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

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