73] All discharges in excess of 50,000 gallons per day, on any day of the year, and those containing toxic pollutants must be monitored. Wyoming statutes provide that monitoring is within the provinces of the administrator.[74] Under his statute the owner or operator may be required to: 1) establish and maintain records; 2) make reports; 3) install, use and maintain monitoring equipment or methods; 4) sample effluents, discharges or emissions; 5) and provide other information as may reasonably be required.

By federal regulation, those required by the administrator to monitor discharges will be required to keep records of the data for a minimum of three years.[75] Results must be reported on the proper federal form with a frequency of at least once per year.[76] Current practice is that public treatment works are required to report quarterly. Since there are only two commercial laboratories in Wyoming, the administator has suggested that an ongoing contract might be negotiated with a laboratory for all testing, thus insuring that reports are received on schedule.

69. 40 C.F.R. § 124.45 (1973).
70. WYO. STAT. § 35-502.18 (a) (iv) (1973).
71. 40 C.F.R. § 124.55 (c) (1973).
72. WYO. STAT. § 35-502.9 (a)3 (vi) (1973).
73. 40 C.F.R. § 124.61 (1973).
74. WYO. STAT. § 35-502.10 (a) (vii) (1973).
75. 40 C.F.R. § 124.62 (1973).
76. 40 C.F.R. § 124.63 (1973).

Enforcement

To qualify for participation in the NPDES, the state must have sufficient recourse to civil, criminal and civil injunctive remedies to insure compliance with the Federal Water Quality Act. The necessary powers are spelled out in the Federal Regulations.[77]

In order to comply with the regulations, the state must have the power to act for an immediate injunction to stop pollution, that is, in an emergency, causing a danger to the health and safety of any person.[78] The Wyoming director has this power under the Environmental Quality Act.[79] The state must also have the power to levy civil fines for violation of permits and orders.[80] State law seemingly complies with this in the section on penalties.[81] Any person who violates any provision of the act or any rule, regulation, standard, permit, or order pursuant to any rule, regulation, standard, or permit shall be subject to a fine of up to $10,000 per day that the violation continues. This is the same penalty for civil fine in the federal act.[82] The state is required to have the power to levy criminal penalties against those who willfully violate standards,[83] permit limitations, or willfully neglect to make NPDES filings. The Wyoming act levies up to $25,000 per day of violation and one year in prison.[84] This penalty doubles for report offenders. Although the Wyoming act does not mention the failure to make filings, since the wording is almost identical to that of the federal act, there should be no federal complaint.[85] The Wyoming and federal acts have identical provisions for up to $10,000 in fines and six months in prison or both for making any false statement in relation to a permit.[86]

The director must be able to sue in courts of competent jurisdiction for injunctive relief to prevent any threatened

77. 40 C.F.R. § 124.73 (1973).
78. 40 C.F.R. § 124.73 (b) (1973).
79. WYO. STAT. § 35-502.15 (1973).
80. 40 C.F.R. § 124.73 (e) (1973).
81. WYO. STAT. § 35-502.49 (a) (1973).
82. 33 U.S.C. § 1319 (d) (1973).
83. 40 C.F.R. § 124.73 (f) (1973).
84. WYO. STAT. § 35-502.49 (c) (1) (1973).
85. 33 U.S.C. § 1319 (c) (1) (1973).
86. WYO. STAT. § 35-502.49 (d) (1973); 33 U.S.C. § 1319 (c) (2) (1973).

or continued violations of terms of NPDES permits without first revoking the permit.[87] Wyoming does not have this exact provision, but a type of injunctive relief may be had by the Environmental Quality Council. If an order to cease and desist a violation of the act has been issued by the director, the council may affirm the cease and desist order. It may then apply to the District Court for its order, violation of which may be punished as contempt.[88] This is a much more cumbersome procedure than is considered in the federal regulation. A seven-man council will not have the decisiveness to get to the District Court in a hurried situation, since the Council does meet with some infrequency. This may be another area where Wyoming runs a substantial risk of non-compliance with the federal act. The lack of an important item such as injunctive relief would cause the E.P.A. to retain jurisdiction over the NPDES.

Miscellaneous Provisions

The federal act and regulations provide that the state must insure that the directors, administrators, and board members have not in the last two years received a substantial portion of their income from permit holders or applicants.[89] A substantial portion of income would be 10%. The Wyoming statute restricts party membership but does nothing about such conflicts of interest.[90] This is one problem that regulations cannot remedy, since it is doubtful that agency regulations are binding on the governor. Perhaps the E.P.A. will not object if the council members do not violate the federal regulations even though there is no assurance that this will continue to be so. But this is another area of questionable compliance.

The disposal of pollutants into wells is not covered by the permit system, but is a source of concern to both the E.P.A. and the state. Federal regulations require that the state control the underground disposal.[91] There is no statute covering

87. 40 C.F.R. § 124.73 (c) (1973).
88. WYO. STAT. § 35-502.12 (c) (iii) (1973).
89. 40 C.F.R. § 124.94 (1973).
90. WYO. STAT. § 35-502.11, 13 (1973).
91. 40 C.F.R. § 124.80 (1973).

this, but regulations could be made, again under the general regulatory power.

The Wyoming statutes cover several areas not considered under federal law. There are minor provisions, but they may help in some way to control water pollution in Wyoming. One such area is the licensing of treatment facility operators.[92] This will help to insure the compliance of public treatment works with the terms of their permits. Another such provision is the tax incentive for pollution control equipment.[93] Property used for control of air, water or land pollution is exempt from ad valorem tax for six years from date of installation. This may be a small amount of money in some cases, but every dollar may serve as an incentive.

Summary and Conclusion

The Wyoming Water Qualitly Act may fail to conform to the federal requirements in several areas. These have been noted; the most important are the lack of the ability of the director to seek injuctive relief against violations of rules and regulations, the lack of statutory authority for public participation in the process of granting and denying of permits and the classification of agricultural runoff as pollution. These problems can be remedied best by statutory changes.

There are other problems with meeting the federal regulations. These are areas where the federal requirements call for regulations for which no specific authority exists, and the administrator must rely on his general rule making authority. If the regional administrator accepts this authority, then Wyoming can administer its water pollution statutes.

The Environmental Protection Agency will retain much control over water pollution in Wyoming even if the state is administering the NPDES. All NPDES permits proposed to be issued must be submitted to them.[94] The administrator may object to any permit proposed to be granted by the state within ninety days. While these provisions may be waived, the

92. WYO. STAT. § 35-502.19 (a) (iv) (1973).
93. WYO. STAT. § 35-502.35 (1973).
94. 40 C.F.R. § 124.46 (1973).

regional administrator may withdraw approval of the state program at any time if he finds that the state is not carrying out the provisions of the Federal Water Quality Act.[95]

Since the program is to be administered to conform to a federal statute, in compliance with the federal method of operation, and with federal supervision, the question arises of why not let the federal government administer its own program. A taxpayer savings would result from less duplication of effort, and the Wyoming polluter would be spared another level of bureaucracy.

The balancing factors that keep the state in the pollution control business are pride, the feeling that citizens will get more fair treatment at the state level and the fact that the state is a powerful body that can have some weight in attempting to moderate the position of the E.P.A. The legislature has made the decision that these factors outweigh the benefits of one program.

Aside from meeting the federal requirements, there are other problems with the Wyoming act. The array of directors, administrators, councils, and advisory boards with their individual duties would be difficult to make more confusing. The citizen attempting to decide who is responsible for what may have a problem: to whom does he apply?

The brevity of the act gives a positive benefit in the great flexibility that it provides an administrator faced with changing federal requirements; but a lack of guidelines as to what the legislature intended removes the law making power one step further from the people. All in all, acts that provide definite guidelines are preferable to those broad acts with no guidelines. We need only to look at the recent trouble in Washington to see problems that one encounters with administrators who have no checks on them.

One who is relying on a permit for his operation would wish that the system for this permit were based on a solid foundation of statutory law rather than on administrative regulation. One need only look to the federal act to see an act that contains a substantial amount of legislative control.

95. 33 U.S.C. § 1342 (c) (3) (1973).

One cannot help but feel that the state legislature took a shortcut with the law.

On the positive side, the state act can provide Wyoming with a substantial amount of pollution control. Given a good set of regulations and wise administrators, the act can do what it was designed to do: clean up Wyoming's waters. The federal government will see to the good regulations, the governor to the wise administrators, and Wyoming will likely have cleaner water.

TED E. ORF

SECTION III. LAND QUALITY: THE REGULATION OF SURFACE MINING RECLAMATION IN WYOMING

I. INTRODUCTION

The Environmental Quality Act (E.Q.A.) is administered by a newly-created state agency, the Department of Environmental Quality. The Land Quality division administrator has primary day-to-day responsibility for enforcement of the E.Q.A. but is accountable both to the director of the Department of Environmental Quality and to the Environmental Quality Council.

Article 4 of the E.Q.A. established a new permit and licensing scheme which is designed to insure adequate reclamation of strip-mined lands. The licensing procedure is based on the operator's submission of a detailed reclamation plan to the administrator prior to commencing mining operations. The E.Q.A. places broad discretion in the administrator and the Land Quality Advisory Board to deny, approve or modify the proposed reclamation plan. Once approved, the reclamation plan sets the performance standards for reclaiming that area. The operator must also submit an annual report on his reclamation activity. The administrator is required by law to conduct an annual inspection of the mine site, and adjust the bond to correspond with changing conditions.

This comment contains an overview[1] of current issues relating to surface mining with a particular emphasis on the impending development of Wyoming's extensive coal deposits and an analysis of the detailed procedures which are required to obtain a license, permit, and approval of a reclamation plan.

1. *See Hearings on H. R. 's Before the Subcomm. on the Environment and the Subcomm. on Mines and Mining on the Regulation of Surface Mining of the House Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess., ser. 93-11 (1973), and Reitze, *Old King Coal and The Merry Rapists of Appalachia*, 22 CASE WESTERN RES. L. REV. 650 (1971), which contains a thorough discussion of surface mining in Appalachia. Not all of the Appalachian experience is relevant to reclamation of western land, however, *See also* Hall, *Problems of Compartments in Politics and Thinking: The Political Games They Support and the Economic Issues They Disguise for the Coal Industry*, ROCKY MOUNTAIN MINERAL LAW FOUNDATION INSTITUTE ON WESTERN COAL DEVELOPMENT 8-1 (1973).

II. BACKGROUND INFORMATION

A. *Surface Mining*

To understand the problems which the new law attempts to solve, one must look first at the nature of the surface mining process. Wyoming's Act applies to "operations by which solid minerals are intended to be extracted from the earth."[2] The surface mining of solid rocks and minerals such as coal, uranium, bentonite, stone, sand, and gravel, etc.,[3] are all subject to the Act. Because surface-mined coal production is projected to increase from 11 million tons in 1972 to as much as 45 million tons by 1980, coal mining has attracted the most attention and will probably remain dominant for some time to come. Moreover, 98% of Wyoming's coal is surface-mined.[4]

Surface mining[5] involves the removal of the rock and soil overburden which covers the mineral deposit in order to extract the desired mineral.[6] Underground mining operations, where a shaft is opened to reach the mineral deposit,[7] are also covered under the Act but do not pose a serious surface reclamation problem because only a comparatively small area of land is affected. The two principle types of surface mining used in Wyoming are open-pit mining and contour mining.[8]

2. WYO. STAT. § 35-502.20 (Supp. 1973).
3. For a general discussion on Wyoming mining, *see* MINING YEARBOOK 1973, U.S. DEP'T. OF THE INTERIOR, 779 (1973) and Kovats, THE CONDITION OF SURFACE MINE RECLAMATION IN WYOMING: A REPORT TO THE STATE OF WYOMING, DEP'T. OF ECONOMIC PLANNING AND DEVELOPMENT (1969).
4. The estimated area of land surface-mined in Wyoming in 1971 was 2,737 acres. Coal mining activities account for 1,016 acres of the total. As part II of this comment indicates, the area to be affected by coal mining in 1971 included: coal, 1,016 acres; stone, 1,616; clay, 434, sand and gravel, 133; phosphate, 30; iron ore, 12; gypsum, 4; copper, 0; and all other (unknown), 984 acres. WYOMING OPEN CUT MINING ADMINISTRATOR'S REPORT, SURFACE MINING, MINERAL RELATED WASTE AND LAND RECLAMATION FOR 1971, 1 (1972). *See also* Glass, *Western Coal Edition*, 78 COAL AGE 186, 200 (April 1973). Glass notes that surface mining should remain dominant well into the next century with deep mines accounting for less than 2% of the state's annual production for the next 25 to 30 years.
5. NATIONAL COAL ASS'N, BITUMINOUS COAL FACTS 14, 15 (1958). *See also* BUREAU OF MINES, U.S. DEP'T. OF THE INTERIOR, MINERAL FACTS AND PROBLEMS 125 (1965).
6. There are six types of surface mining: (1) strip mining, (2) auger mining, (3) open pit mining, (4) dredging, (5) hydraulic mining and (6) contour mining. U.S. DEP'T. OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 42 (1967). For a detailed but not technical treatment of surface mining, *see* Reitze, *supra* note 1, at 651.
7. NATIONAL COAL ASS'N., *supra* note 5, at 15.
8. Glass, *supra* note 4, at 200. Although open-pit and contour types of surface mining are equally represented today, the open pit method is likely to dominate future mining. Active surface mines have highwalls between 0 and 150 feet with the average between 40 and 60. As for the future, an

Because many Wyoming coal seams are quite thick, nearly flat, and often in areas of low relief,[9] the open-pit method will be the more frequently used technique.

B. *The Magnitude of Wyoming's Coal Deposits*

To appreciate the importance of the land quality provisions, one need only review the magnitude of future mining operations. More than 235 square miles[10] of Wyoming lands overlie potentially strippable coal deposits.[11] From 1969 through 1971, 3,936 acres were disturbed due to coal mining while 1,143 acres have been reclaimed.[12] In 1971 a total of 2,737 acres were disturbed by all types of surface mining in Wyoming; coal mining accounted for 1,016 acres.[13]

The immensity of Wyoming coal deposits is staggering.[14] Wyoming has the largest coal reserves of any state—an estimated 546 billion tons within 6,000 feet of the surface. 121.5 billion tons have been mapped and measured within 3,000 feet of the surface.[15] By comparison, coal production in the United States from all underground and surface mines for

open-pit with total terraced relief of up to 900 feet has been considered in the Kemmerer area. Contour stripping is used where a hilly or mountainous terrain over-lies the mineral deposit. Reitze, *supra* note 1, at 652. Open pit mines, which may or may not disturb a large surface area, tend to be a more permanent use of the land. The Wyodak open pit mine near Gillette, Wyoming, has been in operation since the mid-twenties. Some portions have been in operation since that time. Glass, *supra* note 4 at 202.

9. *See* discussion accompanying notes 25 and 26, *infra*.
10. 150,755 acres.
11. These statistics may understate the area of land to be disturbed. Prior to 1969, surface mines affected two to two and one-half times the pit acreage figure. Glass, *supra* note 4, at 202.
12. *Id.*
13. Recent statistics concerning disturbed areas are collected from the annual report submitted by all mining operators to the administrator of the land quality division of the Department of Environmental Quality. A copy of the report, WYOMING OPEN CUT MINING ADMINISTRATOR'S REPORT, SURFACE MINING, MINERAL RELATED WASTE AND LAND RECLAMATION FOR 1971 (1972) is available from Homer Derrer, Acting Administrator, State Office Building, Cheyenne, Wyoming 82001. The figures were also quoted in Glass, *supra* note 4 at 202. Of Wyoming's total acreage of 62,664,960 (U.S. Dep't. of the Interior, Public Land Statistics 1969-3), some 17,941 acres were utilized or occupied by mineral and solid fuels waste generated through 1971. WYOMING OPEN CUT MINING REPORT, SURFACE MINING, MINERAL RECLAMATION AND LAND RECLAMATION FOR 1971, 2 (1972).
14. Wyoming's deposits are primarily low sulphur, subbituminous coal. BUREAU OF MINES INFORMATION CIRCULAR #8531 STRIPPABLE RESERVES OF BITUMINOUS COAL AND LIGNITE IN THE UNITED STATES, 21 (1971). (Hereafter referred to as STRIPPABLE RESERVES OF U.S.).
15. U.S. BUREAU OF MINES INFORMATION CIRCULAR #8538 STRIPPABLE COAL RESERVES OF WYOMING 1, 2 (1971) (Cited hereafter as RESERVES OF WYO.).

1972 total 590 million short tons.[16] Domestic consumption in the United States in 1971 was 496 million short tons.[17]

Presuming that 80% of the coal within 3,000 feet of the surface is recoverable, Wyoming's reserves could supply the entire United States domestic consumption for 195 years at the 1971 rate.[18] The recoverable strippable reserves within 150 feet of the surface are estimated at 19 billion tons.[19] At the 1971 rate of consumption, these reserves could supply the United States consumption demand for 20 years.[20]

More than 99% of Wyoming's total coal reserves are low sulphur coals containing less than 1% sulphur.[21] There are 31.7 billion tons of strippable low sulphur coal reserves in the United States; 13.4 billion tons or 42% are located in Wyoming.[22]

The Wyodak Seam, an unusually rich coal district, is located in Campbell County near Gillette. This zone has "the greatest potential for strippable coal reserves in the Western United States."[23] Half of the total Wyoming coal reserves are located in Campbell County. In fact, a single township surrounding the townsite of Gillette contains nearly 2.9 billion tons of coal, most of which is within 500 feet of the surface.[24]

C. *Geological Characteristics*

Currently, surface mining is the most economical method for mining Wyoming coal because of the small amount of overburden[25] that must be removed to reach the relatively thick deposits. The major coal beds currently being mined

16. 2 MINING AND MINERALS POLICY, 1973, 1-59, SECOND ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR UNDER THE MINING AND MINERALS POLICY ACT OF 1970 (1973).
17. *Id.* at 1-61.
18. This figure is for comparison only.
19. Glass, *supra* note 4, at 196.
20. This figure is for comparison only.
21. Half of Wyoming reserves contains less than 0.7% sulphur. For a discussion of the importance of the sulphur content as it relates to compliance with air quality standards, see STRIPPABLE RESERVES OF U.S., *supra* note 14, at 1. And Glass, *Midyear Review of Wyoming Coal Fields*, 1972, GEOLOGICAL SURVEY OF WYOMING, 6 (1972).
22. STRIPPABLE RESERVES OF U.S., *supra* note 14.
23. RESERVES OF WYO., *supra* note 15, at 11.
24. *Id.* at 12.
25. For a chart comparing relative overburden on coal deposits, *see* STRIPPABLE RESERVES OF U.S., *supra* note 14 at 12.

are from ten to one hundred feet thick and are covered by thirty to one-hundred-fifty feet of overburden. The Wyodak mine near Gillette has a seventy-one foot thick coal bed which is covered by only thirty feet of overburden.[26]

D. *Production Trends*

Wyoming's present coal production comes from nine coal fields located in five of the major coal-producing regions of the state.[27] Historically, the development of Wyoming coal was hampered by its isolation from major markets, high transportation costs, competition from oil, gas and hydropower and the low heat value of sub-bituminous coal compared with the higher heat value of anthracite[28] and bituminous coal.[29] These problems have largely abated and production is increasing dramatically.[30] Coal production for the first quarter of 1973 was up to 62,000 short tons over the 1972 first quarter figure of 26,000 short tons.[31] Production from the state's mines may reach 20 million tons per year by 1975.[32] In dollar value the state's production has quadrupled in the last ten years.[33]

A Department of the Interior study predicts that as many as ten mine-to-mouth, coal-fired, electric generating plants could be costructed in Campbell County alone.[34] Moreover,

26. RESERVES OF WYOMING, *supra* note 15.
27. The active mines in 1972 included: (1) Powder River Coal Basin, comprised of Powder River Field and Glenrock Field, one strip mine each, and Sheridan Field and Gillette Field, two strip mines each; (2) Green River Coal Region, with 2 deep mines in Rock Springs Field; (3) Hanna Coal Field, with 3 strip mines and 1 deep mine; (4) Hams Fork Coal Region, the Kemmerer field with 1 strip mine; and (5) Bighorn Coal Basin, with one deep mine in each of the Gebo Field and Grass Creek Field. The coal-producing counties in Wyoming are Campbell, Carbon, Converse, Hot Springs, Lincoln, Sheridan and Sweetwater. Glass, *Midyear Review*, *supra* note 21, at 11-12.
28. *See supra* note 14.
29. For a discussion of these changing conditions see Glass, *Western Coal Edition*, *supra* note 4, at 193, 202, 203. *See also* R. AUSTIN AND P. BORRELLI, THE STRIP MINING OF AMERICA 8 (Sierra Club 1971). *See generally* U.S. DEP'T. OF THE INTERIOR, 1 NORTH CENTRAL POWER STUDY (1971), and U.S. DEP'T. OF THE INTERIOR S.W. ENERGY STUDY: AN EVALUATION OF COAL-FIELD ELECTRIC POWER GENERATION IN THE SOUTHWEST (1972).
30. For a summary of increasing coal production figures *see* RESERVES OF WYOMING, *supra* note 15, at 7.
31. BUREAU OF MINES, MINERAL INDUSTRY SURVEY, BITUMINOUS COAL AND LIGNITE DISTRIBUTION QUARTERLY, JANUARY—MARCH 1973, 38.
32. Glass, *Midyear Review*, *supra* note 21, at 9.
33. RESERVES OF WYOMING, *supra* note 15, at 6. For a discussion of the economic impact of coal mining on Wyoming, *see* Glass, *supra* note 4, at 186, 200, 201, 204 (1973).
34. U.S. DEP'T. OF THE INTERIOR 1 NORTH CENTRAL POWER STUDY 35 (1971 [Hereafter NCPS.] Each of the ten plants could produce 10,000 megawatts of electricity. By comparison, the Jim Bridger Power Plant presently under

the types of uses for coal are increasing. Research is presently under way to develop a plant capable of converting raw coal into a low-sulphur synthetic oil, pipeline gas and liquified petroleum gases.[35] The U.S. Bureau of Mines predicts that the United States[36] demand for coal in 1980 will be 53% higher than it was in 1967 and by the year 2000, 78% greater.[37]

E. *Environmental Concerns*

Some environmentalists oppose all strip mining.[38] They are aware of the magnitude of the planned development and skeptical of coal companies' concern for the evironment. The Sierra Club, for example, challenges the presumption upon which present strip mining laws are based by inquiring whether high prairie lands[39] are reclaimable once they have

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construction in Southwest Wyoming is the second largest plant west of the Mississippi; it will produce only 1,500 megawatts of power. U.S. DEP'T. OF INTERIOR 1971 MINERAL YEARBOOK 796 (1971).

For an indication of the amount of water which would be required for development of this magnitude, *see* NCPS, 44.

Construction of a new 330 megawatt coal-fired, steam generating plant near Gillette at the Wyodak formation was announced September 20, 1973. The plant will employ up to 640 workers and will be completed in May of 1977. Gillette News-Record, Sept. 27, 1973, at 1, col. 1.

35. In addition, various chemical processing plants, fuel cells, gas turbines and liquid metal systems are projected for development. U.S. DEP'T. OF THE INTERIOR OFFICE OF COAL RESEARCH 1972 ANNUAL REPORT 13 (1973).

Panhandle Eastern Pipeline Co. plans a $400-million commercial gasification plant in the Powder River Basin in eastern Wyoming. The plant, which was announced by the company on September 28, 1973, will provide permanent employement for 800 to 1,000 people and will consume 25,000 tons of coal per day. The plant is expected to be operational between 1978 and 1980. Laramie Daily Boomerang, Sept. 28, 1973, page 7, col. 4.

36. The U.S. also exported 55.9 million short tons tons of coal in 1972. Canada was the largest importer. BUREAU OF MINES, 42 INTERNATIONAL CODE TRADE 27 (June, 1973).

37. STRIPPABLE RESERVES OF U.S., *supra* note 14, at 1.

38. In some situations, where one or more side effects can not be prevented, prohibition of the mining operation is the only suitable remedy.

U.S. ENVIRONMENTAL PROTECTION AGENCY, LEGAL PROBLEMS OF COAL MINE RECLAMATION (Study by the University of Maryland School of Law #14010 FZU) ix (March 1972). *See also* H. CAUDILL, MY LAND IS DYING (1971) and R. AUSTIN AND P. BORRELLI, *supra* note 29.

For the compilation of a newspaper's successful attempt to prevent strip mining in North Carolina, see Winston-Salem Journal and Twin City Sentinel: *1971 Pulitzer Prize in Journalism for Public Service.* (Available in the Hebard Room of the University of Wyoming Coe Library in the Kelly J. Patrick Biographical file, #b-k297jp). Environmentalists have been particularly vocal in Montana where a symposium was held to collect data opposing strip mining. Proceedings of the Montana Coal Symposium, Billings, Montana, 1969, and the comments of McRae, "Coal Industry at What Price? A Rancher's View." Articles advancing this point of view are collected in THE STRIP MINING OF AMERICA, *supra* note 29, at 96-99.

39. Wyoming, one of the Rocky Mountain States, embraces high mountains, elevated and sparsely vegetated plateaus, and mature undulating grassland. Trees are limited to scattered stands along stream and river valleys. In southwestern Wyoming the coal areas

been disturbed.[40] Some writers have suggested that the answer to the reclamation problem is to prohibit all strip mining.[41]

occupy high deserts where even native grasses are sparse. Wyoming lies astride the continental Divide, about two-thirds of the state being on the east slope and one-third on the west. Topographically, Wyoming consists of high mountain ranges separated by broad, relatively flat-floored basins. [Most of the Wyoming deposits underlie these broad basins.] The mean altitude of the state is about 6700 feet.

The climate in Wyoming is semi-arid; warm dry summers alternate with cold rigorous winters. Inclement weather is most common in January, the coldest month. Annual precipitation ranges from a low of five inches in the Red Desert of the Great Divide Basin to a high of forty-five inches in some mountain ranges. In coal areas, rainfall varies from less than six to twelve inches in the southwestern part of the state to six to eighteen inches in the Powder River Basin, where the highest precipitation occurs along the east side of the Big Horn Mountains. Late spring rains provide most of the moisture. RESERVES OF WYO., *supra* note 15, at 5.

Typical climatic conditions from Wyoming's coal-bearing regions are:

Mine Sites	Elevation in feet	Average Precipitation in inches	Average Temp (°F)	Growing Season	Years Recorded	p.h. measurement
Gillette (Wyodak)	4948	14.0	45.4	129	30	7.9 to 8.5
Glenrock (Dave Johnston Power Plant)	4556	14.88	48.0	130	52	7.8 to 8.6
Green River	6089	8.70	—	101	66	7.8 to 8.4
Walcott Jct. Carbon County	6736	10.33	41.6	82	34	8.0 to 8.4
Jim Bridger Power Plant Area in Southwestern Wyoming	6740	8.29	40.3	103	10	7.8 to 9.0

H. BEAUCHAMP, THE USE OF TOPSOIL FOR STRIP MINE REVEGETATION, 34 (1973) (Unpublished master's thesis in Range Management, University of Wyoming, Laramie, Wyoming.)

40. There are numerous provisions which indicate the legislature's intention to insure reclamation. In drafting the regulations the administrator is directed to consider the "potential for adverse environmental impact" by § 35-502.20 (e) (iii) as well as the land's capacity to support the "highest previous use" by § 35-502.21 (a) (i). The Act points to the expectation that the land will be revegetated at § 35-502.21 (a) (iv), and provisions are made for stockpiling topsoil or by some superior method, § 35-502.21(a) and .24(b). Moreover the application may be denied if it is "contrary to the laws or policy of this state," § 35-502.24 (i) (ii). To evaluate reseeding and revegetation problems, the administrator may use qualified experts in hydrology, "soil science, plant or wildlife ecology, and other related fields," § 35-503.22 (a) (i). The applicant may request assistance from the local soil conservation district, § 35-502.24(c). However, because of low rainfall, siltation and acid pollution do not appear to be significant problems. Indeed, the opposite is the problem: there is so little erosion that the scars from strip mining remain unchanged for decades. . . The chance of revegetation of strip-mined areas ranges from unlikely to impossible. R. AUSTIN AND P. BORRELLI, *supra* note 29, at 88.

41. *See* THE STRIP MINING OF AMERICA, *supra* note 29, at 47 the case for abolishing strip mining. *See also The West Va. Debate on Outlawing Surface Mining*, 76 COAL AGE 92 (March 1971).

They argue that the consumer demand for energy should be reduced rather than mining activities expanded to meet continually increasing energy demands.[42] If strip mining were prohibited in Wyoming, at least 17% of the state's coal resource would be unrecoverable,[43] though this figure is subject to dispute.[44]

The North Dakota mined reclamation law explicitly recognized that some lands are unreclaimable and prohibits mining in those areas.[45] There is no similar provision in the Wyoming Act although mining operations may be prohibited if the "proposed mining would irreparably harm, destroy, or materially impair any area that has been designated by the [Environmental Quality] Council to be of a unique and irreplaceable, historical, archeological, scenic or natural value."[46]

On the other hand, those who advocate strip mining suggest that most of the land can be reclaimed.[47] The University of Wyoming Agricultural Experiment Station studied reclamation of mine spoil banks and found that those in the Kemmerer area could be successfully revegetated.[48] A University of Montana study also concluded that revegetation was possible in most sections of the state; the report noted, however, that several decades of revegetation would be required before

42. *See A Legal Solution to the Electric Power Crisis: Controlling Demand Through Regulation of Advertising, Promotion and Rate Structure*, 1 ENV. AFFAIRS 670 (1971). A brief account of the European experience in surface mining is given in STRIP MINING OF AMERICA, *supra* note 29, at 50 et seq. Several European countries have strict reclamation standards which discourage surface mining; as a result, most European countries are importers of coal. *See supra* note 39.
43. Glass, *supra* note 4, at 200.
44. Representative Warren Morton, a geologist who chairs the Wyoming House Mines, Minerals & Industrial Development Committee, says a prohibition on surface mining would render "most of the recoverable coal in Wyoming unminable." Personal correspondence, October 8, 1973.
45. N.D. CENT. CODE § 38-14-05.1 (Supp. 1973).
46. WYO. STAT. § 35-502.24 (g) (iv) (Supp. 1973).
47. Beauchamp, *supra* note 39, concluded that if topsoil is stockpiled and reused, an adequate stand of vegetation may be accomplished. Glass concluded that revegetation of unreclaimed sites will require years to fully establish, "but it is a matter of time rather than an impossibility. Many of the older unreclaimed sites are not naturally revegetated by pioneer native plants." Glass, *supra* note 4, at 204.
48. The study found that Russian olive, caragana and Siberian elm trees survived on the soil banks. Some soil banks revegetated naturally within fifteen years when stabilized from erosion. UNIVERSITY OF WYOMING AGRICULTURAL EXPERIMENT STATION RESEARCH JOURNAL #51, *Reclamation of Strip Mine Soil Banks in Wyoming* (May 1971). Beauchamp's 1973 study concluded, however, that a planned reseeding program is necessary because the sites he tested contained an insufficient amount of natural seed, Beauchamp, *supra* note 39, at 49.

it could be determined whether the reclamation would successfully withstand climatic fluctuations.[49] Other experts have been less pessimistic and have concluded simply that reclamation is possible when the proper techniques are employed.[50] Because of the relatively high ratio of coal to the amount of surface area which must be disturbed to uncover it, there are indications that the cost per ton of an adequate reclamation program would be low in Wyoming.[51] One notably successful reclamation project was conducted at the Big Horn Mine near Sheridan.[52] Compared to the other mining areas in the state, however, the Big Horn area receives higher amounts of rainfall.[53]

There are several revegetation and reclamation test projects presently under way[54] and the Bureau of Outdoor Recreation of the Department of the Interior has established a

49. Carl L. Wambolt, range specialist with the cooperative extension service of the University of Montana at Bozeman, said that proposed revegetation plans that introduced non-native species dependent on commercial fertilizer could diminish the productivity of grazing land and reduce wildlife habitat. He said that wide variety of native species was necessary to insure a proper nutritional supply for cattle and that several decades of revegetation would be required before it could be determined whether the reclamation could successfully withstand climatic fluctuations. Note, 4 ENVR. RPTR. 94 (1973).

50. Melvin S. Morris of the University of Montana's School of Forestry said that adequate reclamation of strip mined land was possible in Montana. Morris called for an approach to reclamation as an integral part of the mining process including stockpiling top soil, sorting overburden, and shaping the new surface to minimize runoff and erosion. He called for revegetation with native and foreign species that emphasize diversity. *Id.* at 94.

Research is being performed at the Montana State University Agricultural Research Station to determine the short and long-term hydrologic effects of surface coal mining and mine reclamation on dry lands. A search for plants which will grow well on strip mined overburden in arid areas is also under way there. For a summary of federally funded programs dealing with surface-mined lands, *see* SECOND ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR UNDER THE MINING AND MINERALS POLICY ACT OF 1970. MINING AND MINERALS POLICY, 1973 (appendices VI-2 to VI-10).

51. In 1971 grading costs alone ranged from 1¼ cents per ton to 43 cents per ton (over $1,000 per acre) in reclamation of coal mined lands. Comment, *Mined Land Reclamation in the Western States—A Brief Look*, 4 NATURAL RESOURCES LAW. 545, 551 (1971). Estimates of reclamation costs under pending federal legislation H.R. 4863 have ranged from 56 cents per ton to over $1 per ton. *See* 4 ENV. RPTR. 93, 94 (May 18, 1973). The concern over cost per ton figures for reclamation should be considered by consumer groups as well as environmentalists since reclamation costs will be considered a cost of production and will be reflected in the price which the consumer pays for the coal or for its derivatives. Reitze, *supra* note 1, at 716.

52. For an industry statement of a successful project, *see* J. Rulli, *Reclamation at Big Horn Mine*, 57 AMERICAN MINING CONGRESS JOURNAL 41 (June 1971). *See also* T. GWYNN, KNIFE RIVER COAL MINING CO., RECLAIMING STRIP-MINED LAND BY ESTABLISHING GAME MANAGEMENT AREAS 1 (1966).

53. *See supra* note 38.

54. APPENDIX MINES AND MINERALS POLICY 1973, *supra* note 49, at VI-2.

clearinghouse for information relating to reclamation of surface-mined lands for recreational purposes.[55]

A report by the Wyoming Legislative Services Agency to the Joint Mines, Minerals and Industrial Development Interim Committee in 1972 reviewed the information available concerning the reclamation records of major coal companies and concluded that:

> [E]vidence clearly exists that many recalcitrant mining operators have in the past and will continue in the future to destroy the environment unless properly controlled. It is because of these operators that some governmental bodies and environmentalists have sought to impose rigid reclamation requirements. Obviously striking a balance would be a more appropriate objective.[56]

III. STRIP MINING LAWS: HISTORY

A. *Wyoming*

Coal has been mined in Wyoming since the middle of the nineteenth century. Since most early production was from underground mines,[57] reclamation of surface mining areas is a problem of recent origin. 1967 was the first year in which surface mining production exceeded production from underground mines.[58] In apparent response to increasing production of coal, uranium, and bentonite, the legislature passed the Open Cut Land Reclamation Act of 1969.[59] This act required operators to obtain a permit and post a bond equal to the estimated cost of reclamation. Provision of a reclamation plan by the operator was optional under this act.[60]

55. The Bureau is establishing a Reclamation Information Center to collect data on the extent of surface mining and associated land disturbance, rehabilitation and restoration practices, costs, successes, failures and potential uses for mined lands. Pertinent reclamation for recreation data should be sent to: Director, Bureau of Outdoor Recreation, Dept. of Interior, Washington, D.C. 20240. 4 ENVR. RPTR. 689 (August 17, 1973).
56. INTERIM REPORT TO THE MINES, MINERALS AND INDUSTRIAL DEVELOPMENT COMMITTEE BY GERALD FOX, LEGISLATIVE SERVICES AGENCY, 1 (March 1972).
57. RESERVES OF WYO., *supra* note 15, at 7.
58. *Id.* at 7.
59. Ch. 192, § 1 to 14, [1969] WYO. SESS. LAWS 393. For a discussion of the provisions of the 1969 Act, *see* Comment, *Regulation of Open Cut Mining in Wyoming*, 5 LAND & WATER L. REV. 449 (1970). *See also infra* note 77. The trend toward increasing state participation in regulating the development of their resources is discussed in Carver, *The Trend Toward State Protectionism in Natural Resource Management*, 18 ROCKY MT. MIN. L. INST. 253 (1973).
60. Ch. 192, § 4, [1969] WYO. SESS. LAWS 394.

The 1969 act was criticized for its vague and inadequate reclamation standards.[61] Operators were required where practical to make a reasonable effort to encourage the revegetation of distubed lands.[62] The primary reclamation provisions were found in the rules and regulations issued by the administrator. The 1969 act made no provision for reclamation of abandoned and unreclaimed lands. The 1973 act also failed to deal with this problem.[63]

B. *Other Western States*

The states of the Northern Great Plains[64] and of the Rocky Mountain province[65] contain 90% of the strippable low sulphur reserves in the United States.[66] Most of these states have also recently revised their mined land reclamation laws[67] in anticipation of the substantial strip mining that will likely occur throughout the region.[68] Arizona and Utah have no law specifically providing for the reclamation of strip-mined lands.

The Montana legislature required a return to "useful production" of mined lands in the Montana Strip Mining

61. *Regulation of Open Cut Mining in Wyoming*, *supra* note 59, at 450. The Act was criticized because it required only that peaks and ridges be reduced to a "rolling topography." The 1969 Act was characterized by the Sierra Club as 'permissive in the extreme." R. AUSTIN AND P. BORRELLI, *supra* note 29, at 90.
62. Ch. 192, § 6, [1969] WYO. SESS. LAWS 396.
63. The administrator may order a forfeiture of an operator's bond and use it to reclaim the lands which were bonded under the Act. WYO. STAT. § 35-502.22 (a) (iii) (Supp. 1973). In Wyoming, 17,941 acres of land have been utilized or occupied by mineral and solid fuel waste of all types while 4,885 have been reclaimed. Coal mining activities disturbed 3,936 acres through 1971 and have reclaimed 1,143 acres. WYOMING OPEN CUT MINING ADMINISTRATOR'S ANNUAL REPORT, SURFACE MINING, MINERALS RELATED WASTE AND LAND RECLAMATION FOR 1971 2 (1972). Sixty-eight per cent of the reclaimed coal land predates Wyoming's Reclamation Act which, like the 1973 Act, has no retroactive clause. The value of these disturbed lands prior to mining ranged from $3 to $50 per acre. Glass estimates basic reclamation costs of grading, minimal seed bed preparation, and seeding would average at least $200 per acre in Wyoming. Glass, *supra* note 4, at 204. Based on these figures, the cost of reclaiming all orphan surface-mined lands in Wyoming would be roughly $3.5 million. This figure may be high, however, since many areas are presently used as community landfill sites.
An additional $.05 per ton tax on Wyoming's 10.9-million ton 1972 coal production would have raised over $500,000 toward meeting the cost of reclaiming lands previously disturbed by all types of mining.
64. Montana, Wyoming, North and South Dakota, STRIPPABLE U.S. RESERVES, *supra* note 14, at 10.
65. Colorado, Utah, Arizona, New Mexico and Idaho. *Id.*
66. These two regions contain 24,691 of the 27,376 billion tons in the continental U.S. *Id.* at 19.
67. *See generally id.*
68. A summary of the laws as of 1971 appears at *id.*, Appendix B. A more recent chart comparing the laws is attached to this article in Appendix A.

Reclamation Act of 1967.[69] In 1969 the legislature added a more environmentally-oriented statement of policy[70] and generally strengthened the act. The law was amended again in 1973; the system whereby the operator contracted with the state to reclaim his mined lands was abolished in favor of a surety bonding system.[71] The 1973 law also gives any resident of the state who knows a provision of the act is not being enforced standing to sue in mandamus.[72] If, after receipt of notice of the failure to perform, the official or employee does not enforce within a reasonable time the requirements of the act or regulations issued under it, then any Montana resident may bring the mandamus action in the appropriate district court.[73]

North Dakota added a prohibition against mining unreclaimable land,[74] authorizing the state to use forfeited bonds and the proceeds from fines levied under the Act to reclaim orphaned lands.[75] The operator's duties were clarified by inserting specific standards for restoration of slopes, re-use of topsoil and for recontouring spoil banks in the statutes.[76]

The South Dakota legislature enacted a surface mining land reclamation law in 1971; its provision are basically similar to Wyoming's present law. An approved reclamation plan and a performance bond are required before mining can begin.[77]

Colorado's Open Cut Land Reclamation Act of 1969 is of the same genre as Wyoming's 1969 Act. Both were patterned after an early Oklahoma law.[78] An intended land use plan is required but the posting of a bond is discretionary with the

69. MONT. REV. CODE § 50-1001 to -1004 (1967).
70. MONT. REV. CODE § 50-1005 (1967). *See* Comment, *Strip-Mining Reclamation Requirements in Montana—A Critique*, 32 MONT. L. REV. 65, 72 (1971).
71. MONT. REV. CODE § 50-1041 (1973).
72. MONT. REV. CODE § 50-1055 (1973).
73. There is no mandamus provision in the 1973 Wyoming Act. An interested party may demand an administrative investigation by filing a written complaint under Article 7, WYO. STAT. § 35-502.46 (Supp. 1973). The Wyoming general law on mandamus may be sufficiently broad to provide relief. *See* notes 210-213 *infra*.
74. N.D. CENT. CODE § 38-14-05.1 (Supp. 1973).
75. N.D. CENT. CODE § 38-14-08 (Supp. 1973).
76. N.D. CENT. CODE § 38-14-05 (Supp. 1973).
77. S.D. COMP. LAWS § 45-6A-7 (Supp. 1973).
78. *See* OKLA. STAT. ANN. TIT. 45 §§ 701-13 (Supp. 1967). *Regulation of Open Cut Mining in Wyoming*, *supra* note 59, at 450.

administrator.[79] For a full comparison of these laws see the chart which accompanies this article in Appendix A.

IV. ARTICLE 4. LAND QUALITY

A. *Purpose and Policy*

The general provisions of Article 1 list potential environmental harms which the E.Q.A. seeks to minimize or avoid.[80] The legislature intended to both preserve and enhance the quality of the state's resources by planning their development, use and reclamation. In the general compliance section of Article 4, the E.Q.A. states that while reclamation is performed in the public interest it constitutes an expense to the operator.[81] The primary responsibility for developing a feasible reclamation plan falls on the operator.[82] Though it must be approved by the State Department of Environmental Quality, the reclamation plan should be consistent with the orderly and economic development of the mining property.[83] The performance bond and inspection requirements are intended to insure that the land is reclaimed to its highest prior use[84] in compliance with the approved plan, whether by the operator, according to the reclamation plan, or by the state through the use of a forfeited bond if the operator fails to comply with the provisions of the E.Q.A.

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79. COLO. REV. STAT. § 92-3-1 et seq. (Supp. 1973). The Colorado law was praised by industry spokesmen because it depends on "the initiative of the operator guided by flexible requirements." Comment, *Mined-Land Reclamation in the Western States—A Brief Look*, 4 NATURAL RESOURCES LAW 545, 550 (1971).

80. WYO. STAT. § 35.502.2 (Supp. 1973). "[P]ollution of the air, water and land of this state will imperil public health and welfare, create public or private nuisances, be harmful to wildlife, fish and aquatic life, and impair domestic, agricultural, industrial, recreational and other beneficial uses . . . ."

81. WYO. STAT. § 35-502.20 (Supp. 1973).

82. WYO. STAT. § 35-502.24 (Supp. 1973).

83. WYO. STAT. § 35-502.21 (Supp. 1973).

> ESTABLISMENT OF STANDARDS—
>
> (a) The council shall, upon recommendation by the advisory board, establish rules and regulations pursuant to the following reclamation standards for the affected areas, including but not limited to:
>
> * * *
>
> (iii) A time schedule encouraging the earliest possible reclamation program consistent with the orderly and economic development of the mining property.

84. The "highest prior use" language will require a definition in the rules and regulations, which had been issued as of press time, some five months after the law became effective on July 1, 1973.

B. *Administrative Structure*

Article 4 of the E.Q.A. is administered by the Land Quality Division of the State Department of Environmental Quality.[85] The administrator reports to the Director of the Department[86] and to the Environmental Quality Council.[87] The Land Quality Division administrator is directed to work with an advisory board appointed by the Governor[88] to develop comprehensive programs to deal with environmental problems,[89] recommend rules and regulations for promulgation by the Council,[90] and submit an annual written report to the Governor.[91] The five member advisory board consists of two members representing the "public interest," one member representing industry, one member representing agriculture and one member representing political subdivisions. Not more than three members of the board may be from the same political party.[92]

The administrator of the Land Quality Division[93] possesses broad power to administer and enforce the Act. He is primarily responsible for the permit and licensing process,[94] for setting bond levels,[95] and for interpreting and applying the Rules and Regulations.[96] He may also retain qualified experts for advice on reclamation techniques and the adoption

85. WYO. STAT. § 35-50.4 - 502.7(d) (Supp. 1973). The land quality division is the successor to the powers, duties, regulatory authority and functions of the open pit land reclamation section of the office of the commissioner of public lands and the department is the successor to the sanitary engineering service branch of the division of health and medical services, which sections and branches are abolished as of the effective date of this act.
86. Robert Sundin, Dept. of Environmental Quality, State Office Building, Cheyenne, Wyoming 82001.
87. WYO. STAT. § 35-502.11 and .12 (Supp. 1973).
88. WYO. STAT. § 35-502.13 (Supp. 1973).
89. WYO. STAT. § 35-502.14(a) (Supp. 1973).
90. WYO. STAT. § 35-502.14(b) (Supp. 1973).
91. WYO. STAT. § 35-502.14(c) (Supp. 1973).
92. WYO. STAT. § 35-502.13(a), .13(b) (Supp. 1973). The Governor initially appoints one member for a six year term, two members for four year terms and two members for two year terms. Thereafter all appointments are for four years. The Governor fills vacancies by appointment.
93. As of October 1, 1973, there were 168 permits outstanding under the Open Cut Land Reclamation Act of 1969 which have not been renewed as required under .20(b). This is due to the fact that the Governor had not appointed a Land Quality advisory board. Section .20(b) of the Act provides a one year period for renewing these permits; the Environmental Quality Council may extend the period if the Land Quality administrator is unable to review the outstanding permits in the one year period.
94. WYO. STAT. § 35-502.22(a)(iv) and 10 (a)(ii) (Supp. 1973).
95. WYO. STAT. § 35-502.22(a)(ii) and .10(a)(ii) (Supp. 1973).
96. WYO. STAT. § 35-502.10(a)(viii) and (ix) (Supp. 1973). These sections require consultation with the advisory board and the director.
97. WYO. STAT. § 35-502.22(a)(i) (Supp. 1973).

of rules.[97] The administrator's decisions may be appealed to the Environmental Quality Council.[98]

C. *Standards*

Article 4 does not contain specific reclamation provisions; it does contain general standards[99] against which the specific performance requirements contained in the rules and regulations, such as slope bans and minimum vegetative cover,[100] may be tested.[101] The broad guidelines are intended to provide guidance for the administrators of the Act and to provide latitude to adapt the law to the peculiar circumstances of each proposed operation.[102] In drafting the rules and regulations, the Director, the Council, the Administrator and the Land Quality Advisory Board are to consider the potential for adverse environmental impact,[103] the highest previous use[104] of the affected lands,[105] the earliest possible reclamation timetable consistent with the orderly and economic development of mining property,[106] and the stockpiling and re-use of topsoil if possible.[107]

The legislature added special provisions for operations presently being conducted with permits issued under the Open Cut Land Reclamation Act of 1969.[108] Their application pro-

98. WYO. STAT. § 35-502.12(a)(iii) (Supp. 1973).
99. *See* Morris, *Environmental Statutes: The Need for Reviewable Standards*, 2 ENV. LAW 75 (1971).
100. It has been suggested by John R. Quarles, Acting Deputy Administrator of the Environmental Protection Agency, that "[p]recise statutory performance requirements such as slope bans and minimum vegetative cover are not necessary in strip mining legislation." Such requirements could hamper the effectiveness of a mining program in adjusting to new systems and technologies that would further reduce environmental damages associated with mining. Quarles, 4 ENVR. RPTR. 93 (May 18, 1973).
101. WYO. STAT. § 35-502.21 (Supp. 1973).
102. Representative Warren Morton, Chairman of the Wyoming House of Representatives Mines, Minerals and Industrial Development Committee. Personal correspondence, October 8, 1973.
103. WYO. STAT. § 35-502.20(e)(iii) (Supp. 1973).
104. WYO. STAT. § 35-502.21(a)(i) (Supp. 1973).
105. WYO. STAT. § 35-502.21 (Supp. 1973).
106. WYO. STAT. § 35-502.21(a)(iii) (Supp. 1973).
107. WYO. STAT. § 35-502.21(a)(v) (Supp. 1973). The relevant text is from Sections 35-502.21(a)(k) through (vi).
108. WYO. STAT. § 35-502.20(c) (Supp. 1973) provides that

> [A]n operator presently operating under a permit issued by the State land commissioner in accordance and in full compliance with the Open Cut Land Reclamation Act of 1969 will be issued a pemit upon submission to the administrator of:
>
> (i) The information, maps and other exhibits required by this act; and
>
> (ii) A reclamation plan which fulfills to the board's satisfaction all of the requirements of this Act.

cedure is simplified[109] and the fact that they are already operating is to be considered.[110]

The rules and regulations promulgated under the 1969 Act remain in effect until superseded by new ones.[111]

D. *Lands Included Under the Act*

There are two categories of land which are exempt from coverage under the Act. Federal lands[112] over which the United States has exercised its power of federal pre-emption are not subject to state regulation.[113] Indian tribal lands are the primary example of federal pre-emption.[114] Other federal lands are subject to a wide variety of federal regulations,[115] but since the requirements are mutually acceptable, the state of Wyoming regulates reclamation activity on federal lands, with one minor exception.[116] The federal government retains

109. WYO. STAT. § 35-502.20(d) (Supp. 1973).

110. WYO. STAT. § 35-502.21(a)(vii) (Supp. 1973).

111. WYO. STAT. § 35-502.6(b) (Supp. 1973).

112. The federal government owns 40% of the surface lands and approximately 72% of the mineral rights in Wyoming. Exploration rules for federal lands are found in Title 43 of the Code of Federal Regulations. Glass, *supra* note 4, at 207.

113. The mere fact that the federal government has the authority to regulate an area does not foreclose the possibility of state regulation so long as the federal government does not preempt the field. In Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 (1963), the Supreme Court said that state statutes "must be upheld unless there is found such actual conflict between the two schemes of regulation that both cannot stand in the same area, or evidence of a Congressional design to preempt the field." *See* Minnesota Rate Cases, 230 U.S. 352 (1913), and Warren Trading Post Co. v. Arizona Tax Commission, 380 685 (1965). *See also* Berger & Mounce, *The Applicability of State Conservation and Other Laws to Indian and Public Land*, 16 ROCKY MT. MIN. L. INST. 347, 349 (1971).

114. The Shoshone Indian Tribe and Arapahoe Indian Tribe v. Wyoming and Gulf Oil Co., Nov. 7, 1969, Docket #5367, unreported decision in U.S. D.C. Wyoming is discussed in Berger & Mounce, *supra* note 113, at 379. The case held that a Wyoming regulatory agency, the State Oil and Gas Commission, has no jurisdiction over wells located on Indian property. *See* Berger & Mounce, *supra* note 113, at 349 n.2, for a full discussion of the case.

Federal regulations concerning mining on Indian land are found at 25 C.F.R. § 177 (1972) or 35 Fed. Reg. (1969). There are no coal mines presently operating on Indian land. Glass, *supra* note 4, at 201.

115. Dietrich, *Mined Land Reclamation in Western States*, 16 ROCKY MT. MIN. L. INST. 143, 191 (1971). The basic federal regulations are found at 34 Fed. Reg. 852 (1969), and are also cited at 43 C.F.R. § 23.2 (1972). *See also* 30 U.S.C. § 181-287, § 351-359, § 601 to § 604 (1964) and 23 U.S.C. § 317 (1964). 4 ENV. RPTR. 77, 78 (March6, 1973). *See also* Ferguson & Haggard, *Regulation of Mining Law Activities in the National Forests*, 8 LAND & WATER L. REV. 391 (1973).

116. One strip mine was exempted by the state under the 1969 Act because it is totally on public land and it is only a temporary mining method for the company. The U.S.G.S. inspects that mine and also periodically checks all other operations that affect public land. Glass, *supra* note 4, at 202.

the power to impose stricter controls on its lands.[117] There is some indication that obtaining approval for access over public lands will be a troublesome process for operators who must traverse federal lands to reach their mines, but that topic is beyond the scope of this comment.[118]

The Wyoming E.Q.A. contains two exclusionary provisions. The first category of excluded activities is composed of minor surface disturbances, such as excavations, extraction of sand, gravel or dirt by a landowner for his own non-commercial use, excavations for buildings and excavations by government agencies for public projects which are regulated by other agencies.[119]

In addition, the E.Q.A. creates two groups of operators who are exempt from the provisions of the E.Q.A. Since the effective date of the 1969 Act[120] was July 1, 1969, any operator who completed or substantially completed[121] mining prior to that date is not subject to regulation under either Act. Second, an operator who was included under the 1969 Act but who substantially completed his mine before July 1, 1973, is exempt from regulation under the 1973 E.Q.A.

E. *Permit Application*[122]

To conduct a mining operation in Wyoming, an "opera-

117. Utah Power and Light Co. v. United States, 243 U.S. 389 (1917). *See also* Olsen, *Surface Reclamation Regulations on Federal and Indian Mineral Leases and Permits*, 17 ROCKY MT. MIN. L. INST. 149, 160 (1972).
One should note that Congress is presently considering laws to increase federal participation in regulation of surface mining reclamation. Both the House and Senate Interior Committees are preparing legislation. 4 ENV. RPTR. 592, 593 (August 10, 1973). *See* HOUSE INTERIOR MINING AND ENVIRONMENT SUBCOMMITTEE PRINT #3 and S. 425 for this session.

118. *See* Lonergan, *Access to Intermingled Mineral Deposit Mining Claims and Private Lands Across Surrounding Public Domain and National Forest Lands*, 8 LAND & WATER L. REV. 125 (1973); Due, *Access over Public Lands*, 17 ROCKY MT. MIN L. INST. 171 (1972); and Biddle, *Access Rights over Public Lands Granted by the 1866 Mining Law and Recent Regulations*, 18 ROCKY MT. MIN. L. INST. 415 (1973).
Lonergan, *id.* at 139 discusses the requirement of a § 102 N.E.P.A. environmental impact statement for this type of use of federal land.

119. WYO. STAT. § 35-502.20(d) (Supp. 1973).

120. WYO. STAT. § 30-96.4(a) (Supp. 1969).

121. This language was criticized for its ambiguity in *Regulation of Open Cut Mining in Wyoming*, *supra* note 59, at 451.

122. Application forms and further information concerning the detailed application procedures are available from the administrator of the Land Quality Division.

tor"[123] must obtain both a "mining permit"[124] and a "license to mine for minerals."[125] The issuance of a permit, which is amendable[126] and transferable[127] certifies that the operator has:

1. Complied with the extensive application requirements of Section 24(a).[128]
2. Submitted an acceptable plan for public inspection with the county clerk of the affected counties.[129]
3. Published notice of his application in a local newspaper of general circulation.[130]
4. Submitted an acceptable plan for reclaiming the land.[131]

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123. WYO. STAT. § 35-502.3(e) (ix) (Supp. 1973) defines *"operator"* as: "any person, . . ., engaged in mining, either as a principal who is or becomes the owner of minerals as a result of mining, or who acts as an agent or independent contractor on behalf of such principal in the conduct of mining operations . . . ." WYO. STAT. § 35-502.23 (Supp. 1973):
> A mining permit is the certification that the tract of land described therein may be mined by an operator licensed to do so in conformance with an approved reclamation plan. No mining may be commenced or conducted on land for which there is not in effect a valid mining permit to which the operator possesses the rights. A mining permit once granted remains valid and in force from the date of its issuance until the termination of all mining and reclamation operations, except as otherwise provided in this Act.

124. WYO. STAT. § 35-502.3(e)(xi) (Supp. 1973):
> *"Mining permit"* means certification by the director that the affected land described therein may be mined for minerals by a licensed operator in compliance with an approved reclamation plan. No mining may be commenced or conducted on land for which there is not in effect a valid mining permit. A mining permit shall remain valid and in force from the date of its issuance until the termination of all mining and reclamation operations, except as otherwise provided in this Act .

125. WYO. STAT. § 35-502.3(e)(xiii) (Supp. 1973):
> "A license to mine for minerals" means the certification from the administrator that the licensee has the right to conduct mining operations on the subject lands in compliance with this Act; for which a valid permit exists; that he has deposited a bond conditioned on his faithful fulfillment of the requirements thereof; and that upon investigation the administrator had determined that the licensed mining operation is within the purpose of this Act.

126. WYO. STAT. § 35-502.24(a)(xii) (Supp. 1973):
> (a) Applications for a mining permit shall be made in writing to the administrator and shall contain . . . (xii) A minimum fee of $100 plus $10 for each acre in the requested permit but the maximum fee for any single permit shall not exceed $2,000.00. The permit is amendable without public notice or hearing if the area sought to be included by amendment does not exceed 20% of the total permit acreage, is contiguous to the permit area, and if the operator includes all of the information necessary in his application to amend that is required in this section including a mining and reclamation plan acceptable to the administrator. The fee for a permit amendment shall be $200 plus $10 for each acre not to exceed $2,000.00.

127. WYO. STAT. § 35-502.25 (Supp. 1973).
128. *See* note 132 *infra*.
129. WYO. STAT. § 35-502.24(d) (Supp. 1973).
130. WYO. STAT. § 35-502.24(e) (Supp. 1973).
131. WYO. STAT. § 35-502.24(b) (Supp. 1973).

5. Mailed a copy of the notice to all surface owners of land within the permit area and to those within one-half mile of the proposed permit area.[132]

6. Attached proof of the notice and mailing to the permit application form.[133]

7. Obtained either an instrument of consent from the surface landowner or an order from the Environmental Quality Council in lieu of the surface owner's consent,[134] and paid the minimum permit fee of $100.00 plus $10.00 per acre.[135]

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132. WYO. STAT. § 35-502.3(e)(vii) (Supp. 1973).
133. WYO. STAT. § 35-502.24(e) (Supp. 1973).
134. WYO. STAT. § 35-502.24(b)(x) (Supp. 1973). This section of the Act requires an operator to obtain either the surface owner's written consent to mine or an in lieu order from the Council. This provision taken at face value does not raise serious constitutional questions. Section .24(b)(x)(c) provides, however, that the Council may issue the in lieu order only if the mineral estate owner's use does not "substantially prohibit the operations of the surface owner." This requirement is arguably unconstitutional in that the mineral owner who bargained for and obtained a mineral estate will be denied by state action the right to mine his coal. This could be held to constitute a taking in derogation of an existing contract and without just compensation. Article 1, § 33 of the Wyoming Constitution provides that, "Private property shall not be taken or damaged for public use or private use without just compensation."

The question of what constitutes a taking is beyond the scope of this comment, but the reader is referred to Michelman, *Property, Fairness and Utility*, 80 HARV. L. REV. 1165 (1967), Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971), Aris Gloves, Inc. v. U.S., 420 F.2d 1386 (Ct. of Claims 1970) and Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2nd Cir. 1966).

Two trends are worthy of note. Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) suggested that any government action resulting in an excessive reduction in the value of private property was a taking. (*But see* U.S. ENVIRONMENTAL PROTECTION AGENCY, LEGAL PROBLEMS OF COAL MINE RECLAMATION 111 (1972) and Village of Euelid v. Ambler Realty Co., 272 U.S. 365 (1926)). An extension of Holmes' position is found in Sun Oil v. Whitaker, 483 S.W.2d 208 (1972), discussed in Note, 7 LAND & WATER L. REV. 175 (1973), and Patton, *Recent Changes in the Correlative Rights of Surface and Minerals Owners*, 18 ROCKY MT. MIN. L. INST. 19, 35 (1973).

The Holmes' view was unpersuasive to several courts which have avoided the taking question by focusing on the reasonable use of the land concept and on the original intent of the parties. The court in Smith v. Moore, 172 Colo. 563, 564, 474 P.2d 794, 795 (1970) held that the right to strip mine coal would not be implied unless it is clearly expressed in terms so plain as to admit of no doubt. Other cases concerning strip mining have restricted the owner of the mineral estate from damaging or destroying the surface estate. *See* Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970); Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971); and West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947). Patton concluded, "Absent a contrary intention affirmatively and fairly expressed in the instrument severing the mineral estate, a court will not permit the owner of unspecified minerals to engage in strip-mining or other operations which substantially destroy the surface." (*Id.* at 42). If the court which considers the constitutionality of the Wyoming Act follows the philosophy which Patton sets out, then a denial of a permit under § .24(b) will be upheld as constitutional.

If, on the other hand, the court concludes, that the mineral is specifically named in the conveyance and strip mining is the only way to develop the resource, then the mining will be permitted and the provision held un-

The permit is valid for the life of the mining and reclamation operation so long as the operator complies with the terms of the Act and the rules and regulations.[136] The operator may request the local soil conservation district to provide reclamation data or research assistance for the development of his reclamation plan.[137]

In addition, if the owner of the mineral estate does not also own the surface rights, then he must obtain either a signed release from the landowner or post a surface-owner protection bond in addition to the state's reclamation bond.[138] The second bond is required to obtain a permit or license and must be provided before the operator may commence mining unless the landowner signs a consent form waiving the bond.[139] The purpose of the bond is to guarantee payment to the surface owner for damages to the surface estate, to the crops and forage, to the tangible improvements of the surface owner and for those damages resulting from the disruption of the surface owner's operation.[140] The surface owner may collect on the bond in an amount which is determined by the parties themselves, by a suit at law against the permittee, or by a suit in equity upon the bond.[141]

The E.Q.A. also provides that the surface owner who owns a valid adjudicated water right may sue for damages due to pollution, diminution or interruption of supply which results

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constitutional, at least in that particular application. The landowner consent provision of the Wyoming Act undoubtedly restricts a mineral owner's use of his property, but a finding of a mere "regulation" of his right is insufficient to void the law on constitutional ground.

Finally, whether the denial of a permit to mine under the provisions of § .24(b) is upheld or not will probably depend on the facts of the case, the severity of the injuries, the terms of the original conveyance and the more subtle demands of the energy crisis and its counterforce, the demand for environmental protection. *Id.* at 40.

135. WYO. STAT. § 35-502.24(a)(xii) (Supp. 1973). The maximum fee is $2,000.
136. WYO. STAT. § 35-502.23 (Supp. 1973).
137. WYO. STAT. § 35-502.24(c) (Supp. 1973).
138. WYO. STAT. § 35-502.33 (Supp. 1973).
139. WYO. STAT. § 35-502.33(a)(i) (Supp. 1973).
140. WYO. STAT. § 35-502.33(a)(ii) (Supp. 1973).
141. WYO. STAT. § 35-502.33(a)(ii) (Supp. 1973). The owner of the mineral estate is considered to have the dominant estate and the surface owner the sub-servient estate. Brimmer, *The Rancher's Subservient Surface Estate*, 5 LAND & WATER L. REV. 49, 52 (1970); Getty Oil Co. v. Royal, 442 S.W.2d 591 (Tex. Civ. App. 1967); and Sun Oil Company v. Whitaker, 483 S.W.2d (Tex. 1972). The contrary view is set out in Patton, *supra* note 134, at 19. This provision will encourage mineral owners to obtain the surface rights as well as the mineral rights because of the expansive range of damages which this provision imposes on them. For provisions relating to federal lands, see 30 U.S.C. § 54 (1970); *see also* Note, *Surface Damage Under a*

from surface mining.[142] Possible damage to water rights does not appeear to be bondable under Section .33(a) provisions for surface owner protection bonds. Damages resulting from pollution of a subterranean stream with a permanent, distinct, known channel are excluded from this provision.[143]

The landowner consent requirement may be subject to an attack on constitutional grounds since the owner of a mineral estate is arguably deprived of his property without just compensation. Courts appear to be divided on the question of whether the owner of a mineral estate may destroy the surface estate in the process of strip mining under color of an implied right of the dominant estate.[144]

A public hearing[145] will be held on the permit application for new permits of any interested persons file a written notice required under Section .24(e).[146] A decision on the permit application must be reached by the administrator within thirty days after the final hearing or after completion of the application. If the application is protested, then the council must reach its decision within thirty days.[147]

F. *Approval, Modification, or Denial of a Permit*

The operator's application for a mining permit may be denied if he has (1) filed an incomplete application;[148] (2) not paid the proper fee;[149] (3) proposed an operation which is contrary to the law or policy of the United States or of this state;[150] (4) proposed an operation which would "irreparably harm, destroy, or materially impair any area that has been

Federal Oil and Gas Lease, 11 WYO. L.J. 116 (1957) and Holbrook v. Continental Oil Company, 278 P.2d 798 (Wyo. 1955). Coal mining is also regulated under 30 U.S.C. § 81 (1970).

142. WYO. STAT. § 35-502.33(b) (Supp. 1973).
143. WYO. STAT. § 35-502.33(b) (Supp. 1973).
144. There is a mixed trend of decisions away from the dominance of the mineral estate. *See supra* note 146, and particularly, Patton, *supra* note 134, and Brimmer, *supra* note 141, at 59.
145. The hearing is held according to the provisions of the Wyoming Administrative Procedures Act. WYO. STAT. § 9-276.19 (Supp. 1973).
146. WYO. STAT. § 35-502.24(f) (Supp. 1973).
147. WYO. STAT. § 35-502.24(h) (Supp. 1973). If a decision has not been reached within thirty days, the applicant would probably have a cause of action in mandamus. *See* notes 210-213, *infra*. The Act makes no provision for a case which extends past the deadline.
148. WYO. STAT. § 35-502.24(g)(i) (Supp. 1973).
149. WYO. STAT. § 35-502.24(g)(ii) (Supp. 1973).
150. WYO. STAT. § 35-502.24(g)(iii) (Supp. 1973). "Any part of the proposed operation, reclamation program or the proposed future use is contrary to the law or policy of this state or the United States."

designated by the council to be of a unique and irreplaceable, historical, archeological, scenic, or natural value;"[151] (5) previously had a license or permit revoked or a bond forfeited;[152] (6) proposed an operation which would create a nuisance or endanger the public safety;[153] (7) been unable to post the required bond;[154] or (8) has a plan against which written objections have been filed by an interested person.[155]

If the administrator acts with the advice of the advisory board to deny, modify, or rule unfavorably on an operator's application, then the operator may appeal the decision to the Council.[156] The Environmental Quality Council will conduct a hearing[157] following the provisions of the Wyoming Administrative Procedures Act.[158]

G. *License Application Procedure*

An operator[159] must also obtain a license to mine after the permit is granted.[160] Using forms provided by the administrator the operator must supply his name and address,[161] a copy of the mining permit for the area,[162] the number of acres and location of the area to be affected by the mining operation during its first year of operation,[163] the estimated dates of commencement and termination of the proposed mining,[164] and a $25.00 application fee.[165] The administrator must then

151. WYO. STAT. § 35-502.24(g)(iv)-(v) (Supp. 1973).
152. WYO. STAT. § 35-502.24(g)(vi) (Supp. 1973).
153. WYO. STAT. § 35-502.24(vii)-(viii) (Supp. 1973).
154. WYO. STAT. § 35-502.24(g)(ix) (Supp. 1973).
155. WYO. STAT. § 35-502.24(g)(x) (Supp. 1973). The mere filing of a written objection would probably be insufficient grounds to deny a permit but could be cited along with other grounds for denial as an expression of public opposition to the project.
156. WYO. STAT. § 35-502.12(c)(ii) (Supp. 1973).
157. WYO. STAT. § 35-502.12(a)(ii) (Supp. 1973). The Act provides for administrative review of the administrator by the Environment Quality Council.
158. The hearing follows the provisions of the Wyoming Administrative Procedures Act, WYO. STAT. § 9-276.19 (Supp. 1973).
159. If the applicant did not also hold the original mining permit, then he must supply a written copy of the transfer by which he obtained the permit rights under Section 35-502.27(b)(ii) and a statement that he has never had a permit revoked, license revoked or bond forfeited for an intentional and substantial violation of the provisions of the Act.
160. WYO. STAT. § 35-502.27(a) (Supp. 1973). Note that Section 35-502.27(b)(ii) requires a copy of the permit to accompany the license application.
161. WYO. STAT. § 35-502.27(b)(i) (Supp. 1973).
162. WYO. STAT. § 35-502.37(b)(ii) (Supp. 1973).
163. WYO. STAT. § 35-502.27(b)(iv) (Supp. 1973). These provisions apply if that area is less than the full permit area.
164. WYO. STAT. § 35-502.27(b)(v) (Supp. 1973).
165. WYO. STAT. § 35-502.27(b)(vi) (Supp. 1973).

promptly review the application.[166] If it is consistent with the terms of the permit and the provisions of the Act then he will require the operator to post a bond[167] in an amount sufficient to insure reclamation of the lands to be disturbed during the first year of mining.[168] Upon receipt of the bond, the administrator must promptly issue the license to mine.

No provision is made in the Act for amending a license. The mining permit under which the license is granted may be amended.[169] A license may be revoked at any time if the advisory board becomes aware of the existence of any fact, reason or condition justifying such action.[170] An intentional misstatement or bad faith omission in the application which would have resulted in an original denial of the license constitutes sufficient grounds for revoking a license.[171]

A license may be suspeded by the advisory board and mining operations halted[172] for a substantial violation of the terms of the license or of the act.[173] The suspension may not be "unreasonably prolonged" and must be lifted when the violation has been corrected to the board's satisfaction.

H. *Bond Provisions*

Before he begins to mine, the operator is required to post a reclamation and performance bond[174] to assure his compli-

166. WYO. STAT. § 35-502.27(c) (Supp. 1973).
167. WYO. STAT. § 35-502.34 (Supp. 1973).
168. WYO. STAT. § 35-502.27(c) (Supp. 1973). See the discussion of the bond provisions in the text accompanying notes 174 to 195.
169. WYO. STAT. § 35-502.24(a)(xii) (Supp. 1973).
170. WYO. STAT. § 35-502.29(a)(i) (Supp. 1973). "The board shall revoke an operator's license: (i) If at any time it becomes aware of the existence of any fact, reason or condition that would have caused it to deny an application for a mining permit whether or not such condition existed at the time of said application."
171. WYO. STAT. § 35-502.29(a)(ii) (Supp. 1973).
172. WYO. STAT. § 35-502.20(a) (Supp. 1973).
173. WYO. STAT. § 35-502.29(b) (Supp. 1973).
174. WYO. STAT. § 35-502.34 (Supp. 1973). To strengthen this section a bond of cost plus 25% could be required to insure reclamation by the operator. The Act does provide that any "operator whose bond is forfeited may be denied a second permit." This provision would be ineffective if the operator had no further intention to mine in Wyoming. Even though the Act contains no specific statutory authorization, this cost-plus concept could be incorporated into the rules and regulations. Under the Act the administrator may adjust the operator's estimate; the cost to the state would be higher than the operator's cost because the state would have to bring in the equipment while the operator usually has the equipment already on the mine site. Personal interview with Homer Derrer, Acting Administrator of the Land Land Quality Division, and Strip Mining Engineer of the Open Cut Land Reclamation Act, September 1973.

ance with the requirements of the Act, the rules and regulations and, primarily, to insure that mined lands will not be left unreclaimed.[175] The amount of the bond is set by the administrator with the director's approval.[176] The bond must be sufficient to recover the cost of reclamation of lands to be affected[177] during the first year of operation. Determination of the level is based upon the operator's cost estimate which is submitted with his permit[178] and license[179] applications, and upon the administrator's own cost estimates.

The minimum bond is $10,000;[180] the Act prescribes no maximum. The amount of the bond is adjusted from year to year to remain consistent with the total size of the unreclaimed area.[181] If the operator believes the required bond is excessive he may request a hearing before the Environmental Quality Council.[182] If an interested party believes the required bond is insufficient to cover reclamation costs, then he may file a written complaint with the director under the provisions of Article 7.

The operator may tender cash, government securities or both in lieu of a bond.[183] If bond is tendered it must be signed by a corporate surety licensed to do business in Wyoming. The advisory board may also require the record mineral owner to join as principal.[184] The surety may cancel the bond only after ninety days notice to the director and after the requirements of the bond have been fulfilled.[185] If the surety's license to do business in Wyoming is cancelled, then the permit to mine will be suspended unless another surety is substituted within ninety days.[186]

175. Bonding provisions are a standard feature of western state mined land reclamation laws. *Compare* MONT. REV. CODE § 50-1039 (5) (Supp. 1973) *with* COLO. REV. STAT. § 92-13-8(1) (Supp. 1969) *and* N. MEX. STAT. § 63-34-18 (Supp. 1973).
176. WYO. STAT. § 35-502.34(c)(i) (Supp. 1973).
177. WYO. STAT. § 35-502.3(e)(xvi) (Supp. 1973).
178. WYO. STAT. § 35-502.24(b) (Supp. 1973).
179. WYO. STAT. § 35-502.27(b)(iv) (Supp. 1973).
180. WYO. STAT. § 35-502.34(c)(i) (Supp. 1973). The total bond for sand and gravel, scoria or jade mining may be less than $10,000 but must be at least $200.00 per acre.
181. WYO. STAT. § 35-502.34(e) (Supp. 1973).
182. The provisions for a hearing before the Environmental Quality Council are set out at WYO. STAT. § 35-502.12 (Supp. 1973). *See also supra* note 158.
183. WYO. STAT. § 35-502.35 (Supp. 1973).
184. WYO. STAT. § 35-502.34(b) (Supp. 1973).
185. WYO. STAT. § 35-502.36 (Supp. 1973).
186. WYO. STAT. § 35-502.37 (Supp. 1973).

Bond forfeiture proceedings are brought by the Attorney General at the formal request of the director who must obtain approval from the Council to begin proceedings.[187] After receipt of notice from the Attorney General of the possible forfeiture, the operator has thirty days to request a hearing before the Council. If no request for a hearing is tendered then the Council must order the bond forfeited.[188] If a request for a hearing is received, then within thirty days the Council must hear the operator's presentation of statements, documents or other relevant information before ruling either to withdraw the violation notice or to order the bond forfeited.[189] If the forfeited bond is inadequate to reclaim the affected lands, the Attorney General may sue to recover the full reclamation cost.[190]

The bond is the state's primary guarantee of reclamation.[191] The Act provides a two-part procedure for its release. Upon completion of the reclamation plan after mining has ceased on any affected land, the administrator may consult the advisory board and recommend a release of up to 75% of the bond on that portion of the affected land. The director must hold at least $10,000 for five years, unless the operator obtains a written release from the surface owner, and the approval of both the administrator and the director.[192] Their approval must be based on an on-site inspection by the administrator which finds that the reclamation plan has been successfully completed.[193]

When the operator believes he has successfully completed the reclamation he may request a release of the retained bond. The director must obtain the administrator's inspection report and rule on the request within sixty days. If the request is denied, the director must notify the operator of the reason for denial and recommend corrective actions. When these

187. WYO. STAT. § 35-502.38 (Supp. 1973).
188. WYO. STAT. § 35-502.38(b) (Supp. 1973).
189. WYO. STAT. § 35-502.38(c) (Supp. 1973).
190. WYO. STAT. § 35-502.39 (Supp. 1973).
191. The provisions of WYO. STAT. § 35-502.28 (Supp. 1973) requiring an annual inspection by the administrator, an annual report by the operator, and an annual adjustment of the bond are also relevant.
192. WYO. STAT. § 35-502.34(d) (Supp. 1973).
193. WYO. STAT. § 35-502.40(b) and (c) (Supp. 1973).

are completed, the director must order the state treasurer to release the bond.[194]

I. *Duties of the Operator—Annual Report*

To preserve his permit and license, the operator must comply with all requirements of the Act[195] and submit an annual report to the administrator within thirty days of the anniversary date of the permit. Generally, the report must contain information on the progress of mining and reclamation activities, deviations from the reclamation plan, a revised timetable of operations and an estimate of the number of acres to be disturbed during the next year.[196] After an on-site inspection[197] by the administrator the reclamation plan may be amended to conform to changing conditions.[198] The director must review the bond to insure that it will adequately insure reclamation of lands to be affected during the coming year.[199] A renewal of the license to mine may be refused for failure to comply with these provisions.[200] The operator must also maintain a sign at each entrance to an operation which lists his permit number, the name of his local agent, and the name, address and phone number of the operator.[201]

Section .32(b) provides that the operator must protect affected topsoil, impound or dispose of toxic wastes, follow the reclamation plan and generally prevent pollution.

V. SPECIAL LICENSE TO EXPLORE FOR MINERALS BY DOZING

Some forms of mineral exploration are conducted by stripping away surface ground cover with a bulldozer.[202] Un-

194. WYO. STAT. § 35-502.40(c) (Supp. 1973).
195. WYO. STAT. § 35-502.32(a) (Supp. 1973).
196. WYO. STAT. § 35-502.28(a)(i) to (iii) (Supp. 1973) lists the full requirements.
197. The U.S. Bureau of Mines has been experimenting with the use of satellites to monitor open pit and strip mining operations using photographs taken during the Gemini V and Apollo VI flights. These types of mines can be monitored with conventional technology if the sharpness of the imagery is sufficiently high. Possibilities also exist for semi-automated change detection processes. U.S. BUREAU OF MINES INFORMATION CIRCULAR #853, SATELLITE MONITORING OF OPEN PIT MINING OPERATIONS (1971).
198. WYO. STAT. § 35-502.28(c) and (d) (Supp. 1973).
199. WYO. STAT. § 35-502.28(d) (Supp. 1973).
200. WYO. STAT. § 35-502.28(b) (Supp. 1973).
201. WYO. STAT. § 35-502.32(b) (Supp. 1973).
202. The general mining laws of the U.S. do not regulate exploration by bulldozing. The new Wyoming Act will now require all operatiors who explor by bulldozing for minerals to obtain a license from the state and post a bond

regulated prior to 1973,[203] these activities now require state approval. If the proposed exploration covers more than forty acres in any four contiguous sixteenth sections,[204] the full provisions of the E.Q.A. apply and the operator must obtain a regular permit and license to mine. If the area affected is under 40 acres, he need only obtain a special mineral exploration license which is valid for one year.[205]

To obtain the special license, the operator must consult the rules and regulations which are available from the administrator,[206] after their promulgation by the Council. Generally, the application must include a reclamation plan and a timetable for re-countouring the land to its original topography and for re-vegetating the area disturbed.[207] The operator must post a bond in an amount adequate to cover the cost of reclamation, as determined by the administrator.[208] A $25.00 application fee is also required.[209] The administrator must inspect the site before the bond can be released.

VI. CONCLUSION

In order to insure compliance with the Environmental Quality Act of 1973, the legislature must provide generous funding for its administration. The permit, licensing and inspection procedures are complex and time-consuming. In addition, there appear to be genuine problems in insuring revegetation of disturbed areas of Wyoming's arid lands. With proper funding and initiative, the Land Division administrator could play an active role in developing answers to these problems.

The fact that the Governor did not make appointments to the advisory boards until mid-October also suggests a weakness in the Act. The absence of a mandamus provision which would permit private citizens to assist in the enforcement of the Act leaves the public's interest protected only by administrators and council members appointed by the gover-

203. WYO. STAT. § 35-502.31(h) (Supp. 1973).
204. WYO. STAT. § 35-502.31(h) (Supp. 1973).
205. The rules and regulations had not been issued as of our press deadline.
206. WYO. STAT. § 35-502.31(a) (Supp. 1973).
207. WYO. STAT. § 35-502.31(b)(i) and (ii) (Supp. 1973).
208. WYO. STAT. § 35-502.34(a) (Supp. 1973).
209. WYO. STAT. § 35-502.31(b) (Supp. 1973).

nor and robs the system of a genuine check-and-balance mechanism. Mandamus[210] may be brought by any citizen against a state oficer or employee who has failed to perform his statutory duty under the laws of the state.[211] It may be granted only in the absence of an adequate remedy at law, where the duty to perform is clear, certain and undisputable, and where it appears that it will be effectual as a remedy.[212] The enactment of regulations may be compelled by mandamus, where, as in the Act, the duty to promulgate regulations is imposed by law.[213]

Finally, one should not overlook the possibility of federal legislation to regulate or prohibit surface mining. Reclamation of surface-mined lands in the post-Appalachian period is an understandably sensitive topic with powerful lobby groups. By placing most substantive reclamation standards in the rules and regulations the Wyoming legislature intended to establish a flexible system capable of meeting minimum federal standards and thereby to retain state control over reclamation of surface-mined areas. A federal pre-emption of reclamation would void even this effort, however.

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210. WYO. STAT. § 1-877 (1945) (Supp. 1973).
Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation, board or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

211. Montana provides specific statutory authority for any resident of the state to bring a writ of mandamus against any state officer or employee who has a duty to enforce any provision of Montana's strip mining law. The resident must first bring the violation to the attention of the public officer or employee. MONT. REV. CODES ANN. § 50-1055 (Supp. 1973): Absence of specific authority in the Act does not defeat the remedy. Mandamus may be brought against any state official, including the governor. State *ex rel* Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1906). Writs of mandamus against state officials will be brought in the Wyoming Supreme Court. WYO. CONST. art. 5, § 3.

212. State *ex rel* Whitehead v. Gage, 377 P.2d 299 (Wyo. 1963); LeBeau v. State *ex rel.* White, 377 P.2d 302, 304 (Wyo. 1963).

213. In the case of Richmond Funeral Directors Association v. Groth, 202 Va. 792, 120 S.E.2d 467, 470 (1961), a city official was required by ordinance to promulgate rules and regulations relating to parking at places where funerals were held. The court pointed out that:
Under the ordinance, the respondent is vested with discretion as to what shall be contained in the rules and regulations to be promulgated by him. Since mandamus does not lie to direct the manner in which the respondent should exercise his discretion, we cannot control the contents of the rules and regulations. However, under the ordinance, the respondent has no discretion as to whether or not he shall promulgate the rules and regulations in the first instance . . . . Mandamus is proper to compel him to perform his duty, without controlling the manner in which he exercises his discretion.

In the final analysis, the success of the E.Q.A. of 1973 will depend on the administrative capability of the offices which the legislature established to enforce the Act and upon the ability, integrity and initiative of the administrators who fill them.

ROBERT E. BROWN

APPENDIX A

COMPARISON OF STATE STATUTORY REQUIREMENTS REGARDING THE REHABILITATION OF SURFACE MINED LANDS IN THE WESTERN UNITED STATES

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX. STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
Effective Date of Current Laws	7/1/69, (Amendment—7/1/69)	3/14/73	2/29/72	Jan. 1, 1970 (Amendment-7/1/73)	7/1/71	7/1/73
Title of Current Law	The Colorado Open Cut Reclamation Act of 1969	The Montana Strip Mining and Reclamation Act	Coal Surface-mining Act	Reclamation of Strip-Mined Lands	Surface Mining Land Reclamation Act	Wyoming Environmental Quality Act
	§ 92-13-1	§ 50-1034	§ 63-34-1	§ 38-14	§ 45-6A	§ 35-502.1
Minerals Subject to Regulation	coal	coal, clay, phosphate rock, uranium	coal	all minerals	all except oil & gas	any mineral
	§ 92-13-3(3)	§ 50-1034	§ 63-34-2(b)	§ 38-14-02	§ 45-6A-2(9)	§ 35-502.20(a)
Operations exempted from the law	none	10,000 cu. yds. removed	none	10 ft. overburden	1,000 tons removed exempted from permit requirements but must rehabilitate	none except 4,000T overburden removed on 2/yr which exempt from certain provisions of Statutes
	§ 50-1036(7) § 50-1403(9)			§ 38-14-04	§ 45-6A-10	§ 35-502.20F

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX. STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
Lands Protected from Mining	none	unique values; must area strip § 50-1042(2)	none	unique values or if unreclaimable § 38-14-05.1	none	unique values § 35-502.24(g)(IV)
"Affected Land" includes access road & railroads	no	yes § 50-1036(5)	no	no	roads: yes railroads: no § 45-6A-2(1)	yes no § 35-502.3(e)(XVI) [see (t)(VIII)]
Prospecting covered by the law	no	yes § 50-1041	no	no	yes	yes § 35-502.30
Bond	Determined by the Board § 92-13-8(1)	$2,000/operation, $200-$2500/ac. not less than estimated cost of state governments rehabilitating land § 50-1039(5)	Determined by Commission § 63-34-18	$500/ac. § 38-14-04 § 38-14-07	Estimated cost of rehabilitation § 45-6A-12	not $10,000 and determined to ensure rehabilitation § 35-502.34
Fines	$50-$1,000 § 92-13-13(2)	rules-$100-$1,000/day; order-$500-$5,000/day § 50-1056	$1,000/day § 63-34-19	$50-$1,000/day § 38-14-12	$1,000/day § 45-6A-31	1st offense $10,000/day 2nd offense $25,000/day willfull violation $50,000 /day § 35-502.49

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX. STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
ADMINISTRATIVE SANCTIONS						
Suspension or Cancellation of Permit	yes § 92-13-13	yes § 50-1050	yes § 63-34-17 § 63-34-20	yes § 38-14-09	yes § 45-6A-23	yes § 35-502.29
Reinstatement Possible	yes	yes	yes	no-and must cease other mining activities within the state within 30 days of forfeiture	yes	yes for suspension of "License to Mine"
	§ 92-13-8	§ 50-1050(2)	§ 63-34-17	§ 38-14-07	§ 45-6A-24	§ 35-502.29(b)
Denial of Subsequent Permits to Operate	yes § 92-13-8	repeated violations § 50-1050(2)	no	yes § 38-14-07	yes	yes § 35-502.48
MINING PERMIT REQUIREMENTS						
Permit Term	1 year	1 year	life of operator	3 years and 3 years to rehabilitate	1 year	life of project
	§ 92-13-5	§ 50-1039(1)	§ 63-34-6	§ 38-14-04	§ 45-6A-8	§ 35-502.23
Submitted to Which Agency	Land Reclamation Board § 92-13-5	State Board of Land Commissions § 50-1039(1) § 50-1030(11)	Coal Surface Mining Commission § 63-34-2(c)	Public Service Commission § 38-14-04	State Conservation Commission § 45-6A-8	Department of Environmental Quality Land Division § 35-502.24(a)

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX. STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
Information Concerning Operator's Past History Required	no	yes § 50-1039(F)(G)	no	no	no	yes § 35-502.24(a)(111)
Mining Plan Required	no	yes § 50-1044	yes § 63-34-9	no yes	§ 45-6A-7	§ 35-502.24(a) yes
Rehabilitation Plan Required	no	yes § 50-1043	yes § 63-34-9	yes § 38-14-05(8)	yes § 45-6A-17	yes § 35-502.24(b)
Intended Land Use Plan Required	yes § 92-13-6(1)(b)	yes § 50-1043	no	yes § 38-14-05(8)	no	yes § 35-502.24
Provisions for Public Remonstrance	no	yes § 50-1037 § 50-1043 § 50-1056 § 50-1057	no, (by rules and regulations-public hearing on environmental impact; public hearing on mining permit)	yes § 38-14-07 § 38-14-09 § 38-14-10	no	yes § 35-502.46
REGULATORY MEASURES						
Regulatory Agency	Land Reclamation Board § 92-13-4 § 92-13-5	Department of State Lands § 50-1036(11)	Bureau of Mines and Mineral Resources § 63-34-10	Public Service Commission § 38-14-02(12)	State Conservation Commission § 45-6A-8	Department of Environmental Quality Land Division § 35-502.5(111)
Regulations Primarily Set By:	Statute, some by agency § 92-13-11	Statute and agency	Agency (with public hearings) § 63-34-10	Statute	Agency § 45-6A-35(5) § 45-6A-26	Agency § 35-502.6

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX. STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
Provisions for Monitoring to be Performed by the Agency	no	no	no	no	no	yes § 35-502.10 (a) (VII) (c)
Reports Required from the Operator to the Agency	yes	yes	As determined by Commission	yes	yes	yes
Annual	§ 92-13-6(1) (B)	§ 50-1049	no § 63-34-13	§ 38-14-05(7)	§ 45-6A-18	§ 35-502.28
Inspection Requirements	Administrative Discretion	yes	To be set by regulation	no	no	yes, by regulation
Prior to permit approval	§ 92-13-7	§ 50-1038(5)	no § 63-34-14			§ 35-502.9(a) (V)
Annually	no	yes	no	no	no	yes § 35-502.28(c)
Report Required from Agency to the Legislature or Governor	no	no	no	no	yes § 45-6A-30	yes § 35-502.14
Monitoring	no	no	no	no	no	yes § 35-502.10(a) (VII) (c)
Specified Commencement of Rehabilitation	no	As soon as possible § 50-1046	Integral Part of mining operation § 63-34-8	no	no	Earliest possible time § 35-502.24

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX. STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
Specified Completion of Rehabilitation	no	Before machinery removed from operation site § 50-1044	Reasonable amount of time § 63-34-8	Within 3 years of expiration of permit (extendable by two years) § 38-14-05(10)	no	no
Trading and Shaping	According to proposed future land use § 92-13-6	To original contour § 50-1044(1)	Regulated by the commission § 63-34-8(a)	To original contour or rolling topography unless dedined otherwise by plan for a higher use § 38-14-05	According to approved plan § 45-6A-17	To assure at minimum, highest previous use § 35-502.21 .24
Slope Restriction of Spoils	no	To approximate contour of the land highwall 20 § 50-1044(1)	no	Final cut 35 degrees to permit traverse by farm machinery § 38-14-05(4)	no	no—to blend into surrounding terrain § 35-502.21
Drainage consideration	yes § 92-13-6(1)(d)	yes § 50-1044(1)	no	yes § 38-14-05(3)	yes § 45-6A-17	yes § 35-502.21
Aesthetic consideration	no	no	yes § 63-34-10(c)(4)	yes § 38-14-05.1	yes § 45-6A-17	yes § 35-502.21

	Colorado COLO. REV. STAT. (1969)	Montana MONT. REV. CODE (Supp. 1973)	N. Mexico N. MEX STAT. (Supp. 1973) § 63-34-1	N. Dakota N.D. CENTURY CODE (Supp. 1973)	S. Dakota S.D. COMP. LAWS (Supp. 1973)	Wyoming WYO. STAT. (Supp. 1973)
Topsoiling	no	yes § 50-1044(J)	no § 63-34-10(c)(4)	2 ft. where available if not, as much as possible § 38-14-05(2)	yes § 45-6A-17	yes, unless other types of soil are superior § 35-502.21
Burial of Toxic Materials	yes § 92-13-6(1)(e)	yes § 50-1043(2)(a)	no	no	no	yes § 35-502.24
Revegetation	no	Permanent cover, diverse cover, self-regenerating § 50-1044	no	According to rehabilitation plan—must be perrenial or annual crop specie § 38-14-05(8)(9)(10)	no	Native or superior, self-regenerating vegetation; planting on the contours § 35-502.21 § 35-502.24
Minimum Period of Time to Evidence Vegetative Stability	no	At least 5 years § 50-1047(3)	no	no	no	At least 5 years § 35-502.34

SECTION IV. SOLID WASTE MANAGEMENT[1]

There has been no comprehensive scheme of solid waste management in Wyoming. The solid waste management provisions of the Act may serve as a vehicle for the adoption of uniform and effective standards.

Prior state legislation did not deal directly with solid waste disposal sites. Air quality,[2] water quality,[3] public health and safety,[4] and nuisance[5] were the basis for state regulation. Municipalities had primary responsibility for not only collection but regulation of solid waste.[6] Ordinances that deal with land quality standards attempt to do so at the collection point.[7]

Solid waste is the only pollution source which is not directly controlled by federal standards. Only when solid waste management practices violate federal air or water quality standards do federal regulations apply. Federal efforts have been confined to the encouragement of state and local development of solid waste disposal plans[8] and to recovery of solid waste resources.[9] Matching fund grants have been used to encourage planning and development of solid waste systems.[10]

1. WYO. STAT. § 35-502.42 to .44 (Supp. 1973). These sections establish procedures for the promulgation of rules, regulations and standards concerning solid waste management.
2. WYOMING AIR QUALITY STANDARDS AND REGULATIONS, § 13 (January 22, 1972). This section, promulgated by the Air Quality Section, Division of Health and Medical Services, Wyoming Department of Health and Social Services, restricts the disposal of refuse by open burning.
3. WYO. STAT. § 35-196 (1957). By the terms of this statute, the contamination of any stream or lake in the state through the depositing of refuse matter, sawdust, or any other deleterious substance therein by any sawmill, mining operation, or industrial works, is prohibited.
4. WYO. STAT. § 35-465 (1957). This section requires the owner of dead animals to bury them or move them more than one half mile from the nearest human habitation. WYO. STAT. § 35-466 (Supp. 1973) forbids the depositing of any form of solid waste on public or private property without the consent of the owner. WYO. STAT. § 35-20 (1957) permits the State Department of Public Health to inspect cities and towns for conditions which may cause epidemic conditions.
5. WYO. STAT. § 35-462 (1957) declares that the depositing of solid waste into rivers, ditches, railroad rights of way, highways, etc, is a nuisance.
6. WYO. STAT. § 15.1-3(39) (1957). This section authorizes cities and towns to utilize vacant land for dumps. WYO. STAT. § 15.1-3(40) (1957) allows cities and towns to promulgate regulations necessary for health, safety, and welfare of the City. By the terms of WYO. STAT. § 18-286 (1957) County Commissioners may zone for dumps.
7. LARAMIE, WYO., CODE §§ 15-1 to 15-28 (1947); GREEN RIVER, WYO., ORDINANCE No. 905, §§ 1 to 11 (1971).
8. The Solid Waste Disposal Act, 42 U.S.C. §§ 3251 to 3259 (Supp. 1973).
9. Resource Recovery Act of 1970, 42 U.S.C. §§ 3252 to 3259 (Supp. 1973).
10. Wyoming was the recipient of a grant under The Solid Waste Disposal Act, of which the federal share was $14,224. This grant financed the WYOMING

Solid waste is the sum of those articles which have reduced in value to such an extent that they are discarded. These used resources are solid material from residential, commercial, industrial and agricultural sources. It includes garbage, rubbish, refuse, yard clippings, dead animals, and abandoned automobiles. Solid waste does not include any part of domestic sewage or dissolved or suspended solids in waste water.[11] Solid waste management concerns the storage, collection, and transfer as well as disposal of solid waste materials.

The volume of solid waste per capita is increasing geometrically in proportion to population. The amount of commercial and residential solid waste per person per day in 1920 in the United States was 2.75 pounds.[12] The National Solid Waste Survey, conducted in 1968, indicated that amount had risen to 5.3 pounds daily per person.[13] This amounted to a U.S. production of 250 million tons of commercial and residential solid waste in 1969, of which only 190 million tons were collected. These figures do not include 2 billion tons of agricultural wastes, 1.7 billion tons of mining wastes, and 110 million tons of industrial waste per year.[14] The smaller amounts of commercial and residential wastes constitute the largest problem as they are generated in areas of greatest population density where disposal sites are at a premium.

Wyoming's volume of per capita collected solid waste is somewhat less than the national average. Collection records of various Wyoming communities indicate that only about 3.5 pounds per person daily is collected.[15] We are blessed with vast areas of arid land suitable for proper solid waste disposal. However, many smaller Wyoming communities have an extremely low total volume of solid waste generated daily. This

1972 SOLID WASTE MANAGEMENT PLAN, a study conducted by the Department of Health and Social Services of solid waste problems and practices in Wyoming.

11. WYO. STAT. § 35-502.3 (d) (i) (Supp. 1973).
12. COUNCIL ON ENVIRONMENTAL QUALITY—THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 106 (1970).
13. R. Block, A. Muhich, A. Klee, H. Hickman, Jr., and R. Vaughan, THE NATIONAL SOLID WASTE SURVEY: AN INTERIM REPORT 12 (U.S. Department of Health, Education, and Welfare, Public Health Service, 1968).
14. THE FIRST ANNUAL REPORT, *supra* note 12, at 107.
15. WYOMING DEPARTMENT OF HEALTH AND SOCIAL SERVICES, WYOMING 1972 SOLID WASTE MANAGEMENT PLAN 1.

fact may make adoption of sophisticated methods of solid waste management difficult and appear to be economically unfeasible.

It is important that Wyoming establish effective standards for solid waste disposal prior to population growth. The responsibility for promulgating standards rests with the State Department of Environmental Quality. The land quality and water quality divisions of the Department are the successors of the powers, duties, regulatory authority and functions of the former Sanitary Engineering Services Branch of the Division of Health and Medical Services. The Department acquired no general rules and regulations concerning solid waste management from the Sanitary Engineering Services.[16] The director is designated as the coordinator for all programs within the state which deal with solid waste management and disposal. Persons or municipalities who require technical expertise or information to comply with the Act may request assistance from the director.[17] The director may promulgate guidelines and recommend procedures for the management of solid waste and for the operation of solid waste disposal sites, but only after consultation with the land advisory board.[18]

All persons[19] or municipalities[20] intending to operate a solid waste disposal site must obtain the director's approval of the site prior to its operation. Applicants are required to

16. WYO. STAT. § 35-502.7(c)(d) (Supp. 1973). The Water Quality Division is currently undertaking the practical administration of the solid waste provisions of the Act, due to the particular expertise of personnel in that division. Interview with Mr. Frank R. Harman, Sanitary Engineer, Water Quality Division, Department of Environmental Quality, Cheyenne, Wyo., Sept. 21, 1973.
17. WYO. STAT. § 35-502.42 (Supp. 1973).
18. WYO. STAT. § 35-502.44 (Supp. 1973). As of October 1, 1973, rules and regulations for solid waste management have not been promulgated pursuant to the Act.
19. WYO. STAT. § 35-502.3(a)(vi) (Supp. 1973).
    "Person" means an individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, municipality or any other political subdivision of the state, or any interstate body or any other legal entity.
20. WYO. STAT. § 35-502.3(a)(ix) (Supp. 1973).
    "Municipality" means a city, town, county, district, association, or other public body;
    County wide or regional solid waste management districts will be considered municipalities under Wyoming law. This would involve cooperation with one or more political subdivisions in the implementation of a solid waste management plan. WYO. STAT. § 9.18.7 (1971).

submit sufficient information for the director to determine the adequacy of the proposed site.[21] The director may request similar information from those presently operating disposal sites. He will discuss the adequacy of the present site with the municipality having jurisdiction. Sites found to be in violation of air or water quality standards may be required to bring their operations within permissible standards or to abandon the site and re-locate. Disposal sites found to have undesirable aspects of a non-violating character such as inconvenient access or poor aesthetic[22] site management may be studied by the director for the purpose of recommending improvements.[23]

No less than forty states and the District of Columbia have promulgated general rules, regulations, and standards for solid waste management. A majority of these rules, regu-

21. Applicants should submit information to the director in the form of plans. WYO. STAT. § 35-502.43(a) (Supp. 1973).

> The plans shall include drawings, specifications and descriptive information in sufficient detail to describe the location, local ground surface, groundwater conditions, distance to roads and all-weather accesses, distances to dwellings and other such technical data sufficient for the director to analyze the conditions relevant to the disposal site.

It is contemplated by Department officials that the approval of the director will be manifested in the form of a permit. *Supra* note 15. *See* WYO. STAT. § 35-502.47 (Supp. 1973) for a discussion of permit procedures.

22. *See* Leighty, *Aesthetics as a Basis for Legislation and Suit*, 17 WAYNE L. R. 1347 (1971). It is interesting to note that poor aesthetic site management is not mentioned with reference to required standards of operation. Poor aesthetic quality of sites will be grounds for the director to recommend improvements, but not to require them. Judicial approval of legislation which restrains property interests merely on the basis of aesthetic considerations remains uncertain. This judicial reluctance is based on a policy in favor of allowing the fullest possible beneficial use and enjoyment of real property and upon the belief that beauty is a matter of individual taste. The use of the police power as a justification for aesthetic legislation may require that "general welfare" be defined to include visual beauty.

The Ohio Supreme Court has indicated its reluctance to include aesthetics as a valid reason for exercise of the police power.

> The police power, however, is based upon public necessity. There must be an essential public need for the exercise of the power in order to justify its use. This is the reason why mere aesthetic considerations cannot justify the use of the police power. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes an aesthetic standard entirely impractical as a standard for the use restrictions upon property. City of Youngstown v. Kahn Bros. Cldg. Co., 112 Ohio St. 654, 148 N.E. 842, 844 (1925).

23. WYO. STAT. § 35-502.43(b) (Supp. 1973).

lations, and standards were promulgated pursuant to statutes which themselves contained minimum standards. The Wyoming Environmental Quality Act does not provide minimum standards or guidelines for the promulgation of pursuant rules and regulations. The wealth of legislation and regulation from neighboring states[24] and their resulting experiences should be noted by Department officials. Utilization of this knowledge should aid in the promulgation of rules and regulations which will prove to be reasonable and effective for our particular environment.

There are several practices for solid waste management which virtually every state has incorporated into their regulations. It would appear that Wyoming will also adopt these provisions. Standards for the limitation or prevention of rodent and insect vectors is an almost universal feature of state solid waste regulations. Measures that insure that air and water quality standards be maintained are as frequently required.[25]

Provisions which require the compacting and covering of solid waste vary considerably. All such provisions require that landfills be covered with a layer of inert material at reguar intervals and that layers of solid waste material not exceed a maximum depth to insure adequate compacting. Other common requirements incude adequate fencing, limitations on salvaging, and keeping of records.[26]

The lack of minimum standards for solid waste in the Act provides for flexibility. It also indicates that the effectiveness of its solid waste management provisions will depend upon the willingness of the director, administrators, and board

24. COLO. REV. STAT. ANN. §§ 36-23-1 to 36-23-16 (Supp. 1973). COLORADO REGULATIONS, SOLID WASTE DISPOSAL SITES AND FACILITIES, Colorado Department of Public Health, Feb. 16, 1972. KAN. STAT. ANN. §§ 65-3401 to 3410 (1972), KANSAS SOLID WASTE MANAGEMENT STANDARDS AND REGULATIONS, Kansas State Department of Health, Jan. 1, 1972. REV. CODE MONT. §§ 69-4001 to 4010 (1965), REGULATIONS GOVERNING THE CONTROL AND LICENSING OF REFUSE DISPOSAL AREAS, Montana State Board of Health Regulation 52-46, Feb. 11, 1966. IDAHO CODE §§ 31-4401 to 4416 (Supp. 1973). IDAHO SOLID WASTE CONTROL STANDARDS, Idaho Board of Health, Aug. 15, 1968. NORTH DAKOTA SOLID WASTE MANAGEMENT REGULATIONS, North Dakota State Department of Health Reg. No. 86, BNA 1973 ENVIRONMENT REPORTER, STATE SOLID WASTE—LAND USE ¶ 1271;0501.

25. BNA 1973 ENVIRONMENT REPORTER, STATE SOLID WASJE—LAND USE ¶¶ 1001:0001 to 1356:0201.

26. *Id.*

members to promulgate adequate rules, regulations, and standards, and see that they are enforced.

SECTION V. VARIANCES

A variance is an authorization to violate without penalty any rule, regulation, standard, or permit promulgated under the Act. Variances are designed to temper application of the Act's standards in individual cases where practical difficulties or unnecessary hardships would result from immediate application of the Act. Variances should not be thought of as exceptions to the provisions of the Act. Exceptions will not be granted. A variance should be thought of as an implementation schedule which allows the applicant a reasonable period of time to comply with the Act's provisions. Water variances will be granted under the water quality provisions of the Act[27] rather than under the general variance provisions discussed below.

A variance may be warranted in three cases. When no techniques are available to abate the pollution, a variance may be granted until such time as the technique becomes available. Such a variance may require that the grantee take substitute measures in the interim.[28] A variance may be granted when, because of complexity or cost, the implementation of necessary abatement measures must be spread over a period of time. If such a variance is granted, the grantee must follow an implementation schedule.[29] When other unreasonable hardships would be caused by the immediate application of the Act, a

27. WYO. STAT. § 35-502.19(a)(vii) (Supp. 1973).
28. WYO. STAT. § 35-502.45(b) (Supp. 1973).
    If the variance is granted on the grounds that there is no practicable means known or available for the adequate prevention, abatement or control of the pollution, or mining operation involved, it shall continue in effect only until the necessary means for prevention, abatement or control becomes known and available and subject to the taking of any substitute or alternative measures that the director may prescribe.
29. WYO. STAT. § 35-502.45(c) (Supp. 1973).
    If the variance is granted on the ground that compliance with the particular requirement from which variance is sought will necessitate the taking of measures which, because of their extent or cost must be spread over a considerable period of time, it shall be for a period not to exceed such reasonable time as, in the view of the director, is requisite for the taking of the necessary measures. A variance granted on the ground specified herein shall contain a timetable for the taking of action in an expeditious manner and shall be conditioned on adherence to such timetable.

variance may be granted. Variances issued for this reason will not be for more than one year's duration.[30]

Any person owning or in control of real or personal property affected by the Act may apply to the administrator of the appropriate division for a variance. The administrator will investigate the request, publish notice of and hold a hearing on the request. He must rule on the variance within sixty days of the hearing and obtain the approval of the director.[31] A variance may be renewed upon application, on terms and conditions and for a length of time which would be consistent with the initial granting.[32] One who believes the variance or renewal to be contrary to the provisions of the Act may file a written complaint with the director. If he qualifies as an aggrieved party,[33] he may also request a hearing before the Council. Based upon the results of the hearing and investigation, the council may affirm, modify, or rescind the variance.

Specific criteria for granting a variance have not been established. Granting of variances will quite likely turn upon the significance given the term "hardship." Variance provisions under the Act are most closely analogous to the granting of variances under zoning statutes.[34] Similar language contained in zoning statutes has not been strictly defined. Application of the provisions has been left to the sound discretion of the zoning authority.[35] Generally, zoning variances are granted only when the zoning authority finds that an unnecessary hardship would otherwise be imposed, and that:

30. WYO. STAT. § 35-502.45(d) (Supp. 1973).
    If the variance is granted on the ground that it is justified to relieve or prevent hardship of a kind other than that provided for in subsection (b) and (c) of this section, it shall be for not more than one year.
31. WYO. STAT. § 35-502.45(a) (Supp. 1973).
32. WYO. STAT. § 35-502.45(e) (Supp. 1973).
    If complaint by an aggrieved party is made to the director on account of the variance, no renewal thereof shall be granted, unless following public hearing on the complaint on due notice, the council finds that renewal is justified.
33. WYO. STAT. § 35-502.3(a)(vii) (Supp. 1973).
    "Aggrieved party" means any person named or admitted as a party or properly seeking or entitled as of right to be admitted as a party to any proceeding under this Act because of damages that person may sustain or be claiming because of his unique position in any proceeding held under this Act.
34. *See* WYO. STAT. § 15.1-89 (1957), as to cities' and towns' power to zone, and WYO. STAT. § 18-288 (1957), as to counties' power to zone.
35. Williams v. Zoning Adjustment Board, 383 P.2d 730 (Wyo. 1963).

(A) the special circumstances are peculiar to the applicant and are not the general case of this similarly situated; (B) that strict application of the law would deprive the applicant of the reasonable use of his property;[35] (C) the variance will not thwart the intent and purpose of the Act; and (D) the hardship is not self-induced.[37] Variances under the Act are implementation schedules rather than exceptions. Therefore, it is likely that unique circumstances of the applicant need not be alleged when applying for a variance.

SECTION VI. PERMITS

The issuance of permits[38] serves to regulate activities which fall within the scope of the Act and comply with applicable rules and regulations. A permit must be obtained before mining operations may be commenced. A permit becomes necessary for other operations upon promulgation of regulations requiring the issuance of a permit for the specific activity. The director[39] and the administrators[40] are empowered to issue, deny, amend, suspend, or revoke permits. Permits shall be issued upon showing by the applicant that he has complied with all relevant provisions of the Act. Applicants who have been denied permits may appeal to the council for a hearing to contest the denial.[41]

36. Financial hardship alone is usually not sufficient to constitute "hardship" for variance purposes. R. ANDERSON, AMERICAN LAW OF ZONING, Vol. 2 § 14.16. *See The Illinois Environmental Protection Act—A Comprehensive Program For Pollution Control,* 66 NORTHWESTERN L. R. 359 (1972) for a discussion of the Illinois application of the term "hardship" in environmental cases.

37. Levy v. Board of Adjustment of Arapahoe County, 149 Colo. 493, 369 P.2d 991 (1962); Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

38. WYO. STAT. § 35-502.47 (Supp. 1973).

39. WYO. STAT. § 35-502.47 (Supp. 1973).

40. WYO. STAT. § 35-502.10(a) (Supp. 1973).

> Each administrator shall have the following powers: .... (ii) To issue, deny, amend, suspend, or revoke permits and licenses and to determine the amount of bond to be posted by the operator to insure reclamation of any affected lands.

41. WYO. STAT. § 35-502.48 (Supp. 1973).

> The council shall give a public notice of such hearings. At such hearing, the director and appropriate administrator shall appear as respondent and the rules and practice and procedure adopted by the council pursuant to this Act and the Wyoming Administrative Procedure Act shall apply. The burden of proof shall be upon the petitioner. The council must take final action on any such hearing within 30 days from the date of the hearing.

See The Wyoming Administrative Procedure Act, WYO. STAT. § 9-276.19 et seq (1965).

Permits may impose conditions which limit the permitted activity. Conditions will be imposed when the permitted activity would otherwise contravene the purpose of the Act. Once a mining permit has been issued, a license must be obtained and a report filed on a yearly basis if operations are to continue. Although the Act does not provide for yearly licensing of water, air, and solid waste permits, these requirements may be imposed as a necessary condition.

SECTION VII. ENFORCEMENT

The enforcement provisions of the Act envision education and persuasion rather than immediate punishment of the violator and termination of the prohibited activity. When a violation is suspected, the appropriate administrator will investigate promptly. If it appears that a violation exists, the administrator shall, "by conference, conciliation, and persuasion, endeavor promptly to eliminate the source or cause of the violation."[42] If these tactics are unsuccessful, the director must provide the violator with written notice of the infringement. The notice may contain an order from the director to cease the violation within a reasonable time. The order becomes final thirty days after its issuance, unless the violator requests a hearing before the council, in which case the order will be stayed pending the council's final determination.[43]

Provision is made for violation which is the result of the malfunction of a pollution source and which is beyond the control of the owner or operator.[44] In such case, no punitive action will be taken provided the owner or operator advises the appropriate administrator of the circumstances and plans an acceptable corrective program.

The State Department of Environmental Quality is powerless to impose penalties or criminal sanctions. Only the Attorney General is authorized to bring action for violation of the Act or any rule, regulation or other determination made

42. WYO. STAT. § 35-502.46(a) (Supp. 1973).
43. WYO. STAT. § 35-502.46(d) (Supp. 1973). The council may affirm, rescind, or modify the director's order.
Any order issued as part of a notice or after hearing may prescribe the date or dates by which the violation shall cease and may prescribe timetables for action.
44. WYO. STAT. § 35-502.49(e) (Supp. 1973).

pursuant to it. Actions are brought in the county in which the violation occurred.[45]

The state may recover, in a civil action, a maximum penalty of $10,000 per day of violation,[46] plus the reasonable value of any fish, game, aquatic or bird life destroyed as a result of the violation.[47] Violators may be enjoined from continuing the proscribed activity.

Criminal sanctions for willful violation provide for a maximum penalty of $25,000 per day of violation and imprisonment not to exceed two years. One convicted of knowingly making false reports or statements which are required by the Act are subject to a maximum fine of $10,000 and imprisonment not to exceed six months.[48] Tampering with a required monitoring device is similarly punishable.

The Act does not provide for individual causes of action. Existing civil and criminal remedies are not altered even though the wrongful action was also a violation of the Act.[49] Those suing for damages caused by pollution must allege individual injury. Alleging only a public injury will not gain standing to sue.[50]

Mandamus[51] may be brought by any citizen against a state officer or employee who has failed to perform his statutory

45. WYO. STAT. § 35-502.49(b) (Supp. 1973).
46. WYO. CONST. art. 7, § 5 (1889). Fines and penalties shall belong to the public school fund of the respective county.
47. WYO. STAT. § 35-502.49(b) (Supp. 1973).
    Any monies so recovered shall be placed in the general fund of Wyoming, state treasurer's office.
    The application of this section may give rise to several problems. The terms, "fish, aquatic life, game or bird life" are not qualified by adjectives such as "usefull." What is the value of butterflies, toads, milkweed, suckers, or even mosquitoes? The Act gives no criteria for placing a value on these things, and hence the application of this section may give rise to huge liability. Where several polluters have contributed to the rising level of pollution in an area, the relative degree of guilt among polluters will become a difficult evidentiary question as well.
48. WYO. STAT. § 35-502.49(d) (Supp. 1973).
49. There is no general requirement that an injured party resort to procedures under the Act prior to bringing an independent action.
50. Sierra Club v. Morton, 405 U.S| 727 (1972). *See* Nettles, *Standing for Environmentalists; Sierra Club v. Morton*, 73 URBAN LAW ANNUAL 379 (1973).
51. WYO. STAT. § 1-877 (1957).
    Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation, board or person commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

duty under the Act.[52] Mandamus may only be granted in the absence of an adequate remedy at law, where the duty to perform is clear, certain, and undisputable, and where it appears that it will be effectual as a remedy.[53] The enactment of regulations may be compelled by mandamus, where, as in the Act, the duty to promulgate regulations is imposed by law.[54]

The effectiveness of any legislation depends upon adequate enforcement. In the case of environmental legislation, where individual standing may be difficult to gain, governmental enforcement becomes especially important. The environment upon which we depend may be best protected through the enforcement provisions of the Act. Both conscientious officials and a watchful citizenry will be needed if these provisions are to be effectively utilized.

J. MICHAEL MORGAN

52. Montana provides specific authority for any resident of the state to bring a writ of mandamus against any state officer or employee who has a duty to enforce any provision of Montana's strip mining law. The resident must first bring the violation to the attention of the public officer or employee. REV. CODE MONT. § 50-1055 (Supp. 1973).

> (2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of the statement to enforce the requirement or rule, the resident may bring an action of mandamus in the district court of the first judicial district of this state, in and for the County of Lewis and Clark, or in the district court of the county in which the land is located. The court, if it finds that the requirement of this act or a rule adopted under the act, is not being enforced shall order the public officer or employee, whose duty it is to enforce the requirement or rule to perform his duties. If he fails to do so, the public officer or employee shall be held in contempt of court and is subject to the penalties provided by law.

Absence of specific authority in the Act does not defeat the remedy. Mandamus may be brought against any state official, including the governor. State ex rel Irvine v. Brooks, 14 Wyo. 393, 84 P. 488 (1905). Writs of mandamus against state officials will be brought in the Wyoming Supreme Court. WYO. CONST. art. 5, § 2.

53. State ex rel Whitehead v. Gage, 377 P.2d 299 (Wyo. 1963); LeBeau v. State ex rel White, 377 P.2d 302, 304 (Wyo. 1963).

54. In the case of Richmond Funeral Directors Association v. Groth, 202 Va. 793, 120 S.E.2d 467, 470 (1961), a city official was required by ordinance to promulgate rules and regulations relating to parking at places where funerals were held. The court pointed out that:

> Under the ordinance, the respondent is vested with discretion as to what shall be contained in the rules and regulations to be promulgated by him. Since mandamus does not lie to direct the manner in which the respondent should exercise his discretion, we cannot control the contents of the rules and regulations. However, under the ordinance, the respondent has no discretion as to whether or not he shall promulgate the rules and regulations in the first instance. Mandamus is proper to compel him to perform his duty, without controlling the manner in which he exercises his discretion.

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Introduction

The National Environmental Policy Act of 1969 (NEPA)[1] was a congressional attempt to force all federal agencies to be more conscious of our surrounding environment and its protection.[2] The statute was an attempt to insure that all federal agencies will develop the appropriate environmental concern by setting forth certain measures to be implemented in carrying out the policy of the Act.[3] It directs all federal agencies to utilize a systematic, interdisciplinary approach in any planning or decision making which may have an impact on man's environment,[4] to compile a detailed statement on the environmental impact of any proposed major federal action which significantly affects the quality of the human environment,[5] and to develop alternative recommendations as to other possible uses of available resources.[6] NEPA requires that all federal agencies develop methods and procedures to insure that environmental amenities and values are given appropriate consideration in future planning and decision making,[7] that all federal agencies recognize the worldwide and long range character of environmental problems and attempt to maximize international cooperation in promoting man's environment,[8] and that all federal agencies utilize ecological information in the planning and development of resource-oriented projects.[9] Furthermore, each federal agency must assist the Council on Environmental Quality[10] and make environmental advice and information available to states,

1. 42 U.S.C. §§ 4321-4347 (1970).
2. The eighth circuit in Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 294 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972) stated: "Thus the Act requires all administrative agencies of the federal government in the process of project development and decision making to consider the environmental impact of their actions." Quoted from 115 Cong. Rec. 40416 (1969).
3. 42 U.S.C. § 4332 (1970).
4. 42 U.S.C. § 4332 (2) (A) (1970).
5. 42 U.S.C. § 4332 (2) (C) (1970).
6. 42 U.S.C. § 4332 (2) (D) (1970).
7. 42 U.S.C. § 4332 (2) (B) (1970).
8. 42 U.S.C. § 4332 (2) (E) (1970).
9. 42 U.S.C. § 4332 (2) (G) (1970).
10. 42 U.S.C. § 4332 (2) (H) (1970).

counties, municipalities, institutions, and individuals upon demand.[11]

When any federal agency contemplates any type of major federal acton, it must make the primary determination as to whether such action falls within the parameters of NEPA, and if so, then it must take appropriate action to comply with NEPA before the project can begin or continue. This decision of the administrative agency as to its compliance with NEPA is subject to judicial review upon appeal as are other types of administrative decisions.[12] The federal courts seem to be in agreement that an administrative agency's environmental impact statement may be judicially reviewed to determine if it is in compliance with the procedural requirements of NEPA;[13] however, other questions concerning the interpretation of NEPA are not so simply answered and have led to a divergence of opinion among the federal courts.

STANDING TO SUE

The recent flood of NEPA cases coming before the federal courts is due to the willingness of these courts to grant standing to sue to private citizens and environmental protection organizations.

The U.S. Supreme Court has held that in general the question of standing depends upon whether the person has shown a "personal stake in the outcome of the controversy"[14] which is sufficient to ensure that "the dispute sought to be adjudicated will be presented in adversary context and in a

11. 42 U.S.C. § 5332 (2) (F) (1970).
12. The Administrative Procedure Act, 5 U.S.C. § 701 (1970) states that actions by administrative agencies are reviewable by the courts unless specifically precluded by statute. Rusk v. Cort, 369 U.S. 367, 379-380 (1962) and Abbot Laboratories v. Gardner, 387 U.S. 136, 141 (1967) are in agreement that administrative action is exempt from judicial review only upon a showing of "clear and convincing evidence" of a contrary legislative intent. NEPA has no language indicating such intent.
13. *See* Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 8th Cir. 1972) *cert. denied*, 409 U.S. 1072 (1972); Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Conservation Council of North Carolina v. Froehlkle, 473 F.2d 664 (4th Cir. 1973). Other federal cases have held that an administrative agency's decision not to file an environmental impact statement is procedurally reviewable. *See* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Natural Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971); and Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).
14. Baker v. Carr, 369 U.S. 186, 204 (1962).

form historically reviewed as capable of judicial resolution.'"[15] However, where there is a statute which provides for judicial review of the actions of authorized public officials in a specific area, the question of standing falls under the Administrative Procedure Act.[16] Section 10 of the Act provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

In 1970, the Supreme Court held, in *Association of Data Processing Service Organizations, Inc. v. Camp*[17] and *Barlow v. Collins*,[18] that a plaintiff had standing to obtain judicial review of agency action under the APA whenever such agency's action had caused him "injury in fact, economic or otherwise," if the injury alleged was to an interest "within the zone of interests to be protected" by the statute violated. However, the interests allegedly injured in both of these respective cases were economic in nature,[19] so neither case actually gave standing to a plaintiff suing under the APA for injury of a noneconomic interest. The insertion of the statement in *Data Processing*, that standing could be had to redress an injury even if not economic in nature, may have been in recognition of a growing trend to allow such type of litigation in the federal courts.

This trend[20] ultimately culminated in the holding in

15. Flast v. Cohen, 392 U.S. 83, 101 (1968). Neither this case nor Baker v. Carr, *supra* note 14, involved NEPA, but refer only to the general requirements for standing to sue in a federal court.
16. 5 U.S.C. §§ 701-706 (1970).
17. 397 U.S. 150 (1970).
18. 397 U.S. 159 (1970).
19. In *Data Processing*, *supra* note 17, the petitioners, who provided data processing services to various business entities, challenged a ruling by the Comptroller of Currency which allowed national banks to compete with petitioner by providing data processing services to bank customers. In *Barlow*, *supra* note 18, the petitioners were tenant farmers who challenged the validity of a regulation issued by the Secretary of Agriculture concerning the legality of assignments of future crops under the Soil Conservation and Domestic Allotment Act.
20. *See* Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (interest in public health affected by the decision of the Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Officer of Communication of United Church of Christ v. Federal Communications Commission, 359 F.2d 994, 1005 (D.C. Cir. 1966) (interest of television viewers in the programming of a local station licensed by the FCC); Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 615-616 (2d Cir. 1965) (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); Reade v. Ewing, 205 F.2d 630, 631-632

Sierra Club v. Morton[21] in 1972. In this case the Sierra Club sued for an injunction to restrain federal officials from approving the construction of a ski resort in the Mineral King Valley of the Sequoia National Forest. The club claimed standing to sue on the basis that it had "a special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country . . ."[22] and that the proposed development "would destroy or otherwise affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[23] The Court held that such an injury to aesthetic and environmental well-being could indeed amount to an "injury in fact" sufficient for standing to sue under § 10 of the APA,[24] but that the Sierra Club had suffered no such injury in fact in this particular case, primarily because the Club did not allege that individualized harm had been suffered by it or its members.[25]

Finally, in *U.S. v. SCRAP,*[26] the plaintiffs sued to obtain an injunction to prevent the allowance of a 2.5% surcharge on all railroad freight rates by the Interstate Commerce Commission. SCRAP alleged that its members "used the forests, streams, mountains and other resources in the Washington Metropolitan Area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities."[27] The Supreme Court held that this alleged injury to a noneconomic interest was sufficient to give the plaintiffs standing to sue since there was an allegation of actual individualized injury to the members of SCRAP. The court stated:

> A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency ac-

(2d Cir. 1953) (interest of consumers of oleomargarine in fair labeling of product regulated by the Federal Security Administration); and Crowther v. Seaborg, 312 F. Supp. 1205, 1212 (D. Colo. 1970) (interest in health and safety of persons residing near the site of a proposed atomic blast in Colorado to recover natural gas.

21. 405 U.S. 727 (1972).
22. *Id.* at 730.
23. *Id.* at 734.
24. *Id.*
25. *Id.* at 740.
26. ____ U.S. ____, 93 S.Ct. 2405 (1973).
27. *Id.* at 2415.

tion, not that he can imagine circumstances in which he could be affected by the agency's action.[28]

There are, then, two requirements for standing to sue in a case challenging administrative agency action under NEPA. First, as stated in *Sierra Club* and *SCRAP,* there must be an allegation of an "injury in fact" to one or all of the plaintiffs or there is no standing It is now clear from the *SCRAP* decision that this interest can be economic or noneconomic, direct or remote, individual to a few or generally possessed by many, so long as an actual injury which has or will occur is alleged.

The second requirement, from the *Data Processing* and *Barlow* cases, is that the injury be to an interest within the zone of interests to be protected by the statute violated by the agency's action. This is where NEPA becomes of importance as a basis for judicial review under the APA. NEPA sets forth the guidelines and requirements against which the agency's actions are to be judged, and is the primary if not the only means available for a plaintiff to gain standing to redress noneconomic injury to the environment.[29]

REVIEWABILITY OF AGENCY DECISIONS

1. Procedural Review

The decisions of federal agencies made under NEPA are generally reviewable by the federal courts.[30] The first decision that must be made by any federal agency contemplating an action is whether the requirements of NEPA apply to the proposed action. NEPA requires that the agency file an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment."[31] The agency's decision as to whether or not it must

28. *Id.* at 2416.
29. For a preliminary study of standing under NEPA, *see* Note, *The National Environmental Policy Act's Influence on Standing, Judicial Review, and Retroactivity,* 7 LAND & WATER L. REV. 115 (1972).
30. *Supra* notes 12, 13.
31. NEPA § 102, 42 U.S.C. § 4332 (2) (C) (1970). That section requires that the environmental impact statement include the following information:
    (i) the environmental impact of the proposed action,
    (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
    (iii) alternatives to the proposed action,
    (iv) the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity, and

comply with the procedural requirements of NEPA and file an impact statement is reviewable by the courts.

In *Ely v. Velde*[32] the appellants brought suit to halt the proposed funding and construction of a penal facility in Virginia. They alleged that the Federal Law Enforcement Assistance Administration had violated the requirements of NEPA by allocating funds for the penal facility to the state of Virginia without first filing an environmental impact statement.[33] Appellees argued that the spending of federal money by a state and its officers was not a major federal action within the requirements of NEPA.[34] The fourth circuit reviewed the facts of the case and the actual physical attributes of the proposed penal facility, and came to the conclusion that this was a major federal action falling within the procedural requirements of NEPA.[35] The court then went on to say that federal agencies must follow the procedural requirements of NEPA since they are not discretionary.[36]

In *National Helium Corporation v. Morton*[37] the Secretary of the Interior terminated federal contracts for the purchase of helium without filing an environmental impact statement, apparently on the basis that such action would have no effect on the human environment. Plaintiffs alleged that this cancellation of the contracts would cause helium to be vented into the atmosphere and be lost forever and thus have an effect on the human environment.[38] The tenth circuit held that this potential rapid depletion of the country's helium resources did have environmental consequences which the Secretary should have considered in the format of an environmental impact statement.[39] The court stated:

> As we view it then the purposes of the NEPA are realized by requiring the agencies to assess environmental consequences in formulating policies, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

32. 451 F.2d 1130 (4th Cir. 1971).
33. *Id.* at 1132.
34. *Id.* at 1133.
35. *Id.* at 1133-1134.
36. *Id.* at 1138.
37. 455 F.2d 650 (10th Cir. 1971).
38. *Id.* at 653.
39. *Id.* at 656.

> by insuring that the governmental agencies shall pay heed to environmental considerations by compelling them to carry out NEPA procedures.[40]

Save Our Ten Acres v. Kreger[41] involved an action to enjoin the construction of a federal office building on a downtown site in Mobile, Alabama. The General Services Administration did not file an impact statement concerning the proposed building on the basis of its determination that the human environment would not be affected.[42] The fifth circuit remanded the case to the district court with instrucions to determine if the agency's decision was correct:

> [T]he court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality.[43]

In *Hanley v. Mitchell*[44] the General Services Administration began construction of a nine-story annex to a federal courthouse in New York City to be used as a federal jail. An environmental impact statement was not filed, and the General Services Administration argued that the proposed project did not significantly affect the human environment.[45] The GSA presented a memorandum in support of its position that the building would have no adverse effects on the environment.[46] The second circuit held that the memorandum was not sufficient to support the GSA's decision not to file an impact statement and remanded to the district court for further consideration to determine if an impact statement should be filed.[47]

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40. *Id.*
41. 472 F.2d 463 (5th Cir. 1973).
42. *Id.* at 465.
43. *Id.* at 467.
44. 460 F.2d 640 (2d Cir. 1972).
45. *Id.* at 642-644.
46. *Id.* at 645.
47. *Id.* at 648. Several other recent Circuit Courts of Appeal decisions have involved the review of an agency's threshold decision not to file an environmental impact statement. First National Bank v. Richardson, ___ F.2d ___, 5 ERC 1830 (7th Cir. 1973) upheld the General Service Administration's determination that the construction of a parking garage and detention facility in a nonresidential area of Chicago, Illinois, would not significantly affect the human environment. Rucker v. Willis, 484 F.2d 158, 5 ERC 1817 (4th Cir. 1973) upheld the Army Corps of Engineers in its determination that the granting of a permit for the construction of fishing piers and a boat

It is evident from the foregoing cases that a federal agency's threshhold determination as to whether it must comply with the procedural requirements of NEPA by filing an impact statement is unquestionably reviewable by the federal courts. If the federal agency does decide to file an impact statement at the outset of the project, then this question of reviewability does not arise. The mere filing of an impact statement by the agency does not preclude further judicial review, however. The question before the federal courts then becomes one of determining whether the statement complies with the procedural requirements of NEPA set forth in § 102 (2) (c).[48]

The purpose of the procedural requirements of § 102 is

> to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent optimally beneficial decision will ultimately be made. Moreover, by compelling a formal "detailed statement" and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial processes to evaluate and balance the factors on their own.[49]

The courts must review the agency's impact statement to see if it fulfills the five requirements of § 102 of NEPA.[50] The eighth circuit in *Environmental Defense Fund v. Corps of Engineers*[51] found that the defendant's impact statement did meet the procedural requirements and simply stated:

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basin in North Carolina was not a major federal action significantly affecting the quality of the human environment. Wyoming Outdoor Coordinating Council v. Butz, ____ F.2d ____, 5 ERC 1844 (10th Cir. 1973) reversed the Forest Service's determination that road building and logging in the Grand Teton National Forest in Wyoming was not significantly affecting the quality of the human environment. Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 5 ERC 1177 (5th Cir. 1973) upheld the determination of the Department of Housing and Urban Development that the construction of a federally funded apartment complex in Houston, Texas, would not have a significant effect on the quality of the human environment.

48. 42 U.S.C. § 4332 (2) (C) (1970). *See supra* note 31.
49. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).
50. 42 U.S.C. § 4332 (2) (C) (1970). *Supra* note 31.
51. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972).

"We have read the statement and found it to contain a full and accurate disclosure of the information required by § 102 (2) (C)."[52] In *Calvert Cliff's Coordinating Committee v. U.S. Atomic Energy Commission*,[53] the District of Columbia Circuit Court stated that Section 102 of NEPA mandates a particular sort of procedural decision making process and if the agency fails to adhere to this process, it is the reviewing court's duty to reverse.[54] In *Natural Resources Defense Council v. Morton*[55] the court stated that the impact statement must set forth the material contemplated by Congress in suitable form.[56] There seems to be no question that the federal courts can review an agency's environmental impact statement to see if it complies with the procedural requirements of NEPA set forth in Section 102 (2) (C).

At this point it is clear that federal courts can and do review administrative agencies compliance with the procedural requirements of NEPA. The courts review the agency's threshold decision as to whether or not NEPA is applicable to the proposed action, and if this question is answered affirmatively the court reviews the agency's environmental impact statement to see if it complies with the procedural requirements of NEPA set forth in Section 102.

One line of federal decisions has held that this procedural review of agency action under NEPA is all that is available to the federal courts since the requirements of NEPA are only procedural in nature.

In *Environmental Defense Fund v. Hardin*[57] the plaintiffs sued to enjoin the Secretary of Agriculture from undertaking a program of chemical extermination of fire ants in the southeastern United States.[58] The court stated:

> [I]n reviewing the Department of Agriculture program under consideration here, the Court will not substitute its judgment for that of the Secretary on the merits of the proposed program but will require

52. *Id.* at 295.
53. 449 F.2d 1109 (D.C. Cir. 1971).
54. *Id.* at 1115.
55. 458 F.2d 827 (D.C. Cir. 1972).
56. *Id.* at 836.
57. 325 F. Supp. 1401 (D.D.C. 1971).
58. *Id.* at 1402.

> that the Secretary comply with the procedural requirements of the NEPA. . . .[59]

In *National Helium Corporation v. Morton*,[60] the plaintiff sued to enjoin the Secretary of the Interior from terminating the government's contract for purchase of the helium in Kansas without filing an environmental impact statement under the requirements of NEPA.[61] The tenth circuit agreed with the district court that NEPA applied in this situation and upheld the injunction until the Secretary complied with the requirements of NEPA by filing the requisite impact statement.[62] In passing, the tenth circuit stated that the requirements of NEPA pertain only to procedure and do not undertake to control decision making within the departments.[63] This statement is pure dictum, however, since it was not a necessary part of the holding in the case.[64]

These courts hold that the true purpose of NEPA is to inform the public, other governmental agencies, the Council on Environmental Quality, the President, and Congress of the environmental effects of proposed governmental actions.[65] It is felt that this information will alert the appropriate decision makers of the potential environmental damage and that they can respond by abandoning or modifying the proposed project.[66] Under this view of NEPA, the function of a reviewing court is only to ascertain if all procedural requirements were met by the agency and not to review the agency's decision on its merits.[67]

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59. *Id.* at 1404.
60. 455 F.2d 650 (10th Cir. 1971).
61. *Id.* at 652.
62. *Id.* at 657.
63. *Id.* at 656.
64. The tenth circuit took the same position in Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971). The court stated at 1236: "The mandates of N.E.P.A. pertain to procedure and not to substance, that is, decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision. The N.E.P.A. creates no substantive rights in citizens to safe, healthful, productive and culturally pleasing surroundings." This holding was later vacated by the U.S. Supreme Court at ____ U.S. ____, 93 S.Ct. 458 (1972).
65. Sierra Club v. Froehlkle, 345 F. Supp. 440, 444 (W.D. Wis. 1972).
66. Conservation Council of North Carolina v. Foehlkle, 340 F. Supp. 222, 225 (M.D.N.C. 1972) *remanded for further consideration at* 473 F.2d 664 (4th Cir. 1973) and Environmental Defense Fund v. Corps of Engineers, 342 F. Supp. 1211, 1216-1217 (E.D. Ark. 1972) *aff'd.* at 470 F.2d 289 (8th Cir. 1972) *cert. denied*, 409 U.S. 1072 (1972).
67. The court in National Forest Preservation Group v. Butz, 343 F. Supp. 693 (D. Mont. 1972) accepted this position somewhat reluctantly at 704: "It

2. Substantive Review on the Merits

Several federal courts have gone beyond this procedural view of NEPA and have reviewed the merits of a substantive agency decision to determine if it was in compliance with NEPA. This substantive view of NEPA is best exemplified by *Environmental Defense Fund v. Corps of Engineers.*[68] The first event in a long chain of events leading up to this decision occurred when Congress passed the Flood Control Act of 1958,[69] which in part authorized the construction of seven dams in the Little River Basin in Arkansas. One of these dams was to be the Gillham Dam located on the Cossatot River to provide flood control, water supply, and water quality control for the area. Funds for construction were made available in the Public Works Appropriation Act of 1963[70] and construction began immediately. Congress continued to fund the project regularly, including a 1.5 million dollar appropriation for the fiscal year 1973.[71] In the fall of 1970, the dam was approximately two-thirds completed at a cost of 9.8 million dollars. On October 1, 1970, the plaintiffs filed a complaint in U.S. District Court, seeking an injunction to stop construction of the Gillham Dam on the grounds, *inter alia,* that the Corps of Engineers had failed to comply with requirements of the National Environmental Policy Act (NEPA)[72] by failing to file the requisite environmental impact statement.[73] The federal district court dealt with the case over a period of one and one-half years and issued six memorandum opinions.[74] In its fourth memorandum opinion,

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appears that the plaintiffs are dissatisfied with the action taken by the Forest Service and the Secretary of Agriculture. However much the court may agree with this dissatisfaction it is no basis for overturning acts of the Secretary which are committed to his discretion by statute.

68. 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972).
69. Act of July 3, 1958, Pub. L. No. 85-500, § 203, 72 Stat. 305.
70. Act of October 24, 1962, Pub. L. No. 87-880, 76 Stat. 1216.
71. Public Works for Water and Power Development and Atomic Energy Commission Appropriation Act, Pub. L. No. 92-405, 86 Stat. 621.
72. 42 U.S.C. §§ 4321-4347 (1970).
73. 42 U.S.C. § 4332 (1970).
74. 325 F. Supp. 728 (E.D. Ark. 1970).
325 F. Supp. 732 (E.D. Ark. 1970).
325 F. Supp. 737 (E.D. Ark. 1971).
325 F. Supp. 741 (E.D. Ark. 1971).
325 F. Supp. 749 (E.D. Ark. 1971).
342 F. Supp. 1211 (E.D. Ark. 1972).

the court held that NEPA was applicable not only to contemplated agency actions but also to ongoing federal projects.[75] The case was tried on its merits before the court in February 1971,[76] and the court found that the Corps of Engineers had not complied with the requirement of NEPA that a detailed statement of environmental impact must be filed.[77] The court then enjoined the Corps of Engineers from continuing construction on the dam until NEPA was complied with.[78] On January 13, 1972, the Corps of Engineers filed an environmental impact statement with the court and moved for summary judgment.[79] The court found that the impact statement was sufficiently in compliance with the NEPA requirements, granted summary judgment for the defendants and dissolved the injunction.[80]

In the course of its opinion, the court held that it could review the defendants' actions only to determine if the procedural requirments of NEPA had been complied with, and that it could not reverse or modify any good faith decision concerning the construction of the dam as long as the procedural requirements of NEPA were met.[81] Appellants appealed this final order to the Eighth Circuit Court of Appeals on the basis that the administrative determination by defendants that the dam should be constructed was reviewable by the court on the merits. The eighth circuit agreed that the courts can review administrative decisions on the merits and that

75. 325 F. Supp. 741 (E.D. Ark. 1971). The Council on Environmental Quality Guidelines, § 1500.13, 38 Fed. Reg. 20549, 20556 (1973) agrees with this holding.

> Agencies have an obligation to reassess ongoing projects and programs in order to avoid or minimize adverse environmental effects. The section 102 (2) (C) procedure shall be applied to further major federal actions having a significant effect on the environment even though they arise from projects on programs initiated prior to enactment of the Act on January 1, 1970. While the status of the work and degree of completion may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures and, if the project or program is continued, that further incremental major actions be shaped so as to enhance and restore environmental quality as well as to avoid or minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

76. 325 F. Supp. 749 (E.D. Ark. 1971).
77. 42 U.S.C. § 4332 (2) (C) (1970).
78. 325 F. Supp. 749, 763 (E.D. Ark. 1971).
79. 342 F. Supp. 1211 (E.D. Ark. 1972)
80. *Id.* at 212.
81. *Id.* at 1216-1217.

judicial review of administrative agency action is not limited solely to procedural compliance with statutory requirements.[82] The court thus upheld the contention of the defendants and held that the language of NEPA indicates that it creates substantive rights which can be subjected to judicial review.[83]

> The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking.[84] The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.[85]

The courts also referred to NEPA's legislative history in support of its decision and quoted from the report of the Senate's Committee on Interior and Insular Affairs:

> A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. But, if goals and principles are to be effective, they must be capable of being applied in action. S. 1075 thus incorporates certain 'action-forcing' provisions and procedures which are designed to assure that all federal agencies plan and work toward meeting the challenge of a better environment.[86]

In addition, Senator Henry M. Jackson, the bill's principal sponsor in the Senate, stated on the Senate floor:

> If an environmental policy is to become more than rhetoric, and if the studies and advice of any high-level advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective oriented environmental management. Concern for environmen-

82. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).
83. *Id.* at 297.
84. *Id.*
85. *Id.* at 298.
86. S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) quoted in Environmental Defense Fund v. Corps of Engineers, *supra* note 82, at 298 n. 13.

> tal quality must be made part of every phase of federal action.[87]

The eighth circuit placed great emphasis on the words "action forcing" and interpreted them to mean that NEPA sets forth substantive requirements which the agency decision must meet, above and beyond the purely procedural requirement of filing an impact statement.[88]

In holding that NEPA creates substantive duties which are subject to review on the merits by the court, the eighth circuit cites several similar holdings as precedent.

One such holding was *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission.*[89] In *Calvert Cliffs'* the petitioner argued that the procedural rules adopted by the Atomic Energy Commission to govern its consideration of environmental matters did not satisfy the requirements of NEPA.[90] The District of Columbia Circuit held that the federal courts have the power to require agencies to comply with the procedural directions of NEPA.[91] The court then went on to state that the reviewing court can reverse an agency's decision on its merits under NEPA if it is shown that "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[92] However, this statement seems to be mere dictum since the basis for the court's decision was apparently only that the Atomic Energy Commission's procedures did not comply with the procedural requirements of NEPA set forth in Section 102.[93]

The D.C. Circuit later reiterated this position in *Natural Resources Defense Council v. Morton,*[94] in which three conservation groups sued to enjoin the Secretary of the Interior from selling oil and gas leases to submerged lands off the

87. 115 CONG. REC. 29087 (1969) quoted in Environmental Defense Fund v. Corps of Engineers, *supra* note 82, at 298 n. 13. Senator Jackson also stated: "The bill directs that federal agencies conduct their activities in accordance with these goals and provides action-forcing procedures to insure that these goals and principals are observed." 115 CONG. REC. 19009 (1969).
88. 470 F.2d 289, 298 (8th Cir. 1972).
89. 449 F.2d 1109 (D.C. Cir. 1971).
90. *Id.* at 1111.
91. *Id.* at 1115.
92. *Id.*
93. 42 U.S.C. § 4332 (2) (C) (1970).
94. 458 F.2d 827, 838 (D.C. Cir. 1972).

coast of Louisiana until the requirements of NEPA were complied with.[95] However, this statement by the court again seems to be mere dictum, since the issue in the case was only whether or not the agency's impact statement was sufficient to comply with the procedural requirement of Section 102 of NEPA.[96]

The eighth circuit in *Environmental Defense Fund*[97] also refers to holdings by the second and fourth circuits in support of its decision. In *Scenic Hudson Preservation Conference v. Federal Power Commission*,[98] the second circuit reviewed the decision of the Federal Power Commission to grant a license to construct a pumped storage hydroelectric plant under the Federal Power Act,[99] but did not overturn the decision since it was based on substantial evidence.[100] The court did not question the correctness of FPC's decision on the merits under NEPA, however, but only reviewed the facts to see if the FPC had complied with the procedural directives set out in Section 102 of NEPA.[101] The court explained:

> [T]he Act does not require that a particular decision be reached but only that all factors be fully explored. The eventual decision still remains the duty of the responsible agency.[102]

In *Ely v. Velde*[103] residents of Virginia sued to enjoin the allocation of funds to the state of Virginia to construct a penal facility. The plaintiffs alleged a failure on the part of the defendants to comply with the requirement of NEPA Section 102 that an environmental impact statement be filed.[104] The fourth circuit stated:

> The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the courts

95. *Id.* at 829-830.
96. 42 U.S.C. § 4332 (2) (C) (1970).
97. 470 F.2d 289 (8th Cir. 1972), *cert denied*, 409 U.S. 1072 (1972).
98. 453 F.2d 463 (2d Cir. 1971), *cert denied*, 407 U.S. 926 (1972).
99. 16 U.S.C. § 797(e), 803(a), 825l(b), 470 f (1970).
100. 453 F.2d 463, 470 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).
101. *Id.* at 481.
102. *Id.*
103. 451 F.2d 1130 (4th Cir. 1971).
104. *Id.* at 1132.

> will not be left to guess whether the requirements of . . . NEPA have been obeyed.[105]

The requirement that the agency must actually take account of the environmental factors specified seems to imply that judicial review on the merits of the agency decision is available. However, the holding in this case was entirely procedural, *i.e.,* that the defendants had not adhered to the procedural requirement of NEPA that an impact statement be filed,[106] so the foregoing requirement must, by necessity, be dictum.

The eighth circuit in *Environmental Defense Fund*[107] ultimately places much reliance on the holding of the U.S. Supreme Court in *Citizens to Preserve Overton Park v. Volpe.*[108] In *Overton Park,* the Secretary of Transportation approved the route of a new highway to be constructed in Tennessee. Construction of the highway along this approved route would destroy 26 acres of Overton Park, and plaintiffs sued, challenging the Secretary's decision.[109] The Supreme Court remanded the case to the district court for a plenary review of the Secretary's decision.[110] This case did not involve NEPA, but was decided under other statutory language, similar to NEPA, requiring an agency to consider certain environmental factors in the decision making process.[111]

It is evident that the holding of the eighth circuit in *Environmental Defense Fund*[112] is somewhat revolutionary in that it went beyond holding a federal agency merely to the procedural requirements of NEPA and held that the agency's substantive decision to continue or abandon the proposed action can be reversed by the reviewing court even if the procedural precepts of NEPA have been complied with.[113] Since this decision was handed down, the fourth circuit has

105. *Id.* at 1138.
106. *Id.* at 1139.
107. 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972).
108. 401 U.S. 402 (1971).
109. *Id.* at 406.
110. *Id.* at 420.
111. *Id.* at 404-405. The statutes involved were the Department of Transportation Act of 1966, 49 U.S.C. § 1653 (f) (1970) and the Federal Aid Highway Act of 1966, 23 U.S.C. § 138 (1970).
112. 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 409 U.S. 1072 (1972).
113. The eighth circuit reiterated this position in Environmental Defense Fund Inc. v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972).

also accepted the substantive view of NEPA. In *Conservation Council of North Carolina v. Froehlke* the district court[114] determined that the Corps of Engineers had complied with the procedural requirements of NEPA by filing an adequate impact statement and could proceed with a proposed dam.[115] The fourth circuit[116] reversed and held that the district court also had an obligation to review the merits of a substantive agency decision to determine if it is in accord with NEPA.[117]

SCOPE OF REVIEW

When an action of a federal agency is challenged in federal court, the court must determine if the agency action is judicially reviewable, and if so, what scope of review is applicable. The common standards for review of administrative agency actions and decisions are set forth in the Administrative Procedure Act.[118] The standard of review to be applied is determined at least in part by the type of agency action being reviewed.

In judicial review of an agency's threshold decision as to whether or not NEPA is applicable and hence whether an environmental impact statement need be filed, the traditional arbitrary or capricious action test[119] is sometimes applied,[120] but more often a special standard of review is applied. In *Ely v. Velde*[121] the court stated that the agency's decision

114. 340 F. Supp. 222 (M.D.N.C. 1972) remanded with instructions at 473 F.2d 664 (4th Cir. 1973).
115. *Id.* at 228.
116. 473 F.2d 664 (4th Cir. 1973).
117. *Id.* In Sierra Club v. Froehlke, ... F.2d ....., 5 E.R.C. 1920 (7th Cir. 1973), the seventh circuit also held that the federal courts have an obligation to review an agency's substantive decision under NEPA on the merits.
118. 5 U.S.C. § 706 (1970). The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
119. Administrative Procedure Act, 5 U.S.C. § 706 (2) (A) (1970).
120. See Rucker v. Willis, 484 F.2d 158, 5 ERC 1817, 1820 (4th Cir. 1973); and First National Bank v. Richardson, ... F.2d ....., 5 ERC 1830, 1839 (7th Cir. 1973).
121. 451 F.2d 1130 (4th Cir. 1971).

could not be arbitrary or perfunctory, but that furthermore, the agency is under a heavy burden to show that there has been a genuine compliance with NEPA.[122] Other circuit courts have applied a reasonableness standard to the agency's threshold decision and require not only that the decision not be arbitrary or capricious, but that it be a reasonable decision under the circumstances of each particular case.[123]

This standard of reasonableness is also applied by some courts in the area of judicial review of an agency's environmental impact statement to determine if it complies with procedural requirements of NEPA set forth in Section 102. In *Calvert Cliffs'*[124] the court stated that an agency's procedural compliance with NEPA must be conducted fully and in good faith.[125] In *Natural Resources Defense Council v. Morton*[126] the court held that in listing alternatives in its impact statement, an agency need not discuss alternatives which were remote from reality, but that the "requirement as to alternatives is subject to a construction of reasonableness,"[127] implying that all reasonable alternatives should be listed.

The courts viewing NEPA as having created substantive rights review the ultimate decision of the agency on its merits. The court in *Calvert Cliffs'*[128] stated that in this type of judicial review, the reviewing court is to first apply the traditional arbitrary or capricious action test set forth in the Administrative Procedure Act[129] and to then determine whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[130]

In actual application this "clearly improper weight" test allows a reviewing court to reverse on the merits under

122. *Id.* at 1139.
123. *See* Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973); Hiram Clark Civic Club v. Lynn, 476 F.2d 421, 5 ERC 1177, 1179 (5th Cir. 1973); and Wyoming Outdoor Coordinating Council v. Butz, ____ F.2d ____, 5 ERC 1844, 1846, (10th Cir. 1973).
124. 449 F.2d 1109 (D.C. Cir. 1971).
125. *Id.* at 1115.
126. 458 F.2d 827 (D.C. Cir. 1972).
127. *Id.* at 837.
128. 449 F.2d 1109 (D.C. Cir. 1971).
129. 5. U.S.C. § 706 (1970).
130. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

NEPA if the court finds that the agency gave insufficient weight to environmental factors.[131] This suggests that the court could initiate a *de novo* review of the evidence and substitute its judgment for that of the administrative agency. However, few courts seem willing to go this far. In *Overton Park*,[132] the U.S. Supreme Court stated that "although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[133] In *Environmental Defense Fund*, the eighth circuit, after holding that the decision of the Army Corps of Engineers was reviewable on the merits and that the *Calvert Cliffs'* "clearly insufficient weight" test was applicable,[134] the court then went on to review and uphold the Corps of Engineers decision, apparently under the traditional "arbitrary and capricious" standard.[135] Thus it would seem that "clearly insufficient weight" test set forth in *Calvert Cliffs'* may often in actual application differ little from the more traditional "arbitrary and capricious test" set forth in the Administrative Procedure Act.[136]

ALTERNATIVE STATUTORY PROVISIONS

Although many states have enacted environmental legislation similar to NEPA,[137] a few state legislatures have tried different forms of legislation to avoid the necessity of interpretation by the courts which is common to a general NEPA-type statute.

Pennsylvania approached the problem in 1971 by amending the state's constitution to give all citizens a constitutional right to a pure environment:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic

131. City of New York v. United States, 344 F. Supp. 929, 940 (D.N.Y. 1972).
132. 401 U.S. 402 (1971).
133. *Id.* at 416.
134. 470 F.2d 289, 300 (8th Cir. 1972).
135. *Id.* at 301.
136. 5 U.S.C. § 706 (1970).
137. *See* CALIF. PUB. RES. CODES §§ 21000 to 21107 (Supp. 1973); MONT. REV. CODES ANN. §§ 69-6501 to -6517 (Supp. 1973). N.M. STAT. ANN. §§ 12-20-1 to 12-20-8 (Supp. 1973); N.C. GEN. STAT. §§ 113 A-1 to -20 (Cum Supp. 1971); WASH. REV. CODE ANN. §§ 43.21C.010 to .060 (Supp. 1972); and WIS. STAT. ANN. § 1.11(Cum. Supp. 1973).

> and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustees of these resources, the commonwealth shall conserve and maintain them for the benefit of all the people.[138]

This type of statute does not require that any agency taking action which may affect the environment must prepare an environmental impact statement or be conscious of the effect its actions may have on the surrounding environment.[139] The constitutional amendment does, however, provide another basis for enforcing environmental consciousness in all types of actions in Pennsylvania. Any action which is detrimental to the state's clean air, pure water, or natural, scenic, historic and esthetic values of the environment is a violation of any person's constitutional right to a clean and pure environment. Any person within the state has standing to sue to terminate any action detrimental to the environment and all that must be alleged is that his constitutional rights have been violated. No problem will arise as to whether the injury was economic or non-economic, since a violation of constitutional rights need not cause economic injury to be re-dressable. This amendment is clearly substantive in nature and gives the courts power to terminate any agency action which is violative of the people's right to a pure and clean environment. This eliminates the interpretation problems inherent in a NEPA-type statute as to whether it is substantive or merely procedural in nature.

The major drawback to this type of legislation is that it does not provide for the filing of an environmental impact statement before the project begins and does not specifically require that any administrative agency decision be made with due regard to the effect of the decision or proposed action on the surrounding environment. The sole remedy is to sue for an injunction after it is apparent that the action undertaken is detrimental to the environment. A pre-determination of

138. PA. CONST. art. I, § 20 (1969).
139. Any major federal action significantly affecting the quality of the human environment within the state of Pennsylvania must still comply with the requirements of NEPA, however.

potential environmental effects at the planning stage of any particular project or action is not required.

Michigan has also enacted an Environmental Protection Act,[140] which on its face eliminates many of the problems of interpretation found in a NEPA-type statute. It allows standing to sue for injury of a non-economic nature.

> The attorney general, any political subdivision of the state, any instrumentality or agency thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust herein from pollution, impairment or destruction.[141]

There is also no doubt that the Michigan statute is substantive in nature and gives the state courts the power to review agency decisions concerning environmental matters on the merits.

> In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:
>
> (a) Determine the validity, applicability and reasonableness of the standard.
>
> (b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.[142]

This specific type of statute may very possibly be easier to apply and demand less interpretation by the courts than a more general type of statute such as NEPA would require.

140. Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201 to .1207 (Cum. Supp. 1973).
141. MICH. COMP. LAWS ANN. § 691.1202 (1) (Cum. Supp. 1973).
142. MICH. COMP. LAWS ANN. § 691.1202 (2) (Cum. Supp. 1973).

The interpretation of NEPA by the federal courts has been and will continue to be no easy task due to the general language used in this statute and due to the emotional overtones implicit in any dispute over environmental values. At least two states have enacted differing types of legislation apparently intended to overcome this interpretation problem. Although their objective may have a least partially been fulfilled by the use of more explicit statutory language, it is clear that these statutes are not the ideal substitute for NEPA. The real strength of NEPA may lie in its general language and need for interpretation. Through unending interpretation of NEPA brought about by today's flood of environmental suits, the federal judiciary will hopefully be able to maintain a fine balance between the demands of a highly productive, industrialized society, on the one hand, and the conscience of a nation concerned for its environment on the other.

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with, but allowed the Sierra Club to collect attorney's fees on the basis that the suit had been brought about public consideration of the proposed project's environmental effects and had insured that adequate measures were taken to protect the area's water resources.

A REVIEW AND CRITIQUE OF WISCONSIN'S 1973 RECLAMATION ACT

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Contents

I. A Brief History of Chapter 318, Laws of 1973

Movement toward a mine reclamation law in Wisconsin was precipitated by the discovery of copper at the Flambeau deposit near Ladysmith in Rusk County in the late 1960s. That discovery, along with known iron and copper deposits in Michigan's Upper Peninsula and the experimental Black River Falls taconite operation in central Wisconsin, aroused speculation that Wisconsin was on the verge of important mining discoveries in its northern counties. Private corporations, public interest groups, and public officials all recognized that Wisconsin was poorly prepared for the environmental repercussions of large-scale mining.

In the late 1960s, the Natural Resources Council of State Agencies (NRCSA) appointed a Subcommittee on Surface Mining (SSM) to investigate problems related to mining and to propose legislation. 1971 Wisconsin Senate Bill 525 resulted from the Subcommittee's work. As originally conceived and introduced by Senator Kreeger, S.B. 525 touched on most mining issues, with the notable exception of taxation.[1] It was directed toward all types of mining - deep, surface, metallic, and non-metallic; it included both provisions for enforcing reclamation and measures for directing mining locations (this is particularly important where unique surface features would be destroyed by mining or where urban fringe development threatens land beneath which valuable deposits lie); it authorized an administrative agency to oversee implementation of the bill; it authorized the agency to restore existing orphaned mined lands. The main administrative mechanisms in S.B. 525 were permits required for undertaking mining and performance bonds to assure reclamation. Permits were required of any operator intending to disturb greater than two surface acres or more

than 10,000 tons of material. In such cases, the operator was required to apply to the administrative agency for permission to mine. Review of the application was to be based on agency standards for acceptable reclamation plans, existing state environmental impact laws, evidence of the operator's financial and technical capabilities to carry out his plan, and evidence that the applicant (individual or firm) had a record of compliance with mining and reclamation laws in the previous five years. Upon having his application approved, an operator was required to post performance bonds covering the anticipated cost of reclaiming the mining site. The bonds would be released by the administrative agency upon acceptable completion of the reclamation plan, or defaulted to the agency if an operator failed to return a site to standards required by the agency. Money from defaulted bonds would be used by the agency to reclaim the site.

S.B. 525 failed to pass the Wisconsin legislature. One observer attributed the bill's failure in part to an unwillingness among legislators to accord to the Department of Natural Resources the added administrative powers entailed by the bill.[2] Nevertheless, discussions continued on the reclamation issue. The 1971 experience led to a narrower focus in subsequent deliberations over reclamation. First, sand and gravel operators made a persuasive case that they should not be included in a reclamation bill. Second, the proposed state zoning plan for reservation of mining sites proved controversial and potentially very difficult to administer.

What remained was a bill aimed more particularly at regulation of mining of metallics and reclamation at such sites. S.B. 39 (1973 Session) introduced by Senator Kreeger was the result of the winnowing process. As S.B. 39 was the result of extensive discussions among most interest groups involved in

the stateside reclamation issue, from the President of Kennecott Copper Corporation to local chapters of the Sierra Club and the Wisconsin Environmental Decade, the bill was widely acceptable and was passed as Chapter 318, Laws of 1973, "The Metallic Mining Reclamation Act" (Wis. Stat. Sections 144.80-144.94).

Some of the dynamics behind the passage of S.B. 39 are of interest. Governor Lucey strongly urged the passage of reclamation legislation and gave impetus to the bill. The sand and gravel operators were represented by effective lobbies, which were influential to the extent of getting their clients excluded from the bill's requirements. Probably the most important single factor, however, was the Flambeau copper discovery and the recognition of the Flambeau Mining Company and its parent, the Kennecott Copper Corporation, that reclamation legislation was inevitable and that the sooner it was adopted, the better their planning could be. Though the bill resulted mainly from concern over surface mining, it also covered deep mining. In Wisconsin, small lead-zinc mines in the southwestern part of the state are the only potentially active deep mines (excluding Flambeau's possible deep mine extension of its surface pit). The Eagle-Picher Company, then operating one Wisconsin lead-zinc mine and interested in opening more, was particularly concerned to assure that marketable mining by-products would not have to be reclaimed before they could be marketed. Zinc tailings are used in agricultural products and as a pavement binder.

II. Content and Criticism of the Metallic Mineral Reclamation Act

The central mechanism in the Metallic Mineral Reclamation Act (MMRA) again involves permits and bonding. Separate regulations cover the prospecting and mining stages of mineral development:

(1) Prospecting Permits (144.84) - Prospecting is defined as examining or exploring areas to determine content, location, and quality of minerals. Prospecting covered here is limited to that "which disturbs 3 tons or more for each acre of surface area located within 300 feet of the ordinary high-water mark of a navigable stream or 1,000 feet from a lake or which disturbs 100 tons or more for each acre of surface area located beyond 300 feet of the ordinary high-water mark of a navigable stream or 1,000 feet from a lake" (Sec. 144.84). A prospector must secure a permit from the Department of Natural Resources (DNR) prior to commencing exploration. In his application, he must describe the proposed area in ways prescribed by the DNR. The application must be accompanied by a fee of 50 cents/acre or $25, whichever is greater. The permit must be granted or denied within 30 days. If granted, the application must meet minimum standards for reclamation and project methods established by the DNR pursuant to Sec. 144.83. The DNR may attach conditions to the permit to assure reclamation of the prospecting site. A permit must be denied the applicant if the DNR finds that the proposed methods and reclamation do not meet established minimum standards, if the applicant fails to meet other requirements of the MMRA, if the applicant has previously failed to comply with the Act and continues to escape compliance, or if the applicant (or a principal partner or owner in an applying firm) has forfeited any bond posted on mining activities in Wisconsin within the previous 5 years, except by mutual agreement with the State. Chapter NR 130 of the Wisconsin Administrative Code contains rules pertaining to prospecting.

Criticism - Peters notes that exploratory methods other than trial excavations are often used.[3] These methods disturb little land. It is very possible to conduct extensive core drillings, for example, and still remain below the limits of Sec. 144.84, even where the prospecting area is close to navigable waterways and lakes.

Gordon Reinke of the DNR's Mine Reclamation Section reports that his office has had problems with the Act's minimum requirements for a prospecting permit because most exploration is done using core sampling.[4] The DNR has drawn on its broader authority to protect air, land, and water resources to establish a policy whereby companies intending to conduct exploration are

expected to notify the DNR of their intent to conduct drillings. No permit is needed for exploratory drillings--none can be justified under Chapter 318. However, the DNR does assert its right to regulate the abandonment of drill hole sites based on Sections 144.30 and 162 of its regulations. Reinke reports that all companies known to be exploring in Wisconsin have agreed to notify the DNR of drilling intent.

(2) Mining Permits (144.85) - No mining or reclamation may be conducted without a mining permit and a written authorization to commence mining (granted by the DNR subsequent to posting of satisfactory bonding). Applications for permits to mine must include a fee of $5/surface acre in the project site or $50, whichever is greater. An application for a mining permit must include information required by the DNR including but not limited to: detailed maps of the site; descriptive data on soil characteristics, the geology of the deposit, the geometry of the excavation, the water table, etc.; a detailed reclamation plan showing the manner, location and time for reclamation, including ongoing reclamation conducted during the mining regime; information on the ownership of the project site, mineral rights owners, and other mining permits held by the applicant in Wisconsin; and evidence that all necessary licenses, permits, and zoning regulations have been satisfied or applied for. For large projects, the Department may require the operator to submit plans for reclaiming the entire affected area, including lands contiguous to the mine site. Where several operators expect to mine a given deposit, the DNR may require that they submit mutually consistent reclamation plans.

The DNR must hold a hearing on an application for a mining permit within 60 days of its receipt. Within 60 days after the hearing, the DNR must approve or deny the permit. The decision must be based on compliance with Chapter 318 and NR 130 and NR 131. A permit must be denied if the applicant has previously failed and continues to fail to comply with provisions of the Act or if the applicant has forfeited a reclamation bond within the previous five years except by mutual consent with the State.

The DNR may require an applicant for a mining permit to furnish information on the cost of reclamation.

Criticism - The fees required of a mining permit applicant seem quite small compared to the usual size and profitability of such operations. A balance must

be struck between not dissuading applicants, not ruling out less wealthy mining concerns, and generating revenues to the people of the state for the use of their non-renewable resources. Admittedly, taxation must carry the load in the respect. Even so, the fee requirements seem low.

The twin 60-day requirements for hearings on the permit and thereafter a DNR decision are thought by many to be too short to allow sufficient preparation for persons or groups wishing to participate in the hearings, and to give the DNR a chance to weigh the massive amounts of information generated about larger projects, particularly when new information is revealed in hearings. One option would be to extend the limits to twin 90-day intervals.

An applicant for a mining permit must demonstrate tha his mining plan conforms to local zoning ordinances and that the operator has applied for all necessary licenses and permits. This provision connects the permit granting procedure in Chapter 318 to local laws incumbent on the operation. Nothing prevents the DNR from granting a permit to an operator who has not yet received clearance by local authorities. An applicant must be denied if local approval is denied.

Important questions are now being raised about the role of local authorities in the permit process, particularly since the recent suspension of hearings on the Flambeau project due to a decision by the Rusk County Board to refuse zoning permission unless and until the state mineral tax law is resolved to its satisfaction. The process might be clarified if either all local licenses and permits were in hand before the mining permit process formally began, or local authorities would refrain from considering applications for licenses or permits until the process was finished.

Of these two, the latter has clear advantages. Local authorities are typically short of technical capabilities to assess mining impacts. It would be to their advantage to wait until the state's technical evaluation--in the mining permit process--is concluded, and all data is in. Then, local decisions might be made with better information.

Individuals or firms are explicitly excluded from receiving either a prospecting permit or a mining permit if they have persisted in failing to comply with Chapter 318 at some other site, or if they have forfeited a reclamation bond within the previous five years (except with the consent of the state). But these requirements apply only to that individual's or firm's previous actions in Wisconsin. Given the meager history of large-scale mining in Wisconsin, except of course in the southwestern lead-zinc district, and the potential for important developments in the north, these provisions seem inadequate to prevent unscrupulous operators from entering the state and receiving their initial permits. Some mechanism might be included in the permit granting process by which the previous performances in other states of firms newly arriving in Wisconsin might be considered. For example, a record of compliance with the reclamation laws of other states might be a condition for receiving a permit in Wisconsin. (I am not versed in the constitutionality of such a matter.)

(3) Reclamation Bonds (144.86) - After receiving a mining permit but before beginning to mine, an operator must file with the DNR a bond conditional on "faithful performance" of all requirements under the MMRA. The bond must be furnished by a surety company licensed in Wisconsin. The operator may deposit cash, certificants of deposit (CD's) or government securities in lieu of a bond. Interest received on securities or CD's must be paid to the operator. The amount of the bond must equal the estimated cost of reclamation of the portion of the project site which will be disturbed by the end of the following year. (As the area disturbed is in proportion to the project site, shall the

bond be in proportion to the total estimated cost of reclamation.) Cost estimates are to be made by the DNR "on the basis of relevant factors including, but not limited to, expected changes in the price index, topography of the site, mining methods being employed, depth and composition of overburden and depth of mineral deposit being mined." As a given site is reclaimed, the bond requirements may be reduced in proportion to the total estimated cost of reclamation as the reclaimed area is in proportion to the total project site.

The operator must demonstrate possession of at least $50,000 in acceptable liability insurance.

Authorization to commence mining shall be given upon satisfaction of bonding and insurance requirements.

Bonds required for two or more projects from one operator may be combined into a single bond.

The DNR may reevaluate and adjust bonding requirements for a project three or more years after the original filing or after a prior reevaluation.

Criticism - Bonds are required only for mining--not for exploration. This may not be serious in the case of initial prospecting with core drilling. However, once a deposit is found, very extensive exploratory drilling usually follows. Roads must usually be built in this development stage and drilling sites are likely to be more disruptive. Nevertheless, as the law stands, the project need not be bonded for reclamation during the development stage. This might be rectified by requiring bonds on exploration when the drilling intensity reaches a certain level or whenever deposits have been located through initial drilling.

The methods for estimating costs are not explicit here and this vagueness could lead to underestimation. Unfortunately, there are no good formulae for costing out reclamation based on physical characteristics of the site. Serious underestimation might be forestalled by imposing a minimum per acre bonding requirement. For example, it is safe to assume that reclamation to

reasonable standards will cost at least $500 per acre. The statute might be changed to make all bonds meet or exceed a $500 per acre minimum.

The law establishes a revolving bonding requirement based on intended disruption and achieved reclamation. This process is desirable for it gives incentives for on-going reclamation and helps reduce mine start-up cost. However, the Act fails to fully describe the revolving process. Bonds are calculated initially to cover disruptions through the end of the year following the start of mining. But the first reevaluation of bonding requirements can be made no sooner than three years after the initial bonding. So, there is an interval of between one and two years, between the period covered by the initial bond and the first reevaluation, during which new disruptions apparently may occur but no new bonds may be required.

It is hard to believe that this is the intent of the Act. It would seem more likely that new bonds should be required annually based on expected new disruptions. The three-year reevaluation would apply to the financial adequacy of existing bonds, not to their spatial adequacy. The Act definitely is vague on this point. Amplification of this mechanism is needed.

It is currently the policy of the DNR to retain a reclamation bond for four years after the completion of mining. (Section 144.90 permits final release no sooner than one year and no later than four years after mining is ended.) Yet, the durability of a given reclamation regime, particularly with respect to its vegetative cover and the stability of tailings basins, may often still be uncertain four years after mining has ceased. To give greater assurances of successful reclamation, the time period might be set at a longer interval by statuate or some mechanism for gradual reduction of the bond (for

example, beginning the fourth year and continuing in equal portions for the subsequent three years) might be set up in the law. It is also possible that these things might be done through changes in the DNR's administrative code.

(4) Powers and Duties of the Department of Natural Resources (144.83) - The DNR must adopt rules for the implementation of Chapter 318. (These rules are codified in NR 130 and NR 131, adopted in November 1976.) The DNR must establish by rule, after consulting the advisory Mine Reclamation Council, minimum qualifications for applicants for prospecting and mining permits. In setting minimum standards for operators and prospectors, the DNR shall consider the competence of each applicant to operate in a fashion consistent with the MMRA and the applicant's previous performance under the Act, as well as other relevant factors.

On or before July 1, 1974, the DNR must promulgate rules establishing minimum standards for prospecting, mining and reclamation to assure that these activities conform to the intent of Chapter 318. The minimum standards may classify prospecting and mining activities according to type of minerals involved. "The minimum standards shall include, but not be limited to, the following, where applicable and practical:

a. Grading and stabilization of excavation, sides and benches.
b. Grading and stabilization of deposits of mine refuse.
c. Stabilization of merchantable by-products.
d. Adequate diversion and drainage of water from the project site.
e. Backfilling.
f. Adequate covering of all pollutant bearing minerals or materials.
g. Removal and stockpiling, or other measures to protect topsoils prior to mining.
h. Adequate vegetative cover.
i. Water impoundment.
j. Adequate screening of the project site.
k. Identification and prevention of pollution as defined in 144.01 (11) resulting from leaching of waste materials.
l. Identification and prevention of significant environmental pollution as defined in S. 144.30 (9)."

On or before July 1, 1976, the Department and the Geological and Natural History Survey must submit to the governor and legislature a plan for comprehensive state zoning of mineral resources and financial incentives for discouraging uses of land over mineral deposits which preclude the mining of those deposits.

The DNR may hold necessary hearings and compel the attendance of witnesses and the production of evidence. It may cooperate with the Geological Survey in research, technical and administrative matters. It may issue compliance orders. It may provide for and

> supervise educational programs necessary to carry out the Act. It may accept, receive, and expend gifts on behalf of the state. The DNR may conduct at its own expense, using its own personnel and equipment or contracting for the services of others, the reclamation of abandoned project sites. It may issue prospecting and mining permits. It may cancel the mining or prospecting permits of parties convicted of violation of the MMRA. The Department may compel persons under its jurisdiction to provide information necessary for performing the duties assigned it under this Act.

Criticism - As was noted above, evaluation of operator competence under this Act does not explicitly consider actions in other states by each applicant.

DNR rules and regulations under Chapter 318 were not approved until November 1976, more than two years after the required date.

The characteristics of minimum standards listed in this section are topical rather than specific, and they are subject to wide latitude in application as a result. For example, to what gradient shall grading be performed? What areas must be backfilled, and with what materials? Unfortunately, there seem to be few realistic alternatives to imprecise wording of standards because of the potentially great variations in reclamation needs at each site. One possible approach would be to attempt to identify the desired post-mining use of the land and to establish specific reclamation standards for each site consistent with that objective. (Minnesota's DNR is reported to be drafting its reclamation rules along these lines, and to be calling its approach "management by objectives.")

The preceding observation points to what is perhaps a more general weakness in the current reclamation law. The law generally prescribes procedures to be followed rather than specific results to be achieved. The goals of the Act are stated as vague ideals rather than as physically measurable standards.

This vagueness leads to two problems. First, it means that standards of enforcement are left to the discretion of the DNR, which opens the door

to erratic enforcement. Second, it means that applicants for mining permits must guess at the standards for reclamation in their mining and reclamation plans. They have little specific guidance in knowing what will be required of them.

Finally, the Geological Survey's comprehensive report on mineral zoning and incentives for mineral land protection was delayed to December 1976 by the discovery of copper near Crandon in May 1976. It is not yet available in print. By the admission of M.E. Ostrum, the state geologist, the report cannot be comprehensive due to lack of geological information in most areas of the state.[5]

(5) Modifications of a Mining Permit (144.87) - An operator may apply at any time to amend or cancel a mining permit or to change the mining and reclamation plan for a project site. The application must identify the tract of land affected by the proposed change. Such an application may also propose an increase or decrease in the area of a project site.

An application for modifications must be processed as was the application for the original mining permit. If the application is made to cancel an unmined portion of a project site, the bond or security posted on that portion shall be ordered released to the operator upon inspection that the portion has not been disturbed. The operator's permit shall be amended to withdraw permission to conduct operations on the cancelled portion.

An operator may be released from responsibility for complying with the Act, upon transferring his interests to another party, if both parties have complied with the Act and the successor operator assumes the duty to conform to the reclamation plan accompanying the mining permit. Given these conditions, the DNR must transfer the mining permit upon approval of the successor's bond or security deposit.

The DNR may find that because of changing reclamation costs, technology, provisions of Section 144.83, or governmental land use plans, a given reclamation plan is no longer adequate. In such a case, the Department must require the permit holder to submit an amended mining and reclamation plan to meet the changing situation. The amended plan must be processed as was the original. The applicant is considered to hold a temporary permit until a ruling is made on the amended application. Such a reevaluation may be made by the DNR no more frequently than every 15 years.

Criticism - In provisions for approving the transfer of a permit, no requirement is made for legal statements of agreement to the stated conditions. The successor party might be required to sign a statement agreeing to assume all duties under this Act and the mining and reclamation plan accompanying the permit.

It is important that the DNR have the power to require revision of a mining and reclamation plan. However, limiting reevaluations to 15-year intervals is very restrictive and takes much of the force out of this provision. For example, the plan for the Flambeau Mine near Ladysmith anticipates operation of a pit for 11 years. In this case, the DNR would be prevented from reevaluating the mining and reclamation plan conceivably until after the mining and reclamation have already been performed and the security bonds have been released. A shorter interval for reevaluation, perhaps eight or ten years, seems called for.

(6) Miscellaneous - Section 2 of Chapter 318 established a five-member Mine Reclamation Council. The Council is said in 144.815 to "serve as a problem-solving body to work as a liaison between the department and the metallic mining industry...to advise the department on matters relating to the reclamation of mined land in this state, and on whether certain rules and specific mining and reclamation plans will be reasonably certain to provide for reclamation of mining operations in this state" consistent with the Act.

Section 144.81 contains definitions; among them is a definition of abandonment of mining as follows: "the cessation of mining, not set forth in an operator's mining and reclamation plan or by any other sufficient written or constructive notice, extending for more than 6 consecutive months. Abandonment of mining does not include the cessation of mining due either to labor strikes or the cessation of mining due to such unforeseen developments as adverse market conditions for a period not to exceed 5 years as determined by the department after consulting with the mine reclamation council. Any site at which abandonment of mining has occurred is an abandoned project site."

Section 144.88 requires that any person who prospects or mines in violation of this Act must be fined not less than $5 nor more than $100 per acre affected. The violator is liable for the full cost of reclaiming the affected area. Each day's violation must be considered a separate offense.

Section 144.89 requires an annual report for each project site, and a report within 30 days after completion of all mining at a site and within 30 days after completion of the mining and reclamation plan. Such reports must contain information required by the DNR. Failure to submit such reports must lead to cancellation of the violator's mining permit.

Section 144.91 requires the DNR to issue compliance orders upon allegation of any violations of the Act or pursuant rules. Such orders become effective unless the accused operator requests a hearing in writing within 10 days of the order's issuance. In such an event the Department must hold a hearing. In lieu of a compliance order, the DNR may hold a hearing on the violation and may compel the attendance and testimony of the alleged violator. The Department must revoke the mining permit for a project site where the operator fails to conform to a compliance order. The DNR must notify the Department of Justice of the permit cancellation within 14 days, and within 30 days thereafter, the Department of Justice must take action against the violator.

Where an operator has failed to reclaim in accordance with his approve plan within one year after completion or abandonment of mining, excepting acts of God, the DNR shall assume responsibility for reclamation of the affected portion of the site. The operator is responsible for such reclamation up to the limits of his bond or security deposit. Those engaged in mining at the time of the enactment of Chapter 318, who are exempted from bonding requirements, are liable only for an amount to be determined according to usual requirements for bonds.

Section 144.92 requires current mine operators and prospectors at the time of the law's enactment to submit permit applications within 90 days of enactment. All data submitted for a prospecting permit under the MMRA must be treated confidentially by the Department, unless the operator agrees to its publication. If the Department concludes that any information required under this Act would divulge trade secrets of any operator, the Department must consider such data confidential, unless the operator agrees to its release.

Comments - (This listing is not exhaustive but captures most of the important substantive points of the legislation.)

The Mine Reclamation Council is a useful reservoir of reclamation expertise. It might also be utilized to establish more specific standards for reclamation results.

The definition of abandonment is particularly tricky when it comes to determining whether a mine has closed for reasons of adverse market conditions. It is particularly difficult to get reliable information on operating costs at a specific mine, unless the operator is willing to divulge the necessary information, and hence it may be hard to determine the exact market position of a given mine.

The fact that a violating operator is liable only to the limits of his security bond points out one problem with the provision elsewhere that the DNR may not require revision of a reclamation plan more often than every 15 years. What would happen, for example, if violations were discovered 14 years after the initial plan was approved, and meanwhile the acceptable standards for reclamation have been upgraded? If the DNR is to reclaim the land to conform with the newer standards, it is likely to spend much more than was provided for in the operator's security bond.

It is often impossible to achieve complete reclamation within one year, and hence is unrealistic to expect the DNR to move in after a year to finish the job. This provision might better read that certain tasks must be completed within prescribed intervals--for example: grading, soil preparation, and dismantling facilities within one year; planting and pit reclamation within two years; a stable vegetative cover within three or four years.

III. Comparison With Laws of Michigan and Minnesota

By July 1975, 38 states had adopted programs requiring reclamation of surface mined land.[6] These programs vary significantly in content according to

the geologic and geographic qualities in each state and the political contexts within which the programs are legislated and administered.

Wisconsin is similar to its neighbors Michigan and Minnesota in its geologic characteristics. The most important minerals found in each of these three states are metallic minerals, or construction minerals. Apart from peat deposits found in all three states, little or no energy resources are likely to be found.

However, these three states differ in important ways in the political contexts surrounding mining, and consequently, reclamation. Michigan and Minnesota both have long histories of large-scale metallic mining. Minnesota's Mesabi, Vermillion, and Cuyana Ranges, and Michigan's Gogebic, Menominee, and Marquette Ranges have long been important sources of high-grade iron ore for the Great Lakes iron and steel industry. Mining interests are important and well entrenched in both states. These interests have proven resistent to reclamation requirements, and powerful in shaping these requirements when at last they were drafted. Minnesota passed its first reclamation law in 1969. Printed in 1971, it is known as the Mine Reclamation Act of 1971. The law was amended and strengthened in 1973.[7] The 1969 version of the Minnesota statute is quite similar to the current Michigan law, which was adopted in 1970. Hence, in describing these laws, it is useful to begin with the Michigan statute, passed in 1970 as the Mine Reclamation Act.

> The Michigan law covers open pit mining of coal, gypsum, stone, metallic ore and similar solid materials. Clay, gravel, marl, peat and sand are excluded from coverage. It instructs the chief of the state Geological Survey to study the "regulation of mining areas necessary in the public interest," and to promulgate rules for regulating erosion, vegetation, stabilization, and removal of debris from mining sites. The chief is responsible for administering the resulting rules. He may conduct site inspections upon giving reasonable prior notice to the operator or landowner. Operators must submit to the chief annual plan maps of their mining operations. The maps must

show changes at the site occurring in the past year and changes expected in the ensuing year. The chief is instructed to "periodically... ascertain the long-range land environment plans of the operator."

The chief may require an operator to post a performance bond if he has reasonable doubt of the operator's financial capability to comply with the rules promulgated under the Act. The chief may postpone the furnishing of the bond depending on the life of the mining operation.

The chief may request the attorney general to initiate a restraining order, injunction, or other measures for preventing a violation of the rules promulgated under the Act. Upon application for an exemption from some part of the rules by an operator, the chief may permit such a variance if it is not contrary to the public interest.

This is about all the Michigan law has to say. Obviously, the content of the legislation was expected to be supplied in the subsequent rules. However, the statute provides for a minimum of enforcement power on the part of the administrator and, because of its vagueness, is thought to be basically unenforceable by its administrators.[8]

One must look to Michigan's administrative rules to assess Michigan's reclamation program:[9]

The rules call for reclamation of any exploration site not mined within two years, but have no requirements for reporting exploration activities. An operator must notify the chief of intent to begin mining more than 30 days before actually beginning, but needs no kind of permit or formal approval to set forth. The operator must submit annual maps of his operation accompanied by a report on any reclamation work performed during the preceding year. An operator must notify the chief within six months of the abandonment of the mine or any portion thereof. The chief may also declare a mine or portion of a mine abandoned if it has not been used for one year or he determines that it has in fact been abandoned.

Within 30 days of abandonment, and annually thereafter, the operator must report on reclamation activities completed and those planned for the coming year.

The chief may require the operator to submit a long-range environment plan for the mining area. The operator may submit such a plan voluntarily. Where the surface owner is not the operator,

the surface owner must be given a chance to comment on the environment plan. The chief is to evaluate the environment plan according to the reclamation required by the Act and determine any shortcomings. Rejected plans may be revised and resubmitted. Approved plans are to be called reclamation plans. Reclamation plans may be changed at any time by mutual consent of the chief and the operator. The chief may change the plan to bring it into conformance with existing law, if he determines that the existing plan is clearly impossible or impractical, or if the approved plan is not accomplishing the intent of the Act.

Reclamation must be accomplished by an operator within two years after abandonment, or within the time set forth in the approved reclamation plan. Debris and rubbish must be removed within one year. Extensions may be granted by the chief. The chief must determine the acceptability of the reclamation work. Approval of vegetative cover must be withheld until the planting has survived at least two growing seasons.

The supervisor may require a performance bond if he has reasonable doubt as to the operator's financial capability to accomplish reclamation. The bond must be in the amount of the expected cost of reclamation as determined by the chief. In estimating this cost, the chief must consider the future suitable use of the land, among other things. The state treasurer may charge a fee sufficient to cover expenses incurred in handling securities deposited by an operator. Liability on a bond continues until reclamation is completed and approved by the chief.

It is evident from these provisions of the Michigan rules that many of the procedures which are mandatory in the Wisconsin law are voluntary in Michigan. Moreover, Michigan lacks a procedure for granting permits contingent on reclamation plans. Bonding is not uniformly required. Environment plans need not be requested (none has been to date) and apparently need never come to the point of approval when they are requested and submitted. A tremendous amount of discretion is left to the chief (the head of the state Geological Survey Division of the Department of Natural Resources). Of the provisions reviewed above, operators are <u>required</u> to do only the following:

- Grade and revegetate any prospecting site not included in a mining operation within two years
- Notify the chief of intent to mine at least 30 days prior to beginning, and notify the chief of a change in ownership within 30 days of the change

- Provide annual maps of the mining operation accompanied by annual reports on reclamation achieved and reclamation intended
- Give written notice within six months of abandonment
- Report on the state of reclamation of the mine area or any portion thereof within 30 days of abandonment and annually thereafter
- Submit a long-range environment plan for the mining area if requested to do so by the chief, and if the operator is not the surface owner, to allow the surface owner to comment on the plan before submitting it to the chief
- Conduct reclamation activities concurrently with the mining operation insofar as is possible
- Remove rubbish and debris within one year of abandonment
- Reclaim the mining area within two years of abandonment, or as provided for in an approved reclamation plan
- Notify the chief of completed reclamation
- Post a security deposit or bond if required to do so by the chief and pay fees required by the state treasurer.

In certain respects, these provisions suggest improvements in the Wisconsin law. First, all prospecting sites must be reclaimed unless they are to become part of a mine site within two years. As it is written, the Wisconsin law applies only to prospecting operations exceeding certain minimum levels of disruption. (This shortcoming in the Wisconsin law has been largely ameliorated by provisions of the pursuant administrative rules. Using the general authority of the Act and separate authority under the Wisconsin law governing the drilling of water wells, NR 130.02 requires all exploratory drill holes to be reclaimed. The legal basis for this requirement is indirect, however, and could usefully be spelled out in the MMRA.)

Second, the Michigan law makes some attempt to get the opinion of the surface owner on the mining and reclamation plan where the surface owner is not the operator. Separated ownership has been a much bandied issue in Wisconsin, but the MMRA makes no provision for instances where ownership remains split during the mining process.

Third, the Michigan law sets down specific time limits for the accomplishment of certain tasks after abandonment. Rubbish and debris must be removed within one year; reclamation achieved within two; reclamation certified only after the vegetative cover has survived at least two growing seasons. (These limits may be set differently in an approved reclamation plan.) Wisconsin's law presumably allows for limits to be set in the mining and reclamation plan approved prior to granting a mining permit, but this would be done at the discretion of the administrator. No legislative guidelines are given.

There is a certain lack of realism in the time limits imposed in the Michigan law because few sites can support stable vegetation within two years. The provision for vegetation surviving two growing seasons apparently is intended to adjust for this fact. It would not be unreasonable, at most sites, to expect grading, removal of buildings, etc., to be accomplished within two years.

The preceding discussion captures the procedural aspects of the Michigan rules. Other important sections of those rules set forth standards for reclaiming open pits, stockpiles, tailings basins, and auxiliary lands. These provisions may be of particular interest in evaluating Wisconsin's law because of the absence of such specific standards in that law or in the rules drawn pursuant to it.

(1) Reclamation of Open Pits - Surface overburden must be segregated and stockpiled. Stockpiles must be sloped to minimize erosion, promote vegetation, and to be consistent with proposed subsequent uses of the land. Rock banks of open pits must be angled to provide adequate safety. Where a pit is subsequently used to contain a body of water to be used for recreation, the bank must be stepped to permit escape from the water. Unless the pit will be flooded, waste material contained in it must be sloped and graded. Backfilling is not required, but where it is done, backfill material must be non-toxic, non-flammable, and non-combustible solids unless permission is granted to use the pit for sanitary landfill.

(2) Reclamation of Stockpiles - The top surface must be formed to provide proper drainage, promote revegetation, minimize erosion, and be consistent with subsequent uses of the land. Overburden stockpiles must be sloped to minimize erosion, promote vegetation, and to be consistent with future uses of the land. Where substantial natural vegetation is not expected within 5 years or erosion is occurring or is likely, overburden stockpiles must be stablized by planting or other treatment. Rock or lean ore stockpiles must be sloped and shall be covered with surface overburden sufficient to provide for vegetation, unless authorized by the chief. Where erosion is occurring or either the operator or chief has reason to believe that it is likely to occur, the operator must take immediate steps to correct the condition.

All acid-forming, toxic, flammable, or combustible material shall be stockpiled to minimize erosion and pollution. The chief may prescribe other preventive measures for these stockpiles.

(3) Reclamation of Tailings Basins and Auxiliary Lands - Dams or dikes constructed for tailings basins or water reservoirs must meet state standards (as detailed in other laws). Unless constructed of concrete or asphalt, dams or dikes must be built to permit vegetation or stabilization of their outer faces. Erosion of a dike or dam must be repaired. A system for draining water from a basin must be constructed to prevent breaching of the dikes.

Stacked tailings in a basin must be sloped to permit vegetation or other stabilization treatment. Where substantial natural vegetation is not expected within five years after abandonment, that portion of the basin not under water must be planted with vegetation. Vegetation which can give rapid, permanent, adequate, and economical cover shall be given priority. Where vegetation cannot reasonably be expected to succeed, other stabilization methods must be employed.

Where water will remain in the basin after abandonment, the portion of the inner face of the dike which might erode from wave action must be protected by solid erosion-resistant cover.

The banks of borrow pits used for dike or other construction must be sloped to minimize erosion and promote vegetation. Where substantial vegetation is not expected within 5 years, or where erosion is occurring or is likely to occur, borrow pits must be planted to suitable vegetation.

Abandoned roads must be graded and prepared to minimize erosion and promote vegetation. Planting or appropriate vegetation may be necessary.

While these standards are not precise in defining acceptable limits for such things as erosion and adequate vegetative cover, at least they give both the administrator and the operator reasonably complete guidelines about procedures to be followed, and the important points, in reclaiming. The comparable directives under Wisconsin's Act are found in section NR 131.07 of the administrative code:

> Mining and reclamation operations shall be conducted in accordance with an approved mining and reclamation plan and any permit conditions to provide the following considerations for natural resources protection where applicable and practicable:
>
> (1) Grading and stabilization of excavation, sides and benches
> (2) Grading and stabilization of deposits of mine refuse
> (3) Stabilization of merchantable by-products
> (4) Adequate diversion and drainage of water from the project site
> (5) Backfilling
> (6) Adequate covering or other handling acceptable to the department of all pollutant-bearing minerals or materials
> (7) Removal and stockpiling, or other measures to protect topsoils prior to mining
> (8) Adequate vegetative cover
> (9) Water impoundment
> (10) Adequate screening of the project site
> (11) Identification and prevention of environmental pollution
> (12) Abandonment and reclamation procedures in accordance with the reclamation plan
> (13) Long-term maintenance of the project site in accordance with the reclamation plan
> (14) Conformance with environmental quality standards

Clearly, the characteristics of an acceptable plan are minimally described in the Wisconsin Act or pursuant rules. Consequently, much more discretion is bestowed on the administrators of the program in the permit approval process. This further demonstrates the point mentioned above that Wisconsin's law is strong on procedure and weak on substance.

Minnesota's Reclamation Act is something of a hybrid between the approaches used by Wisconsin and Michigan:

The Minnesota law authorizes the administrator (in this case the commissioner of natural resources) to conduct a study and survey to determine needed regulations of mining in the state consistent with the Mineland Reclamation Act. The commissioner is then authorized to promulgate rules to achieve the necessary regulation. (These rules remain in the drafting stage.) The rules adopted pursuant to the Act should comply with or exceed any minimum requirements for reclamation which may be established in federal legislation. The commissioner must give adequate prior notice of site inspections.

Permits are required prior to mining. Permits are based on: proposed plans for reclamation, restoration, or both; a certification of liability insurance; bonds required as determined by the commissioner according to prescribed guidelines; local advertisement of the operator's mining and reclamation plans. The commissioner is given 120 days to approve or deny a permit. Hearings are required if persons owning property which would be affected by the mining operations file written objections to the mining plan or if requested by a public agency. Permits are granted for the duration of the mine and may be amended by application from the operator. A permit may be revoked: if no substantial progress toward mining has taken place within three years; at the request or with the consent of the permittee; or by the commissioner in case of breach of the terms of the mining permit or in case the commissioner determines that such cancellation is necessary to protect the public health or welfare.

The commissioner must require a performance bond from an operator who: fails to perform reclamation provided for in the permit; fails to comply with rules promulgated pursuant to the Act; fails to perform research agreed upon by the operator and the commissioner or the Act; or cannot persuade the commissioner of his financial ability to comply with the Act and pursuant rules. The commissioner is to review the need for and the extent of each operator's bond annually.

This outline of the Minnesota statute reveals a few points not treated in Wisconsin's law, or treated differently. First, prospecting remains unregulated. Second, the Minnesota law anticipates the strong possibility of federally legislated minimum standards for reclamation and seems to provide the commissioner with the authority to propose rules which would bring Minnesota's program in substantial compliance with such standards. Wisconsin's law contains no such proviso.

Third, in its requirements for mining permit applicants, Minnesota's statute includes "a proposed plan for the reclamation or restoration or both, of any mining area affected by mining operations to be conducted on and after the date which permits are required for mining..." This introduces the concept of restoration which means to return the site to its original condition. For practical purposes, there are likely to be few open pit metallic mines at which restoration is practical within reasonable financial limits. But this does suggest that full restoration might be appropriate and required, for example, at sites of unusual natural or historic importance.

Fourth, rather than requiring hearings in all cases, Minnesota requires adequate public notice of the proposed mining and reclamation plan filed by the operator. In the event that there is written objection to the plan from and affected landowner or a request for hearings by a public agency, hearings must be held. This provision has the advantage that hearings might be avoided where little controversy exists. However, it has great disadvantages in limiting those who can force hearings to directly affect landowners or public agencies, and in trusting local advertisements to be adequate channels for delivering information about the proposed plans for public scrutiny.

Fifth, one reason for revoking a Minnesota mining permit is if no substantial progress has been made toward construction or mining within three years. This prevents permit holders from simply sitting on deposits covered by their permits. Wisconsin's reclamation law contains no comparable provision but does contain terms which might be used with the same effect. In Wisconsin, a site is considered abandoned if mining ceases for a period of more than six consecutive months in a manner not provided for in the operator's approved mining and reclamation plan, unless for reasons of labor

strikes or adverse market conditions in which cases mining may cease for up to five years without a declaration of abandonment. The mining regime must proceed as it is described in the mining and reclamation plan, except for forces beyond the operator's control. One mechanism for controlling delays in site development, then, is to assure that the mining plan will not allow them.

The Wisconsin law is more stringent in that a declaration of abandonment may be issued after only six months of cessation. However, it is less stringent in that nothing prevents the mining and reclamation plan from containing long delays in mine development. Furthermore, Wisconsin's outside limit on (unplanned) interruptions is five years, while Minnesota's law tolerates no more than three-year halts.

Finally, Minnesota's law calls for annual review of performance bonds. Wisconsin permits such a review no sooner than every three years. Though more cumbersome to administrate, annual review would provide greater incentives for on-going reclamation. It would also keep the amount of money tied up in bonds closer to the amount actually needed for reclamation in case of default.

IV. Conclusion

Wisconsin's reclamation law employs a permit-bonding approach in a thorough procedure for licensing mining activities in the state. Relatively complete information on each mining project is required of the owners; public approval is required before mining can begin; and bonds conditioned on adequate reclamation of each site are required of each operator.

The Wisconsin law does have important biases and shortcomings, however, which are especially evident in comparing it with reclamation laws from states with similar problems. First, it applies only to metallic mining and exempts

other important types of mining, especially pit mining of sand, gravel and other aggregates. Second, it is heavy on procedures and light on actual standards for reclamation. Third, it fails to capture the bulk of prospecting activities in the state because they fall below its minimum tonnage limits. Fourth, the law does not base the evaluation of permit applicants on past reclamation behavior in other states. Fifth, the Act seems confused in the procedure by which an operator's bond requirement is to be reevaluated. Finally, it permits reevaluation of an operator's mining plan no more frequently than every 15 years, which seems undesirably long.

When viewed in the light that Wisconsin's law anticipates important mining developments, its emphasis on establishing procedures to assure responsible mining is understandable. It is to be hoped that as mining activities grow in the state, experience will show ways to add specificity to Wisconsin's reclamation standards.

Footnotes

[1]Peters, John L., "New Surface Mining in Wisconsin," Wisconsin Law Review, Wisconsin Law School, Madison, Vol. 1, 1973, pp. 234-58.

[2]Quinn, Michael, Wisconsin Senate Republican Caucus Staff. Personal communication, March 12, 1976.

[3]Peters, John L., op. cit., p. 242.

[4]Reinke, Gordon, Chief, Mine Reclamation Section, Wisconsin Department of Natural Resources. Personal communication, January 5, 1977.

[5]Ostrum, M.E., Wisconsin State Geologist. Personal communication, January 7, 1977.

[6]Imhoff, Edgar A., Thomas O. Friz, and James R. LaFevers, A Guide to State Programs for the Reclamation of Surface Mined Areas, U.S. Department of the Interior, Geological Survey Circular 731, 1976.

[7]Costello, Michael, Division of Minerals, Minnesota Department of Natural Resources. Personal communication, October 1976.

[8]Segall, Thomas, Geological Survey Division, Michigan Department of Natural Resources. Personal communication, January 6, 1977.

[9]These rules, numbered R425.1 - R425.49, became effective in November 1976.

Comparison of Royalty Rates for Selected Jurisdictions

	Per Yard	Per Bale[1]	Per 100#	Per Ton	Comments
Alberta		.01	.0125	.25	"Dry" peat
Ontario: ("Peatmoss")		.02	.025	.50	
(Sphagnum)		.04	.05	1.00	
Saskatchewan ("Peat")		.024	.03	.60	
(Sphagnum)		.04	.05	1.00	Existing
Saskatchewan		.08	.10	2.00	Proposed
Quebec	No Royalties, however, "duties" based on annual profit are levied.[2]				
Manitoba	.075				Per Yd. Extracted
Michigan[3]	.05				Extracted, not Processed
Maine[4]		.015			
Montana	.74[5]				
Minnesota (pre-1960)	.04				Wet peat in place
Minnesota		.05	.625	$1.25	

Note: (1) Systems of Royalties based on cubic yards are not readily convertible to systems based on weight.
(2) Figures underlined represent system employed.

[1]A "bale" is 6 cubic feet and weighs 80 lbs.

[2]See Section VI-D "Taxation of Peat" pp. 18-20.

[3]Not currently utilized.

[4]Not currently utilized.

[5]Either 74¢ per yard extracted or a minimum of 5% of gross value of peat shipped. The gross value shall be calculated by weight or cubic measurement of the peat, whichever is most favorable to the State.

APPENDIX E

MANUAL OF STATE AGENCY RULES

Rules of
THE MINNESOTA ENVIRONMENTAL QUALITY COUNCIL

ENVIRONMENTAL REVIEW PROGRAM
(Environmental Impact Statements)

1977 Edition

Cite the rules as:
(for example)
MEQC 21

Distributed by
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MINNESOTA ENVIRONMENTAL QUALITY COUNCIL
100 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

Rules

FOR THE ENVIRONMENTAL REVIEW PROGRAM
(Environmental Impact Statements)

Contents

(Chapter one through ten reserved for future use)

MEQC 21-41 filed with the Secretary of State on December 27, 1976; effective February 13, 1977; promulgated pursuant to the Minnesota Environmental Policy Act of 1973.

ENVIRONMENTAL QUALITY COUNCIL
ENVIRONMENTAL IMPACT STATEMENTS

Chapter Eleven: Authority, Purpose, Definitions, General Provisions

MEQC 21 Authority and purpose

A. Authority. The Rules contained herein are prescribed by the Minnesota Environmental Quality Council to implement the Environmental Impact Statement provisions pursuant to authority granted in Minn. Stat. § 116D.04, subd. 2 (1974), and shall be followed by all persons in implementation of the Minnesota Environmental Policy Act of 1973. The procedures specified in these Rules are in addition to the other procedures and substantive responsibilities of public agencies and private persons contained in the Act, and do not limit the authority of the Council to review, study, or resolve any matter of environmental concern authorized by law.

B. Purpose of environmental impact statement. The purpose of an Environmental Impact Statement is to provide information for agencies and private persons to evaluate proposed actions which have the potential for significant environmental effects, to consider alternatives to the proposed actions, and to institute methods for reducing adverse environmental effects. An Environmental Impact Statement is not a document to justify an action, nor shall indications of adverse environmental effects necessarily require that an action be disapproved. It is to be utilized as a guide in issuing, amending, and denying permits and carrying out the other responsibilities of public agencies to avoid or minimize adverse environmental effects and to restore or enhance environmental quality consistent with the Act.

MEQC 22 Definitions: The following terms have the meanings ascribed to them in these Rules.

A. "Act" means the Minnesota Environmental Policy Act of 1973, as amended, Minn. Stat. § 116D.01 et seq. (1974).

B. "Action" means the whole of a project which will cause physical manipulation of the environment, directly or indirectly. The determination of whether an action requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the activity.

"Action" does not include the following:

1. Proposals and enactments of the Legislature.

2. The rules, orders, or recommendations of public agencies.

3. Executive Orders of the Governor, or their implementation by public agencies.

4. Judicial orders, except orders establishing judicial ditches pursuant to Minn. Stat. ch. 106 (1974).

5. Submissions of proposals to a vote of the people of the State.

C. "Approval"' means the issuance of a governmental permit, or any review of a proposed action required by state or federal law or regulations.

D. "Council" means the Minnesota Environmental Quality Council (MEQC).

E. "Days." In computing any period of time prescribed or allowed in these Rules, the day of the act or the event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is 15 days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

F. "Environmental Impact Statement (EIS)" is defined by Minn. Stat. § 116D.04, subd. 1 (1974) and these Rules.

G. "EIS Preparation Notice" means a written statement by the Responsible Agency or Responsible Person which requires an EIS to be prepared.

H. "Environment" means the physical conditions existing in the area which will be affected by the proposed action, including land, air, water, minerals, flora, fauna, ambient noise, energy resources available to the area, and man-made objects or natural features of historic, geologic or aesthetic significance.

I. "Environmental Assessment Worksheet (EAW)" means a worksheet provided by the Council to determine whether an EIS is required.

J. "Environmental Documents" means EAWs, Draft EISs, Final EISs, Negative Declaration Notices, and EIS Preparation Notices.

K. "EQC Monitor" means an early notice bulletin containing all notices of impending actions that may have significant environmental effects.

L. "Governmental Action" means an action proposed to be undertaken by a public agency directly or an action supported or licensed, in whole or in part, by a governmental permit issued by a public agency.

M. "Governmental Permit" means a lease, permit, license, certificate, variance, or other entitlement of use, or the commitment to issue or the issuance of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, by a public agency to another public agency or to a private person.

N. "Inadequate EIS" means an EIS that fails sufficiently to examine potential environmental effects, alternatives, or desirable modifications, or an EIS not prepared in compliance with the Act and these Rules.

O. "Local Agency" means any general or special purpose unit of government of the state with less than state-wide jurisdiction, including but not limited to regional development commissions, counties, municipalities, townships, port authorities, housing authorities, and all agencies, committees, and boards thereof.

P. "Negative Declaration Notice" means a written statement by the Responsible Agency or Responsible Person that a proposed action does not require the preparation of an EIS.

Q. "Other Approving Agencies" means all public agencies other than the Responsible Agency that must approve a project for which environmental documents are prepared.

R. "Person" means a human being, unincorporated association, partnership, trust, corporation, or public agency.

S. "Petition" means a document that contains at least 500 signatures and requests the preparation of an EIS.

T. "Private Action" means an action proposed to be undertaken by a private person that does not require a governmental permit.

U. "Proposer" means the private person or public agency that will undertake an action or that will direct or authorize others to undertake the action.

V. "Public Agency" means a federal, state, regional or local agency, board, commission, or other special purpose unit of government. "Public Agency" includes all public educational institutions but does not include the courts of this State.

W. "Regional Development Commission" means any regional development commission created pursuant to Minn. Stat. §§ 462.381-396 (1974) inclusive and the Metropolitan Council established by Minn. Stat. ch. 473 (Supp. 1975).

X. "Responsible Agency" means that public agency which has the principal responsibility for preparing the environmental documents required by the Act and these Rules.

Y. "Responsible Person" means the person who proposes to undertake an action and who is responsible for the preparation of the environmental documents required by the Act and these Rules.

Z. "Reviewing Agencies" means all public agencies which have either jurisdiction by law or special expertise with regard to the environmental effects of an action for which an EIS is prepared. All agencies that are members of the Council shall be considered reviewing agencies.

MEQC 23 General Responsibilities.

A. Environmental Quality Council.

1. The Council's duties and responsibilities include the following:

a. Coordinate the EIS program as set forth in these Rules.

b. Coordinate among public agencies, when appropriate, review of EISs prepared pursuant to the National Environmental Policy Act. The coordination may include requests to the preparer or to a public agency to undertake additional environmental analysis, to hold informational meetings, or to conduct any other review consistent with the Act and these Rules.

c. Provide a manual of procedure to guide public agencies, Responsible Agencies, and Responsible Persons in the implementation of this Act and these Rules; and assist on request in determining whether the specific action requires an EIS.

2. In addition, the Council may, where it deems necessary:

a. Require revision of any EIS that it finds inadequate.

b. Require preparation of alternative or additional environmental re-

view before allowing commencement of any action or approval of any action by a public agency.

c. Provide technical assistance on request of a public agency, Responsible Agency or Responsible Person.

d. Review any rules, guidelines, procedures, or local ordinances adopted to implement the Act and these Rules.

e. Hold hearings or informational meetings to facilitate implementation of the Act and these Rules.

B. Public agencies.

1. All public agencies are responsible for complying with the requirements of the Act and these Rules. Public agencies shall inform a proposer, and a representative of the petitioners when a petition is involved, of the operating procedures that they will follow in implementing the Act and these Rules for each EAW they prepare. Such operating procedures shall also be available to the public at the offices of the Responsible Agency. Whether a public agency prepares environmental documents itself or contracts with private experts for the preparation, the public agency is solely responsible for the adequacy and objectivity of the environmental documents. Nothing in these Rules shall limit existing authority of public agencies to charge proposers reasonable fees for document preparation.

2. All public agencies shall retain their existing statutory authority subject to the policies of the Act and the authority of the Council to reverse or modify decisions or proposals or to require preparation of environmental documents.

3. Under the Act, these Rules shall not affect the specific statutory obligations of any public agency to perform the following:

a. To comply with criteria or standards of environmental quality regardless of whether an EIS is required for an action.

b. To coordinate or consult with any federal or state agency.

c. To act or refrain from acting contingent upon the recommendations or certification of any public agency or federal agency.

4. A public agency, at the request of a Responsible Agency, shall provide any unprivileged data or information to which it has reasonable access concerning a particular action and shall assist in the preparation of environmental documents on any action for which it has special expertise or access to information.

5. A public agency shall prepare the environmental documents on an action which is the subject of a petition upon the direction of the Council.

6. When environmental documents are prepared on an action by a Responsible Agency, every public agency which has jurisdiction to approve the action shall consider the environmental documents prepared on that action before approving the action.

7. Public agencies shall provide one free reproducible copy of all environmental documents to each location on the official MEQC distribution

list, except as otherwise provided herein. These will be available for internal agency distribution and for public copying.

C. Private persons. When environmental documents are required on an action that is subject to a governmental permit, the proposer shall supply in the prescribed manner any unprivileged data or information reasonably requested by the Responsible Agency that that person has in his possession or to which he has reasonable access.

Chapter Twelve: Substantive Requirements

MEQC 24 Actions requiring environmental assessment worksheets.

A. General. The purpose of an EAW is to assess rapidly, in a worksheet format, whether a proposed action is a major action with the potential for significant environmental effects and additionally in the case of a private action, whether it is of more than local significance.

B. EAW required.

1. An EAW shall be prepared on any action which is not exempted by MEQC 26 and which falls within one of the following categories. The Responsible Agency is shown in parentheses for each category except that when a proposer of an action is a public agency that agency shall be the Responsible Agency. The Council may specify a different Responsible Agency for good cause.

a. Construction of a new industrial park of over 320 acres in size — (Local);

b. Construction of a facility or integral group of facilities with at least 250,000 square feet of commercial or retail floor space or at least 175,000 square feet of industrial floor space, or a mixture of commercial, industrial and retail floor space totaling at least 250,000 square feet, unless located in an industrial park for which an EIS has already been prepared — (Local);

c. Any industrial, commercial or residential development of 40 or more acres, any part of which is within a floodplain area, as defined by the "Statewide Standards and Criteria for Management of Floodplain Areas of Minnesota" — (Local);

d. Construction of a commercial or industrial development, any part of which is within a shoreland area (as defined by Minn. Stat. § 105.485 (1974)), covering 20,000 or more square feet of ground space, not including access roads or parking areas, and located on a parcel of land having 1,500 feet or more of shoreline frontage — (Local);

e. Construction of a facility that generates more than a maximum of 2,500 vehicle trips per hour or a maximum of 12,500 vehicle trips per eight-hour period — (Local);

f. Construction of a new oil refinery, or an expansion of an existing refinery that shall increase capacity by 10,000 barrels per day or more — (PCA);

g. Construction of a pipeline greater than six inches in diameter and 50 miles in length — (DNR);

h. Construction of facilities on a single site that are designed for, or capable of, storing a total of one million or more gallons of liquid natural gas, liquid petroleum gas, or other liquid fuels — (PCA);

i. Construction of an underground storage facility for gases and liquids that requires a permit, pursuant to Minn. Stat. § 84.57 (1974) — (DNR);

j. Construction of a new mineral or fuel processing or refining facility, including, but not limited to, smelting and hydrometallurgical operations — (PCA or DNR);

k. Construction of a facility if the cumulative emissions of particulate matter and sulfur oxides exceed 50 tons per day — (PCA);

l. Main roadway grading construction of a four-or-more lane, divided highway with at least partial control of access of ten route miles or more in length and carrying 10,000 venicles ADT (Average Daily Traffic) — (Hwys);

m. Construction of a new airport that is within the key system, pursuant to Minn. Stat. § 360.305, subd. 3 (1974) — (Aeronautics);

n. Construction or opening of a new facility for mining metallic minerals — (DNR);

o. Construction or opening of a facility for mining gravel, other nonmetallic minerals, and fuels involving more than 320 acres — (Local, except DNR with respect to peat fuels).

p. A new appropriation for commercial or industrial purposes of either surface water or ground water averaging 30 million gallons per month, or exceeding 2 million gallons in any day during the period of use; or a new appropriation of either ground water or surface water for irrigation of 640 acres or more in one continuous parcel from one source of water — (DNR);

q. Any new or additional impoundment of water creating a water surface in excess of 200 acres — (DNR);

r. An action that will eliminate or significantly alter a wetland of Type 3, 4, or 5 (as defined in U.S. Department of Interior, Fish and Wildlife Service, Circular 39, "Wetlands of the U.S., 1956") of five or more acres in the seven-county metropolitan area, or of 50 or more acres outside the seven-county metropolitan area, either singly or in a complex of two or more wetlands — (Local);

s. Any marina and harbor project of more than 20,000 square feet of water surface area — (Local);

t. Construction of a new or additional residential development that includes 100 or more units in an unsewered area or 500 or more units in a sewered area — (Local);

u. Construction of a residential development consisting of 50 or more residential units, any part of which is within a shoreland area (as defined by Minn. Stat. § 105.485 (1974)) — (Local);

v. Construction of a development consisting of "condominium-type" campgrounds, mobile home parks, or other semi-permanent residential and/or recreational facilities, any part of which is within a shoreland area (as defined by Minn. Stat. § 105.485 (1974)) or floodplain (as defined by the "Statewide Standards and Criteria for Management of Floodplain Areas of Minnesota") exceeding a total of 50 units or, if located in areas other than the above, exceeding a total of 100 units — (Local);

w. Construction of a sanitary landfill for an excess of 100,000 cubic yards per year of waste fill, or any sanitary landfill located in an area characterized by soluble bedrock, where leachates may significantly change groundwater quality — (PCA);

x. Construction of a new paper and pulp processing mill — (PCA);

y. The application of restricted use pesticides over more than 1,500 contiguous acres — (Agriculture);

z. Harvesting of timber within the Boundary Waters Canoe Area Portal Zone or in a State Park or Historical Area, that is not included in an annual timber management plan filed with the Council — (DNR);

a_1 Permanent removal of 640 or more contiguous acres of forest cover — (DNR);

b_1 Conversion of 40 or more contiguous acres of forest cover to a different land use — (Local);

c_1 Construction of electric generating plants at a single site designed for, or capable of, operation at a capacity of 200 or more megawatts (electrical) — (PCA);

d_1 Construction of electric transmission lines and associated facilities designed for, or capable of, operation at a nominal voltage of 200 kilovolts AC or more, or operation at a nominal voltage of ± 200 kilovolts DC or more, and are 50 miles or more in length — (EQC);

e_1 Construction of nuclear material processing plants and facilities — (PCA).

2. An EAW may be prepared on any proposed action to determine if the action is a major action with the potential for significant environmental effects and for a private action if the action is of more than local significance.

C. Waiver of EAW. In cases where the magnitude and environmental impact of a project allow a Responsible Agency or Responsible Person to determine that an EIS is necessary without preparation of an EAW, or if a federal agency is preparing a state EIS pursuant to MEQC 25 F.4., an EAW need not be prepared. Publication of the EIS Preparation Notice shall be required. In cases where the Responsible Agency is not the proposer, if the project proposer does not concur in the determination of need for an EIS without the preparation of an EAW, the agency shall prepare an EAW.

MEQC 25 Actions requiring environmental impact statements.

A. General criteria. An EIS shall be required whenever it is determined that an action is major and has the potential for significant environmental

effects. In making this determination, material effects on the environmental variables specified in MEQC 30 A.3. will indicate that an EIS should be prepared. In the case of a private action, it must also be determined that the action is of more than local significance.

B. Major action. In determining whether an action is major, the following factors shall be considered:

1. Type of action;

2. Scope of action, including size and cost;

3. Location and nature of surrounding area;

4. The totality of cumulative related actions, as defined by MEQC 25 E.;

5. Relation of the action to anticipated growth and development; and

6. Permit(s) and approval(s) required in addition to those of one primary, local agency.

C. Local significance. In determining whether a major private action is of more than local significance, the following factors shall be considered:

1. Location of the action; and

2. Area affected by the action.

D. Potential for significant environmental effects. In determining whether an action has the potential for significant environmental effects, the following factors shall be considered:

1. Type, extent, and reversibility of environmental effects;

2. Cumulative potential effects of related or anticipated future actions, as defined by MEQC 25 E.;

3. The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and

4. The extent to which environmental effects can be anticipated and controlled as a result of other environmental studies undertaken by public agencies or the project proposer, or of EISs previously prepared on similar actions.

E. Related actions.

1. When two or more actions are related, they shall be considered as a single action and their cumulative potential effects on the environment shall be considered in determining whether an EIS is required. Actions are related if:

a. They are of a similar type, and are planned or will occur at the same time, and will affect the same geographic area; or

b. They are interdependent and not independently viable stages or segments of development of the same project and would not be undertaken if subsequent stages or segments would not also occur; or

c. It can be determined, based on a comprehensive plan or on the precedent that would be established by a public agency's undertaking or ap-

proving an action, that one of the actions will induce other actions of the same type or affecting the same geographic area.

2. A comprehensive plan for a geographic area or other public agency overall program or plan document may be considered as a Related Actions EIS.

a. The geographic area must contain possible actions each with the potential for significant environmental effects or actions whose cumulative potential environmental effect is significant.

b. For an individual action in the geographic area, the need for an individual action EIS or a modification of the Related Actions EIS shall be judged by the guidelines for a Subsequent EIS.

3. A Related Actions EIS shall meet the content requirement of MEQC 30 D.; however, the data may be more generalized and not as exhaustive as an individual action EIS. Additionally, the alternatives may be more in the nature of prototypes or alternate scenarios.

F. Miscellaneous.

1. Subsequent EIS. When an EIS has been prepared on an action, no additional EIS need be prepared on the action unless changes in the action are proposed which will involve new and potentially significant environmental effects not considered in the previous EIS.

2. Single EIS. When an action is to be carried out or approved by more than one public agency, only one EIS shall be prepared pursuant to the Act.

3. Expansions or modifications. The expansion or modification of an ongoing action which requires new or modified governmental permits shall be subject to the same requirements in the Act and these Rules for the preparation of environmental documents as a new action.

4. Federal EIS. When these Rules require the preparation of a state EIS on an action, and a federal EIS is required for the same action, pursuant to the requirements of the National Environmental Policy Act (NEPA) and the implementing regulations thereto, all or any part of the federal EIS may be submitted in lieu of all or any part of a state EIS. However, when the federal EIS is used, the elements of the EIS that are required by the Act and these Rules, but are not required by NEPA, shall be added to the federal EIS, including alternatives and modifications which can be implemented by state and local agencies. When a federal EIS is prepared in lieu of a state EIS, the state Responsible Agency shall independently review the federal EIS and ascertain that the conclusions and recommendations are those that the state agency would reach. Insofar as practicable, the Responsible Agency shall consult with the federal agency and coordinate all environmental reviews to the end that the requirements of state law are met by a single Draft EIS, single Final EIS, and a single hearing process, in which the state agency actively participates and adds supplementary material as necessary. In such circumstances, an EAW shall not be required; however, an EIS Preparation Notice shall be published in the *EQC Monitor.*

G. Environmental review of proposed large electric power generating plants and high voltage transmission lines.

1. Other provisions of these Rules to the contrary notwithstanding, this

subsection provides for the environmental review of large electric power generating plants (LEPGP) and high voltage transmission lines (HVTL) under the Minnesota Environmental Policy Act. Certificates of need (Minn. Stat. § 116H.07), and Certificates of Corridor Compatibility and Site Compatibility (Minn. Stat. § 116C.57, subd. 1) may be issued before preparation and filing of an EIS. One purpose of this process is to insure that the environmental review of LEPGP and HVTL is consistent with the sequential permitting for energy facilities as provided in Minnesota Power Plant Siting Act, Minn. Stat. §§ 116C.51 to 116C.69 and the Minnesota Energy Agency Act, Minn. Stat. §§ 116H.01 to 116H.15. The environmental review of LEPGP and HVTL shall be separated into the following five phases:

a. Environmental Report on Certificates of Need

b. Environmental Report on Sites for LEPGP

c. Environmental Report on Corridors for HVTL

d. HVTL Route EIS

e. LEPGP EIS

2. This environmental review process provides for the consideration of the potential environmental effects of a proposed action early in the decision making process at the phase where they are most appropriately considered. The intent of the process set out in this subsection is to eliminate duplication by reducing repeated consideration of identical issues in the various phases of this sequential process. The limitation on the environmental issues considered at each phase of the environmental review process is based on the preemption of the need, siting, corridor, and routing decisions as provided in Minn. Stat. §§ 116H.06 and 116C.61.

a. Environmental report on certificates of need.

(1) Preparation. The Minnesota Energy Agency shall prepare an Environmental Report when it receives an application for a Certificate of Need for a proposed LEPGP or HVTL.

(2) Content. The Environmental Report on the Certificate of Need shall include; but not be limited to:

(a) A summary of the information provided in the application;

(b) A brief analysis of alternatives to the proposed facility, which analysis shall include: a discussion of the economic and environmental feasibility of each alternative including the alternative of a different sized facility, an estimate of the time it would take to implement each alternative, the projected availability of each alternative, and the estimated reliability of each alternative;

(c) An evaluation of the environmental and economic impact of the proposed facility, each reasonable alternative thereto, and the alternative of no facility;

(d) An evaluation of:

(i) the environmental impact of the proposed action, including any pollution, impairment, or destruction of the air, water, land, or other natural resources located within the state;

(ii) any direct or indirect adverse environmental, economic, and employment effects that cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short term uses of the environment and the maintenance and enhancement of long term productivity, including the environmental impact of predictable increased future development of an area because of the existence of a proposal, if approved;

(v) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented;

(vi) the impact on state government of any federal controls associated with proposed actions; and

(vii) the multi-state responsibilities associated with proposed actions.

(3) The report shall not be as exhaustive or detailed as an EIS, since an exhaustive and lengthy discussion of site-differentiating factors and detailed design information would be inappropriate and is not available at the Certificate of Need stage.

(4) Review and comment. The Environmental Report on the Certificate of Need shall be distributed in accord with the MEQC distribution list at least 20 days before the commencement of the Energy Agency's Certificate of Need hearing on the Application. The availability of the report and notice of the hearing shall be published in the *EQC Monitor* as specified in MEQC 35. Comments on the Environmental Report shall be submitted at the Certificate of Need public hearing. The preparation and review of the Environmental Report shall be completed within the statutory time limit provided for the Energy Agency's final decision on an application for a Certificate of Need.

(5) Council review. The Energy Agency shall submit its findings of fact and decision to the Council. Failure by the Council to request review of the Energy Agency's final decision within 10 days of the decision shall constitute Council acceptance of that decision and the issues determined by the Energy Agency in issuing or denying the Certificate of Need. Such issues shall not be considered in the Environmental Reports and environmental documents prepared at the subsequent siting, corridor, routing or licensing phases.

b. Environmental report on sites for large electric power generating plants.

(1) Preparation. The Council shall prepare a Site Environmental Report when it receives a site application for a LEPGP.

(2) Content. In the Site Environmental Report the Council shall include an evaluation of the exclusion criteria, avoidance areas and site selection criteria as required by the regulations adopted under the Power Plant Siting Act for the designation of a site and also MEQC 30 D. of these Rules. The Report shall provide an evaluation of each site that is considered for designation at the siting public hearings. The Site Environmental Report shall not consider the need for the LEPGP or information not related to site differentiating impacts. It shall not be as exhaustive or detailed as an EIS.

(3) Review and comment. The Site Environmental Report shall be

distributed in accord with the MEQC distribution list and made available for review and public comment at least 30 days prior to the conclusion of the public hearing held on the site application. The Council shall respond to substantive comments received on the Environmental Report. The preparation and review of the Site Environmental Report shall be completed within the statutory time limits for the issuance of a Certificate of Site Compatibility.

(4) Final decision on Certificate of Site Compatibility. The Council shall consider the Site Environmental Report before its final decision on the issuance of a Certificate of Site Compatibility for a LEPGP. Such issuance by the Council shall constitute a final determination of the issues that were considered in the designation of the site.

c. EIS on large electric power generating plant.

(1) Preparation. After designating a site, the Council shall determine whether an EIS shall be required on the LEPGP. If the Council or Responsible Agency determines that an EIS is required, the Minnesota Pollution Control Agency shall be the Responsible Agency, unless MEQC 27 A.3. applies.

(2) Content and procedures. The content of the EIS shall contain the information required by MEQC 30 D. of these Rules. Alternative sites, the need for the facility, and any other issues previously determined by the Minnesota Energy Agency or the Council shall not be considered in the EIS. The Environmental Reports prepared at the siting and need phases and the issues previously determined shall be referenced and summarized in the EIS.

d. Environmental report on corridors for high voltage transmission line.

(1) Preparation and content. The Council shall prepare a Corridor Environmental Report upon the receipt of an application for a corridor for a HVTL. The Corridor Environmental Report shall include the evaluation of exclusion criteria, avoidance areas and selection criteria as required in accordance with the regulations adopted under the Power Plant Siting Act and also MEQC 30 D. of these Rules, for each alternative corridor considered for designation by the Council. The Report shall not be as exhausive or detailed as an EIS.

(2) Review and comment on environmental report. The Corridor Environmental Report shall be distributed in accord with the MEQC distribution list and made available for review and public comment at least 20 days prior to the conclusion of the public hearing held on the corridor application. The Council shall respond to the substantive comments received on the Environmental Report.

(3) Final decision on certificate of corridor compatibility. The Council shall consider the Corridor Environmental Report before issuing a Certificate of Corridor Compatibility. Such issuance by the Council shall constitute a final determination of the issues that were considered in the designation of the corridor. The preparation and review of the Corridor Environmental Report shall be completed within the statutory time limits for the issuance of a Certificate of Corridor Compatibility.

e. High voltage transmission line route EIS.

(1) Preparation. After designating a corridor, the Council shall

determine whether an EIS shall be required on the route for the HVTL in accord with these Rules. If it determines that an EIS is required, it shall prepare the EIS.

(2) Content. The Route EIS shall include the information required by the Power Plant Siting Act and the Rules adopted thereunder for High Voltage Transmission Lines (HVTL) and also MEQC 30 D. of these Rules All alternative routes designated for study by the Council shall be discussed in the EIS. The Environmental Reports prepared at the need and corridor phases and the issues previously determined shall be referenced and summarized in the EIS. The EIS shall not consider the need for the facility, routes outside the designated corridor or any routes not designated for study by the Council.

(3) Procedures. The Draft EIS shall be made available to all MEQC distribution points and to the extent practical to interested persons and shall be submitted at the public hearing on the route application. The Final EIS shall be submitted to the Council before it designates a specific route.

(4) Final decision on designation of route. The Council shall consider the Final EIS in designating a route for the HVTL. The preparation and review of the Route EIS shall be completed within the statutory time limits for the Council's designation of a route.

MEQC 26 Actions not requiring environmental documents.

A. General exemptions. The preparation of environmental documents shall not be required:

1. When a substantial portion of the action has been completed or implemented and an EIS on the action would not be able to influence remaining implementation or construction of the action to minimize adverse environmental consequences.

2. When there has been adequate environmental review of an action within the jurisdiction of the Council pursuant to Minn. Stat. § 116G.01 et seq. (1974) (the Critical Areas Act of 1973), or Minn. Stat. § 116C.04(2)(b) (1974) (the Environmental Quality Council Act of 1973).

3. When, and so long as, a public agency denies a governmental approval required for the action.

4. When an imminent and substantial danger to the public health, safety or welfare makes it necessary to undertake a major action that has the potential for significant environmental effects and application of these Rules would be impracticable. In such cases, the proposer shall consult with the Chairman of the Council to arrange an alternative means of environmental review before taking the action.

B. State agencies developing procedural guidelines may develop EAW and EIS exemption categories. Such categories shall be submitted for Council review and approval and shall be subject to Minn. Stat. ch. 15 (1974) Rule making procedures.

C. EAW exemptions. Unless an action is included under MEQC 24 B.1., the following items are categories for which an EAW shall not be required.

This listing may be used as a guideline for developing other state agency exemption categories under MEQC 26 B. The following listing is not intended to imply that EAWs must be prepared on actions not included in this listing. In cases where EAWs are neither exempt nor mandatory, the public agency should prepare EAWs only where it is probable that the actions will cause significant environmental effects and an EAW is needed to guide the decision on whether an EIS is required.

1. Operation, maintenance, or repair work involving no substantial change in existing structures, land uses, or water quality.

2. Construction or alteration of a single or multiple residence with four dwelling units or less and accessory appurtenant structures and utilities, when not in conjunction with the construction or alteration of two or more such residences.

3. Construction or alteration of a store, office, or restaurant designed for an occupancy of 20 persons or less, if not in conjunction with the construction or alteration of two or more stores, offices, or restaurants accumulating an occupancy load of more than 30 persons, unless designated to be an historical structure.

4. Restoration or reconstruction of a structure in whole or in part being increased or expanded by less than 25 percent of its original size, square footage, or capacity, and aggregating less than 5,000 square feet, provided that such structure has not been designated to be of historical, cultural, archeological, or recreational value by a public agency.

5. Repaving or reconstruction of existing highways not involving the addition of new travel lanes or acquisition of additional right-of-way.

6. Installation of traffic control devices on existing streets, roads, and highways other than installation of multiple fixtures on extended stretches of highway.

7. Licensing or permitting decisions relating to individual persons or activities directly connected with an individual's household, livelihood, transportation, recreation, health, safety, and welfare, such as motor vehicle licensing, hunting licenses, professional licenses, and individual park entrance permits.

8. Purchase of operating equipment, maintenance equipment, or operating supplies.

9. Sales or lease of surplus governmental property other than land, radioactive material, pesticides, or buildings.

10. Loan, mortgage, guarantee, or insurance transactions in connection with new or existing structures or uses as defined in subparagraphs MEQC 26 C.2., 3. or 4.

11. Borrowing for purposes other than capital construction or land purchase.

12. Maintenance of existing landscaping, native growth, and water supply reservoirs, excluding the use of pesticides.

13. Utility extensions as follows: water service mains of 500 feet or less

and one and a half inches diameter or less; sewer lines of 500 feet or less and eight inch diameter or less; electrical service lines of 500 feet or less and 240 volts or less; gas service mains of 500 feet or less and one inch diameter or less; and telephone service lines of 500 feet or less.

14. Construction of accessory appurtenant structures including garages, carports, patios, swimming pools, fences, barns, or other similar agricultural structures, excluding feedlots; or other similar buildings not changing land use or density.

15. Grading or filling of 750 cubic yards or less.

16. Local bus stops and bus shelters or transit signs, which do not require accessory parking facilities.

17. Minor temporary uses of land having negligible or no permanent effect on the environment, including such things as carnivals and sales of Christmas trees.

18. Filling of earth into previously excavated land with materials compatible with the natural material on the site.

19. Individual land use variances including minor lot line adjustments and side yard and setback variances, not resulting in the creation of a new subdivided parcel of land or any change in land use character or density.

20. Basic data collection, training programs, research, experimental management, and resource evaluation projects which do not result in an extensive or permanent disturbance to an environmental resource, and do not constitute a substantial commitment to a further course of action having potential for significant environmental effects.

21. Accessory signs appurtenant to any commercial, industrial, or institutional facility not regulated by an agency of the State.

Chapter Thirteen: Procedural Requirements

MEQC 27 Selection of preparers, preparation of EAW, and notice of EAW conclusions.

A. Selection of preparers. The following procedures will be followed to determine the Responsible Agency or Responsible Person for the preparation of an EAW.

1. When a private person proposes to carry out an action which does not require any governmental permits, that person shall be the Responsible Person.

2. For any action in MEQC 24 B.1. the agency designated in parentheses shall be the Responsible Agency.

3. For any action not included in MEQC 24 B.1. or which falls into more than one category of MEQC 24 B.1., the Responsible Agency shall be determined as follows:

a. When a single public agency proposes to carry out or has jurisdiction to approve an action, it shall be the Responsible Agency.

b. When two or more public agencies propose to carry out or approve an action, the Responsible Agency shall be the public agency with the greatest responsibility for supervising or approving the action as a whole. Where two or more public agencies have an equal claim to be Responsible Agency, the public agencies shall either:

(1) By agreement, designate which agency shall be the Responsible Agency; or

(2) Submit the question to the Council, which shall designate the Responsible Agency based on consideration of the above principles.

c. To assist local governmental units in determining which public agency is the Responsible Agency, proposers of actions which are included in MEQC 24 B.1. shall provide a list of the other state and local permits known at the time to be required on the action.

4. When a private person proposes to carry out an action which in whole or in part requires a governmental permit, that person may prepare an EAW to be submitted to the appropriate Responsible Agency for its consideration and conclusion.

a. For any action in MEQC 24 B.1., a private person may voluntarily submit an EAW to the Responsible Agency. The agency will then have 30 days to add supplementary material if necessary and to prepare an EIS Preparation Notice or issue a Negative Declaration Notice and to submit the document to the Council with appropriate notices for publication in the *EQC Monitor.*

b. For any action which is not included in MEQC 24 B.1., a private person may voluntarily submit an EAW to the agency which appears to have the most approval authority on the project. If the agency and the proposer cannot agree on an appropriate Responsible Agency, the question shall be submitted to the Council for resolution. The agency will then have 30 days to add supplementary material if necessary and to prepare an EIS Preparation Notice or issue a Negative Declaration Notice and to submit the document to the Council with appropriate notices for publication in the *EQC Monitor.*

c. If an EAW determines an EIS is needed, the agency filing the EIS Preparation Notice shall be the Responsible Agency for preparation of the EIS.

5. Notwithstanding subparagraphs 1-4 above, for any action the Council may designate a Responsible Agency or Responsible Person for preparation of environmental documents.

B. Preparation of EAW.

1. The EAW shall be prepared as early as practicable in the development of the action. Early in the preparation of the EAW, the Responsible Agency shall consult with all other public agencies which have the jurisdiction to approve the action or a part of the action. When a local agency is the Responsible Agency, it shall consult with local agencies which so request and local agencies likely to be directly impacted by the proposed action. The Responsible Agency or Responsible Person may consult with appropriate reviewing agencies and other interested persons.

2. The format of an EAW shall be a worksheet and checklist in a form to be provided by the MEQC. The EAW shall include, as a minimum, the information outlined in MEQC 30 A.

C. Notice of EAW conclusions.

1. After an EAW is prepared, the Responsible Agency or Responsible Person shall file with the Council either an EIS Preparation Notice or a Negative Declaration Notice, with a copy of the EAW attached. A Negative Declaration Notice shall not be filed before official public review of the proposed action commences.

2. The Notices shall contain the information listed in MEQC 30 B. and C.

3. The Notices filed shall not be published until the Council has determined that a copy of the EAW has been mailed to all points on the official MEQC distribution list and to the city and county directly impacted by the proposed action.

4. When an EAW has been waived pursuant to MEQC 24 C., an EIS Preparation Notice shall still be required.

MEQC 28 Review of EIS preparation notices and negative declaration notices.

A. Review of EIS preparation notices.

1. When an EIS Preparation Notice is published, an EIS shall be required on an action unless within 30 days of EQC Monitor publication of the Notice, a member agency of the MEQC, a public agency with the jurisdiction to approve the action, or the proposer files objections with the Responsible Agency, the proposer of the action, and the Council.

2. The Council, at its first meeting held more than 30 days after the filing of an objection, shall determine whether an EIS shall be prepared. This time limit shall be waived if a hearing is ordered pursuant to MEQC 28 A.3.

3. The Council may hold a public hearing or informational meeting to assist it in its determination. When a hearing is held, it shall follow the following procedures:

a. The hearing shall be held as expeditiously as practicable in a county to be affected by the proposed action. Notice of the hearing shall be given at least 30 days in advance of the hearing to the proposer of the action, to all public agencies with jurisdiction over the action, and to the representative of the petitioners, if any. The hearing shall be conducted by a hearing officer, shall be transcribed, and shall continue until all persons have had an opportunity to be heard.

b. At the first monthly meeting at least 20 days after receipt by the Council and by requesting persons of the hearing officer's findings and recommendation (which receipt shall occur within 20 days of the hearing's conclusion), the Council shall consider the recommendation and any written briefs or argument filed by interested parties to the hearing, and shall decide whether to accept, reject, or modify the recommendation. Failure of the Council to act at this meeting shall be deemed acceptance of the recommendation of the hearing officer.

B. Review of negative declaration notices.

1. When a Negative Declaration Notice is published, an EIS shall not be required on an action unless within 30 days of *EQC Monitor* publication of the Notice, a member agency of the EQC, a public agency with the jurisdiction to approve the action, a representative of 500 original petitioners pursuant to MEQC 32 E.1., or a representative of 500 new petitioners pursuant to MEQC 32 E.2., files objections with the Responsible Agency or the Responsible Person, the proposer of the action, and the Council.

2. The Council, at its first meeting held more than 30 days after the filing of an objection, shall determine whether an EIS shall be prepared. This time limit shall be waived if a hearing is ordered pursuant to MEQC 28 B.3.

3. The Council may hold a public hearing or informational meeting to assist in its determination. When a hearing is held, it shall follow the procedures outlined in MEQC 28 A.3.

MEQC 29 Preparation and review of EIS.

A. Preparation and review of draft EIS.

1. The Responsible Agency or Responsible Person shall prepare and file the Draft EIS within 120 days of the EIS Preparation Notice publication date. This time limitation may be extended by the Council only for good cause upon written request by the Responsible Agency or Responsible Person.

2. The Responsible Agency may require the proposer to submit any relevant data or information that the proposer has in its possession or to which it has reasonable access.

3. The Responsible Agency or Responsible Person may consult with and request comments of public agencies with jurisdiction by law or special expertise and the public regarding the environmental effects of an action, including the appropriate regional development commission.

4. Reviewing agencies may comment in writing to the Responsible Agency or the Responsible Person within 30 days of receiving the EIS.

5. The Draft EIS is filed when it is delivered to the Council in a form and manner acceptable to it together with evidence that copies were mailed to all appropriate Council-designated distribution points, all approving agencies, reviewing agencies, the proposer, and, to the extent practicable, requesting persons.

6. Between 30 and 45 days after the Draft EIS is filed, an informational meeting shall be held by the Responsible Agency, or by the MEQC if there is no Responsible Agency, in a county affected by the proposed action as part of the Draft EIS review process. Notice shall be given at least 20 days in advance of the meeting and shall be mailed to recipients of the Draft EIS and published in a newspaper of general circulation in the counties affected by the action. The Draft EIS meeting may be consolidated with any hearing required by law to be held before approval of the action. A typewritten or audio-recorded transcription of the meeting shall be made, and the public record shall remain open for 20 days after the last day of the hearing to allow any person to submit additional information or opinions. All written and oral

statements received into the record, or summaries thereof, shall be included in the Final EIS.

B. Preparation and review of final EIS.

1. The Responsible Agency or Responsible Person shall have 30 days from the close of the Draft EIS record to prepare and file the Final EIS. The Council may extend this time limitation upon written request showing good cause by the Responsible Agency or Responsible Person.

2. The Final EIS is filed when it is delivered to the Council in a form and manner acceptable to it together with evidence that copies were mailed by the preparer to all appropriate Council-designated distribution points, the proposer, all approving and reviewing agencies, and, to the extent practicable, requesting persons.

3. Council review.

a. The Council may review any Final EIS to determine whether the procedures and policies of the Act and these Rules have been adequately complied with. Failure to review a Final EIS in the time specified in b. constitutes its acceptance.

b. If the Council decides to review a Final EIS, it shall commence the review at or before its first meeting held more than 30 days following filing of the Final EIS. The Council shall determine EIS adequacy at or before its first meeting held more than 45 days after commencing review. All persons receiving the Final EIS shall be notified of the Council's decision and of the time and place of any information meetings which it may hold to aid its review.

4. If the Council determines that a Final EIS is inadequate, it shall so notify the Responsible Agency or Responsible Person and shall identify in writing within 15 days the improvements or additions necessary for Council acceptance of the Final EIS. The Responsible Agency or Responsible Person shall file a revised EIS in the manner provided in subparagraph MEQC 29 A.5. within 30 days of receipt of the Council's written comments. Reviewing agencies and other persons shall comment in writing on the revised EIS within 15 days of receipt of the revised EIS. The Final EIS shall be submitted to the Council within 15 days after the close of the comment period in the form and manner provided in subparagraph MEQC 29 B.2. The Council may extend these time limitations upon written request and a showing of good cause by the Responsible Agency or Responsible Person.

5. The Council shall make a final decision on the adequacy of the Final EIS prior to any governmental approval of the action.

MEQC 30 Content requirements.

A. Content of an EAW. The EAW shall address at least the following major categories in the concise form provided on the worksheet:

1. Summary.

a. Finding of Negative Declaration or Positive Declaration (EIS Required);

b. Activity Identification (name, sponsors, Responsible Agency, EAW contact person, reason for preparation, any federal jurisdiction, governmental permits);

c. Activity Description Summary (location, proposal, construction schedule, estimated costs).

2. Activity description.

a. U.S.G.S. Map 1:24,000 Scale, Diagrams;

b. Land Use Categories Affected;

c. Size and Dimensions of Project.

3. Assessment of potential environmental impact.

a. Ecological Effects (topography, wetlands, water systems, wildlife, vegetation);

b. Environmental Hazards (toxic materials, floodplains, steep slopes, geologic hazards);

c. Water Quality and Quantity (surface and ground water impacts);

d. Resource Conservation, Energy, and Usage (agricultural or forest lands, minerals, energy sources and use);

e. Planning, Land Use, Community Services (compatibility with plans, regional impacts, population, employment, housing, utilities, transportation);

f. Open Space and Recreation (parks, federal, state, local);

g. Historic Resources [landmarks (federal or state), historic sites, archaeologic sites, paleontologic sites];

h. Air Quality (pollutants);

i. Noise (vibration and sound);

j. Other Environmental Concerns.

4. Mitigation of adverse environmental effects.

5. Findings and certification. (private or governmental action, time for EIS preparation, EQC distribution certification).

B. Content of negative declaration notice. Each Negative Declaration Notice shall include:

1. A brief description of the proposed action.

2. A statement that no EIS is required because the action is not a major action with the potential for significant environmental effects, and in the case of private actions is not of more than local significance, supported by reasons.

3. Where the EAW and supporting documentation is available for public inspection and copying.

C. Content of EIS preparation notice. Each EIS Preparation Notice shall include:

1. A brief description of the action requiring the EIS.

2. The Responsible Agency or Responsible Person for EIS preparation.

3. The recommended time requirements for preparation.

4. Recommendations, if applicable, as to the extent to which the action may proceed during the EIS process.

5. Where the EAW and supporting documentation is available for public inspection and copying.

D. Content of draft EIS. A Draft EIS shall contain the following information:

1. Summary. A summary sheet which describes the action, major environmental impacts (adverse and beneficial), reasonable alternatives, and the federal, state, and local permits outstanding shall be included. Also, federal, state, or local agencies, other organizations, and private individuals consulted in the preparation of the EIS shall be identified.

2. Description. A description of the action, including type, size and location, and the environmental setting of the action. A regional and site-specific map should be included to assist in identification of the project.

3. Environmental impact of the proposed action. All phases of an action shall be considered when evaluating an action: planning, acquisition, construction, implementation, development, operation, and conclusion of operation. Special consideration shall be given to pollution, impairment, or destruction of the air, water, land, or other natural resources located within the State resulting from the proposed action, without limitation by the definitions of "action" and "environment" in these Rules. This discussion shall also include a description of all resources in the area and how they will be affected by the action, with emphasis placed on resources that are rare or unique to the region or that possess important historical, cultural, natural, ecological, or aesthetic values, without limitation by the definitions of "action" and "environment" in these Rules.

4. Any direct or indirect environmental, economic, energy, and employment effects that cannot be avoided if the proposed actions is implemented. This discussion shall describe the adverse and beneficial environmental, economic, energy, and employment effects that will result directly from the action, as well as the effects that may be reasonably expected to result from the action. Mitigation measures that have been or may be incorporated into the action to reduce or minimize significant adverse environmental, economic, energy, and employment effects shall be discussed.

5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented. This discussion shall include the proposed use of non-renewable resources, long term or irreversible commitments of resources to a particular use and any irreversible and irretrievable damage that may result from the action.

6. The relationship between local short term uses of the environment and the maintenance and enchancement of long term productivity, including the environmental impact of predictable increased future development of an area if the action is implemented. This discussion shall include the extent that

the proposed action involves trade-offs between short term environmental gains or losses versus long term gains or losses, including potential risks to health and safety, and the extent that the proposed action forecloses future options. The impact of predictable increased future development in the area that may be stimulated, directly or indirectly, by the proposed action shall be discussed.

7. Alternatives to the Proposed Action. An objective evaluation of all reasonable alternatives to the action and the environmental impact of each and the reasons for their rejection in favor of the recommended choice shall be made. Reasonable modifications of the proposed action that may avoid or reduce adverse environmental effects shall be discussed, including the expected benefits, costs, and effects on the objective of the proposed action.

8. The impact on state government of any federal controls associated with the proposed action. Federal actions pending which may affect the final outcome of the project should be discussed, including those actions which may result in the expenditure of additional state funds.

9. The multi-state responsibilities associated with the proposed action. Impacts of the proposed action upon multistate responsibilities shall be discussed, including the environmental effects of the action upon adjacent states.

D. Content of final EIS. The Final EIS shall consist of the Draft EIS, the comments or summaries thereof received through consultation and public comment, including public meetings or hearings held on the EIS, and the response of the Responsible Agency or Responsible Person to the significant environmental issues raised in the consultation, comment, and review process. The response of the Responsible Agency or Responsible Person to constructive comments received may take the form of a revision of the Draft EIS or may be an attachment to the Draft EIS.

MEQC 31 Final decisions and actions.

A. No decisions granting or denying a permit application for which notice is required to be published in MEQC 35 shall be effective until 30 days following publication of the notice.

B. No public agency proposing an action for which notice is required to be published in MEQC 35 shall begin to implement that action until 30 days following publication of the notice.

C. When an EAW is prepared on any action, no final decision to approve or commence the action shall be made until 30 days following publication of a Negative Declaration Notice.

D. On any action for which an EIS Preparation Notice has been published, no final decision to approve or commence the action shall be made until the Council has completed its review of the Final EIS. Where public hearings are required by law to precede issuance of a governmental permit or other implementation of a governmental action, public hearings shall not be held until after filing of a Draft EIS, except for projects reviewed under MEQC 25 G.

E. When an EIS is required on an action, any physical construction on the action or operation of the action shall be halted from the time the EIS

Preparation Notice is published until the Final EIS is accepted by the Council, unless the Council determines that construction or operation may begin or continue. In that case, the Council shall specify the extent to which construction or operation shall be allowed, and the specific reasons for that determination. This Rule shall in no way limit the Council's statutory authority to halt actions or impose other temporary relief.

MEQC 32 Petition for an EIS.

A. Petition. Any person or group of persons may file with the Council a petition that contains the signatures and addresses of 500 or more individuals and requests the Council to require an EIS on an action.

B. Content. In addition to the signatures, the petition shall include the following written information:

1. Description of the action;

2. Proposer of the action;

3. The anticipated environmental effects of the action;

4. The name and address of a representative of the petitioner for the purpose of this section;

5. Any additional information that may be used in the EAW to determine whether the proposed action is a major action with the potential for significant environmental effects, and in the case of private actions whether the action is of more than local significance.

C. Council action.

1. The petition shall qualify for the remedies provided by these Rules and Minn. Stat. § 116D.04, subd. 3 (1974), unless the Council determines that:

a. The petition lacks 500 signatures; or

b. The action is one to which these Rules do not apply, pursuant to MEQC 26; or

c. An EIS Negative Declaration Notice has been filed in accord with these Rules and the time for objections or appeal has passed; or

d. The petition is frivolous or clearly outside the scope of these Rules and the Council disqualifies the petition by order.

2. In all other cases, the Council shall refer the petition to a Responsible Agency for preparation of an EAW or, where appropriate, arrange for a Council review pursuant to MEQC 28 A.3.

D. Responsible agency duties. The Responsible Agency shall have 45 days in which to prepare the EAW referred to it by the Council pursuant to MEQC 32 C.2. and shall thereupon publish an EIS Preparation Notice or Negative Declaration Notice.

E. Challenge of Negative Declaration Notice by petitioners.

1. If a Negative Declaration Notice is published, a representative of the

original petitioners for an EIS may, within 30 days, request Council review of the decision pursuant to MEQC 28 B.

2. Any person or group of persons may request Council review of a Negative Declaration Notice on any action by submitting a new petition signed by 500 or more individuals.

a. Content: The petition shall state on each page, "NEGATIVE DECLARATION CHALLENGE-PETITION FOR A STATE EIS". The petition shall also include the items described in MEQC 32 B. above.

3. Review: On all petitions received within 30 days of publication of a Negative Declaration Notice as provided in MEQC 35, the Council shall conduct a public hearing to facilitate the Council's review of whether an EIS must be prepared. The hearing shall be held as expeditiously as practicable in a county to be affected by the proposed action. The review procedure is specified in MEQC 28 B.

Chapter Fourteen: Early Notice Rules

MEQC 33 Authority and purpose.

A. To provide early notice of impending actions which may have significant environmental effects, the Council shall, pursuant to Minn. Stat. § 116D.04, subd. 8 (1974), publish a bulletin with the name of *"EQC Monitor"* containing all notices as specified in MEQC 35. The Council may prescribe the form and manner in which the agencies submit any material for publication in the *EQC Monitor*, and the Chairman of the Council may withhold publication of any material not submitted according to the form or procedures the Council has prescribed.

B. These Rules are intended to provide a procedure for notice to the MEQC and to the public of natural resource management and development permit applications, and impending governmental and private actions that may have significant environmental effects. The notice through the early notice procedures is in addition to public notices otherwise required by law or regulations.

MEQC 34 Exemptions.

A. All National Pollutant Discharge Elimination System Permits granted by the Minnesota Pollution Control Agency, under the authority given it by the Environmental Protection Agency, of the United States of America, shall be exempt from these Rules unless otherwise provided by resolution of the Council.

B. Where, in the opinion of any public agency, strict observance of MEQC 33-35 would joepardize the public health, safety, or welfare, or would otherwise generally compromise the public interest, the agency shall comply with these Rules as far as practicable. In such cases, the agency shall carry out alternative means of public notification and shall communicate the same to the council Chairman.

C. Any federal permits for which review authority has been delegated to

a non-federal public agency by the federal government may be exempted by resolution of the Council.

MEQC 35 EQC MONITOR publication requirements.

A. Public agencies are required to publish the following in the *EQC Monitor* except that this section constitutes a request and not a requirement with respect to federal agencies.

1. Notice of receipt of applications or government proposals for the natural resources management and development permits listed below. When an action has been noticed pursuant to MEQC 35 A.3. separate notice of individual permits required by that action need not be made unless changes in the action are proposed which will involve new and potentially significant environmental effects not considered previously.

a. Navigational obstructions within designated state or federal Wild and Scenic River land use districts.

b. Commercial and industrial wharves used for cargo transfer.

c. Channelization of one or more miles of designated Class I or II public water courses.

d. Any marina and harbor project of more than 20,000 square feet of water surface area.

e. Any new or additional impoundment of water creating a water surface in excess of 200 acres.

f. Filling of ten or more acres of public waters.

g. Dredging of ten or more acres of public waters.

h. All public hearings conducted pursuant to water resources permit applications (Minn. Stat. ch. 105 (1974)).

i. A new appropriation for commercial or industrial purposes of either surface water or ground water averaging 30 million gallons per month, or exceeding two million gallons in any day during the period of use; or a new appropriation of either ground water or surface water for irrigation of 640 acres or more in one continuous parcel from one source of water.

j. Application for the underground storage of gas or liquids.

k. County, state or federal auctions for sale of publicly owned timber on any tract adjacent to a public highway.

l. County, state or federal auctions for sale of publicly owned timber on any tract adjacent to public waters of the State.

m. County, state or federal auctions for sale of publicly owned timber on any tract, any part of which is within one quarter (¼) mile of an organized public, private or non-profit recreation area or camp.

n. Notice of all public permit and lease sales for state permits and leases to prospect for and mine iron ore, copper nickel, or other minerals as required by Minn. Stat. §§ 93.16, 93.335, and 93.351 (1974) and Copper-Nickel Rules and Regulations.

o. Permits and leases for iron ore in non-merchantable deposit areas (Minn. Stat. 93.283).

p. New leases and permits for use of state forest lands for summer cabins, commercial recreational facilities and gravel pits.

q. Roads through state forest lands exceeding five miles in length.

r. Facility plans for new or expansion of industrial treatment works not covered by NPDES permits (Minn. Stat. § 115.07 subd. 1 (1974)).

s. Facility plans for new or expansion of liquid storage facilities equal to or exceeding 50,000 gallons (Minn. Stat. § 115.43, subd. 3(2)(1974)).

t. New or expansion of solid waste disposal systems handling 100 cubic yards or more of solid waste per day (Minn. Stat. § 116.07, subd. 4A (1974)).

u. Installation permit application for new or expansion of incinerators with capacity equal to or in excess of one ton per hour of solid waste (Minn. Stat. § 116.07, subd. 4A (1974)).

v. Installation permit application for new or expansion of an emission facility emitting 100 tons or more per year of any restricted air contaminant (Minn. Stat. § 116.07, subd. 4A (1974)).

w. New or expansion of a feedlot designed for 1,000 cattle or more equivalent animals units (Minn. Stat. § 116.07, subd. 7 (1974)).

x. Construction of a public use airport (Minn. Stat. § 360.018, subd. 6 (1974)).

2. Impending actions proposed by state agencies when the proposed action may have the potential for significant environmental effects.

3. EIS Preparation Notices and Negative Declaration Notices.

4. Notice of Draft EIS informational meetings or hearings to be held pursuant to MEQC 29 A.6.

5. Notice of other actions that the Council may specify by resolution.

6. Notice of the application for a Certificate of Need for a large energy facility, pursuant to Minn. Stat. § 116H.03 (1974).

B. Public agencies may publish notices of general interest or information in the *EQC Monitor*, including notices of consolidated state permit applications, the latter to be commenced at the discretion of the Council.

C. The MEQC is required to publish the following in the *EQC Monitor:*

1. Receipt of valid petitions, pursuant to MEQC 32, and assignment of a Responsible Agency therefore.

2. Receipt of Draft or Final EIS.

3. Notice of any public hearing held pursuant to Minn. Stat. § 116D.04, subd. 9 (1974).

4. Receipt by the Council of notice of objections to a negative declara-

tion by petitioners or a public agency, and the time and place at which the Council will review the matter, including notice of public hearings, if any.

5. The Council's decision to hold public hearings on a recommended Critical Area pursuant to Minn. Stat. § 116G.06, subd. 1(c) (1974) (Critical Areas Act, 1973).

6. Notice of application for a Certificate of Corridor Compatibility or Site Compatibility, or a High-Voltage Transmission Line Construction Permit pursuant to Minn. Stat. § 116C.51 et seq. (Power Plant Siting Act of 1973).

MEQC 36 Content of notice.

A. The information to be included in the notice for natural resources management and development permit applications and other items in MEQC 35 A.1. and 2. shall be submitted by the public agency on a form approved by the Council. This information shall include but not be limited to:

1. Identification of applicant, by name and mailing address.

2. The location of the proposed project, or description of the area affected by the action by county, minor civil division, public land survey township number, range number, and section number.

3. The name of the permit applied for, or a description of the proposed project or other action to be undertaken in sufficient detail to enable other state agencies to determine whether they have jurisdiction over the proposed action.

4. A statement of whether the agency intends to hold public hearings on the proposed action, along with the time and place of the hearings if they are to be held in less than 30 days from the date of this notice.

5. The identification of the agency publishing the notice, including the manner and place at which comments on the action can be submitted and additional information can be obtained.

MEQC 37 Statement of compliance. Each governmental permit or agency authorizing order subject to the requirements of these Rules issued or granted by a public agency shall contain a statement by the agency concerning whether these Rules have been complied with, and publication dates of the Notices, if any, concerning that permit or authorization.

MEQC 38 Publication.

A. The Council shall publish the *EQC Monitor* whenever it is necessary, except that material properly submitted to the Council shall not remain unpublished for more than ten working days.

B. The *EQC Monitor* shall have a distinct and permanent masthead with the title "EQC Monitor" and the words "State of Minnesota" prominently displayed. All issues of the *EQC Monitor* shall be numbered and dated.

MEQC 39 Cost and distribution.

A. When an agency properly submits material to the Council for publi-

cation, the Council shall then be accountable for the publication of the same in the *EQC Monitor*. The Council shall require each agency which is required to publish material or requests the publication of material in the *EQC Monitor,* including the Council itself, to pay its proportionate cost of the *EQC Monitor* unless other funds are provided and are sufficient to cover the cost of the *EQC Monitor.*

B. The Council may organize and distribute contents of the *EQC Monitor* according to such categories as will provide economic publication and distribution and will offer easy access to information by any interested party.

C. The Council may further provide at least one copy to the Documents Division for the mailing of the *EQC Monitor* to any person, agency, or organization if so requested, provided that reasonable costs are borne by the requesting party. Ten copies of each issue of the *EQC Monitor,* however, shall be provided without cost to the legislative reference library and ten copies to the state law library, and at least one copy to designated MEQC depositories.

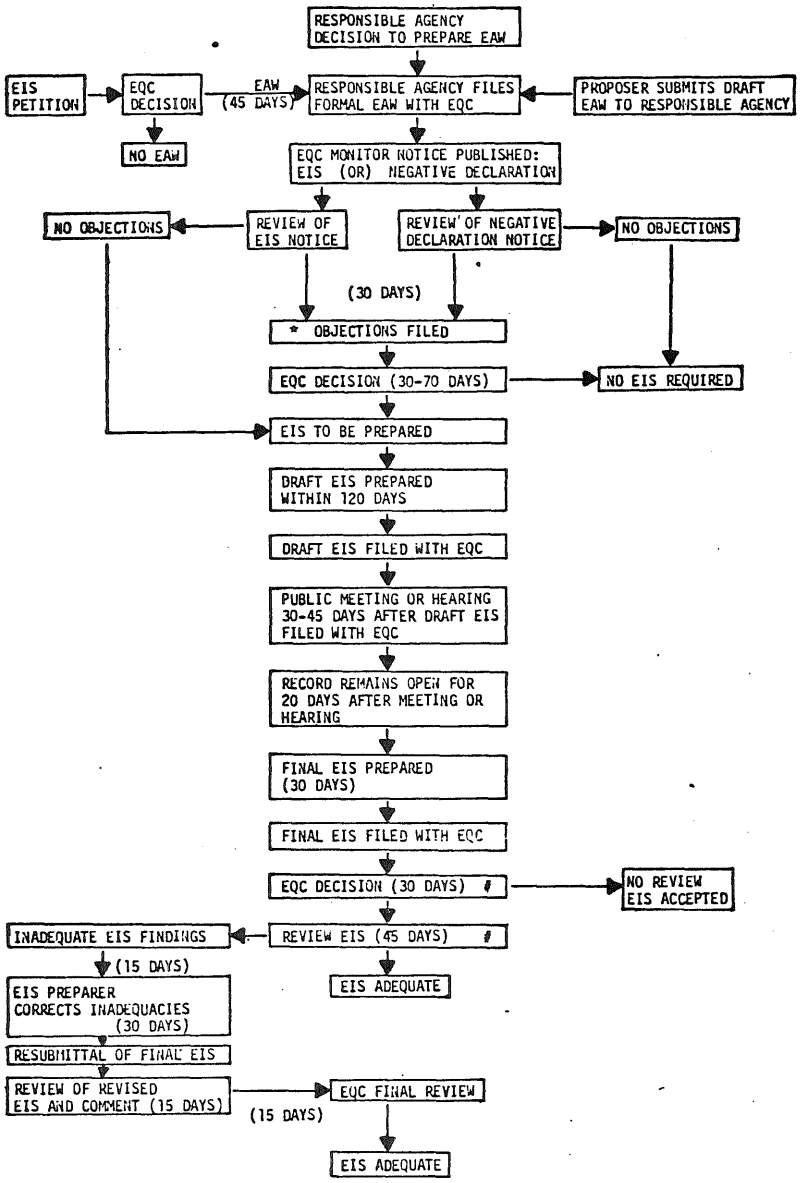
D. The MEQC shall provide adequate office space, personnel, and supply necessary equipment for the operation of the *EQC Monitor* without cost to the agencies.

MEQC 40 General.

A. Publication duties of the *EQC Monitor* may be transferred to the State Register upon resolution of the Council.

MEQC 41 Effective date. The amendments to these Rules (MEQC 21-41) shall become effective upon filing with the Secretary of State. All petitions received, environmental assessments ordered or received, and EISs ordered before the effective date of the amendments shall at the request of the preparer of the document be processed and reviewed as if these amendments were not in effect. Projects previously reviewed or exempted by the MEQC are not subject to these Rules except for those actions included in MEQC 25 F.1.

MINNESOTA ENVIRONMENTAL REVIEW PROCESS



Review time variable dependent upon meeting or hearing schedule
* From pertinent agencies, petition or developer

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