Minimizing Environmental Liabilities in Winding Down an Operating Subsidiary

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Synopsis

§ 3.01. Introduction.

When a mining operation is closed and the operating subsidiary corporation responsible for the mine is

dissolved, liabilities of that subsidiary do not necessarily go away. Particularly in the environmental area, recently enacted laws and judicial decisions have greatly expanded the responsibilities of a parent company for the actions of the subsidiary, even holding the parent liable for those actions well after the subsidiary no longer exists. However, there are ways that a parent company can avoid or at least minimize the risk of acquiring the subsidiary's liabilities.

The most effective way to minimize potential parent liability is through actions that the parent can take when it creates the operating subsidiary, structuring the parent/subsidiary relationship so as to reduce the risk that the parent will be found liable for major environmental liabilities caused by the subsidiary. In addition, there are measures that the parent company can take during or after the mine closure process which can also reduce the environmental risks, or at least allow the parent to manage those risks in a careful and coordinated way.

In this Chapter, we will first summarize the types of environmental liabilities that can result from mining operations, including those arising under various statutes and regulations. Some of the protective structural measures that can be taken in establishing an operating subsidiary will then be outlined. Finally, the discussion will focus on risk management measures that can be adopted when the subsidiary is being wound down.

§ 3.02. Potential Liabilities from Mining Operations.

Mining operations can give rise to a variety of physical effects on the environment, including air pollution, water pollution, subsidence, landslides and mine fires. This Chapter will examine surface and ground water pollution, since those environmental liabilities have been the focus of much legislative, regulatory and judicial attention in the last several years. In addition, the cleanup costs for these water pollution problems can run into many millions of dollars, creating substantial liabilities for the operating subsidiary and, potentially, for the parent company as well.

For water remediation issues, there are a number of potential sources of liability, including common law and various federal and state statutes. The primary sources of liability will be found under common law and the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[(2)]

CERCLA provides that certain parties, including owners and operators of facilities with soil and/or groundwater contamination, are liable for cleanup costs incurred by government agencies or other private parties in remediating that contamination.[(3)]

In addition to CERCLA, the Surface Mining Control and Reclamation Act (SMCRA),[(4)] also applies to mining operations, but it does not provide for liability once reclamation is complete and a performance bond is released.[(5)]

As a result, SMCRA is not especially relevant to the liabilities of a parent for an operating subsidiary's actions after the subsidiary's operations have been terminated. Therefore, this article will focus primarily upon common law and CERCLA liability principles. Since the principles of liability under CERCLA are substantially broader than under common law, parent companies planning to manage their liabilities will be prudent to assume that the CERCLA liability principles are potentially applicable to every situation, in order to protect themselves against that more significant risk.

§ 3.03. Liabilities of Dissolved Corporations and Their Parents.

As a basic principle of corporation law, once a corporation dissolves, it ceases to legally exist and therefore cannot be sued.[(6)]