

WVDEP loses another coal mine pollution case

by Ken Ward Jr.



A second federal judge has ordered the West Virginia Department of Environmental Protection to clean up the way it cleans up abandoned coal mine pollution.

U.S. District Judge John T. Copenhaver Jr. yesterday [ruled that WVDEP must obtain permits](#) for the abandoned mine sites it maintains under the agency's Special Reclamation program.

Essentially — and very importantly — this means that WVDEP is going to have to set pollution limits for these sites, and improve the treatment being used so that discharges from abandoned mine sites meet the state's water pollution limits.

Earlier this year, U.S. District Judge Irene M. Keeley [issued a similar ruling](#) in West Virginia's northern district. Copenhaver's decision covers the state's southern coalfields, and specifically addresses three sites at issue in the case brought by the [West Virginia Highlands Conservancy](#) and the [West Virginia Rivers Coalition](#).

This ruling is also the second time in a week that Judge Copenhaver has ruled against WVDEP in a significant Clean Water Act case. Last week — in a matter that WVDEP wasn't even a party to — [the judge concluded](#) that the agency's secret deals with coal operators do not prohibit citizens from bringing their own pollution enforcement lawsuits.

Jim Hecker, environmental enforcement director at Public Justice and lead counsel for the citizen groups, said this morning:

The State was running these three sites 'off the books' to try to escape accountability for necessary water treatment. Two district courts have now ordered the State to obtain the required discharge permits for 21 bond forfeiture sites. Once it does, the State will have to comply with the water quality standards it is now violating.

The Special Reclamation program, required by federal law, aims to clean up coal mines abandoned since passage of the 1977 Surface Mining Control and Reclamation Act. Mines abandoned before then are covered by a separate program, also mandated by the 1977 law and funded by coal industry taxes.

Over the years, the Special Rec program has never had enough money. Thousands of acres of abandoned mine sat unreclaimed. Hundreds of polluted streams went untreated.

Historically, the fund has been short of money because coal operators had not posted reclamation bonds sufficient to cover the true cost of mine cleanups at sites they abandon. A state tax on coal production was never set high enough to cover the difference.

For more background, see [here](#), [here](#) and [here](#).

WVDEP has made improvements in the program, but an advisory council report issued in March [projected the fund could go broke by 2012](#). Lawmakers later approved a Manchin administration proposal to continue for one year the special coal industry tax that funds the cleanups — but the administration bill [did not go as far as recommended by the advisory council](#), which thought the tax should be increased from 14 cents per ton to 20 cents per ton.

Today, the WVDEP operates water treatment systems at dozens of abandoned mine sites. But WVDEP does not reduce the pollution from those sites enough to meet water quality limits, and does not obtain Clean Water Act permits for the site discharges.

The rulings by Keeley and Copenhaver will change that.

But the rulings are far from final. WVDEP Secretary Randy Huffman and the Manchin administration are appealing Keeley's decision to the 4th U.S. Circuit Court of Appeals. In a [brief filed Monday with the Richmond, Va.-based court](#), WVDEP General Counsel Ray Franks argued that Keeley's ruling "threatens a raid on the treasury" of the state. Franks also sounded a little bit like another WVDEP lawyer, Fenway Pollack, [who argued to the state Surface Mine Board that no mining operation in West Virginia could ever avoid violating water pollution rules](#).

According to Franks' brief to the 4th Circuit:

Once a permit is issued that contains the CWA's more stringent water quality standards for iron and manganese, all the credible record evidence indicates that WVDEP will find it impossible to live up to them.

When the discharge monitoring reports show exceedances, WVDEP's Environmental Enforcement section will have little choice but to issue notices of violation ... just as it does to corporate mining operators. The violations will be followed up with orders or settlement agreements imposing monetary fines, penalties, or assessments against WVDEP.

But in the end, Franks concedes that compliance could be achieved — if WVDEP spends enough money on pollution treatment at the sites.

... If WVDEP is forced to obtain NPDES permits for its treatment efforts at 18 orphaned mine sites, the agency's resultant inevitable failures to meet the water quality standards thereby imposed will expose it to seriatim citizen suits, or, perhaps more likely, a reopening of this one.

Should the citizen-plaintiffs prevail, WVDEP will either have to stop all treatment at the subject sites (so that it may cease and desist 'discharging pollutants') or expend the necessary additional funds to bring the sites into compliance.

Of course, the [West Virginia Supreme Court ruled 15 years ago](#) that WVDEP has a mandatory duty to use money from the Special Reclamation Fund to treat water pollution from abandoned mine sites. And money in that fund comes from the coal industry. As Joe Lovett, co-counsel for the citizen groups and director of the Appalachian Center for the Economy and the Environment, said:

The State will have to increase coal taxes by large amounts to pay for these pollution control improvements. The court's ruling will require WVDEP to stop protecting the coal industry from the paying the full environmental costs of coal mining.

9 comments

[1 blue canary](#) { 08.25.09 at 1:58 pm }

So the government department responsible for protecting the environment is making secret deals with coal companies and was knowingly violating water quality standards? I should really stop being surprised by the ridiculousness that comes out of the WVDEP.

(On the other hand, the fact that the coal companies aren't paying enough to clean up their abandoned sites is just par for the course.)

[2 Thomas Rodd](#) { 08.25.09 at 2:05 pm }

Ken, thanks for including links to court briefs and orders. They provide a much clearer picture than any journalistic summary could do — even one by yourself — to people who are interested in these issues.

These so-called “orphaned” mine sites are not some legacy from the “bad old days.” These mines were permitted after 1977, under current SMCRA and West Virginia law. And these mines made a lot of money for their owners and the owners of the coal they mined.

Because West Virginia is (still) allowed by OSM to waive the requirement for full reclamation bonding, when these coal companies closed their doors, there was little or no performance bond money for land reclamation, much less for toxic drainage treatment.

So the State took them over — and spent money from the “Special Reclamation Fund” to regrade, etc., and treat the drainage in a fashion that two federal judges have said was inadequate.

Money for that Fund comes from a tax on ongoing coal production. It’s never been enough to cover the real costs — and where that kind of money will come from in the future is a complete unknown. Good luck, people of the future!

[3 Clem Guttata](#) { 08.25.09 at 2:36 pm }

Thomas — Thank you for that summary.

It really sounds like there are layers upon layers of people asleep at the wheel here!

I wonder what would happen to that recently upgraded state bond rating if the full extent of our unfunded environmental liabilities was accounted for?

It is no wonder corporations don’t follow our clean water regulations when the principle enforcement agency isn’t following them either.
It really shouldn’t be this difficult to get the state government to follow state laws.

[4 rhmooney3](#) { 08.25.09 at 3:13 pm }

These are not abandoned mined lands — there are post-SMCRA (1977) unreclaimed bond forfeiture mine sites. (Abandoned Mined Lands is specifically defined in SMCRA.)

This is a nation-wide concern.

OSMRE has not reported or even kept track of these unreclaimed bond forfeitures — <http://groups.google.com/group/bob-mooney/web/walk-away-reclamation> (This link has been posted on this blog previously.)

Abandoned mine lands: a mid-course review of the National Reclamation Program for Coal by National Research Council (1986) — <http://books.google.com/books?id=wJlrAAAAyAAJ> — does briefly mention post-SMCRA unreclaimed mine sites during the interim state programs (before performance bonding was required by the federal act).

The performance bonding programs of the approved state regulatory programs have never been solvent so as to provided for timely reclamation of sites where bond forfeitures occur.

In fact, the Ohio state regulatory program, conditionally approved on August 16, 1982, still has an unfulfilled condition:

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Ohio has one program condition remaining at 30 CFR 935.11 from OSM's 1982 approval of the Ohio permanent regulatory program. Ohio must demonstrate that its alternative bonding system (ABS) will ensure timely reclamation at the sites of all operations for which bond has been forfeited. OSM's review of this program area in EY 2002 again identified that Ohio's inability to complete timely reclamation of bond forfeiture sites remains a significant issue.

On May 4, 2005, the OSM Director formally notified Ohio that he was taking action pursuant to 30 CFR Part 733 and would recommend that the Secretary of Interior withdraw approval of Ohio's bonding program unless Ohio submitted a program amendment to address the deficiencies with the bonding program.

Source: 2008 Annual Evaluation Report on the Ohio programs
<http://www.osmre.gov/Reports/EvalInfo/2008/OH08-aml-reg.pdf>

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This 733 Action by OSMRE still remains not acted upon.

(Prior to that 733 Action I had contacted the Interior Inspector General about this matter, but that office decided not to pursue it.)

Both Pennsylvania and West Virginia state programs changed from bond pools (alternative bonding systems) to full-cost performance bonding as a result of lawsuits being filed by environmental organizations.

In regards to post-mining toxic mine water discharges, the states (notably Pennsylvania) say it's no longer a problem due to improve Cumulative Hydrological Impact Assessments (CHIAs) that are done prior to issuing permits.

(Note: post-mining toxic mine water discharges are not prohibited under SCMRA; such impacts are to be minimized, not eliminated.)

Before all else, OSMRE needs to establish its Inspectable Units Inventory since the state lists have not been well maintained. That supposedly is now underway.

5 Ken Ward Jr. { 08.25.09 at 3:28 pm }

Bob,

I think my post (as well as the stories it links to) makes clear that these are not AML sites.

They are, however “abandoned mines” in that the operators walked away from them without reclaiming them.

West Virginia does not have a full-cost bonding system — it still has an alternative bonding program. See <http://arcc.osmre.gov/cfo/AER2008FINAL.pdf>.

Ken.

6 Ken Ward Jr. { 08.25.09 at 3:39 pm }

Bob,

Pennsylvania also has an alternative bonding system.

Ken.

7 rhmooney3 { 08.25.09 at 4:02 pm }

Ken,

Yes, it’s still an ABS — I miswrote.

OSMRE has been ducking the performance bonding inadequacy issue forever. Over 7,000 bond forfeitures have occurred under SMCRA and still nothing substantive is done — though “OSM remains encouraged.”

<http://arcc.osmre.gov/cfo/AER2008FINAL.pdf> .

(Ken, watch where you put periods.)

From pages 33-34

R. Special Reclamation Fund

On May 29, 2002, OSM fully approved the State's Alternative Bonding System (ABS) that included: an increase in the special reclamation tax rate from 3 cents per ton of clean coal mined to 14 cents, with 7 of the 14 cents expiring after 39 months; the creation of a Special Reclamation Advisory Council (the Council) to monitor the progress of the ABS in meeting future bond forfeiture reclamation obligations; and, removal of the limitation on funding for treating pollutional discharges at bond forfeiture sites.

During the 2008 evaluation year, the Council approved an actuarial study developed under contract for the SRF. The actuarial review revealed that the SRF balance is expected to decline and is threatened with solvency as early as June 2012. This conclusion is supported by another study that was performed by Marshall University's Center for Business and Economic Research (CBER), and completed in 2006. In this report, it was shown that without additional revenues, the Fund would decline to a negative balance by 2017.

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OSM REMAINS ENCOURAGED [emphasis added] by the efforts of the Council and the WVDEP as they work\ cooperatively to develop alternatives to address long term funding of the Special Reclamation Fund. OSM continues to closely monitor all actions and events related to this matter and believe the efforts of the Council with support of the WVDEP are prudent.

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In late November, 2007, the West Virginia Department of Environmental Protection released a study by an actuary...

The study also found that it takes the Department of Environmental Protection a very long time to start reclaiming mines or cleaning up polluted streams. On average, it takes DEP nearly five years to start land reclamation after the operator deserts the site. It takes the agency nearly 10 years to start construction of water treatment facilities at deserted sites.

Source: http://wvhighlands.org/wv_voice/?p=518

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The main difficulty in approval of the West Virginia alternative bonding system, was satisfying the requirement that sufficient funds, on a continuing basis, would be available to the state to fully cover the costs of reclamation on all forfeited lands. To satisfy this concern, the OSM required the state to submit a statistical and actuarial study demonstrating that the special reclamation fund would be solvent and that depletions from the fund would be sufficiently controlled by the special reclamation tax. It was not until submission of the requested actuarial study that the alternative system was finally approved. (See 46 FR 5915 (JANUARY 21, 1981); 48 FR 8447 (March 1, 1983))

Source: <http://www.osmre.gov/topic/Coalex/COALEX37.shtm>

8 Joe { 08.26.09 at 10:33 am }

Did it ever occur to DEP that they could actually deny mining permits because they, based on the historical data, would create AMD? Maybe the administration had better start listening to the field staff instead of Micromanaging everything!

9 Thomas Rodd { 08.26.09 at 3:51 pm }

To be completely fair, I think that DEP has in recent years denied some surface mining permit applications due to their likely creation of AMD. They have also granted some mining permits where there are serious claims that AMD will be created. I think the ICG deep mine permit near Grafton is such a case.