

Reclamation Liability under the Surface Mining Control & Reclamation Act (SMCRA)

**U.S. Coal in the 21st Century:
Markets, Bankruptcy, Finance, and Law**

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SMCRA's Structure

- A classic, “*cooperative federalism*” program
- *States may assume primary regulatory authority over virtually all aspects of mining and reclamation subject to—*
 - *Minimum federal standards, and*
 - *Federal oversight, including independent federal enforcement authority. SMCRA, §521(a)(1)*
- States may defer to the federal Office of Surface Mining Reclamation & Enforcement (OSMRE), which then establishes a program for that state. (E.g., Tennessee)

Permitting Requirements for Reclamation

- As part of every permit application, operators must submit a *reclamation plan* that essentially *assures that mined land is restored to its pre-mining capability*. SMCRA, §508.
- Requires operators, for example, to:
 1. *Eliminate all highwalls*
 2. *Restore agricultural productivity of the land*
 3. *Restore pre-mining hydrologic conditions*

Bonding Requirements for Reclamation

- Performance bonds are required for all mining operations in an amount *sufficient to allow the regulatory agency to complete the work under the reclamation plan. SMCRA, §509*
- Liability extends for 5-10 years after self-sustaining vegetation has taken hold on the reclaimed land
- “*Self-bonding*” allowed for companies only *where they meet detailed financial criteria*

Bonding and Bankruptcy

- Bankruptcies are wreaking havoc on the bonding program with *some of the biggest companies cutting deals ostensibly to limit their reclamation liability to a fraction of reclamation costs. Consider Wyoming:*
 - *Alpha Resources* promised \$67M for \$411M in liabilities
 - *Arch* promised \$75M on \$486M in liabilities
 - *Peabody* promised \$127M for \$790M in liabilities

Asset Manipulation to Justify Self-Bonding?

- *“While it may be true that Peabody Energy Co. and Arch Coal, Inc. do not meet the requirements for self-bonding, they are not the guarantors of their mines bonds. There are [wholly owned] subsidiary companies that do meet the requirements for self bonds.... This practice is in full compliance with State and Federal laws.”*
 - OSMRE Self-Bonding Fact Sheet (Feb. 9, 2015)
- *Less than a year later, Arch and its subsidiary filed for bankruptcy; Peabody followed shortly thereafter*

Performance Standards for Reclamation

- Reclamation must proceed “*as contemporaneously as practicable*” with mining. SMCRA, §515(b)(16)
 - The original federal rules (Carter Admin.) imposed “*time and distance*” requirements for reclamation timing
 - Reagan era rules simply adopted statutory language
 - *Contemporaneous reclamation has proved impossible to enforce, especially for mines that self-bond*
 - Mines that self-bond have *nothing to gain by delaying the “release” of their self-bonds*

Enforcing the Standards

- When an operator violates SMCRA, the regulatory agency *must issue a notice of violation (NOV) and require full compliance within 90 days or less. SMCRA, §521(a)(3)*
 - Failure to abate the violation within 90 days requires *cessation of all mining*
- If the state agency fails to enforce, OSMRE is supposed to step in and issue an NOV
 - *Failure to post or maintain an adequate bond is a plain violation of the law and thus requires issuance of an NOV*

Enforcement at Mines Still Removing Coal

- *State agreements to guarantee less than the full cost of reclamation violate SMCRA*
 - For mines still removing coal, the mine should be required *either to post a full bond or close*
 - If a full bond is not financially possible, the government could demand *accelerated reclamation as a condition for allowing mining to continue*
 - *Can a bankruptcy court really override the specific environmental requirements of SMCRA?*

Enforcement at Mines Abandoned by Bankrupt Companies

- *Post-1977 abandoned mines remain subject to SMCRA until all reclamation work is completed*
- The government may lack leverage to force reclamation at abandoned mines owned by bankrupt companies, they must still enforce
 - *States must deny permits to any applicant who owns or controls an operation violating SMCRA. SMCRA, §510(c)*
 - OSMRE maintains an “*applicant/violator system*” database designed to identify interlocking relationships

Recent OSMRE Initiatives

- On August 16, 2016 OSMRE announced that it will initiate *a rulemaking on self-bonding in response to a petition from WildEarth Guardians*
- On August 5, 2016, OSMRE issued a *policy advisory on self-bonding* urging—
 1. *Vigilance in monitoring companies that self-bond and replacement with surety or collateral bonds where appropriate*
 2. *No new self-bonds until at least 2021*
 3. *Better documentation of financial criteria for new self-bonding claims*

Enforcement Actions

- Several groups have filed “*citizen complaints*” with OSMRE and several states demanding enforcement of SMCRA’s bonding requirements
- OSMRE has issued *10-day notices (TDNs)* to several states, some as early as late last year, alleging bonding violations
- Some states have responded, largely claiming no obligation to enforce in light of bankruptcy proceedings
- *OSMRE could now take its own action, but it has thus far refused to act*