ADMINISTRATIVE AND LEGAL ASPECTS OF ENERGY WATER TRADEOFFS IN THE REGULATION OF SURFACE COAL MINING: COMPARATIVE ANALYSIS OF ADMINISTRATIVE LAW AND WATER QUALITY REGULATION IN OKLAHOMA AND WYOMING

E-009

By

James J. Lawler
Department of Political Science

with contributions by

Bobby Birdwell

and

M. Darrell Dominick

Final Technical Completion Report
Oklahoma Water Resources Institute

July, 1982

Preface

This report is intended as preliminary to a more ambitious effort to analyze the compatibility of legal and administrative institutions in four states which together may form a system of energy-water tradeoffs in the conveyance of coal and water from Wyoming to Oklahoma, Arkansas, and Louisianna -- i.e., the Energy Transportation Systems (ETSI) Coal Slurry pipeline. At the outset, particular attention is focused upon the administrative legal and organizational framework of these states. All of the states have adopted the Revised Model State Administrative Procedure Act, with variations in statutory provisions, judicial construction, and implementing organizational structure. The first phase of the research deals with Wyoming and Oklahoma, both of which are coal-producing states with water resource problems resulting from surface coal production.

Acknowledgments

This project was made possible by funds provided by the Oklahoma Water Resources Research Institute at Oklahoma State University, supplemented by funds from the Oklahoma State University Energy Institute. The investigator wishes to thank Professor Norman N. Durham, Dean of the Graduate College and Director of the Energy Institute, and Professor Joe H. Mize, Director of the Energy Institute, for their confidence and support.

The investigator wishes to thank, and gratefully acknowledge the valuable research assistance provided by, three outstanding graduate students who helped to make this research possible: Bobby Birdwell, who conducted interviews of public officials in Oklahoma and Wyoming and gathered extensive information; M. Darrell Dominick, whose graduate report for the Master of Arts degree, An Analysis of Administration Oklahoma Coal Surface Mining and Water Tradeoffs was an outgrowth of research conducted for this project; and Scott Ingram, who provided a valuable analysis of the Office of Surface Mining.

Thanks is also extended to the following public officials, who provided a wealth of useful information in interviews:

Mr. Robert Dorn, First Assistant
Administrator, Land Quality Division,
Wyoming Department of Environmental Quality

Mr. Larry Edmison, Director,
Oklahoma Department of Pollution Control

Mr. William Garland, Administrator,
Water Quality Division,
Wyoming, April 23, 1982

Mr. Glenn A. Goss, Member,
Wyoming Environmental Quality Council
and General Manager of Peabody Coal Co.
in Wyoming

Mr. Arnold Hannum, Chief
Mine Inspector, Wyoming
Department of Mines

Mr. Ron Jarman, Chief of the
Water Quality Division,
Oklahoma Water Resources Board

Mr. Mike Kastle, Director,
Abandoned Mine Lands Program,
Oklahoma Conservation Commission

Justice Marion Opala,
Oklahoma Supreme Court

Mr. Blaney Qualls, Deputy Chief
Mine Inspector, Oklahoma
Department of Mines

Introduction

Surface mining of coal presents a potentially serious threat to the scarce water resources of coal-producing western states. According to Gerald D. Seinwill, Acting Director of the Water Resources Council, "Water is the most serious long-range problem now confronting the nation--potentially more serious than the energy crisis." Coal, the nation's most abundant non-renewable energy resource, has been targeted for accelerated development, as a means of reducing the United States' dependence upon imported petroleum! One study notes, however, that:

> As coal companies gear up to double the nation's coal production in the next decade, the regulatory efforts to abate coal mine water pollution will become increasingly important.[1]

About 54 percent of the nation's coal is located in states west of the Mississippi, where seams lie close to the earth's surface.[2] The western coal is efficiently mined by stripping away layers of overburden (earth, vegetation, and rock) above the coal seams instead of tunneling underground.

I. Surface Mining and Water Resources.

This process of surface mining, or "strip-mining", threatens water resources in several ways. Surface mining may adversely affect water quantity in a given area by fracturing groundwater aquifers and confining strata and by altering surface water channels and runoff patterns.[3] Surface mining on alluvial valley floors can disrupt alluvial sediments which serve the important function of strong water supplies for vegetation during the growing season. Surface mining, likewise, poses a threat to water quality--principally from sediment, acid and alkaline mine drainage,

and increases in toxic trace elements.

Sedimentation from lands stripped of vegetative cover "is a major obstacle to aquatic species colonization of streams, lakes and reservoirs, regardless of location."[4] Suspended sediment diminishes the penetration of light for aquatic plants on which fish feed, and can suffocate fish by clogging their gills. Surrounding streams become filled with silt. Leaching of iron, manganese, zinc, copper and other metals by exposure of chemically is accelerated reactive materials in spoil banks and refuse banks. Acid mine drainage principally from contact of runoff water with iron sulfide exposed by the surface mining, is a less serious problem in the west, where soils are predominantly alkaline, then in eastern coal fields. However, alkaline mine drainage, from overburdens containing limestone and other calcium compounds which generate alkaline waste water, is a problem in some areas. The presence of chlorides, sulfates and other soluable irons can lead to increased salinity in western waters.[5]

In Oklahoma one of the concentration of coal and water resources in the same sub-region of the State poses special problems of public policy. Oklahoma's coal reserves, totalling an estimated 7.8 billion tons, are located in area of over 15,000 square miles across 19 counties of eastern Oklahoma.[6] In 1980, 54 active mines in this region were producing over 5 million tons of coal per year by surface mining.[7] Although the high sulfur content of Oklahoma coal limits its use locally because of federal clean air regulations, the coal is exported to Kansas, Florida, Colorado, and even Japan. In addition, some 30,000 acres of surface mined lands in eastern Oklahoma lie abandoned and unreclaimed.[8] The abandoned mines are a greater source

of mine-related water pollution than are active mines.[9]

According to the Oklahoma Water Resources Board (OWRB) "Most of the state's water resources are located in eastern Oklahoma, where abundant rainfall and runoff provide excellent potential for water resources development."[10] An average of 34 million acre feet of "surplus" water leaves eastern Oklahoma every year.[11] The Oklahoma Comprehensive Water Plan proposes a statewide water conveyance system to transfer over 2.5 million acre feet of water per year from eastern Oklahoma to central and western Oklahoma, which are otherwise expected to experience substantial water deficits by the year 2040.[12] Although the water proposed for transfer is of good quality at the present time, expected expansion of strip-mining activities in eastern coal fields could substantially degrade the water quality in the future.

The consequences of surface mining for water resources is even more problematic for Wyoming, which in 1980 became the leading coal producing state in the United States.[13] A report by the U.S. Department of Agriculture identifies the Power River and Tongue River Boasins in Wyoming and Montana as areas in which the impact of coal development upon scarce water resources will be particularly severe.[14] During the 1980's, coal production in these basins is expected to increase from 15 percent to 30 percent. Sulfate levels in the water are naturally high owing to geological factors, and discharges from mining activities may raise these levels beyond a critical point. Increased sedimentation is also expected as a result of land disturbance from the mining activities.

II. Energy-Water Tradeoffs and Decision-Making Institutions: The Growing Importance of State Administrative Regulation.

The extent to which surface mining operations in each state actually interfer with the water supply depends at least as much upon institutions

and policies as upon physical and technological realities. Trade-offs between energy and water are determined by public officials: those who pass legislation and those who are responsible for its interpretation and implementation. This study concerns officials in the latter category: public administrators and judges who are involved in interpreting and implementing legislation concerning surface mining as it affects water pollution.

The Oklahoma Legislature has recognized that "coal mining operations presently contribute significantly to the nation's energy requirements, and that the cooperative effort established by Oklahoma environmental legislation is necessary to prevent or mitigate adverse environmental effects."[13] Responsibilities for administering this environmental legislation are divided among several state administrative agencies which operate within a matrix of overlapping federal and state statutes and case law. Likewise, Governor Herschler of Wyoming observes:

> Wyoming recognizes the need to contribute toward energy self-sufficiency, there is a state-wide consensus that mining should occur under state endorsed terms which preserve the quality of our environment and the health and safety of our citizens.[14]

The Wyoming Environmental Quality Act declares as policies and purposes of the State: "to prevent, reduce and eliminate pollution; to preserve and enhance the air, water and reclaim the land of Wyoming; to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the State..."[15] The Wyoming Department of Water Quality is authorized to make regulations to implement the Act within the framework of state and federal law, and the jurisdiction of federal administrative agencies.

State administrative regulation is becoming increasingly important as result of a reduced role of the federal government in major areas of

resource administration.[16] As an example of his policy of emphasizing the state regulatory role over federal responsibility, President Reagan mentioned that: "The Federal Office of Surface Mining, in the Department of the Interior, has been reorganized with the appropriate role of the Federal Government being one of assistance, advice and review of State efforts."[17] The Office of Surface Mining (OSM) polices implementation of the Surface Mining Reclamation Act which includes a variety of provisions concerning water pollution control. Reorganization has taken the form of decentralization and a reduction in the number of OSM's field officers.[18] According to Interior Secretary James G. Watt, "This reorganization reflects OSM's changing mission and our determination to develop a working partnership with the states."[19]

The decreasing federal role is also reflected in reduction in budget and inspection personnel for the two major federal agencies in charge of regulating water pollution from surface mining operations, OSM and the Environmental Protection Agency.[20] Moreover, the OSM's "state window" provision allowing states to propose alternative regulatory techniques to comply with federal requirements for surface mining operations was relaxed by amendments effective in November, 1981. The amendments allow states to adopt regulations which are "as effective" as the federal regulations in controlling environmental problems, without requiring a showing that the variations from federal regulations are strictly necessary because of local conditions.

III. Oklahoma and Wyoming as Subjects for Comparative Study: Interdependencies, Similarities, and Differences in Regulatory Variables.

Comparison of the regularoty approaches of Oklahoma and Wyoming toward water pollution from surface mining can offer insights into the desirability of alternative regulatory patterns which are already in operation at the

state level. The two states are part of an interstate energy-water system of interdependent resource development programs. Most of the coal burned from Oklahoma is low-sulfur coal, Wyoming coal, imported to satisfy air pollution control requirements. By 1990, Oklahoma is expected to require about 41 million tons of coal per year.[21] Usage of coal in Oklahoma power plants was 1.5 MMTA in 1977 and is expected to be 45.5 MMTA by 1990.[22] The decision of Public Service Company to abandon plans to construct the Blackfox nuclear power plant in eastern Oklahoma increases the likelihood of additional coal-fired plants in the area. Use of a mixture of Oklahoma and Wyoming coal in new utility stations in Oklahoma is expected to increase demand in the latter state for strip-mined coal from both states. Plans have been developed for a proposed coal slurry transportation project to transport coal from Wyoming to power plants in Oklahoma, Arkansas, and Louisiana.[23] By transferring water from an area in Wyoming where it is relatively scarce to a part of Oklahoma where it is readily available, the project would make water resource management in Wyoming more critical. Since the slurry pipeline will affect markets for coal in both states, and concomitant surface mining activities, it will add to the challenge of effective policies and administration of energy-water tradeoffs.

From an administrative-legal standpoint, Oklahoma and Wyoming share important similarities which are worthy of study. Both states have adopted, albeit with important modification, the Model State Administrative Procedure Act (MSAPA) prepared by the National Conference of Commissioners on Uniform State Laws.[24] This Act, which is followed by some twenty other states and the District of Columbia,[25] is based upon the federal Administrative Procedure Act of 1946. The MSAPA specifies basic procedural requirements for rule-making, order making, review of agency decisions,

and other proceedings by state administrative agencies, thereby providing "a substantial body of like legislation"[26] upon which administrative decisions affecting coal-water tradeoffs must be based. Furthermore, Oklahoma and Wyoming are under the common federal appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit. Decisions of that appellate court on matters involving federal mining reclamation and water resources legislation are legally binding precedent for both states, unless overturned by the United States Supreme Court.

Nevertheless, there are important differences between Oklahoma and Wyoming in the terms of geological conditions and the regulatory context of tradeoffs between strip-mining and water resources. Oklahoma's coal seams are considerably thinner than those of Wyoming, and an argument can be made that this difference requires different reclamation procedures. Thus far, the OSM has not accepted that argument.

In terms of the regulatory context, at least three kinds of variables deserve consideration. First, each state has adopted different statutory provisions which affect mining and water. These include variations or modifications of the Model State Administrative Act, itself; differing statutes which supplement the procedural requirements of the Act; and different substantive legislation in each state concerning particular measures for pollution control. Common federal legislation, and oversight by the Office of Surface Mining and the Environmental Protection Agency, help to reduce the extent of variation in substantive state law. Yet increasing federal tolerance of state-initiated alternatives has somewhat reduced the constraining effects of federal law upon state regulatory diversity.[27]

Second, administrative agencies in the two states differ markedly in organizational structure, resources, and style of operation. The Oklahoma Water Resources Board has exclusive control over administering water rights, but shares responsibilities for water pollution control with other agencies. In Wyoming, all aspects of environmental regulation including air pollution, water pollution, and surface mining reclamation are regulated by the Department of Environmental Quality; but water rights are administered by a separate agency, under the Wyoming Board of Control and the State Engineer. Agencies in the two states differ in size, budgetary resources and recruitment patterns. These differences have resulted in different patterns of implementation of statutory requirements from one state to another.

Third, judicial influences have had a considerable impact in shaping application of the law. By giving differing interpretations to similar statutory language, the courts of Oklahoma and Wyoming have created diverging bodies of state administrative law.

IV. Objectives of the Study

This study presents a comparative analysis of regulatory approaches to water pollution from surface mining operations in Oklahoma and Wyoming. Of particular concern is the interaction between state administrative law and the structural and behavioral contexts of resource management. Administrative law has traditionally been defined as "the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review."[28] Administrative law contains the basic procedural requirements for investigations, rule-making, order-making, and licensing by administrative agencies, and the review of these matters by courts. Yet as Robinson, Gellhorn and Bruff

water resources, must satisfy minimum procedural requirements set forth by federal legislation.

I. The Primary Controversy in Oklahoma: An Example Administrative-Legal Dynamics.

The critical importance of state administrative law to surface regulation became evident in Oklahoma in 1980-81, when the State became emboiled in a controversy over primary in administration of mining reclamation. The primacy controversy illustrates the complex inderdependencies among various provisions of administrative law.

On December 23, 1980, Oklahoma District Judge Stewart Hunter issued an injunction against enforcement of rules and regulations developed by the Oklahoma Department of Mines (ODOM) to implement the Oklahoma Coal Reclamation Act of 1979 (45 O.S. 1980 sec. 742.1 et sec). The case which led to this outcome, Oklahoma Mining and Reclamation Association v. Oklahoma,[30] was brought by an organization representing the Oklahoma coal industry, on grounds that the regulations were unreasonably restrictive of their property rights. Applying the "arbitrary and capricious standard" specified in the Oklahoma Administrative Procedures Act, as a basis for overturning decisions of administrative agencies,[31] Judge Hunter found that the regulations were capricious, and ordered the Department of Mines not to enforce it.

The regulations had been prepared by ODOM to meet federal requirements by which Oklahoma could achieve primacy in administering mining reclamation programs, as an alternative to direct federal administration by the Office of Surface Mining. After the Oklahoma Attorney General appealed the decision, Secretary of the Interior James Watt granted conditional primacy to the State, with the understanding that the rules would be implemented

as soon as the injunction was lifted.

However, the Oklahoma Mining and Reclamation Association used the Administrative Procedures Act again to challenge the regulations, this time in the political arena of the Oklahoma Legislature, Section 38 of the Oklahoma Administrative Procedures Act again to challenge the regulations, this time in the political arena of the Oklahoma Legislature, Section 38 of the Oklahoma Administrative Procedures Act requires submission of all agency regulations to the Legislature for review. Agency rules can be vetoed by a simple majority of either of the two ouses of the Legislature. On February 12, 1981, the Oklahoma House of Representatives vetoed the entire body of "Permanent Rules" which the Department of Mines had issued. In the absence of valid regulations to implement the Coal Reclamation Act of 1979, the State returned to the previous regulations in effect under the Coal Reclamation Act of 1978 (45 O.S. 1978, secs. 742-764). These earlier regulations, however, did not satisfy federal requirements for state primacy.

On September 10, 1981, J. R. Harris, Director of the federal Office of Surface Mining informed the Oklahoma Deputy Chief Mine Inspector, L. B. Qualls, that: "I must carry out the requirements of Sec. 504 (A) (3) of the SMCRA and 30 CFR 733.12," requiring denial of primacy for state programs which do not meet minimum state standards. Harris did indicate that the requirements for notice and hearings in the federal Administrative Procedure Act could be used to postpone termination of conditional primacy until the recovering of the Oklahoma Legislature in January, 1982. If primacy were revoked, coal mining in Oklahoma would be effectively halted for a period of eighteen months or more, while the federal government prepared new regulations, reviewed applications, and issued permits.

In response to this crisis, the Oklahoma Department of Mines invoked emergency provisions of the Oklahoma Administrative Procedures Act which allow agencies to promulgate regulations without meeting the usual notice and hearing requirements if there is "imminent peril to public health, safety or welfare." Acting under the authority of this provision, the ODOM prepared a new set of regulations which were closely tailored to federal regulatory norms.

OSM imposed four conditions for approval of Oklahoma's program.[32] Most relevant to state administrative law was the requirement that citizens be able to bring suit directly in district court for alleged violations of mining reclamation regulations without first exhausting administrative remedies, as required by the Oklahoma Administrative Procedures Act. Section 41(c) of the Oklahoma Coal Reclamation Act of 1979 provided that "(a)ny action respecting violation of this act or the regulations thereunder may be brought only pursuant to the Administrative Procedures Act..." The Oklahoma Attorney General interpreted this provision to prohibit action in the courts without first pursuing relief through the administrative channels of the Oklahoma Department of Mines. Even then, action in court would be limited to review of the administrative decision according to the restrictive criteria of the Administrative Procedures Act, instead of providing a de novo proceeding. Since the Oklahoma Control and Reclamation Act did not provide citizens with the same access to courts for citizens suits as would be available under Section 520 of the federal Surface Mining Control and Reclamation Act, the Oklahoma statute was found by the OSM to be deficient.[33] Oklahoma lawmakers agreed to remove the offending passage "only pursuant to the Administrative Procedures Act."

The new regulations by the Oklahoma Department of Mines took effect on December 14, 1981. They were essentially identical with those which had been vetoed, except for changes to accommodate new federal requirements. Since the Legislature took no action against the new rules within thirty days after issuance, they escaped legislative veto and are still operative.

II. The Model State Administrative Procedure Act: Statutory and Judicial Modifications in Oklahoma and Wyoming.

The Model State Administrative Procedure Act, which had its genesis in the 1937 report of the President's Committee on Administrative Management, was approved by the National Conference of Commissioners on Uniform State Laws in October, 1946 -- four months after passage of the federal Administrative Procedure Act which it resembles in many respects. The model act adapted various provisions of the federal act to the needs of state government. A Revised Model State Administrative Procedure Act was adopted by the Commissioners in 1961, on the basis of the experience in states which had adopted the Model Act and the recommendations of the Hoover Commission Task Force on Legal Services and Procedure.

According to the Commissioners, "The Model Act will, of course, require careful adjustment to the special statutory conditions peculiar to the state under consideration, but the general principles set forth are of universal applicability and the suggested language will also be found helpful." One of the purposes of the Act was to achieve a degree of uniformity, as opposed to the regulation of administrative agencies on a piecemeal basis by a variety of procedures unique to a given agency.[34] Professors Curran and Sacks observe:

> Uniformity of procedure is desirable to the extent that it is obtainable for a myriad of diverse agencies. To a considerable extent, uniformity is achieved as a by-product of a code of minimum procedural requirements.[35]

The Revised Act does not mention exceptions for particular state agencies, and manifests a desire that the principles embodied in the Act "govern throughout the administrative structure."[36] Both the Oklahoma Administrative Procedures Act (OAPA), adopted in 1963, and the Wyoming Administrative Procedure Act, (WAPA), passed in 1965, have substantially adopted the revised (1961) version of the Model Act, while introducing significant variations.

A. Coverage; Agency Exemptions.

Coverage of the act depends upon whether or not a given administrative unit is an "agency" within the meaning of the Act. In defining an "agency", the Oklahoma Act includes several major exemptions which do not appear in the Model Act. The WAPA, on the other hand, broadens coverage by including "a county, city or town, or other political subdivision of the state"[37] under the definition of "agency". From the standpoint of energy-water issues, the most significant exemption from the coverage under OAPA is the Oklahoma Corporation Commission. According to Oklahoma State Supreme Court Justice Marion Opala, the majority of administrative law cases reaching the Oklahoma courts are reviews of decisions by the Corporation Commission, which is not covered by the Oklahoma Administrative Procedures Act.[38] The Corporation Commission was excempted because the oil and gas industry and other interests affected by the Commission were reluctant to disrupt the elaborate, well-established procedures which had already developed concerning that agency.

The Corporation Commission, which regulates petroleum and natural gas operations in Oklahoma, is not concerned with surface mining activities. As the agency primarily responsible for regulating water pollution from oil and gas operations in the State, and as one of seven state agencies represented on the Oklahoma Pollution Control Coordinating

Board (PCCB), the Corporation Commission does have a meaningful role in shaping Oklahoma's water quality efforts. The fact that the Commission operates under a different code of procedural rules from other agencies regulating the environment may affect the decisions of its representative on the PCCB, albeit such influences would be difficult to ascertain. Of greater importance is the fact that much of the administrative law on energy-water tradeoffs in Oklahoma is shaped to a considerable extent by administrative decisions, and judicial review of decisions, of a commission which is outside the regime of the State Administrative Procedures Act. Such cases could provide persuasive but not binding legal precedent for agencies which are covered by the OAPA.

B. Rule-Making.

Rule-making is the process by which an agency performs the quasi-legislative function of making general regulations. Both Oklahoma and Wyoming have adopted almost verbatium the Model Act's definition of a rule as "each agency statement of general applicability that implements, interprets or prescribes the organization, procedure, or practice requirements of an agency."[39] Rule-making authority is provided by the statute setting up a given agency, but the administrative procedure acts specify the procedural requirements and conditions for the lawful exercise of rule-making power.

1. Notice and Comment.

Except in emergency situations, no adminsitrative regulations are valid in either Oklahoma or Wyoming unless the requirements for rule-making notice and comment have been satisfied. Yet these requirements, however, are different in the two states. Both states provide for twenty-days advance notice of a rule-making proceeding "all persons who have made timely request of the agency for advance notice of its rule-making

proceedings..." Oklahoma however, provides in addition that notice "shall be published in the Oklahoma Gazette or successor publication."[40] Wyoming, has no similar requirement of active general publication by the agency in a specific printed medium. In Wyoming, notice must simply be mailed to the attorney general, and the legislative service office,[41] and be made available to members of the public.

2. Emergency Regulations.

Both states have provisions for emergency adoption of regulations without notice and comment. The determination of an "emergency" is somewhat different in the two states. In Oklahoma, an agency must find "imminent peril to the public health, safety or welfare,"[42] and must state its reasons for that finding in writing. However, the Wyoming Department of Environmental Quality, which is the administering agency for mining and water regulation, provides that rule-making must be preceded by public notice in newspapers in various parts of the state.

In the 1980 Case of State ex rel. Pollution Control Board v. Kerr-McGee Corp., the Supreme Court of Oklahoma held that notice of regulations by the Pollution Control Coordinating Board were satisfied by publication of the regulations in the Oklahoma Gazette and "the preannounced availability of the water quality standards for public inspection."[43]

Both Oklahoma and Wyoming have provisions for emergency and adoption of regulations without notice and comment in "emergencies." The means by which an emergency is determined is somewhat different in the two states. In Oklahoma, an agency must find "imminent peril to the public health, safety or welfare,"[44] and must state its reasons for that finding in writing. The sufficiency of the reasons for a finding of an emergency is expressly made "subject to judicial review." In Wyoming, the nature of an emergency is not defined, nor need an agency issue formal findings

for the basis of its determination that such an emergency exists. Instead, the Wyoming statute provides that the governor must concur in writing with the finding that an emergency exists before an agency can proceed on an emergency basis.[45] Where Oklahoma relies primarily upon the courts to control agency abuses of emergency powers, Wyoming relies upon the elected chief executive.

The controversy over state primacy for mining reclamation in Oklahoma suggests the possible significance of this difference. When the Oklahoma House of Representatives veoted the reclamation regulations of the Oklahoma Department of Mines in 1981, the ODOM was able to prepare very similar rules on an emergency basis without clearance from the governor. In the politicized atmosphere surrounding the issue in 1981, with militant opposition to the state regulations from both mining interests and environmentalists, it is not clear that endorsement from the elected executive could have been readily obtained.

3. Executive and Legislative Veto.

Both Oklahoma and Wyoming deviate substantially from the Model State Administrative Procedure Act in providing for regular review of administrative rules by political organs. In Oklahoma, rules must be submitted to both houses of the legislature, and the legislature may disapprove a rule by a resolution of either house.[46] If the legislature does not disapprove a rule within thirty calendar days after submission, or within thirty days after the next legislative session convenes, if a session adjourns in less than thirty days after the rule is transmitted, the rule takes effect as a binding regulation. A 1978 amendment provides that administrative rulemaking cannot occur when the legislature is not in session unless "imminent peril to the public health, safety or welfare" is involved.[47] The decision of the Oklahoma Legislature in January, 1982,

to take no action on the new mining reclamation regulations prepared by the ODOM provided a face-saving way of acquiescing to rules which had been rejected during the previous session.

Wyoming has adopted a more elaborate process of review by both the state legislature and the chief executive. Under the Administrative Regulation Review Act (ARRA), passed in 1977, the Legislative Service Office, the Management Council of the legislature, and the legislature itself, as well as the governor, have roles in approving administrative regulations.

Agency rules are submitted to the Legislative Service Office, which reviews the rules and reports its findings to the Management Council. The Council, consisting from leaders of both parties from both houses of the legislature, reviews the regulations, "to determine if they properly implement legislative intent, are within the scope of delegated authority, and are lawfully adopted."[48]

The Council must submit its approval or recommendation to the governor within thirty days after the report is received from the LSO, and must report its findings and actions to the legislature in its next session. Approval by the governor, upon finding that the rule is within the scope of the agency's authority and has complied with proper procedures, is also necessary before a rule can become effective. The governor may order that an amendment which has been approved by the LSO and the Management Council be rescinded or amended. After the LSO, the Management Council and the governor have acted, the rule is reviewed by the legislature, in the light of recommendations by the Council. The rule stands unless there is a majority vote of both houses against it.

The Wyoming ARRA has been criticized for providing "too much review by too many people", thereby "destroying the essential purpose of the

administrative process, which is the combination of efficiency and expertise."[49] It has also been observed that the ARRA "has actually given the most powerful review authority to the governor."[50] Nevertheless, the requirement that both houses must disapprove an administrative rule in order to invalidate it would prevent the veto of the entire body of mining regulations by a single house of the legislature, as is possible in Oklahoma.

C. Individual (Contested Case) Proceedings and Permitting Procedures.

Provisions for obtaining permits and licenses under administrative procedure acts in both Oklahoma and Wyoming are practically verbatim adoptions of Section 14 of the Revised Model State Administrative Procedure Act.[51] In both states, if the rights to notice and a hearing are provided for in a licensing or permitting proceeding, the provisions for quasi-adjudicative decisons of administrative agencies are applied. Except in emergencies, revocation or suspension of a license or permit can occur only after notice by mail to the holder of the license or permit, and the licensee is given an opportunity to show compliance. Summary suspension of a permit or license is authorized in emergencies threatening to the public health, safety, or welfare; but the agency must state the finding of the emergency in its oreer, and regular proceedings for revocation or suspension must follow "promptly."

There are some important differences between the two states in the proceedings to be followed where hearings and notice are provided. The procedures used in these cases are those which are appropriate to order-making or adjudication, which Oklahoma calls "individual proceedings" and Wyoming refers to as "contested cases." These proceedings involve the settlement of disputers at an evidentiary hearing in which administrators make findings of fact and apply established rules and norms

through reasoned analysis.

1. Discovery

The discovery provisions of the Wyoming APA are a major innovation in administrative law. Parties to administrative proceedings can acquire information from other private parties and from the agency itself for use in preparing a case in an administrative hearing.[52] If the agency or other party refuses to provide the information, a court order can be obtained to compel disclosure. The discovery process is subject to substantial constraints:

> neither the agency, nor any member, officer or employee shall be required to disclose information which is confidential or privileged under the law and...no member of the agency shall be compelled to testify or give a deposition in a contested case.[53]

Nevertheless, existence of a device whereby administrators can be compelled to provide information adverse to the agency's position in a contested case helps to equalize the usual disadvantage which private citizens face in encounters with state bureaucracy. Wyoming's discovery procedures are consistent with trends in courtroom procedure, as well as with the public interest in gaining information from government, as reflected in the "Freedom of Information Act" amendment to the federal Administrative Procedure Act.[54]

2. Evidence

Another appraent difference between the OAPA and the WAPA lies in the treatment of evidence in administrative adjudicatory hearings. The Wyoming statute follows the Revised Model State APA in stating that agencies "shall" exclude "irrelevant, immaterial or unduly repetitious evidence..."[55] The Oklahoma statute retains the wording of the original model act, which uses the permissive language "may" instead of the

mandatory "shall." The commissioners comment makes clear the word "shall" in the Revised Model Act means that: "Agencies are required (not merely permitted) to exclude"[56] the kinds of evidence mentioned. The Oklahoma wording suggests greater discretion on the part of an agency to admit evidence that might be excluced in a court of law. Oklahoma's APA also particularizes at some length the "rules of privilege recognized by law" which must be given effect by the agency: the privilege against self-incrimination, attorney-client communications, etc. By ordinary principles of statutory construction, the extensive and apparently complete itemization of priveleged evidence would imply a legislative intent that the list is exhaustive and that any other evidence should not be protected as privileged.[57] This itemization contrasts with the Model Act and the Wyoming APA. Merrill notes that this Oklahoma modification of the Model Act was based upon study of the kinds of privilege which are appropriate for administrative proceedings.[58]

In practice, however, the difference may be more apparent than real, as a result of judicial interpretation. Both the Wyoming and Oklahoma courts show considerable deference tothe agency's discretion in deciding upon the admissibility of evidence.[59] Neither Oklahoma nor Wyoming has adopted the Model Act's provision that: "the rules of evidence as applied in (non-jury) civil cases in the (District Courts of this State) shall be followed."[60] On the basis of draft bills by the Oklahoma Bar Association,[61] Oklahoma rejected the language of the Revised Model Act, and adopted the "convincing evidence" test of the original Model Act. Oklahoma requires that the evidence possess probative value commonly accepted by reasonably prudent men in the conduct of their affairs."[62] In corresponding passage in the Wyoming statute, an administrative order must be "supported by the type of

evidence commonly relied upon by resonably prudent men in the conduct of their serious affairs."[63] From all indications in existing case law, the terms "probative value" in the Oklahoma statute and "serious" in the Wyoming statute are interpreted by the courts to have much the same meaning.[64]

3. Right to Counsel

Right to counsel is provided for adjudicatory proceedings in both states. In Oklahoma, the right is restricted to "parties,"[65] while Wyoming extends the right to "any person compelled to appear before an agency or representative thereof," as well.[66] Oklahoma also specifically states that "such counsel must be duly licensed to practice law by the Supreme Court of Oklahoma...,"[67] thereby eliminating the possibility that paralegals can serve as counsel in state administrative proceedings. The Wyoming APA provides the right to be represented by "counsel or other duly qualified representative,"[68] thereby following federal practice in authorizing participation by paralegal counsel in administrative adjudicatory proceedings.

4. Avoidance of Bias in Order-Making

Oklahoma explicitly provides for disqualification of any hearing examiner or administrative decision-maker in an adjudicative proceeding who "cannot accord a fair and impartial hearing or consideration."[69] Any party can raise the issue of disqualification of an administrative adjudicator "on the ground of his inability to give fair and impartial testimony" by filing an affidavit "stating with particularity" the basis for the allegation.[70] The validity of the charge is determined by the remaining members of the agency. If a member is, thus, disqualified, the governor is directed to replace that member by a member pro-term, for purposes of that case.

Wyoming has no express counterpart of this provision, but the Wyoming judiciary has found a similar one by judicial interpretation of the constitutional and statutory "right to be heard before an unbiased, fair and impartial tribunal."[71] Indeed, the Supreme Court of Wyoming has held that parties to administrative adjudications have a right of voir dire inquiry to ascertain whether or not the decision-makers are biased.[72]

5. Official Notice

"Official notice" is the administrative counterpart of "judicial notice," the process whereby an adjudicative body takes note of certain facts which are considered to be well-established. Oklahoma has adopted verbatim the Model State APA provisions, which allow notice of "judicially cognizable facts," and of "generally recognized technical or scientific facts within the agency's specialized knowledge," in addition to allowing utilization of "the agency's experience, technical competence, and specialized knowledge..."[73] However, the Supreme Court of Oklahoma has held that an agency cannot rely entirely on such knowledge, and that "there must be some evidence submitted or officially noticed on which this specialized knowledge could operate or which would indicate the nature of this specialized knowledge."[74]

Wyoming provides broader official notice, by authorizing administrative agencies to take notice of "information, data and material included within the agency's files."[75] The practical significance of the Wyoming provision is to shift the burden of proof from the agency to parties challenging agency decisions where the issues in dispute involve materials in agency files.

6. Rehearing

Oklahoma's provisions for rehearing of administrative cases have no counterpart in Wyoming law nor in the Model State APA. Rehearing, if provided, must occur within ten days of the original decision, and must be based upon one of the following grounds:

> (a) newly discovered or newly available evidence, relevant to the issues;
> (b) need for additional evidence adequately to develop the facts essential to proper decision;
> (c) probable error committed by the agency in the proceeding or in its decision such as would be ground for reversal on judicial review of the order.
> (d) need for further consideration of the issues and the evidence in the public interest; or
> (e) a showing that issues not previously considered ought to be examined in order properly to dispose of the matter.[76]

By helping to avoid the expense and delay of courtroom litigation, re-hearing helps to expedite the administrative process, as well as to provide due process to parties. The Oklahoma provisions help "to regularize the practice with respect to rehearing."[77]

D. Judicial Review.

The conflict between the interest in facilitating administrative functioning and the cometing interest to protect the rights of individuals is nowhere more evident than in the statutory provisions for judicial consideration of agency decisions.

1. Standing

Both Oklahoma and Wyoming extend the right of judicial review of agency decisions to "any person aggrieved or adversely affected" by a final administrative order.[78] Yet the Supreme Court of Oklahoma has interpreted the term "party aggrieved or adversely affected" to mean "one whose pecuniary interest is directly affected or whose right of property is established or divested."[79] This interpretation is

somewhat restrictive, in light of trends broadening standing at the federal level to include non-pecuniary aesthetic and recreational interests.[80] Where surface mining and water resources are concerned, such non-pecuniary interests might well be of critical importance. Wyoming case law appears to be more liberal in providing standing for persons whose interests of any kind are adversely affected by administrative actions.[81] Yet the Wyoming Supreme Court has held that when the possibility of personal injury is relatively remote, a party lacks standing for judicial relief.[82]

2. Exhaustion of Administrative Remedies

The requirement in Oklahoma administrative law that judicial review is available only for a "final order" of an administrative agency because the subject of major controversy between the Oklahoma Department of Mines and the federal Office of Surface Mining. Sec. 41(c) of Oklahoma Coal Reclamation Act of 1979 provided that "(a)ny action respecting a violation of this act or the regulations thereunder may be brought only pursuant to the Administrative Procedures Act..." According to an opinion by the Oklahoma Attorney General, the Oklahoma Administrative Procedures Act requires that appeals within administrative channels must be exhausted before the case can be brought to court.[83] Furthermore, the judicial relief available would be review, in which the agency decision has presumptive validity, as opposed to a de novo proceeding, in which the facts are decided afresh by the courts. Sec. 526 of the Surface Mining Control and Reclamation Act, as interpreted by the Office of Surface Mining, requires de novo judicial consideration.[84]

According to the Supreme Court of Oklahoma,

> (I)t is well settled in Oklahoma that exhaustion of statutory administrative remedies is a jurisdictional prerequisite to resort to the courts. The purpose of the rule is to aid in the orderly administration of justice, and to prevent transfer to the courts of duties imposed by law on administrative agencies.[85]

Yet the same court held in another case that the requirement of exhaustion of administrative remedies may be excused if a strong showing is made that administrative remedies are not adequate to provide relief from an injury.[86]

The OSM requirement of de novo review was satisfied by deleting the offending phase from the Oklahoma coal Reclamation Act. However, the requirement of administrative exhaustion also applies to decisions of other Oklahoma agencies which decide cases involving water pollution from surface mining operations, including: the Oklahoma Water Resources Board, the Oklahoma Board, the Oklahoma Department of Pollution Control and the Oklahoma Conservation Commission.

The Wyoming APA is even more explicit than its Oklahoma counterpart in making review by the courts "(s)ubject to the requirement that administrative remedies be exhausted..."[87]

3. Scope of Review

In the critical area of the scope of judicial review of administrative decisions, both Oklahoma and Wyoming appear to have substantially modified the Revised Model State Administrative Procedure Act. In setting forth the grounds on which an administrative decision can be reversed under the Revised Model Act, Commissioners on Uniform State Laws replaced the "substantial evidence" rule by the "clearly erroneous" rule, on the basis of recommendations by the Hoover Commission Task Force and the American Bar Association.[88]

The "clearly erroneous: test follows the analogy of an appellate court's relationship with a lower court, in allowing the reviewing court to "reverse when it takes a contrary view of the evidence even though there is evidence to support the finding."[89] The "substantial evidence" test gives greater deference to agency discretion in upholding an agency decision if a rational person could have reached that decision, even if erroneous.[90]

Wyoming has expressly rejected the "clearly erroneous" test, in favor of the "substantial evidence" criterion, by limiting the courts" to a determination that...(t)he findings of facts in issue in a contested case are supported by substantial evidence."[91] The Supreme Court of Wyoming has held that "(i)f substantial evidence, which a reasonable mind might accept as adequate to support an agency's action, is found anywhere in the record," a reviewing court must allow the decision to stand.[92] According to the Wyoming Supreme Court, "substantial evidence" supporting an administrative decision "may be less than the weight of the evidence, but cannot be clearly contrary to the overwhelming weight of evidence; more is required than a mere scintilla of evidence or suspicion of the existence of a fact to be established."[93]

The Oklahoma APA adopts some of the wording of the Model State APA in authorizing reversal or modification of an agency decison which is "clearly erroneous in view of the reliable, material, probative and substantial competent evidence...."[94] Yet the Oklahoma Supreme Court has, in practice, interpreted this provision as if it were identical to the substantial evidence test.[95] Consequently, judicial review in Wyoming and Oklahoma does not differ as much in practice as it does in statutory appearance.

III. Water Pollution Legislation and Surface Mining Operations: The Statutory Context.

From the standpoint of tradeoffs between water resources and coal production, the most critical aspects of administrative law concern regulations and procedures pertaining to the following subjects: (1) the process for designating areas as "unsuitable for mining"; (2) requirements for determining and minimizing adverse effects of surface mining upon the hydrologic balance; (3) the development and implementation of sedimentation control requirements for active mines; (4) the development and implementation of standards for the regulation of effluent from point sources; (5) control of "non-point source" water pollution; (6) special requirements for alluvial valley floors; (7) provisions concerning grading, which affect water runoff; and (8) regulations concerning restoration of topsoil and vegetation.

On each of these matters, administrative discretion is exercised within an elaborate framework of intersecting, often overlapping state and federal statutes, each with its own provisions for administrative procedure. The formal provisions of these statutes, the regulations made by pursuant to them by administrators, and the informal policies and practices of agencies administering the regulations give shape and substance to the more general provisions of the administrative procedure acts.

A. Federal Legislation

Although a number of federal laws are applicable to surface-mining operations,[96] the three which have the greatest impact upon mining operations are the Federal Water Pollution Control Act, as amended by the Clean Air Act of 1977 (PL 95-217),[97] and the Surface Mining Reclamation Act of 1977 (PL 95-87)[98] and the National Environmental Policy Act (PL 190).[99] All three require extensive interaction

between federal and state administrative agencies. Critics have complained that the applicable laws at different governmental levels are often redundant and not always congruent.[100] In 1982, Peabody Coal Company completed an application for a permit which consisted of twenty-seven volumes, weighed 185 pounds. The company estimates a cost of $3 million to complete the work required for new permitting requirements. To a significant extent, legislation on water pollution, and especially on surface mining, is an elaboration of federal specifications.

1. The Federal Water Pollution Control Act and Intergovernmental Relations: Areas of Jurisdictional Uncertainty and State Administrative Authority

The Federal Water Pollution Control Act, as amended by the Clean Water Act, creates water quality standards for every navigable body of water in the United States, and established a permit system for discharges of pollutants into such waters from point sources. Point source discharges are discharges from any "discernible, continued and concrete conveyance." The Act empowers the Environmental Protection Agency (EPA) to develop technology-based effluent limitations for point sources, and creates a permit system called the National Pollution Discharge Elimination System" (NPDES) to enforce the limitations. NPDES establishes a schedule for implementing the effluent limitation guidelines set by EPA for each point source and for monitoring each point source discharge.

When water at a surface mine site is impounded, as it must be to facilitate mining operations, it becomes a "point source," and therefore subject to the NPDES system. EPA has published final "effluent limitations for existing sources in the coal mining point source

category."[101] Current limitations for total suspended solids (TSS) are set at 35/70 mg/l TSS for base flow conditions.(see Table 1). During the reclamation phase of mining, and during two year, 24-hour precipitation events, effluent limitations are .05 ml/l SS and apH from 6 to 9.

The Surface Mining and Reclamation Act (SMCRA) passed in August, 1977 to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."[102] Title II of the Act established the Office of Surface Mining Reclamation and Enforcement (OSM) Sections 506, 510 515, and 516 of the Act require OSM to regulate all aspects of surface mining affecting water quality and quantity, including:

- Nonpoint source discharges
- Discharges to ground water
- Discharges to surface waters not regulated by EPA
- Impacts of mining on water quantity
- Discharges to surface waters during reclamation[103]

There is substantial jurisdictional overlap between EPA and OSM over regulation where water-related aspects of surface mining is concerned.

Under Section 5 & 3 of SMCRA, EPA is required to review state mining programs presented to OSM, and must concur in approval of such programs. In the permitting process, the two agencies have developed a "special" NPDES permit which can be processed as part of a single SMCRA permit application.[104] Nevertheless, an individual NPDES permit would be required if an objection is raised.

In some cases, interaction between the two federal agencies has extended the purview of federal regulatory authority beyond that which

the agencies might have separately acquired. EPA for example, did not require the use of sediment ponds as a control technology for all effluent, so long as EPA effluent limitations are met. However, OSM required that all runoff from areas disturbed by surface mining operations be contained for treatment in sediment ponds.

Invoking the "state window" concept, Wyoming proposed a plan which would allow removal of the sediment ponds before full release of the performance bond under OSM's regulations. Wyoming based this alternative upon the local necessity of preventing evaporation of water from the ponds, to lessen adverse impacts upon holders of downstream water rights. Secretary Watt, who stands above OSM in the Department of the Interior, agreed that "The need to preserve water and avoid evaporative loss resulting from sediment ponds in Wyoming justifies pond removal whenever the background level of sediment discharges have been achieved without regard to complete revegetative success."[105] Nevertheless, EPA interpreted OSM's sediment pond regulations to require retention of the ponds until final bond release. On the otherhand, when EPA developed numerical limitations for one segment of the industry -- i.e., active mining and base flow runoff, OSM adopted the same effluent limits and applied them to all surface mining and for all discharges.[106]

The jurisdictional divisions established by the FWPCA and the SMCRA are ambiguous in certain areas. EPA's authority over ground water pollution from the mines remains unclear. In 1976, EPA was asked to consider the effect of coal settling facilities and sludge disposal upon ground water. The EPA denied jurisdiction, on grounds that its guidelines were only "applicable to point source discharges as defined in (FWPCA)."[106] EPA's regulatory jurisdiction under the

It is also illegal under the act

> to deposit, or cause, suffer, or procure to be deposited materials in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water....[116]

Although regulatory authority over point source pollution under the Act has been transferred to EPA the Rivers and Harbors Act is still applicable to non-point pollution.[117] From a practical standpoint, however, no federal administrative agency is actively policing violations of the Act, and courts have narrowly defined the standing of parties who can sue on the basis of the Act.[118]

The OSM has broad authority to regulate aspects of mine-related water pollution. The agency published a regulatory program on March 13, 1979, which emphasized control of potential harm by surface mining to the hydrologic balance of an area.[119] Hydrologic balance is

> the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake or reservoir.[120]

The Act requires that surface mining operations "minimize the disturbances to the hydrologic balance at the mine-site and in associated offsite areas...by...restoring recharge capacity of the mined area to approximate premining conditions." Other provisions for protecting the hydrologic balance include diversion of overland and shallow ground water flow, construction of sedimentation ponds and discharge structures, treatment of acid and toxic forming spoil monitoring of surface water and ground water, and protection of "biological communities." Backfilled materials must be distributed in such a way that contamination of ground water systems with toxic, acidic, or other harmful mine drainage must pass through sedimentation ponds, which must be maintained

until reclamation of the disturbed area has been completed and drainage from it meets federal effluent standards. Among the most frequent violations of the act are "(f)ailure to meet effluent standards" and "(f)ailure to pass all surface drainage through sedimentation ponds."[121]

Federal law imposes further procedural requirements for strip mining operations in the form of environmental impact statements. Under the National Environmental Policy Act, (NEPA) "major federal actions significantly affecting the quality of the human enviornment" must be assessed in an Environmental Impact Statement (EIS) before the action can be taken.[122] Federal NPDES permits are considered to be "major actions" for purposes of NEPA, requiring an EIS from the EPA. Moreover, an EIS from the Department of the Interior is required for approval of a mining plan. EPA regulations governing application of NEPA provide for review by EPA of preliminary environmental information documents (EID) submitted by permit applicants for "new source" discharges. If no significant impact appears, no EIS is required. However, if impacts from the operation do seem to be significant, a detailed analysis of those impacts is required before the permit can be issued, and a draft EIS must be submitted for complete public review before preparation of the final statement. Although the EPA requires this elaborate process only for "new sources," the agency has an expansive concept of "new source", based upon any of seven conditions "events".[123]

B. State Legislation in Oklahoma and Wyoming

Both the FWPCA and the SMCRA provide for state involvement in regulating water quality. In Wyoming, the Environmental Quality Act of 1973 contains the basic provisions relating both to water quality (Article 3) and surface mining reclamation (Article 4). Among the

stated policies and purposes for the Act are included:

> to preserve and exercise the primary responsibilities of the state of Wyoming; to retain for the state the control over its air, land and water and to secure cooperation between agencies of the state, agencies of other states, interstate agencies, and the federal government in carrying out these objectives.[124]

Oklahoma's counterpart to this legislation is contained in Title 45, (Coal Reclamation Act) and Title 82, secs. 926.1-942 (Pollution of Waters; Pollution Control Co-ordinating Act).

Casual inspection of the mining reclamation legislation in the two states shows clearly the homogenizing influence of the federal prototype. Extensive passages of the statutes are identical, despite the fact that different states are involved. There is greater variation between the two states in water quality legislation, not only in language but in substance.

1. Designation of Land Unsuitable for Surface Mining

According to one prominent executive in the coal mining industry, the regulations which is considered to be potentially the most burdensome are those concerning the identification of lands unsuitable for mining.[125] "This," he says, "is because most of the rest of the regulatory problems are technical in nature and can eventually be worked out at a cost, whereas no one really understands the 'lands unsuitable' process yet."[126]

The procedures and criteria for identifying "lands unsuitable" in Wyoming are substantially the same as in Oklahoma, with two exceptions. The Oklahoma statute requires that determinations of unsuitable lands "shall be integrated as closely as possible with present and future land use planning and regulation processes at the federal, state and local levels."[127] The Wyoming statute does not contain a similar provision, which could conceivably affect judicial construction of the

"lands unsuitable" provisions.

The statutes in both states provide that "any person" with an interest which might be "adversely affected" has the right to petition" for a "lands unsuitable" designation. Yet the meaning of "person", in a different context, became an issue in the controversy over Oklahoma's administrative primacy over surface mining. The Oklahoma Coal Reclamation Act did not define the term "person", and the Oklahoma Attorney General ruled that the Department of Mines lacked the authority to define the term by regulation.[128] Title 25 of the Oklahoma Statutes, does not specifically concern mining or water, states that: "The word 'person', except when used by way of contrast, includes not only human beings, but bodies politic or corporate."[129] In the case of Nesbitt v. APCO Oil Corporation, the Supreme Court of Oklahoma found that "person," in Title 25, included any "legal commercial (or) governmental entity."[130] The court cited as precedent the case of Oklahoma Human Rights Commission v Hotie, Inc., an anti-discrimination case, in which "person" was held to include governmental, legal and commercial entities.[131] Thus, the term has the broadest conceivable meaning, conferring standing to petition upon a wide variety of units, both private and public.

2. The Reclamation Plan

Every applicant for a surface mining permit is required to submit a reclamation plan as part of the permit application. The language of the Oklahoma and Wyoming statutes is different concerning the particulars of the plan, but the substance is essentially the same. Each application must include, inter alia, a description of the hydrology water quality and water quantity of all lands in the mine plane area, adjacent areas,

and the topographic and ground water basin surrounding the mine plan area. The application must also show the extent to which the proposed surface mining could contaminate or alter the flow of an underground or surface water source for domestic, agricultural or other beneficial use, and show alternative water sources if such disruption should occur. The reclamation plan must contain a detailed description of the measures to be taken to protect the quality and quantity of both ground water and stream water in the mined area and adjacent areas; a plan for treating surface water and ground water drainage from disturbed areas, as required in the SMCRA, and a plan of restoring "the approximate rechange capacity" of waters in the area of the mine plan. In granting or denying a permit, the implementing agency must consider the hydrologic impact of the proposed development.

3. Review and Public Participation in Surface Mining Permit Approval or Denial

In keeping with federal guidelines, both Oklahoma and Wyoming provide for input from persons objecting to a requested permit. The applicant must publish notice of the application in a newspaper of general circulation in the mining locality for a period of four consecutive weeks. Within thirty days after the last publication of the application notice, the permit may be challenged. The Wyoming statute provides that "(a)ny interested person" can file such objections, Oklahoma specifies that such persons must have "an interest which is adversely affected."

If requested, an informal conference or hearing must be held in which the agency considers the objections, and notice of the conference or hearing published in a newspaper of general circulation. Wyoming law provides that the conference or hearing must be held within

a reasonable time. Wyoming law specifies that: "The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review will be afforded as provided in the Act."[138] (Emphasis added). The Oklahoma Coal Reclamation Act likewise provided that:

> For the purpose of this and every hearing authorized by this act, the Department may, pursuant to the Administrative Procedures Act, administer oaths, subpoena witnesses, or written or production of the materials, and take evidence including, but not limited to, site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation.[139] (Emphasis added)

Given the essential similarities of the administrative procedure acts in the two states with respect to these matters, the formal requirements for hearings in the two states appear to be substantially the same.

D. State Inspection and Enforcement

Federal regulations call for three types of inspections: (a) "partial" inspections, averaging one per month, to determine compliance with some of the permit requirements; (b) "complete" inspections, averaging one per three months, to determine compliance with all permit requirements; and (c) "periodic" inspections of exploration operations. Enforcement penalties must not be less stringent than those for federal enforcement but they can be more stringent. Federal enforcement powers include issuance of cessation orders, suspension or revocation of permits, and civil penalties of a maximum of $20 to $5000 per violation, depending upon the operation's history of past violations, negligence, good faith and the magnitude of the violation.

Wyoming provides that

> any person who violates, or any director, officer or agent who willfully and knowingly authorizes, orders or carries out the violation of any provision of this act, or any rule, regulation, standard permit adopted hereunder or who violates any determination or order of council pursuant to this act or any rule, regulation, standard, permit, license or variance is liable to either a penalty of not to exceed ten thousand dollars ($10,000.00) for each day during which violation continues, or, for multiple violations by surface coal mining operations, a penalty of not to exceed five, thousand ($5,000.00) for each day during which the violation continues, which may be recovered in a civil action, and the person may be enjoined from continuing the violation as herein provided.[140]

Oklahoma provides civil penalties of not more than $5,000.00 for each violation.

The SMCRA, as interpreted by OSM has been criticized for encouraging state "clones" of the federal prototype. Comparison of the language of surface mining statutes in Oklahoma tends to confirm this criticism. Indeed, several comments submitted to OSM during OSM hearings on December 23, 1980, questioned the propriety of "numerous OSM regulations that Oklahoma has chosen to adopt without substantive modification."[141] Department of Interior officials informed Oklahoma officials that major parts of Oklahoma's proposed regulations "were not necessary in Oklahoma because they duplicated Federal law not applicable in Oklahoma" or "were not necessary in Oklahoma because they were not relevant to the coal industry in Oklahoma."[142] Oklahoma's one effort to submit a "state window" proposal, however, was disapproved by OSM.

Nevertheless, the outward appearance of uniformity may be deceiving. Structural and behavioral variations in the administrative

implementation of the statutes may lead to different environmental consequences.

Part Two. The Organizational and Behavioral Framework: State Administrative Practice

Administrative law, as it is experienced by surface coal mining operators and other persons which the law affects, is filtered through a series of organizational and human intermediaries which determine the ultimate meaning of the law. As one industry spokesman stated, in testimony before a congressional committee: "Each inspector has the right to interpret the regulations as he sees it. As a result, the Ohio inspectors have one interpretation, the Office of Surface Mining has another, and the MSHA has a third."[143] To understand how the law actually operates, it is necessary to understand the agencies and administrators who apply it.

The following profiles of the relevant state administrative agencies are based upon interviews with leading agency officials and upon descriptions in agency reports and other documents.

I. Oklahoma's Approach: Multi-Agency Co-ordination*.

To meet the challenge of water pollution, including mining pollution, Oklahoma uses a multi-agency approach, with a mechanism of co-ordination provided by the Pollution Control Co-ordinating Board. The two "front line" agencies responsible for water pollution from active mines are the Oklahoma Department of Mines (ODOM) and the Oklahoma Water Resources Board (OWRB) which are roughly analogous to OSM and EPA at the federal level. The Oklahoma Conservation Commission, however, is responsible for administration of the Rural Abandoned Mine program, and has certain pollution control responsibilities relating to active surface mining.

---

*This section draws heavily upon the M.A. Report of M. Darrell Dominick.

A. The Oklahoma Department of Mines (ODOM).

The Office of Surface Mining has granted primacy in administering the federal surface mining regulatory program to the Oklahoma Department of Mines (ODOM). The ODOM, which is also known as the Office of the Chief Mine Inspector, was established in 1907, when Oklahoma became a state.

1. Organizational Structure and Formal Authority

The Department is headed by a Chief Mine Inspector who, until January 8, 1979, was an elected official. The position is now appointive by the governor with the advice and consent of the Oklahoma Senate. The Deputy Chief Mine Inspector, heads the Department in the absence of the Chief Inspector, is also appointed by the governor. The Chief Inspector is executive officer for the State Mining Board, which has rule-making powers over mining health and safety matters. A bill signed by Oklahoma Governor George Nigh on April 28, 1981, increased the membership of the Board from eight to nine, and requires at least one of the members to represent an industry mining minerals other than coal. Five of the members must be practical miners, three of whom must be strip miners. Two members must be owners or superintendants of mines. The Chief Mine Inspector must have at least eight years of experience as a practical miner. In sum, the qualifications assure that members of the principal policy-making board will have experience in mining. One member must be from outside the mining industry. There are no requirements, however, for representation of persons with experience or expertise in water or other environmental areas. In terms of geographic representation the Board consists predominately of eastern Oklahomans, reflecting consentration of the mining industry in the eastern, water-abundant part of the state.

During most of its existence, the main function of ODOM was mine safety. Reclamation became a responsibility of the agency in 1968, with passage of the Open Cut Land Reclamation Act and the stronger Mining Lands Reclamation Act, which followed in 1971. These state laws antedated the Coal Reclamation Act, which was passed in compliance with the federal SMCRA. Since 1977, the ODOM has been responsible for enforcement of surface mining regulations, by means of a permit system, requiring detailed reclamation plans and on-site inspection.

2. Organizational Resources and Behavior.

Thirty-two ODOM employees were directly involved in surface coal mining activities in 1980.[144] Seventeen of the employees were working full-time on coal regulatory activities at the end of 1980.[145] The bulk of field personnel, including mine and reclamation inspectors, are located in the eastern half of the state, where the mines are situated. There were only four inspectors in the field in mid-1982. These personnel are not specialists in water quality, but are trained generally to enforce the Coal and Reclamation Act. The inspectors must perform all of the major duties relating to enforcement of mining regulations. This is no small task, given the fact that they are responsible for a sixteen-county area. In 1980, inspections averaged over 200 per inspector for the year.

There is a relatively high turnover among personnel -- a phenomenon which some ODOM officials attribute to frustrations inherent in the law which the agency must enforce with minimal resources. There have been recent efforts to recruit inspectors with higher levels of preparation as a result of increased responsibilities under the surface mining law. In April, 1982, a vacancy for reclamation inspector was

open due to a retirement. There were several applicants, with degrees ranging from engineering and geology to agronomy and law.[146] An effort is made to recruit field personnel who have personal characteristics which facilitate implementation of the law without arousing undue animosity from coal producers.

The workload of the Officer of Chief Mine Inspector appears to be extremely heavy. During the space of seventy-five minutes, an interviewer observed that the Deputy Inspector received twenty-five telephone calls, including calls from the Governor, the Attorney General, members from both houses of the legislature, irate coal producers, company lawyers, and private citizens.[147]

Permitting consumes considerable time and effort of agency personnel. The 32 operating companies applied for 100 permits in 1981. "Incidental" permits are particularly burdensome to the agency. These involve requests to exceed the boundaries authorized in an existing permit. Denial of such requests results in frequent conflicts between the agency and coal producers, who expect ready approval of their requests for extensions.

ODOM issued 145 notices of violation and 17 cessation orders in 1980.[148] If coal mining activities in Oklahoma increase, as is predicted, these figures should be even greater during the next few years. The public participation provisions of the law in the permitting process have aroused considerable concern within the agency, as well as in the mining industry. It requires 60 days to prepare a "permit package," and review and approval can ordinarily be accomplished within 90 days if there is no protest. A protest, however, can require as many as 230 days, and over a year's time is likely to be consumed if litigation arises.

In fiscal year 1981, the ODOM operated on a budget of about $1.2 million.[149] Agency officials expressed some misgivings that the transfer of federal responsibilities to the States by the Reagan Administration wuld simply mean reduction of federal support, without corresponding reduction in expectations and demands upon ODOM.

Nevertheless, the federal OSM is satisfied that, in 1982, the ODOM has the capabilities for primacy in administering the federal surface mining laws. By requesting removal of the Oklahoma Administrative Procedure Act's requirement of exhaustion of administrative remedies,[150] OSM has increased the likelihood that parties will resort to litigation. This would further tax the already strained capabilities of the agency. Nevertheless, OSM left the provisions of the Oklahoma Administrative Procedure Act for the public hearings which federal law requires intact, thereby assuring a rather legalistic process in which due process interests are furthered, alleit at the expense of flexibility.

B. The Oklahoma Water Resources Board (OWRB)

Oklahoma does not, at this writing, have primacy in administration of federal water pollution control laws. Yet the Oklahoma Resources Board is responsible for certifying National Discharge Elimination System (NPDES) permits and certain permits issued by the Corps of Engineers for dredge and fill operations, as well as issuing state discharge permits.

1. Organizational Structure and Formal Authority

The OWRB, created in 1957, brought together in a single agency responsibilities for planning and regulating both the quantity and quality of water. The OWRB is authorized to set water quality standards for the state, and to abate water pollution. The agency

has both rule-making and order making powers, as well as the power to revoke, modify or deny state permits for the discharge of pollutants into state waters, and to make inspections pursuant to the Pollution Remedies (New) legislation.[151]

The agency is headed by a Board, consisting of nine members appointed for seven-year terms by the Governor, with senatorial confirmation. One member is appointed from each congressional district, thereby providing a degree of geographic representativeness. The remaining members are appointed at large. Recreation, industry, irrigation, municipalities, and soil conservation must each be represented by at least one member of the Board, and no more than two may come from any of those sectors. The executive director of the OWRB is appointed by the Board as the chief administrative officer for the agency. The executive director and assistant director head an organizational apparatus of five divisions. One of these, the Water Quality Division has the primary responsibility to regulate water pollution. This division administers state discharge permit programs, certifies federal permits, and conducts regular sampling to monitor levels of pollutants in the waters of the state.

Discharges from surface coal mining operations come under OWRB jurisdiction as "point source" industrial discharges.

Yet the OWRB shares regulatory responsibilities for water quality with other state agencies, notably: the Department of Mines, the Department of Pollution Control, the Department of Health, and the Conservation Commission.

2. Organizational Resources and Behavior

The OWRB has 64 full-time equivalent employees and a budget of approximately $2.7 million in fiscal year 1981.[152] In 1980, the

agency responded to 147 citizen complaints, and conducted 85 public hearings and 7 individual hearings on violations. Unlike previous directors, the current director, James Barnett, is a lawyer, not an engineer. As former legal counsel for the OWRB as Assistant Attorney General, he is attuned to the complexities of state and federal law.

The Water Quality Divison has two offices -- one in Oklahoma City and one in Tulsa. A majority of the division's twenty-five employees are located in Oklahoma City. Yet the Tulsa office is administratively and scientifically self-sufficient.

Compared to the Department of Mines, the OWRB has experienced relatively little turnover. Employees who left the agency during the past three years have done so to take higher-paying jobs -- either with other agencies of government or with private industry. Of the twenty-five employees of the division, four have Ph.D's, ten have M.S. degrees, and nine have bachelor's degrees from colleges or universities. The two without college degrees are clerical personnel. The Division's activities fall into three principal categories: development of water quality standards, a task which is performed by persons with doctorates in environmental sciences; permitting, which is done by persons with engineering degrees; and enforcement, which is carried out by water quality specialists having B.S. or M.S. degrees.

The OWRB is perceived by officials in other agencies as being the "most aggressive" of the seven state agencies represented on the Oklahoma Pollution Control Co-ordinating Board. One OWRB official acknowledged some duplication of authority with other agencies, but maintained that such duplication helps to assure that, if one

agency does not respond adequately to a problem, another will.[153] The requirement of separate permits from both the Department of Mines and the OWRB, while disliked by applicants, is unlikely to change because neither of the permitting agencies has expertise in both the mining and the water quality fields. Requests for a permit to engage in surfacemining are initiated with the ODOM, which then refers the applicant to the Water Quality Division for a discharge permit. Relations between the two agencies, however, are somewhat distant. A dispute arose between the two agencies in 1981 concerning which of them should have permitting authority over permitting mining activities -- a controversy which was ultimately submitted for resolution by the EPA regional office in Dallas. Some frustration has been expressed in the Water Quality Division of OWRB about the inadequacy of available methods and technology for tracing pollution to mining sources.

If a violation of Oklahoma's water quality regulations is reported or observed, the field enforcement staff of the Water Quality Division prepares a field report. The violator is then sent a "violation letter," notifying him of the breach and the conditions for compliance. If the violation continues, an adjudicative hearing, following specifications of the Oklahoma Administrative Procedures Act, is held before the Board. After decision is rendered by the board, the case can be taken to court for litigation. However, such hearings are relatively rare events. All violations during the past three years have been settled informally, by negotiation. As a matter of working policy, the agency prefers to use persuasion and negotiation as much as possible, while employing formal sanctions as a last resort.

In April, 1982, the OWRB approved amendments and revisions to its rules and regulations, including an updated section on "Pollution

Remedies" (Chapter X). Several new subsections on hearings and permit applications, right of entry, and maintenance of records were included. The new regulations streamline the hearing process (Chapter II). They also provide that: "In the exercise of all powers and performance of all duties the Board shall comply with the procedures provided in Title 82 of the Oklahoma Statutes, APA, and these rules and regulations."[154]

C. The Oklahoma Conservation Commission (OCC) and the Abandoned Mine Lands (AML) Program

The Oklahoma Conservation Commission (OCC), created during the dust bowl era to combat soil erosion, has broader functions today, including flood prevention, water storage, sedimentation control, and the regulation of abandoned mine lands.

1. Organizational Structure and Formal Authority

The Oklahoma Conservation Commission consists of a Governing Board of five members, appointed by the Governor, who represent the conservation districts of five regions into which Oklahoma is divided. Each member must be a landowner/co-operator (farmer or rancher) in his or her local conservation district. The Governor appoints an Executive Director and an assistant director. State law authorizes nine full-time employees of the commission, who must administer technical and financial assistance programs through eighty-eight conservation districts in the state. Each district has its own board of five landowner members -- three of them elected locally, two of them appointed by the commission. The local boards set task priorities for the district officers, each of which is served by a District Conservationist, an engineering aide and a clerk.

According to a legal opinion of the Oklahoma Attorney General, the OCC and the conservation districts are authorized to carry out reclamation activities under the Abandoned Mine Lands Program (AML). As a considtion for assistance, conservation districts are required to prepare and secure the Commission's approval of flood control plans. House Bill 85 *S. L. 1935, Chapter 70, Article 3) authorizes the Commission: "To control, store and preserve within the boundaries of the State all unappropriated waters which may be stored within the State in any manner whatsoever, for any useful purpose...." The Commission must approve all applications for planning and development assistance under the federal Watershed Protection and Flood Prevention Act, which is administered by the U.S. Soil Conservation Service.

The abandoned Mine Lands Program is authorized at the federal level by Sec. 406 of the Surface Mining Control and Reclamation Act, Title IV.[155] The program provides federal funds of up to 87 percent of the costs for state reclamation of mines and mine waters which were unreclaimed before August 3, 1977, Oklahoma became the first state to submit a reclamation plan for abandoned mines under this program in November, 1979. The program, which was approved in January, 1982, gave the OCC responsibility for administering state abandoned mine reclamation efforts, with the support and supervision of the Soil Conservation Service, U.S. Department of Agriculture. The program is co-ordinated with federal emergency programs administered by OSM. A new divison of the OCC was created to administer the program.

Officially, AML is autonomous from OCC. The Director of AML is not considered to be a member of the OCC staff. In reality, formal this formal autonomy serves merely to satisfy technical requirements of

federal and state policies against increases in the staff of "bureaucracies." The AML administration can be considered an integral part of the OCC. The Governor assigned responsibility for the program in Oklahoma to the OCC. OCC, in turn, delegated administrative responsibility to the Haskell Conservation District. The Haskell County Conservation District Board serves as the administrative of project sites and negotiating with landowners.

Section 403 of the Act sets forth the following priorities for expenditures from the Reclamation Fund:

> (1) the protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal mining practices;
> (2) the protection of public health, safety and general welfare from adverse effects of coal mining practices;
> (3) the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife recreation resources, and agricultural productivity;
> (4) research and demonstration projects relating to the development of surface mining reclamation and water quality control program method and techniques;
> (5) the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by coal mining practices;
> (6) the development of publicly owned land adversely affected by coal mining practices including land acquired as provided in this title for recreation and historic purposes, conservation, and reclamation purposes.[156]

Abondoned Mine Land project sites are selected by the Oklahoma Conservation Commission, on the basis of AML Inventory data or notification from a conservation district. The conservation district contacts the surface owner and the mineral owner, the owners of adjacent land, county commissioners, and the State Highway Department, and discusses the preferred reclamation alternative.

Reclamation, however, is a voluntary program of assistance to landowners of abandoned mines who agree to participate in reclamation programs. If owners agree to the preferred reclamation alternative, the Conservation District will publish in local newspapers in the area a notice of reclamation and secure the necessary rights of entry. The OCC enters into a reclamation management agreement with the Conservation District, and the OCC, in co-operation with the District, selects a Project Supervisor. A pre-bid conference is held at the reclamation site, to exchange information with contractors. After a contractor is selected through the bidding process, reclamation is monitored by the Project Supervisor, who submits monthly progress reports to the OCC. Final inspection of the AML site is conducted by the OCC, the Conservation District Director, the State Engineer, and the contractor. AML is subject to the Environmental Impact Statement requirements of federal laws including: NEPA, Executive Order 11514 (Protection and Enhancement of Environmental Quality, 1970), Executive Order 11990 (Protection of Wetlands, 1977) and Executive Order 11988, Protection of Floodplains, 1977). The OCC is considered to be an "administrative agency: under the Oklahoma Administrative Proecdures Act, and thereby subject to the provisions of the Act.

2. Organizational Resources and Behavior

OCC has undergone recent expansion and re-organization in response to the Abandoned Mine Land program. Mr. Mike Kastle, who formerly served as Assistant Director of the OCC, is now Director of the Abandoned Mines Program. Although he officially resigned from the OCC, he is, for practical purposes, a part of the organization. Mr. Don O'Ryan, with some fifteen years of experience with the U.S. Office of Surface Mining, thereby providing valuable experience with a

federal oversight agency. Although the AML staff, itself, is small, the organization can rely upon conservation district employees to implement the program.

The OCC has intimate ties with the eighty-eight conservation districts; which provide a powerful co-operative network among citizens and administrators. The agency also has close, longstanding ties to the U.S. Soil Conservation Service (SCS), the principal federal agency involved in implementing the Rural Abandoned Mines Program (RAMP), under PL95-87. When the Reagan administration took office, most of the funds to be allocated to this program, which is similar to Oklahoma's Abandoned Mine Lands program, were transferred to state implementing agencies, including the OCC. Since the relationship between the two agencies is sturdy, there is unlikely to be animosity between the two agencies as a result of this development. Some $3.3 million are expected to be available to the OCC from this transfer of funding.[157]

The OCC is primarily concerned with delivering services, rather than with regulation. The agency relies primarily upon persuasion in administering voluntary conservation and reclamation programs based upon co-operative ties with landowners. The OCC's regulatory powers are limited to assuring compliance, once a co-operative landowner has been given cost-shared funds. Nevertheless, if a landuser does not comply with conditions set by the OCC, the funds must be returned. Inas much as the AML program involves reclamation of approximately 35,000 acres of abandoned mine lands in Oklahoma, the effectiveness of the OCC will have a potentially major effect upon sedimentation and other forms of water pollution from surface mining operations in the state.

D. The Department of Pollution Control and the Pollution Control Co-ordinating Board (PCCB).

To alleviate conflict among various state agencies concerning responsibility and authority in matters of pollution control, the Oklahoma Legislature passed the Oklahoma Pollution Control Coordinating Act in 1968.[158] The Act created the Pollution Control Coordinating Board, and its executive arm, the Oklahoma Department of Pollution Control, which are charged with the responsibility of coordinating the state's water pollution control efforts through existing agencies.

1. Organizational Structure and Formal Authority

The PCCB is unique among Oklahoma agencies involved in water quality, in that other state agencies are represented on the Board. Until 1981, the Oklahoma Department of Mines was not represented on the PCCB. Absence of representation on the Board was considered to be a serious impediment to effective control of water pollution.[159] By the authority of H. B. 12 17, the Department of Mines replaced the Department of Economic Development on the Board in July, 1981. Although it is too early, at this writing, to assess the effects of this change, the addition of the DOM is expected to strengthen the Board in dealing with mine-related water pollution.

Besides the DOM, other agencies represented on the eleven-member Board are: the Departments of Health, Agriculture, and Wildlife; the Corporation Commission; and the OWRB. In addition to the executive directors of the six agencies, the PCCB includes members who are appointed at large by the Governor. In 1981, the number of appointed members was increased from two to four. This development could be of major significance, by increasing the likelihood that a majority of the

members will act against administrative agency. Only two directors are now required to combine with the four appointed members to produce a voting majority. This structural change may help to overcome the organizational inertia resulting from the voting strength of agencies with a vested interest in protecting their jurisdictions from encroachments of administrative rivals.[160]

A major purpose of the Board is to coordinate pollution control activities among state agencies, in order to avoid duplication of efforts. The Act was amended in 1971 to expand the scope of the Board's co-ordinating activities from only water to all environmental pollution. The PCCB is the designated agency responsible for preparation of water quality plans for most of Oklahoma under Sec. 208 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500). Moreover, the Board has auxilliary regulatory powers which can be used when other state agencies are unable or unwilling to control a given problem. The Board can require the appropriate agency to investigate pollution problems within the latter's jurisdiction, and to report the results of such investigations to the Board. The Board can act on its own initiative by a vote of six members, in any of the following circumstances: (a) the agency having primary jurisdiction has failed or neglected to take action; (b) no other agency has jurisdiction over a given pollution problem; (c) effective action by other agencies is prevented by jurisdictional conflicts; or (d) the agency having primary jurisdiction lacks the necessary enforcement powers. The Board then has broad authority, including investigatory and order-making powers, to deal with the problem. Violation of orders of the Board is a misdemeanor. The PCCB also has the authority to review the water quality and beneficial use standards established by the OWRB, and to

adopt other binding minimum standards for the state should the OWRB standards be deemed inadequate.

The Department of Pollution Control is the administrative arm of the Board. The Department serves as the designated recipient of federal pollution control funds, except those designated for municipal wastewater treatment, as a repository and clearinghouse for environmental regulations, pollution control permits from the various state agencies, reports on pollution control funding, and records of pollution control activities; as an agency for water quality basin planning and area planning, under Secs. 3 and 208 of PL 92-500, respectively; and as a public information and communication unit to promote environmental awareness through such means as an annual water and pollution "short school" and a 24-hour telephone service for pollution complaints.

The Rules and Regulations of the PCCB provide that: "Except as hereinafter provided the rules governing the rule making powers of the Board shall be the same as those found in the Administrative Procedures Act (Title 75,)S Supp. 1970 secs. 301 to 325)."[161] The rules and regulations specify a right of any person affected by any rule of the PCCB to petition for a declaratory ruling by the agency. The rules and regulations also set forth detailed procedures for adjudicative hearings in "individual proceedings" by the Board.

The prospects for aggressive action by the Department in controlling pollution are constained by many factors. Not the least of these are the facts that: state law directs that the Department make maximum use of existing state agencies; the executive directors of such agencies sit on the governing board of the department; and the salary of the Director of the Department is set by the Board.

2. Organizational Resources and Behavior

There is a marked discrepancy between formal powers and actual operations of the PCCB. The agency was created in response to efforts by a coalition of agricultural and energy producers to prevent the Department of Health from becoming the dominant agency in controlling pollution. The Department of Health was viewed as insufficiently responsive to the needs and concerns of energy industries, farmers and ranchers. From a political standpoint, the difficulty of the Board in taking aggressive action against pollution is intentional, not accidental. The Board was never intended to be a "front line" enforcement agency. However, the addition of appointed members to the Board in 1981 increases its potential for activism. In particular, the position of the representative of the Department of Wildlife, which has a strong identification with environmental interests, has been enhanced by increasing the potential for leadership of a coalition including the four appointed members and the executive director of only one other agency.

Although the Board has used formal rule making and order making powers sparingly, the Board has, on occasion, taken an expansive view of its powers -- and has been upheld by the courts. The cases of Nagel v. Ensearch Exploration Co. and Ensearch Exploration Co. v. Pollution Control Coordinating Board[162] concerned the intervention of the Board in a dispute between a landowner and the Corporation Commission. The Corporation Commission investigated alleged groundwater pollution from drilling operations by Ensearch, and found that the company had complied with Corporation Commission rules. The landowner appealed to the PCCB, which agreed to hear the dispute. The case is the first in which the Board agreed to assume jurisdiction after the

agency having primary jurisdiction decided that no pollution control action was warranted.

Another case in which the PCCB took vigorous action against a polluter concerned a fish kill in the Cimarron River. The PCCB initiated an action for recovery of damages from Kerr-McGee Corporation for wrongful destruction of wildlife by allegedly depositing deleterious substances into the river, thereby causing the fish kill. The Board's authority to pursue such a cause of action was challenged by the corporation, and ultimately determined by the Oklahoma Supreme Court.[163] The Court held that the State, through the PCCB, had a common law right to sue the plaintiffs for negligence resulting in the destruction of fish which were restocked by the State. An important decision by the Attorney General, however, found that the PCCB was not the sole state agency charged with the responsibility to abate water pollution.[164] Another opinion of the Attorney General concluded that the PCCB's authority to act on its own initiative is discretionary, not mandatory.[165] The Attorney General also decided, in a case involving an inter-agency dispute with the OWRB and the Department of Health, that the Department of Pollution Control had the authority to receive such funds, and to disburse them to the other agencies.[166]

The relatively small staff and limited funding of the agency, however, limit it role in pollution control. In fiscal year 1981, the department had ten full-time-equivalent employees, and available funds of $1.5 million.[167]

In sum, regulatory power over surface mine-related water pollution in Oklahoma is dispersed among four separate agencies. Although each agency is subject to the Oklahoma Administrative Procedures Act the formal powers and procedures available under the Act and other legislation

do not adequately describe the actual practices of agencies operating under the act, because of budgetary and personnel constraints and the perceived desirability of resolving differences informally by persuasion and negotiation.

II. Wyoming's Approach: Consolidation of Environmental Functions

In contrast to Oklahoma, Wyoming has largely centralized responsibility for regulation of both water quality and land quality in a single Department of Environmental Quality (DEQ) which also has responsibility for air quality and solid waste management. A separate agency, the Department of Mines, has jurisdiction over safety and health at the mine site, including aspects of water and refuse disposal which relate to those matters. A memorandum of understanding between the Wyoming State Inspector of Mines and DEQ identifies the responsibilities of each agency and provides for timely disposition of mine-related matters of mutual concern. Another agency, the Office of the State Engineer is responsible for storage and management of state waters in dams and reservoirs. Memorandum of understanding between the Wyoming State Engineer and the DEQ provide that, the agencies will notify each other of activities which may have impacts within each other's jurisdictions, when a mine permit application or revision for a proposed surface coal mine is filed with the DEQ, the Land Quality Divison has agreed to furnish the State Engineer with specified information concerning the operation. However, it is the Land Quality Division of DEQ which is primarily responsible for administering the SMCRA, under state primacy arrangements; and it is the Water Quality Division of DEQ which regulates water pollution in the state.

The department is headed by a director who is appointed by the governor, and who serves at the governor's pleasure. The director

appoints the administrators of the three "line" divisions (water quality, air quality and land quality), and they serve at the director's pleasure. The act delegates considerable authoirty to the director, including the power to "Perform any and all acts necessary to promulgate, administer and enforce the provisions of (the Environmental Quality Act) and any rules, regulations, orders, limitations, standards, requirements or permits adopted, established or issued thereunder, and to exercise all incidental powers as necessary to carry out the purposes of "the Environmental Quality Act.[168]

Despite formal centralization of authority, the DEQ is far from monolithic in its actual functioning. The divisions have considerable independence in performing their assigned tasks.

A. The Environmental Quality Council (EQC)

The Environmental Quality Council (EQC) serves as the adjudicative organ of the department, and upon recommendation from the director of the Department, promulgates rules and regulations "necessary for the administration of" the Environmental Quality Act.[169] The Act specifically provides that: "All proceedings of the council shall be conducted in accordance with the Wyoming Administrative Procedure Act (Secs. 9-4-101 to 9-4-115).[170]

The seven member EQC is described as an "independent" regulatory agency.[171] Various measures are taken to insulate the Council from partisan influence; members serve staggered four-year terms, and no more than four members can be of the same political party. Members are appointed by the governor with the advice and consent of the senate. No member who receives more than ten percent of his income from a permit applicant may act on a permit application from that applicant. Members

of the Council are appointed by the governor with the advice and consent of the senate.

The Council consists entirely of private citizens. At least one member must come from the mineral industry and one must be from agriculture. Members do not receive a salary.

Wyoming case law reaffirms the breadth and flexibility of the quasi-legislative authority of the Council to make rules and regulations which prevent, reduce or eliminate pollution.[172] The Council provides public hearings in "notice-and-comment" rulemaking, in which no cross-examination is permitted except by Council members. The Council also hears appeals from parties affected by actions of the DEQ. These "contested case" proceedings are conducted as trial-type hearings, replete with direct and cross-examination and sworn testimony. One of the Council members acts as hearing examiner in the contested case proceedings, and has authority to make decisions on admissibility of evidence, the order of presentation of a case, and other procedural matters. The entire Council, however, decides the case. The EQC may:

> (i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any divison administrator.
> (ii) Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified;
> (iii) Affirm, modify or deny the issuance of orders to cease and desist any act or practice in violation of the laws, rules, regulations, standards or orders issued or administered by the department or any divison thereof....[173]

The concentration rulemaking and ordermaking powers in an independent agency is a distinctive feature of Wyoming's approach to regulation of surface-mining and water quality.

2. Organizational Resources and Behavior

The requirement that the minerals industries be represented on the Council has given surface mine operators a powerful voice in the regulatory process. At this writing, Mr. Glenn A. Goss, General Manager of Peabody Coal in Wyoming, was serving as the industry member.

As the Council's workload has increased it has expanded its staff. In 1980, a full time Administrative Aide, who is an attorney, was hired by the EQC to administer the Council's activities and provide advice on pending issues. The Aide, in turn, employs consultants in specialized areas relating to the Council's work. The EQC is, thus, equipped with a source of information independent of the DEQ's staff.

Surface mining occupied much of the Council's attention during 1981. Public hearings or meetings averaged four per month in that year, and the number of meetings was "expected to increase dramatically" during fiscal 1981-1982" due to the increased development of resources in Wyoming, constant demand for new and revised standards and regulations for the Department of Environmental Quality, and the impact of the State's Program Implementing the Surface Mine Control and Reclamation Act of 1977...."[174]

B. The Land Quality Division (LQD)

Functionally, the Land Quality Division of DEQ corresponds most closely to the Department of Mines in Oklahoma. The organizational structure of the LQD, however, is very different from its Oklahoma counterpart.

1. Organizational Structure and Formal Authority

The Land Quality division is empowered by law:

> (i) To utilize qualified experts in the field of hydrology, soil science, plant or wildlife ecology, and other related fields to advise on mining reclamation practices, and the adoption of rules....
> (ii) To fix the amount of, collect, maintain and otherwise comply with the statutory performance bond....
> (iii) To reclaim any affected land with respect to which a bond has been forfeited;
> (iv) To recommend to the director, after consultation with the advisory board, the issurance, denial revocation and suspension of permits, licenses and special exploration permits...[175]

The LQD has four operating units, each directly under the Division Administrator: (a) Administration and Budget; (2) Analysis and Technical Support; (3) Mining Permit and Reclamation; and (4) Abandoned Mine Lands. The Analysis and Technical Support section is based in Cheyenne, but provides technical assistance to the District field force upon request. The Mining Permit and Reclamation section contains the field force, under the supervision of the District Engineering supervisor. The Abandoned Mine Lands program is handled by a seperate section which is concerned with restoration, safety, land acquisition and rights of way for abandoned mine areas.

2. Organizational Resources and Behavior

With fourteen full-time-equivalent personnel, including five hydrologists, two soil scientists, two botanists, an archaeologist, and others trained in environmental sciences, the Technical Support staff spends an estimated 30 percent of its time conferring with applicants and other members of the public.[176] The District field force, which is responsible for compliance monitoring and inspection, is divided among four districts. Two districts are based in the Cheyenne office. One of the remaining two districts has headquarters in Landler, while the other is based in Sheridan. The latter two districts are each staffed by one engineer, five reclamation specialists, and one

secretary. The two Cheyenne-based districts, able to draw upon the services of DEQ's main office, are each staffed by one engineer and two reclamation specialists.

In 1980, the Land Quality Division was designated as administrator of monies from the Abandoned Mine Lands Reclamation Fund. Three Coperative Agreements were concluded with the Office of Surface Mining for reclamation of abandoned mine lands.

Expenditures by the LQD for the year ending in June 30, 1981, totalled over $1.7 million or 38 percent of the total expenditures of the DEQ. This was the largest percentage of any of the divisions in the Department.

Pursuant to federal requirements, the Land Quality Division must conduct twelve inspections per year for each of the operating coal mines in the State. From July, 1980, through June, 1981, the Division issued a total of 68 Notices of Violation and 19 Lease and Desist orders. Most violations, however, are settled by voluntary correction in response to a warning. Fines can be imposed, but are sometimes avoided where willing compliance seems likely.[177]

The Division has experienced heavy demands on its resources as a result of the federal requirements for retaining primacy. In 1981, for example, considerable time and Division resources were consumed in an effort to reconcil the federal requirements that highwalls from surface mining be eliminated with another federal requirement that habitats of endangered species be preserved. Eagles had nested in a mining highwall. Several field trips to this site by various DEQ officials were required before the conflict was resolved.

The matter identified by the Land Quality Division as one of its foremost concerns is "groundwater hydrology wherein in-site mining

practices indicate that pollution may occur."[178] In 1981, the Division acknowledged that it did "not have expertise of human toxicologists to cope with...inherent problems resulting from this type of mining...."[179]

C. The Water Quality Division (WQD)

The Water Quality Divison, (WQD) is the Wyoming counterpart to Oklahoma's Water Resources Board in the area of water pollution control. However, the WQD lacks the authority over the administration of water rights comparable to that of the OWRB.

1. Organizational Structure and Formal Authority

The Administrator of the Water Quality Division is authorized to recommend to the director "rules, regulations, standards and permit systems to promote the purposes of "the Environmental Quality Act."[180] The statute states an intention "to retain for the state the control over its...water" and "to prevent, reduce and eliminate" water pollution.[181] The Water Quality Division has the task of implementing these directives. The Division's activities consist of six major programs: (a) the Federal Water Pollution Control Program, concerned with water monitoring and administration of discharge permits for point sources; (b) the water quality management program, involving co-ordination of planning under Sec. 208 of the Federal Water Pollution Control Act; (c) the Municipal Facilities Construction Grant Program, which provides 75 percent federal funding for municipal treatment facilities; (d) the OSM programs, which deals specifically with control of pollution from surface mining activities; and (e) the ground water protection program.

2. Organizational Resources and Development

With expenditures of over $1.6 million in the year ending June 30, 1981, the water quality division ranks second to Land Quality in total expenditures by the divisions of DEQ. The number of active discharge permits by WQD more than doubled from Fiscal Year 1974 through Fiscal Year 1981, when the total reached some 800.[182] Sixty new discharge permits were issued in Fiscal Year 1981, while 240 were renewed or modified.[183]

The WQD has 35 full-time equivalent employees, including both surface and ground water activities. The head of the water quality laboratory has a Ph.D., and all of the professional staff engineers and discipline scientists have either bachelor's or master's degrees. The staff is relatively stable. No one has left the division except for promotions or higher paying jobs with other agencies or with private industry.

The operation of WQD is somewhat decentralized. The "State Office" is located in Cheyenne, but field offices are maintained in Sheridan and Lander. The field offices are relatively self-sufficient in providing day-to-day quality control.

As a matter of official policy, the Division maintains that enforcement strategy "is designed to employ conference and concliation whenever possible and to utilize formal enforcement actions or court complaints only after these tactics have failed to achieve the desired objective.[184] When a violation is detected, a "letter of violation" setting forth the nature of the offence and necessary corrective action" is sent to the violator. If the violator takes no corrective action, a Notice of Violation will be issued. This Notice states the offense in a legal document carrying the weight of the law. If the violator does not comply with a Notice of Violation, a cease and desist order

will be issued or a complaint filed by the State in District Court. There have been no lawsuits concerning water quality as it relates to surface mining, although several letters of violation have been issued.[185] Thus far, the letters of violation have been sufficient to produce compliance satisfactory to the WQD.

Part Three: Summary and Conclusions

Increased surface coal mining activity in Oklahoma and Wyoming presents a potential threat to sensitive ground water and surface water resources in both states. In Oklahoma, the mining is concentrated in the eastern part of the state which has also been designated as the supply source for interbasin water transfer to the central and western subregions. In Wyoming, a projected doubling of coal production in the 1980's poses a danger to already limited water resources of the Powder River and Tongue River basin areas and other waters in the nation's leading coal producing state. An emphasis by the Reagan administration upon an increased role for the states in mining and water regulation has heightened the importance of state administrative law and regulatory structure in tradeoffs between coal production and water resource protection.

Oklahoma and Whoming are systemically linked by supply-demand relationships and by a proposed coal slurry pipeline. A common core of administrative law provided by adoption of the Review Model State Administrative Procedure Act in both states, the sharing of a common federal judicial circuit, and the substantial uniformity in surface mining regulations required by the federal Office of Surface Mining, provides a basis for meaningful comparison.

This study has examined areas of similarity and difference in the legal and organizational frameworks for energy-water tradeoffs in the two states. Despite statutory similarities resulting from substantial adherence to the Ravised Model APA in both states, important differences were noted. Oklahoma's exemption of the corporation commission, hence the oil and gas industry, from coverage of the Administrative Procedures Act affects the relevance of legal precedent of court cases in energy-

relations, and have engaged in jurisdictional disputes over authority to regulate water pollution from mining operations. The Oklahoma Conservation Commission, which, for practical purposes, administers the Abandoned Mine Lands reclamation program, operates essentially on a voluntary, co-operative basis. The Pollution Control Co-ordinating Board which acts as a reserve or "back-up" agency to the others, manifests an in-built structural inertia as a result of heavy representattion of agency directors in its membership. Whether or not the addition of appointed "at large" members will overcome this condition remains to be seen. Nevertheless, the existence of multiple agencies with some overlap in responsibilities may increase the likelihood that at least one of them will take action against a given infraction.

Wyoming's regulatory approach differs most conspicuously from Oklahoma's in two respects: the greater formal centralization of regulatory responsibility in Wyoming and the considerable quasi-legislative and quasi-judicial authority given to an independent regulatory body, the Environmental Quality Council. Wyoming's greater centralization is a difference from Oklahoma in degree rather than in kind. Structural and functional separation between the Land Quality Division and the Water Quality Division, and the substantial sub-regional autonomh exercised by various division officers, have resulted in considerable de facto decentralization of regulatory activity.

While Wyoming appears to have encountered fewer problems of regulatory co-ordination among administrative units than Oklahoma, the concentration of rule making and order making authority in an independent regulatory council has presented other difficulties. Representation of the mining industry and other interests on the Council helps to assure that the department will not be unresponsive to the

interests of major sectors of opinion in the state. Yet such representation at the policy-making level also provides an opportunity for an organized interest group to block effective environmental programs for all phases of mine related pollution, by influencing a majority of a single non-elected council. Coupled with the multi-tiered process of legislative and executive review which Wyoming has established for administrative decisions, the administrative structure in Wyoming increases the veto power of minorities with access to the review committees.

Oklahoma and Wyoming differ in many respects, not the least of which is the far greater magnitude of coal production in Wyoming. Wyoming is experiencing the social and political effects of a mineral "boom" comparable to that which Oklahoma experienced earlier in the century. Further comparison of the social, political and environmental characteristics of the two states, is necessary before conclusions can be drawn concerning the feasibility or desirability of modifying institutions in one state on the basis of the other's experiences. Yet it is hoped that the comparative overview of administrative legal and institutional patterns in the two states has contributed a useful point of departure for further comparative study of the relationships between legal and institutional variables, on the one hand, and outputs affecting coal production and water quality, on the other hand.

Secretary of the Interior James G. Watt has stated that the Reagan administration is

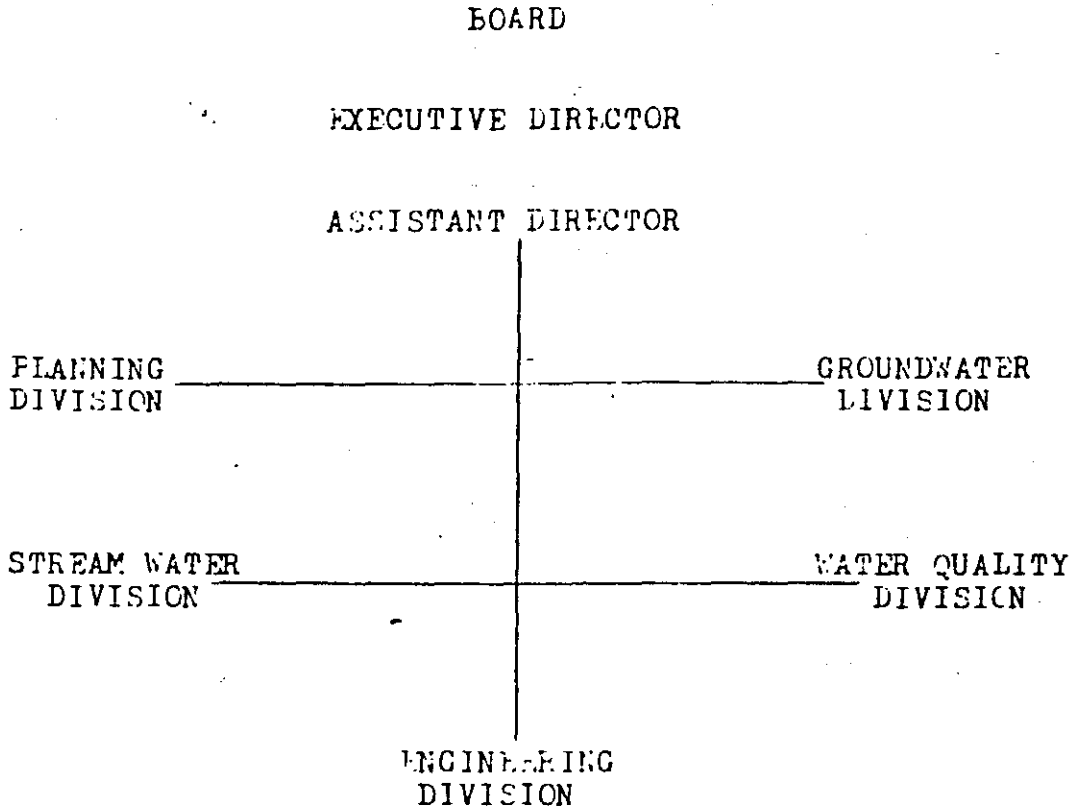
> committed to make good the pledg made by Congress almost four years ago to all coal-producing states: that they are to have the primary responsibility for enforcing surface mining environmental and reclamation standards.[186]

By comparing the experiences of states which have taken different approaches to regulation within similar legal regimes, it is hoped that states can make better informed decisions on energy-water tradeoffs.

APPENDIX A: EPA's Effluent Limitations for Water Pollutents, 1981.

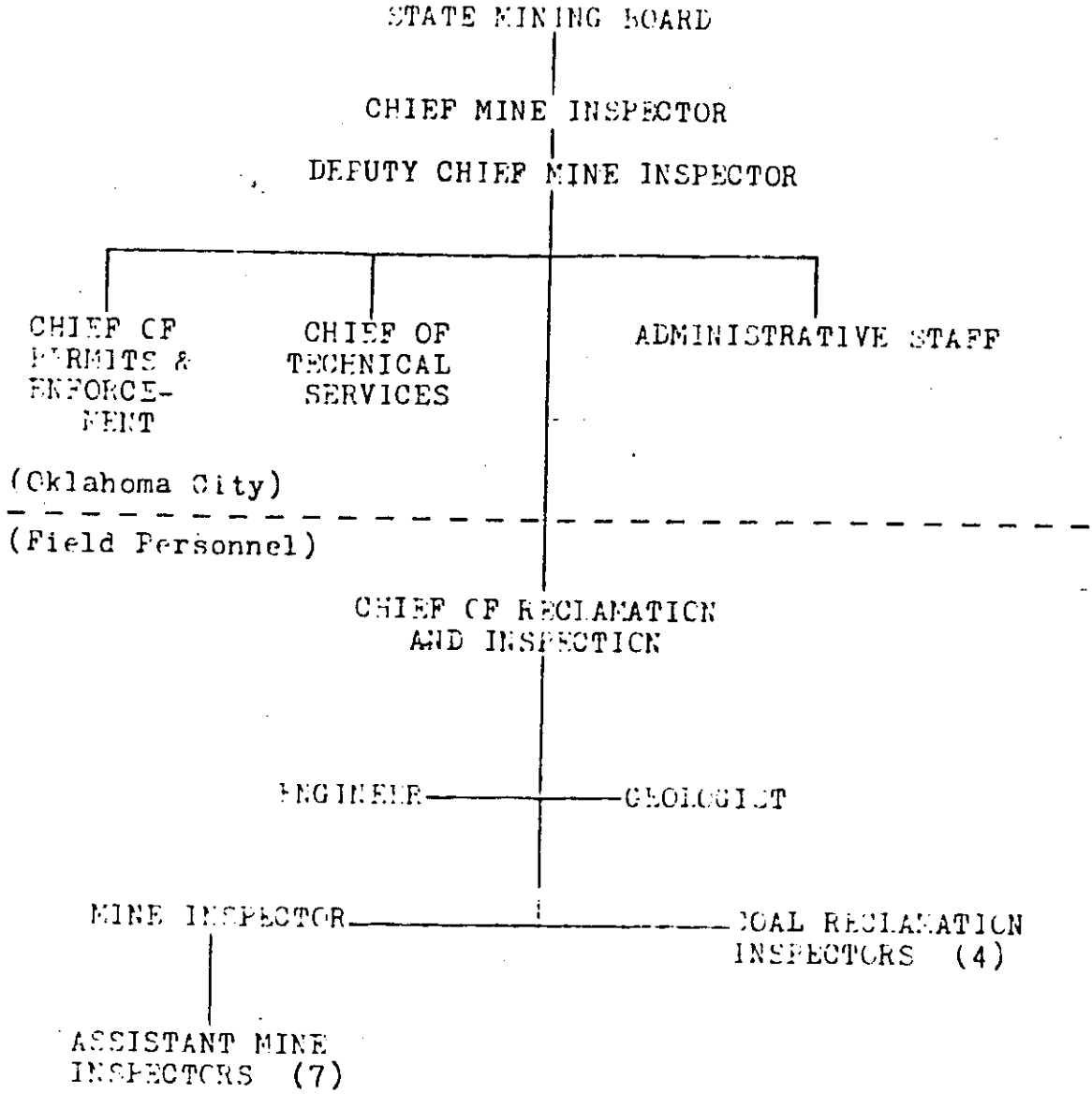
Total Effluent Characteristics	Effluent Limitations (Mg/l) Maximum Allowable	Average of daily values for 30 consecutive days
Iron	7.0	3.5
Manganese	4.0	2.0
Suspended Solids	70.0	35.0
pH	6.0 to 9.0 at all times (range)	

APPENDIX B: Organization of Lead Agencies for Mine-Related Water Pollution in Oklahoma and Wyoming



ORGANIZATION OF THE OKLAHOMA WATER RESOURCES BOARD

Source: Joseph W. Westphal and James J. Lawler, Commitments, Priorities, and Organizational Options for Water Resource Planning in Oklahoma, Final Technical Completion Report A-076-OKLA, Oklahoma Water Resources Research Institute, (August 1979), p. 172.

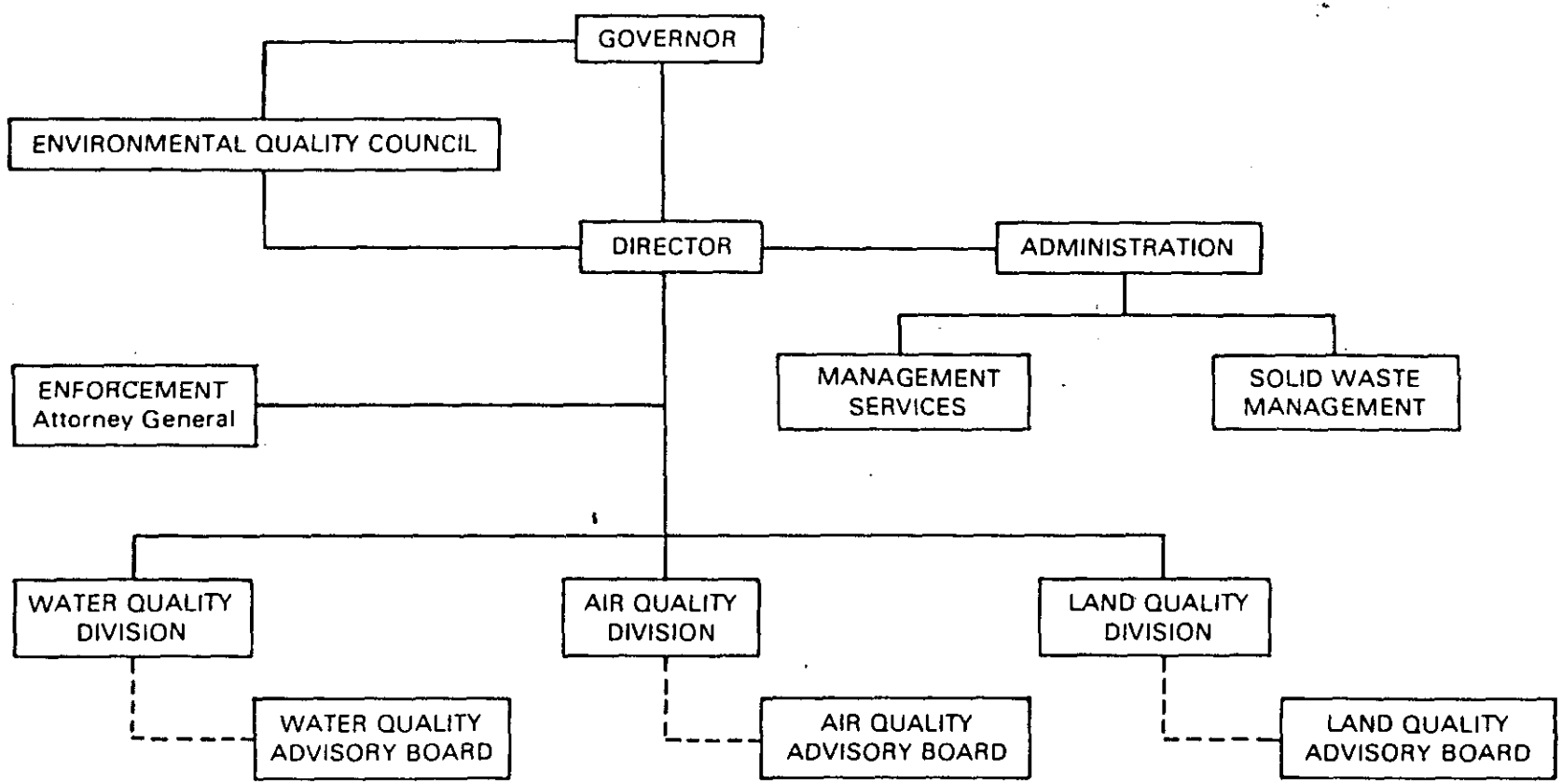


ORGANIZATION OF THE OKLAHOMA DEPARTMENT OF MINES

Source: M. Darrel Dominick, An Analysis of the Administration of Eastern Oklahoma Coal Surface Mining and Water Tradeoffs (Stillwater, Ok.: Master's Paper, Department of Political Science, May 1982, unpublished).

DEPARTMENT OF ENVIRONMENTAL QUALITY

PROGRAM ORGANIZATION CHART



[14]Wallace, C. McMartin, Virgil Whetzel, and Paul R. Myers, Coal Development in Rural America: Resources at Risk (Washington, D.C.: United States Department of Agriculture, August, 1981), p. 38-40.

[15]Wyoming Statistics, (1973), Sec. 35-11-102.

[16]"Interior's Plans for OSM Anger Environmental Organizations," Coal Age, (July, 1981), p. 21.

[17]U.S. Federalism: The First Ten Months, A Report from The President. (Washington, D.C.: Government Printing Office, 1981), p. 1.

[18]"Reorganization of OSM Itended to Code Power to States," Coal Age (July, 1981), p. 19.

[19]Quoted in Ibid.

[20]"The Coal Slurry Pipelines," Oklahoma Business (March, 1977), p. 33.

[21]Oklahoma Health Department, 1981, cited in Bureau of Land Management and Woodward-Clyde Consultants, Department of the Interior: Final Impact Statement on the Energy Transportation Systems, Inc. Coal Slurry Pipeline Transportation Project (Denver, Colorado: Bureau of Land Management, 1981), p. 1-3.

[22]Department of the Interior Bureau of Land Management, Environmental Impact Statement on the Energy Transportation Systems, Inc. Coal Slurry Pipeline Transportation Project, (Denver Colorado: BLM, 1981), vol. I, p. 1-3.

[23]Ibid, vols. 1 and 2.

[24]Natural Conference of Commissioners on Uniform State Laws, "Uniform Law Commissioners' Revised Model State Administrative Procedure Act," Handbook of the Nantional Conference of Commissioners on Uniform State Laws and Proceedings (1961), p. 199 ff; Uniform Law Annotated, vol. 13 (St. Paul: West, 1979), p. 355 ff; The Oklahoma Administrative Procedure Act, passed in 1963, is codified as 75 Ok. Stat., secs. 301 to 327. Wyoming's counterpart, adopted in 1975, appears as W. S. 1977, and secs. 9-4-101 to 9-4-114.

[25]In 1981, these were: Arkansas, Connecticut, District of Comumbia; Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin.

[26]Maurice H. Merrill, "Oklahoma's New Administrative Procedure Act," Oklahoma Law Review, vol. 17 (February, 1964), pp. 56, p. 2.

[27]"OSM Issues Final "State Window' Rule; Flexibility Expected in Mine Plans," Coal News (National Coal Association), No. 4597 (November 9, 1981).

[28]Kenneth Culp Davis, Administrative Law and Government, 2nd edition (St. Paul, Minn.: West Publishing Co., 1975), p. 6.

[29]Glen O. Robinson, Ernest Gellhorn, and Harold H. Bruff, The Administrative Process, second edition (St. Paul, Minn.: West Publishing Co., 1980), p. 3.

[30]Oklahoma Mining and Reclamation Association v Oklahoma, District Court for Oklahoma County, Oklahoma, No. CJ-80-5520 (1980).

[31]75 Okla. Stats, sec. 322 (1)(b)

[32]Federal Register, vol 46 (January 19, 1981), p. 4902.

[33]Federal Register, vol. 46 (January 19, 1981), p. 4909.

[34]Gary M. Haman and Robert P. Tunnicliff, "Idaho Administrative Agencies and the New Idaho Administrative Procedure Act," Idaho Law Review, vol. 3 (1966), pp. 61-129, p. 64.

[35]W. J. Curran and A. M. Sacks, "Massachusetts Administrative Procedure Act," Boston University Law Review, vol. 37 (1957), pp. 70-99, p. 97.

[36]Handbook of the National Conference of Commissioners on Uniform State Laws (1961), p. 206.

[37]Wyo. Stat., sec. 9-4-101 (a)(i)

[38]Justice Marion Opala, Oklahoma Supreme Court, interviewed by Tim Blanchard, March 25, 1981. Tim Blanchard, The Model State Administrative Acts: A Brief Comparison and Analysis (unpublished paper).

[39]Model State Administrative Procedure Act, Sec. 1 (7); 75 Ok. Stat. sec. 301 (2); Wyo. Stat; sec. 9-4-101(vii);

[40]75 Ok. Stat., sec. 303.

[41]Wyo. Stat. (1977), sec. 9-4-103(a).

[42]75 Ok. Stat., sec. 303 (2) (b).

[43]State ex rel. Pollution Control Co-ordinating Board v Kerr McGee Corp, 619 p. 2d859 (Okla., 1980), 44, 75 Ok. Stat., sec. 303 (2)(b).

[45]Wyo. Stat. sec. 9-4-104.

[46]75 Ok. Stat., sec. 301 (2) (Supp. 1978).

[47]Ibid

[48]Wyo. Stat., sec. 28-9-102 (a)(i)(1977).

[49]Barton R. Voigt, "Wyoming's Administrative Regulation Review Act," Land and Water Law Review, vol. 14 (1979), pp. 189-206, pp. 205-206.

[50]Ibid., p. 205.

[51]75 Ok., Stat. sec. 314; Wyo. Stat., sec. 9-4-113; Administrative Procedure Act, sec. 14.

[52]Wyo. Stat., sec. 9-4-107 (h).

[53]Ibid.

[54]5 U.S.C., sec. 552

[55]Wyo. Stat., sec. 9-4-108(a).

[56]Commissioners' Comment, Revised Model State Administrative Procedure Act, sec. 10, Uniform Laws Annotated, p. 410; 75 Okla. Stat., sec. 310.

[57]This conclusion would follow fromthe "express mention" of statutory construction: "expressio unius, exclusio alterius" (express the one, exclude the other).

[58]Maurice H. Merrill, "Oklahoma's New Administrative Procedure Act," Oklahoma Law Review, vol. 17 (February, 1974), pp. 1-56, p. 29.

[59]Tovas v State By and Through Real Estate Commission, 635 p. 2d1172, (Wyo. 1981), Tulsa Area Hospital Council, Inc. v. Oral Roberts University, 626P.2d316 (Okla., 1981)

[60]Model State Administrative Procedure Act, Sec. 10(1).

[61]"Report of the Committee on Administrative Law," sec. 15, Oklahoma Bar Association Journal, vol. 25 (1954), p. 1947.

[62]75 Ok. Stat., sec. 310 (1)

[63]Wyo. Stat., sec. 9-4-108 (a)

[64]Tovas v. State By and Through Real Estate Commission. 635 p. 2d 1172 (Wyo. 1981) Tulsa Area Hospital Council, Inc. v. Oral Roberts University 626 P2d316 (Okla., 1981).

[65]75 Ok. Stat., sec. 310(5).

[66]Wyo. Stat., sec. 9-4-107(j)

[67]75 Ok. Stat., sec. 310 (5).

[68]Wyo. Stat., sec. 9-4-107 (k).

[69]75 Ok. Stat., sec. 316.

[70]Ibid.

[71]Board of Trustees, Laramie County School District No. 1 v. Spiegel, 549 P.2d1161 (Wyo., 1976).

[72]Ibid.

[73]75 Ok. Stat., sec. 310 (4).

[74]Sebring v. Caporal, 452 P.2d777, 781 (Ok., 1969).

[75]Wyo. Stat., sec. 9-4-108(d).

[76]75 Ok. Stat., sec. 317.

77Merrill, Note 56, p. 38.

[78]75 Ok. Stat., sec. 318.

[79]National Motor Club v. State Insurance Board, 393P.2d511, 511 (Okla., 1964).

[80]Kenneth Culp Davis, "The Liberalized Law of Standing," University of Chicago Law Review, vol. 37 (1970), 450; Louis Jaffe, "Standing Again," Harvard Law Review, vol. 84 (1971), 633. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Scenic Hudson Preservation Conference v. Federal Power Commission, 354F.2d608 (1965).

[81]"Note," Wyoming Law Journal, vol. 16 (1962), p. 296. David H. Carmichael and David R. Nicholas, "The Wyoming Administrative Procedure Act," Land and Water Law Review, vol. 1 (1966), pp. 497-517.

[82]Matter of Various Water Rights in Lake DeSmet Reservoir, 623 P.2d764 (Wyo., 1981).

[83]Opinion of the Attorney General, February 25, 1980.

[84]Federal Register, vol. 46 (Monday, January 19, 1981), p. 4906.

[85]Lincoln Income Life Insurance Co. v. Wood, 556P.2d602, 604 (Okla., 1976); Accord, Hughes v. City of Woodward, 457 P.2d787, 790 (Okla., 1969). Martin v. Harrah Indep. School District, 543 P.2d1370, 1372 (Okla., 1976).

[86]Mattoon v. City of Norman, 617 P.2d1347.

[87]Wyo. Stat., sec. 9-4-114(a).

[88]Revised Model State Administrative Procedure Act, (Annotated Sec. 15, Commissioners, Comment, p. 431.

[89]Ernest Gellhorn, Administrative Law and Process (St. Paul, Minn,: West Publishing Co., 1972), p. 265.

[90]Ibid.

[91]Wyo. Stat., sec. 9-4-114(c)(iv).

[92]Tovas v State By and Through Real Estate Commission, 635 P.2d1172 (Wyo., 1981).

[93]Laramie River Conservation Council v. Industrial Siting Council, 588 P.2d1241(1978). For a discussion and critical analysis, of judicial review in Wyoming, see Nancy D. Wood, "The Scope of Judicial Review of Administrative Actions," Land and Water Law Review, vol. 14 (1979), pp. 607-624.

[94]Ok. Stats., sec. 322 (1)(e).

[95]Michael P. Cox, "The Oklahoma Administrative Procedures Act: Fifteen Years of Interpretation, "Oklahoma Law Review, vol. 31 (1978), pp. 886-913. Oklahoma Water Resources Board v. Central Master Conservancy District, 464 P.2d 748, 752-53 (Okla., 1969), Stillwater Savings and Loan Association v. Oklahoma Savings and Loan Board, 534 P. 2d 9, 14 (Okla., 1975). Tulsa Area Hospital Council, Inc. v. Oral Roberts University, 626 P. 2d 316 (Okla., 1981).

[96]George E. Dials, Testimony Before the Small Business Committee, U.S. Senate, May 14, 1979, in The Effect of Government Regulation on the Production and Use of Coal. Hearings Before the Select Committee on Small Business, United States Senate, Ninety-Sixth Congress (Washington, D.C.: U.S. Government Printing Office, 1979), pp. 746-64, Table I, pp. 753-757; Jerry L. Lombardo, Statement in Ibid., pp. 492-511.

[97]33 U.S.C., secs. 1251 et seq (1978).

[98]30 U.S.C., secs. 1201 et seq (1978).

[99]42 U.S.C., secs. 4321 et seq (1970).

[100]Lombardo, Note 97; James R. Jones, Statement Before the Small Business Committee, Note 97, pp. 474-91.

[101]40 C.F.R., part 434; 46 F.R. 3155 (January 13, 1981). F.R. 21380. 604 F. 2d 239, 246-48(4th Cir., 1979).

[102]30 U.S.C., sec. 1201 (a).

[103]Environmental Protection Agency, Environmental Impact Assessment Guidelines for New Source Surface Coal Mines, EPA-130/6-79-005, (Washington, D.C.: U.S. Environmental Protection Agency, 1979), p. 4.

[104]"Questions Which Arose During the Appearance of David Hawkins on Coal Use," Hearings before the Select Committee on Small Business, Note 97, pp. 936-937. Governor Ed Herschler, Wyoming, "Letter to Mr. Roger L. Williams, Region VIII Administration, Environmental Protection Agency (April 8, 1981).

[105]Secretary James Watt, Department of the Interior, in Ibid.

[106]Jerry L. Lombardo, "Statement," Note 97, p. 495.

[107]Kentucky ex rel. Jancock v. Train, 9 Envir. Rep. (BNA)(ERC) 1280, 1282 (E.D. Ky. 1976); United States Steel Corp. v Train, 556 F. 2d (7th Cir. 1977); United States v. Phelps Dodge Corp. 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

[108]James J. B. Tripp and Adam B. Jaffe, "Preventing Groundwater Pollution: Towards a Coodinated Strategy to Protect Critical Recharge Zones," Harvard Environmental Law Review, vol. 3 (1979), pp. 1-47.

[109]42 U.S.C. secs. 300f to 300j-9 (1976).

[110]42 U.S.C. secs. 6901-6987(1976).

[111]15 U.S.C. secs. 2601-2629 (1976).

[112]U.S. Comptroller General, "National Water Quality Goals Cannot Be Attained Without More Attention to Pollution from Diffused or Non-point Sources," CED-78-6 (Washington, D.C.: General Accounting Office, 1977), p. i.

[113]W. Chris Wicker, "Enforcement of Section 208 of the Federal Water Pollution Control Act Amendments of 1972 to control Nonpoint Source Pollution," Land and Water Law Review, vol. 14 (1979), pp. 398-47, p. 426.

[114]United States v. Valley Camp Coal Co., 480 F. 2d 661 (4th Cir. 1973).

[115]33 U.S.C., sec. 401-413.

[116]Ibid.

[117]W. Rodgers, Environmental Law (1977), pp. 397-99.

[118]California v. Sierra Club, 15 ERC 1929 (U.S. Supreme Court, 1981).

[119]44 F.R.50: 15311-15436 (1979).

[120]Ibid., sec. 816.51.

[121]"Strip-Mining and the Utilities," Electrical World (May, 1981), pp. 82-83, p. 83.

[122]42 U.S.C. 4341, P L 91-190.

[123]40 C.F.R. 434, January 12, 1979.

[124]Wyo. Stat., sec. 35-11-101 (Laws 1973, ch. 250, sec 1; 1977, ch. 132, sec. 1).

[125]Correspondence from James R. Jones, Director, Environmental Quality, Peabody Coal Company, June 11, 1982.

[126]Ibid.

[127]45 Ok. Stat., sec. 781 (D).

[128]46 F.R. 4905 (January 19, 1981).

[129]25 Ok. Stat. 1979 Supp., sec. 16.

[130]State of Oklahoma ex rel Nesbitt v. APCO Oil Corporation, 569 P. 2d 434 (Okla., 1977).

[131]Oklahoma Human Rights Commission v. Hotie, Inc., 505 P. 2d 1320 (Okla., 1973).

[138]Wyo. Stat., sec. 35-11-406 (k).

[139]Ok. Stat., sec. 745.15 (3).

[140]Wyo. Stat, sec. 35-11-901 (a).

[141]46 F.R. 18537 (March 25, 1981).

[142]Ibid.; 45 F.R. 67365 (1980).

[143]Robert H. Gentile, President, N. & G. Construction, Inc., Statement, Hearings, Note 106, pp. 765-67, p. 766.

[144]Interview of Deputy Chief Inspector Blaney Qualls, by Bobby Birdwell, March 22, 1982.

[145]Office of the Chief Mine Inspector, Oklahoma Department of Mines, Seventy-second Annual Report for Calendar Year 1980, (Oklahoma City: Big Red Q. Quickprint, 1981), p. 9.

[146]Interview of Deputy Chief Inspector Blaney Qualls, by Darrell Dominick, April 1, 1982.

[147]Interview by Birdwell, Note 142.

[148]Office of the Chief Mine Inspector, Annual Report, Note 143, p. 14.

[149]State of Oklahoma, Budget for the Fiscal Year Ending June 30, 1981 (Oklahoma City: Executive Department, Division of the Budget, January, 1980), p. 253.

[150]Oklahoma Energy Environment Report, vol. 11, No. 37 (September 16, 1981), p. 6.

[151]82 Ok. Stat. Supp. 1981, secs. 926. 3rd 926.9.

[152]State of Oklahoma, Budget, Note 147, p. 317.

[153]Interview of Mr. Ron Jarman, Chief of Water Quality Division, Oklahoma Water Resources Board, Bobby Birdwell, April 16, 1982.

[154]Oklahoma Water Resources Board, Rules, Regulations and Modes of Procedure (1982).

[155]Title IV, Public Law 95-87, 91 Stat. 460, 30 U.S.C. 1236.

[156]Ibid., sec. 403, quoted in interview with Mike Kastle, Director, Abandoned Mine Lands Program in Oklahoma.

[157]Oklahoma Energy Environment Report, vol. 21 (July 25, 1979), pp. 3-5.

[158]82 Ok. Stat., Supp. 1976, Secs. 931-942.

[159]M. Darrel Dominick, "The Intergovernmental Relations Associated with Administering Oklahoma Coal Surface Mining and Water Tradeoffs," (unpublished paper, November 19, 1981), p. 13.

[160]Interview of Mr. Larry Edmison, Director, Department of Pollution Control, by James Lawler, April 1, 1982.

[161]Oklahoma Department of Pollution Control, "Rules and Regulations," sec, III (8) - 13.

[162]Joseph W. Westphal and James J. Lawler, Commitments, Priorities and Organizational Options for Water Resource Planning in Oklahoma, Final Technical Completion Report A-076-OKLA, Oklahoma Water Resources Institute (August, 1979), p. 184.

[163]State ex rel Pollution Co-ordinating Control Board v. Kerr - McGee Corp., 619 P. 2d 859 (Okla., 1980).

[164]State of Oklahoma Attorney General, Opinion No. 72-183 (June 23, 1972).

[165]State of Oklahoma Attorney General, Opinion No. 76-193 (June 4, 1976).

[166]State of Oklahoma Attorney General, Opinion No. 72-183 (June 23, 1972).

[167]State of Oklahoma, Budget for the Fiscal Year Ending June 30, 1981, p. 309.

[168]Wyo. Stat., Sec. 35-11-109 (a)(i).

[169]Ibid., Sec. 35-11-112 (a).

[170]Ibid., Sec. 35-11-112 (f).

[171]Ibid., Sec. 35-11-112 (a).

[172]Tri-State Generation and Transmission Association v. Environmental Quality Council, 590 P. 2d 1324 (Wyo., 1979); Town of Torrington v. Environmental Quality Council, 557 P. 2d 1143 (Wyo., 1976).

[173]Wyo. Stat., sec. 35-11-112 (c).

[174]Department of Environmental Quality, 1981 Annual Report, (Cheyenne, Wyo., 1981), p. II.

[175]Wyo. Stat., sec. 35-11-403 (a).

[176]Department of Environmental Quality 1981 Annual Report, p. 67.

[177]Interview of Mr. Robert Dorn, First Assistant to Administrator, Land Quality Division, Wyoming Department of Environmental Quality, by Bobby Birdwell, July 29, 1982.

[178]Department of Environmental Quality, 1981 Annual Report, 78.

[179]Ibid.

[180]Wyo. Stat., sec. 135-11-302 (a).

[181]Ibid., sec. 35-11-102.

[182]1981 Annual Report, p. 51.

[183]Ibid., p. 52.

[184]Ibid., p. 59.

[185]Interview of Mr. William Garland, Administrator, Water Quality Divison, Wyoming, April 23, 1982.

[186]James G. Watt, Secretary of the Interior, Statement Before the House Subcommittee on Energy and the Environment, July 16, 1981.