Recent Permitting and Enforcement Measures to Combat Acid Mine Drainage — Are They in Contravention of SMCRA?

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§ 10.01. Introduction.

Environmental agencies are trying new solutions to prevent and remediate an old problem in the coal industry — acid mine drainage. To prevent the problem, these agencies have recently adopted “policies” of refusing mining permits where there may be a need for long-term treatment of acid mine drainage. To remediate the problem, the agencies have started using water pollution laws to force parties other than the coal operator — such as landowners and lessors — to bear the expense of cleaning up sites contaminated by acid mine drainage. This chapter examines the problem of acid mine drainage, reviews the measures traditionally available to environmental agencies to combat it, and explores whether the new “solutions” now being used by these agencies are in conflict with existing law.

§ 10.02. The Problem of Acid Mine Drainage.

Mine drainage has always been a part of the mining industry. Its significance, however, has changed tremendously. In the industry’s earlier days, it was little more than an impediment to mining efficiency. During mining, operators routinely encountered water that threatened to flood or otherwise interfere with mining operations. Typically, the water was removed by pumps and ditches and simply transported to the nearest river or stream. Few cared — or even realized — that the water that was being removed was often different from and harmful to the streams and rivers to which it was being sent.¹

¹ See generally, Crickmer and Zegeer, Elements of Practical Coal Mining, p. 669-670 (1981)[hereinafter cited as Crickmer and Zegeer].
Now the focus on mine drainage is different. During the past 30 years, the mining industry — and those that regulate it — have become increasingly aware that mine drainage not only interferes with mining, but that it has the potential to cause serious environmental problems as well. The is especially true when the mine drainage takes on the characteristics of acid mine drainage or “AMD.”

[1] — What Is Acid Mine Drainage?
AMD is mine drainage characterized by low pH and elevated levels of sulfates, acidity, and other metals such as iron, manganese and aluminum. It is formed when water and air come into contact with iron sulfide minerals (particularly pyrite) found in the rocks associated with mining. The iron sulfide minerals chemically react with the air and water to form acid, which then dissolves other minerals associated with the coal.

The chemical reaction necessary to form AMD is not a simple one. Instead, the formation of AMD depends on a complex interrelationship between several different variables, such as the amount of sulfuric material present, the availability of oxygen and water, the presence of neutralizing

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2 Alkaline mine drainage can also cause problems, as it can contain detrimentally high levels of iron, manganese and sulfates. See U.S. Environmental Protection Agency and U.S. Dept. of Interior, Statement of Mutual Intent Strategic Plan for the Restoration and Protection of Streams and Watersheds Polluted by Acid Mine Drainage from Abandoned Coal Mines at 3 (1995)[hereinafter cited as SMISP]. However, alkaline mine drainage usually does not have as severe adverse effects upon the environment as does acid mine drainage. See U.S. Environmental Protection Agency, Inactive and Underground Mines — Water Pollution Prevention and Control at 5 (1975)[hereinafter cited as U.S. E.P.A.]. Primarily, alkaline drainage is more common in the western United States where overburden material encountered in mining is highly alkaline and sometimes saline. See U.S. E.P.A. at 11.

3 The symbol “pH” measures the degree of acidity. It represents the logarithm of the reciprocal of hydrogen ion concentration in gram atoms per liter. The pH scale ranges from 0 to 14. A pH of 7.0 is considered neutral, whereas a pH less than 7.0 is on the acid side and a pH greater than 7.0 is on the alkaline side.

4 SMISP at 3.

5 SMISP at 3.

6 Id.
agents, and the time of exposure. In addition to the chemical reactions, certain bacteria are also capable of affecting the formation of AMD by oxidizing sulfide minerals in a manner that produces acid.

The high acidity associated with AMD can have severe effects on aquatic and human life. Acidic waters will support only limited water flora, such as acid-tolerant molds and algae, and usually will not support any fish. With regard to humans, AMD often requires that water be treated with neutralizing agents before it can be suitable for use in municipal and industrial water supplies. The high acidity associated with AMD can also cause corrosion of bridges, culverts, locks, boat hulls and pumps.

In addition to the problems related to high acidity, AMD can also cause detrimentally high concentrations of metals in the water. High metal concentrations can harm aquatic life by smothering invertebrate life living on stream beds, by decreasing the oxygen content of streams, by reducing the breeding area for aquatic life, and by slowly poisoning organisms. Also, high levels of iron in water plagued by AMD can react with air and water to form ferrous hydroxide or “yellow boy” — a substance that results in an unsightly reddish-orange color that is characteristic of many streams affected by AMD.


AMD can result from both surface and underground mining operations. During surface mining for instance, the solid rocks overlying the coal (typically referred to as “overburden”) are removed, routinely broken into

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8 See U.S. E.P.A. at 18.
9 U.S. E.P.A. at 23.
10 Id. Typically, fish cannot live in waters which a pH lower than 5.0. See Williams, “Coal Mine Water Pollution: an Acid Problem with Murkey Solutions,” 64 Ky. L.J. 407, 411. (1976). AMD can reduce the pH level of steam to a value in the 2.0-4.5 range. Dallmeyer “A New Legislative Approach for the Control of Acid Mine Drainage” 17 Ga. L. Rev. 969 (1983)[hereinafter cited as Dallmeyer].
11 With regard to industrial water supplies, acidic water can corrode metal pipes and industrial equipment. See Dallmeyer at 970, n. 9.
12 U.S. E.P.A. at 23.
13 See U.S.E.P.A. at 23; Dallmeyer at 910.
ACID MINE DRAINAGE

fragments, and placed back in the coal pit after coal removal. This process often exposes acid forming minerals in some of the rocks to water and air, a combination that may result in AMD if the levels of acid forming minerals are high enough. In addition, the pavement beneath the coal can also contain AMD-forming minerals.

Similarly, during underground mining, the overburden between the surface and the coal seam is usually disturbed. During this disturbance, vertical fissures or cracks may appear, often extending to underground aquifers, or in some cases even to the surface. AMD occurs when water passes through these fissures and cracks and comes into contact with acid forming minerals. Often this process results in large reservoirs of AMD forming in the mine voids below the earth’s surface.

Although AMD can be formed by either surface or underground mining operations, most existing AMD discharges are from abandoned underground mines. In 1976, the U.S. Environmental Protection Agency estimated that more than 200,000 inactive and abandoned underground mines existed in the United States. In 1973, it was estimated that eastern abandoned underground mines alone produced more than five million pounds of acid a day.

In addition to being most commonly discharged from abandoned underground mines, AMD is also most prevalent in the eastern United States, particularly in the Appalachian regions. The reasons for this are twofold. First, the coal found in Appalachia is high in sulfur — a key ingredient in the formation of AMD. Also, the eastern regions have a high abundance of surface and groundwater available to react with acid-forming minerals to form AMD. Both factors make AMD particularly severe in the Appalachian coal regions.

14 See Crickmer and Zegeer at 671.
15 SMISP at 3.
16 U.S. E.P.A. at 8.
17 Id.
18 Id.
19 See Vish, McGinley and Hunt at § 30.21[4].
20 See Dallmeyer at 970.
21 There are more than 7500 miles of AMD-impacted streams in Appalachia. See SMISP at 9. Such an extensive problem places enormous costs on the coal industry. In West
§ 10.03. Regulation of Acid Mine Drainage.

Because AMD is such a serious problem, it receives a great deal of attention in the Surface Mining Control and Reclamation Act (SMCRA), the primary federal statute designed for the regulation of the environmental effects of coal mining. Both SMCRA and the regulations promulgated pursuant to it regulate AMD through a series of permitting requirements, performance standards, bonding requirements, reclamation requirements and ownership and control rules which are designed to address AMD problems before, during and after mining. These measures are discussed below.


SMCRA combats AMD initially in the permitting process. Section 510(b) of SMCRA forbids the issuance of a permit until there is a demonstration that (1) reclamation of the proposed operation can be accomplished as required by SMCRA and the State or Federal program implementing it; and (2) the proposed operation is designed to prevent “material damage” to the hydrologic balance outside the permit area.

Virginia alone, it has been estimated that the coal industry spent roughly $1 million per day during between 1991 and 1992 treating AMD. This amounted to about $5 per ton of coal produced. See R. Carter, “Reclamation Targets are Coming Into Focus,” Coal, August 1994, at 38.

22 30 U.S.C.A. § 1201-1328 (1986 & 1995 Cum. Supp.). SMCRA is enforced by the Federal Office of Surface Mining (OSM). States can assume exclusive jurisdiction over the regulation of surface coal mining and reclamation within their state by enacting a program that is no less effective than SMCRA and the regulations promulgated pursuant to it. 30 U.S.C. § 1253. Because these programs must be consistent with SMCRA, this article will focus primarily on the AMD aspects of SMCRA, with the idea that primacy states have, or should have, similar controls with regard to AMD.

23 30 C.F.R. Parts 700 - 900.

24 In regulating AMD, OSM does not use the term “acid mine drainage,” but rather “acid drainage,” which it defines as “water with a pH of less than 6.0 and in which total acidity exceeds total alkalmity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation. . . .” 30 C.F.R. § 701.5. OSM also defines “toxic mine drainage” as “water . . . discharged from . . . mines . . . which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota. . . .” Id.

25 30 U.S.C.A. 1260(b). Specifically, Section 510(b) provides in relevant part that:

(b) Requirements for approval.
Both of these demonstrations place significant emphasis on the problem of AMD.

[a] — Reclamation Plan Requirements.

Section 510(b)(2) of SMCRA dictates that a permit application cannot be approved unless the permit applicant demonstrates to the regulatory authority that reclamation can be accomplished under the proposed operation’s reclamation plan. The necessary elements of an acceptable reclamation plan are found in section 508(a) of SMCRA. With respect to water resources, section 508(a) provides that:

(a) Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provision of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:

(13) a detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:

(A) the quality of surface and underground water systems, both on- and off-site, from adverse effects of the mining and reclamation process;

No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

(3) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 1257(b) of this title has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to the hydrologic balance outside permit area . . . .
§ 10.03

(14) such other requirements as the regulatory authority shall prescribe by regulations.\(^{26}\)

These provisions are the basis for a comprehensive set of regulations dealing specifically with AMD. For instance, OSM’s regulations require that the permit application contain a reclamation plan demonstrating how the applicant will comply with the various environmental protection performance standards\(^{27}\) of SMCRA, many of which relate to AMD.\(^{28}\) Also, the regulations require the permit applicant to provide information on the measures that will be used to handle acid-forming materials in a matter consistent with SMCRA.\(^{29}\) Similarly, the regulations require the permit applicant to describe the steps to be taken to comply with the Clean Water Act and other water quality laws.\(^{30}\) Also, the regulations require a “hydrologic reclamation plan” which must include the measures proposed to avoid and treat AMD.\(^{31}\)

[b] — Prevention of “Material Damage.”

In addition to assuring that proper reclamation can be accomplished, section 510(b) of SMCRA also requires a demonstration that the proposed operation is designed to prevent “material damage” to the hydrologic balance outside the permit area.\(^{32}\) This determination is made by the regulatory authority, which performs a Cumulative Hydrologic Impact Assessment or “CHIA” on the area that will be impacted by the proposed operation.\(^{33}\) If the CHIA reveals that “material damage” will occur to the hydrologic balance outside the permit area, the permit must be denied.\(^{34}\)

\(^{26}\) 30 U.S.C.A. §1258(a).
\(^{27}\) These environmental protection performance standards are discussed more fully at §10.03[2].
\(^{28}\) 30 C.F.R. §§ 780.18(a)(surface mines) and 784.13 (underground mines).
\(^{29}\) 30 C.F.R. §§ 780.18(a)(surface mines) and 784.13 (underground mines).
\(^{30}\) 30 C.F.R. §§ 780.18(b)(9)(surface mines) and 784.13(b)(9)(underground mines).
\(^{31}\) 30 C.F.R. § 780.21(h)(surface mines) and 784.14 (underground mines).
\(^{32}\) 30 U.S.C.A. § 1260(b)(3).
\(^{33}\) Regulations concerning the “CHIA” are found at 30 C.F.R. § 780.21(g) for surface mining operations, and 30 C.F.R. § 784.14(f) for underground mining operations.
\(^{34}\) In analyzing the effects of AMD during the preparation of the CHIA, the regulatory authority is aided by the “probable hydrologic consequences” or “PHC” determination.
In performing the CHIA, the regulatory authority considers, among other things, the effects of AMD in determining whether “material damage” will occur. While “material damage” is not defined under SMCRA, it includes at least those effects which would cause a violation of effluent limitations and water quality standards. With regard to AMD, then, an operation will not be permitted unless it can be designed to meet effluent limitations and water quality standards with regard to acidity, metal concentrations and suspended solids.

[a] — General.

Once an operation is permitted, it must operate pursuant to certain environmental performance standards established under SMCRA and the regulations implementing it. If the operator fails to do so, he may be subject to enforcement by the regulatory authority in the form of monetary penalties, orders to abate the violation of the performance standard, and even orders to cease operations. Moreover, section 520 of SMCRA that must be performed by the permit applicant. See 30 C.F.R. §§ 780.21(f)(for surface mining operations) and 784.14(e)(for underground operations). The PHC determination is designed to predict the effects of the proposed operation upon the quality and quantity of the surface and groundwater in and around the proposed permit area. With regard to AMD, the PHC determination must include findings on (1) whether acid or toxic-forming agents are present that could result in contamination of surface or ground water supplies; and (2) the impact the operation will have on acidity and total suspended solids.

48 F.R. 43973 (September 26, 1983). This statement appears to contemplate that discharges from a site that do not meet State and Federal Water quality standards will be considered to constitute “material damage.”

40 C.F.R. § 434.30 provides the effluent limitations applicable for AMD, which include limitations on iron, manganese, total suspended solids (TSS) and pH.

Section 521 of SMCRA provides that a “Notice of Violation” or “NOV” shall be issued for any violation of SMCRA or its regulations. Such a “NOV” must give the permittee a reasonable time, but not more than 90 days, to abate the violation. If the
provides private citizens with the right to sue to compel compliance with SMCRA’s environmental protection standards.\textsuperscript{38}

Many of the environmental performance standards with which an operator must comply relate to the control of AMD. For instance, sections 515 and 516 of SMCRA, which set out environmental performance standards for true surface mines and deep mines, respectively, contain the following provisions relating to AMD:

(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to —

(10) minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and groundwater systems both during and after surface coal mining operations and during reclamation by —

(A) avoiding acid or other toxic mine drainage by such measures as, but not limited to —

(i) preventing or removing water from contact with toxic producing deposits;

(ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

(iii) casing, sealing, or otherwise managing boreholes, shafts, and wells to keep acid or other toxic drainage from entering ground and surface waters.\textsuperscript{39}

\textsuperscript{38} 30 U.S.C.A. 1270.

\textsuperscript{39} 30 U.S.C.A. §§ 1265(b)(10) & 1266(b)(9).
These performance standards are implemented by a wide array of AMD-related regulations for surface and underground operations. These regulations cover such subjects as the general requirements for protecting surface and groundwater resources,\textsuperscript{40} compliance with water quality standards and effluent limitations,\textsuperscript{41} disposal of coal mine waste,\textsuperscript{42} and general requirements for backfilling and grading.\textsuperscript{43}

[b] — Surface Mines.

Section 515(b)(14) of SMCRA contains a special provision relating specifically to surface mines which is designed to ensure that acid-producing materials in overburden do not lead to the formation of AMD. Specifically, this provision requires true surface mines to:

\begin{quote}
(14) insure (sic) that all debris, acid forming materials, toxic materials, or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and that contingency plans are developed to prevent sustained combustion.\textsuperscript{44}
\end{quote}


Section 516(b)(12) of SMCRA requires operators to locate openings for all new drift mines in acid- or iron-producing seams so as “to prevent a gravity discharge from the mine.”\textsuperscript{45} According to OSM, this provision was intended to prevent the construction of new “up-dip” mines in the Appalachian coal fields that resulted in an open channel with water flowing down-gradient unimpeded to the mine opening.\textsuperscript{46} The idea was to prevent

\begin{footnotes}
\item[40] 30 C.F.R. § 816.41 (surface mines) and 817.41 (underground mines).
\item[41] 30 C.F.R. § 816.42 (surface mines) and 817.42 (underground mines).
\item[42] 30 C.F.R. § 816.81 (surface mines) and 817.84 (underground mines).
\item[43] 30 C.F.R. § 816.102 (surface mines) and 817.102 (underground mines).
\item[46] 48 Fed. Reg. 43959-60 (Sept. 26, 1983). OSM defines “gravity discharge” as “mine drainage that flows freely in an open channel down gradient. Mine drainage that occurs as a result of flooding a mine to the level of the discharge is not gravity discharge.” See 30 C.F.R. 701.5.
\end{footnotes}
or retard the formation of AMD by requiring “mine planning that will result in the creation of barriers to air and water flow through the mine.”


In addition to protecting the environment through permitting requirements and performance standards, section 509 of SMCRA also requires that mining operations post a bond adequate to cover the costs of reclamation. Regulations issued under section 509 address such topics as the requirement to file a bond, the period of liability for the bond, the determination of the amount of the bond, and the adjustment of bond amounts. All of these issues may be implicated and affected by the presence of AMD at a mining operation.


The final tool available for the control of AMD is found in OSM’s ownership and control rules. Under section 510 of SMCRA, permit issuance is forbidden to any applicant who “owns” or “controls” a surface coal mining operation currently in violation of SMCRA. Ownership and control rules developed by OSM to implement section 510 provide for a “permit block” on any permit applicant that either (1) owns or controls an operation currently in violation of SMCRA; or (2) is owned or controlled by an operation in violation of SMCRA. This “permit blocking” procedure provides an effective tool in the remediation of sites affected by AMD and other environmental problems because it forces those operators who are permit-blocked to either reclaim the mine site in violation or go out of business for lack of a permit.

48 30 C.F.R. § 800.11.
49 30 C.F.R. § 800.13.
50 30 C.F.R. § 800.14.
51 30 C.F.R. § 800.15.
52 For instance, a bond may be significantly higher in situations where AMD may require expensive, long-term treatment costs.
53 30 C.F.R. § 773.15(b). The definitions of “owned or controlled” and “owns or controls” are found at 30 C.F.R. § 773.5.
54 In other words, while the ownership and control rules do not necessarily require the applicant to remediate a violation, the applicant will have to do so in order to obtain the mining permit necessary to its business.

Despite the wide variety of tools available under SMCRA to combat AMD, both OSM and state regulatory authorities have recently developed additional permitting and enforcement measures designed to prevent and remediate AMD. As discussed below, however, the legal support for these new initiatives is questionable.


The first new measure undertaken by OSM and state regulatory authorities to combat AMD has been the adoption of an unofficial policy of refusing mining permits where there is a potential for AMD that may require long-term water treatment. As explained below, strict adherence to this policy can and has resulted in permitting decisions that defy both law and reason.


On September 28, 1994, OSM released a draft report prepared by its “Acid Mine Drainage Policy Team.” The stated goal of the policy team — and the focus of the report — was the development of a policy for avoiding and controlling AMD through measures based on existing laws and regulations. While the report was only released in draft form, it is very important — not only because it is helpful in predicting future OSM policy, but because at least one regulatory authority has relied on OSM’s draft statements in making permitting decisions.

The report takes a stringent and narrow position in terms of permitting operations where AMD may be involved. Relying upon the language of

55 The report was undertaken as part of a “management guidance plan” adopted by OSM on March 15, 1994. The “management guidance plan” also contained a provision that OSM should, in consultation with the States, the public, industry, and the Eastern Mine Drainage Federal Consortium, develop policy options that focus on preventing acid/toxic mine drainage (AMD) by means of the permitting process, and on improving permitting, enforcement and bonding requirements on active sites with potential AMD problems. See OSM Policy Statement (Draft), Avoiding and Controlling Acid Mine Drainage (1994).
56 See Section 10.04[1][b].
section 515(b) of SMCRA, the report begins with the premise that AMD must be “avoided.” The report then provides that it is OSM’s policy that this requirement be met “through the administration of an effective and, where necessary, exacting permitting process.” Thereafter, the report suggests a permitting process to accomplish the “avoidance” requirement that is exacting indeed.

Specifically, the report takes the position that no operation should be permitted where the permit application indicates that AMD will need to be treated on a long-term basis. According to the report:

A permit must be denied unless the operator demonstrates through scientific mine-drainage prediction methods that the mining and reclamation plan will achieve the standard of “avoiding” acid mine drainage on a permanent basis. Although SMCRA specifies that treatment of drainage is a measure to avoid AMD, permits containing a perpetual treatment plan for anticipated discharges rather than a plan for elimination of such discharges must not be approved because of the risks and uncertainties associated with long-term treatment. Plans for perpetual treatment contained in a permit application inherently do not provide the requisite assurance that AMD will be avoided to allow permit approval. Following permit issuance, if unanticipated AMD occurs, treatment would be acceptable if no other suitable alternative exists.

Notably, OSM recognizes in this statement that treatment of AMD is an accepted measure for “avoiding” AMD, but indicates that such acceptance will hinge upon whether treatment is “unanticipated” as opposed to “anticipated.” OSM elaborated on its approach toward “anticipated” and “unanticipated” AMD as follows:

The Office of Surface Mining Reclamation and Enforcement (OSM) recognizes water treatment as a valid temporary management practice. It may be initially approved or incorporated by permit revision into the mining and reclamation plan whenever needed for control of anticipated on-site, short-term acidic/toxic water conditions occurring during active mining, to achieve compliance with effluent and other water-quality standards, and to prevent off-site material damage to the hydrologic balance. Additionally, OSM recognizes water treatment as a remedial practice necessary to comply with
effluent and other water-quality standards and to prevent off-site material damage, in the event of *unanticipated* occurrences of AMD subsequent to approval of the permit so long as treatment is needed to comply with applicable water quality laws. Permits may not be issued for a site that would require long-term water treatment in lieu of complete reclamation.

Accordingly, under current OSM thinking, a permit should not be issued to a proposed operation where long-term water treatment is anticipated. Instead, water treatment should only be allowed for anticipated occurrences of AMD that are short-term in nature, or for unanticipated AMD problems that arise *after* a permit is issued. Under the draft policy, any other uses of water treatment are unacceptable, and should result in the denial of a permit.

### [b] — OSM’s Draft Acid Mine Drainage Policy in Action: *McElroy Coal Co. v. WVDEP.*

Although it has only been released in draft form, OSM’s position that a permit should be denied where there is a potential for long-term treatment of AMD has already been adopted by at least one state regulatory authority. This view was taken by the West Virginia Department of Environmental Protection (WVDEP) in *McElroy Coal Co. v. WVDEP.*

In that case, McElroy Coal Co. (McElroy), a subsidiary of Consolidation Coal Co. (Consol), applied to WVDEP for a permit to expand an *existing* refuse disposal area. In its permit application, McElroy proposed to first regrade the refuse to create relatively steep slopes and then to cap it with alkaline material and soil, thereby preventing or retarding any water infiltration that could lead to AMD. Additionally, McElroy proposed to chemically treat the water during active refuse disposal and, if necessary, after the refuse disposal area was capped. McElroy’s plan, however, was not acceptable to WVDEP.

WVDEP contended that substantial amounts of AMD would discharge from the refuse disposal area after it was capped, and refused to recognize McElroy’s plan to chemically treat the water if necessary. Instead, WVDEP

insisted on a plan requiring that the refuse be blended with alkaline material before disposal. Indeed, after several discussions between the parties, it appeared clear that WVDEP had adopted a policy of rejecting any plan to dispose of potentially acidic coal refuse without an alkaline addition plan — regardless of the cost. When McElroy did not agree to an alkaline addition plan as part of its permit, WVDEP denied McElroy’s permit application.

McElroy appealed the permit denial to the West Virginia Surface Mine Board, and argued that WVDEP had not considered whether the refusal disposal discharge would create a “perpetual” AMD discharge, but rather simply applied a policy of denying any permit for acidic refuse disposal that did not contain an alkaline addition plan. McElroy also argued that permit denial was unlawful because both the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) and its federal counterpart, SMCRA, explicitly recognized water treatment as a means of avoiding AMD. Finally, McElroy argued that WVDEP’s permit denial was unreasonable because of the enormous increase in cost required to implement WVDEP’s alkaline addition plan. In support of this argument, McElroy introduced evidence demonstrating that WVDEP’s required alkaline addition plan would cost approximately $3.6 million per year for the anticipated 20 year life of the disposal area, compared to only $150,000 annually for McElroy’s proposed water treatment plan! Over McElroy’s objection, WVDEP introduced evidence that the AMD from the proposed permit area would last for 600 years, a “fact” never considered by WVDEP in its permit denial decision. In response, McElroy introduced evidence that the refuse would produce AMD during its 20-year life, but that after reclamation the need for treatment would be reduced to nothing over another 20 years.

McElroy’s arguments, however, were unsuccessful. The Board ruled 4-2 that WVDEP’s “policy” of denying permit applications involving a potential for long-term treatment of AMD was both lawful and reasonable. Notably, in support of its arguments, WVDEP relied upon the OSM Draft AMD Policy as authority for its actions. In private discussions with the parties, the majority members of the Board conceded that they did not consider whether the AMD would continue for the 600 years predicted by WVDEP or the 40 predicted by McElroy (20 during active refuse
disposal and 20 thereafter). Instead, they stated frankly that even 40 years was a “long time” and that “even big companies” such as Consol go bankrupt, thereby leaving behind substantial unbonded liabilities. The minority Board members stated that they believed WVDEP had illegally adopted a new rule and applied it to McElroy without determining whether McElroy would create a “perpetual” AMD discharge.


OSM’s 1994 “draft” policy requiring the denial of any permit that may require long-term treatment of AMD suffers a paucity of support in SMCRA and its regulations. That is, it is “long” on policy and “short” on legal support. Far from OSM’s contentions, there is absolutely no basis for any distinction between “anticipated” and “unanticipated” occurrences of AMD, nor is there any support for OSM’s conclusion that AMD cannot be “avoided” through long-term treatment. These facts are proven by an examination of SMCRA and its legislative history, the regulations promulgated pursuant to SMCRA, and the relevant case law.

[i] — SMCRA and Its Legislative History.

OSM’s policy regarding long-term water treatment and AMD is perhaps most plainly contradicted by the language of SMCRA itself. As noted above, sections 515(b) and 516(b) of SMCRA provide the performance standards for the control of AMD. These performance standards require that an operator:

58 The majority did, however, direct that WVDEP issue the permit if the law otherwise allowed McElroy to post a reclamation bond sufficient to cover long-term water treatment costs as long as necessary. See McElroy Coal Co. v. WVDEP, Appeal No. 94-56-SMB, Order at ¶13 (W. Va. Surface Mine Board 1995). The majority’s view of the water treatment bond, though, is not entirely consistent with OSM’s view of West Virginia’s “alternative bonding” system, which is comprised of a site-specific bond capped at $5,000 per disturbed acre backed by a bond pool financed by a coal excise tax. OSM takes the position that this system, either through site specific or bond pool monies, must be sufficient to treat long-term AMD. See 60 Fed. Reg. 51900, 51902 (October 4, 1995).

59 An excellent critique of OSM’s Draft Policy is contained in a document submitted collectively by several industry groups entitled “An Evaluation of the OSMRE DRAFT POLICY Statement Avoiding and Controlling Acid Mine Drainage.”
minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by-

— avoiding acid or other toxic mine drainage by such measures as, but not limited to-

— preventing or removing water from contact with toxic producing deposits;

— treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;

— casing, sealing, or otherwise managing boreholes, shafts, and wells to keep acid or other toxic drainage from entering ground and surface waters.\(^{60}\)

This language expressly recognizes treatment as a means of avoiding acid mine drainage.

In its draft AMD policy, though, OSM tries to avoid this express language through novel interpretations of the law that are unsupported by, and in some cases even plainly contradicted by, SMCRA. For instance, OSM admits that treatment is a recognized method of avoiding AMD, but attempts to limit the use of treatment depending upon whether the AMD is “anticipated” or “unanticipated.” The language of SMCRA, however, makes no such distinction. Similarly, OSM’s Draft AMD Policy focuses on avoiding AMD “formation” when no provision of SMCRA requires such an accomplishment. Indeed, section 515(b) of SMCRA provides that AMD may be avoided by treating it before it is “released” downstream — a measure that could only be undertaken after AMD formation.

The legislative history of SMCRA likewise conflicts with OSM’s recent policy on long-term treatment. In passing SMCRA, Congress

\(^{60}\) 30 U.S.C.A. §§ 1265(b)(10) & 1266(b)(9).
commented upon the methods of AMD avoidance available to operators, stating as follows:

With respect to acid mine or other toxic drainage, *a wide range of alternatives is available to the industry* to avoid pollution of ground and surface waters through a number of techniques, *including treatment*, diversion of waters from producing deposits, and isolation of toxic overburden ground and surface water flow.\(^{61}\)

This comment clearly indicates that Congress intended treatment to be an acceptable method available to operators in meeting their obligation of “avoiding” AMD. Indeed, further comments by Congress indicate that it intended treatment to be a *required* method of avoiding AMD:

In cases where there will be water discharge from the mine site, the number of discharges should be minimized by collectively controlling and channeling the water into an acceptable receiving stream or a real location. *It also should be understood that prior to any discharge off the permit area, the discharge should be treated to remove pollutants that may be present.*\(^{62}\)

More recently, Congress confirmed again that its intentions are to allow operators broad latitude in the methods available for AMD avoidance. In 1994, the Senate Appropriations Committee noted the AMD initiative being undertaken by OSM and cautioned OSM that, while Congress continues to fund such endeavors, OSM must recognize the wide array of measures available to operators for controlling AMD, including treatment:

The Committee is aware that the Office of Surface Mining Reclamation and Enforcement [OSM] is preparing an initiative to coordinate efforts for cleaning up acid mine drainage and minimizing future pollution. Specifically, OSM is working with the States, the public, industry, and the Eastern Mine Drainage Federal Consortium to develop policy options that focus on preventing acid/toxic mine drainage [AMD] by improving permitting, enforcement, and bonding

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\(^{62}\) *Id.* at 116.
requirements on active mine sites with potential AMD problems.

The Committee continues to provide funding for research and development of acid mine drainage treatment and abatement techniques. The Committee expects that the Department [of the Interior] will build upon the existing body of research, and that in pursuit of any new AMD initiatives, the Department will continue to recognize the provision of the Surface Mining Control and Reclamation Act [SMCRA], which provides the coal industry with a wide range of alternatives for minimizing acid mine drainage, including treatment to reduce pollutants that may be present before discharge off the mine permit area.\(^63\)

Similarly, during a committee conference in the House of Representatives regarding appropriations to the Department of the Interior, OSM was again directed to continue to recognize water treatment as an option available to operators in any AMD initiative:

In pursuing this initiative the OSM should comply carefully with the Surface Mining Control and Reclamation Act and with federal rulemaking requirements. A \emph{wide range of alternatives should continue to be considered} to reduce pollutants during mining and to prevent post mining discharge of polluted water, including mitigation and treatment to reduce pollutants that may be present before final discharge off the mine permit area.\(^64\)

In preparing its Draft AMD policy, however, OSM appears to have ignored these comments.

\[\text{[ii] — OSM Regulations.}\]

The regulations promulgated by OSM to implement SMCRA also demonstrate that water treatment is an integral part of AMD avoidance, both during and after active mining. In general, these regulations provide that mining and reclamation practices that minimize water pollution and changes in flow are preferred to water treatment, but nevertheless make it clear that water treatment is an accepted method of AMD avoidance. This


\(^{64}\) H. Rep. No. 740, 103d Cong., 2d Sess. 28 (1994).
is demonstrated in both the hydrologic-balance protection standards\textsuperscript{65} and hydrologic reclamation plan requirements\textsuperscript{66} of the regulations.\textsuperscript{67}

Similarly, the need for water treatment was recognized by OSM in the preamble to its permanent program rules:

Of course in addition to sedimentation, persons must use treatment facilities to reduce acid or other toxic contents of drainage from the disturbed area, to meet effluent limitations of Section 816.42(a)(7) for pH, iron and manganese, and any other pollutant parameters limited by applicable State or Federal law . . . .

For acid and other toxic mine drainage, \textit{treatment facilities are to be required during and after mining operations} as necessary technology under Section 515(b)(10)(A) of the Act and Best Available Control Technology under Section 515(b)(24) of the Act.\textsuperscript{68}

\textsuperscript{65} See 30 C.F.R. §§ 816.41 (for surface mining) and 817.41 (for underground mining). Section 816.41 provides, in relevant part, as follows:

(a) General. All underground mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, and to support approved postmining land uses in accordance with the terms and conditions of this part. The regulatory authority may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. \textit{Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.}

\textsuperscript{66} See 30 C.F.R. § 780.21(h)(calling for the hydrologic reclamation plan to “provide water treatment facilities when needed”).

\textsuperscript{67} The recognition of water treatment as a method of avoiding AMD is also implicit in the regulations’ requirement that discharges of water from an operation comply with the effluent limits promulgated by E.P.A. at 40 C.F.R. part 434. 30 C.F.R. § 816.42. These effluent limitations were based on what the Best Available Technology Economically Achievable (BAT) could achieve, and EPA determined that the best technology available for the control of AMD consisted of various water control and treatment methods. \textit{See generally, 47 Fed. Reg.} 45382 (October 13, 1981). Accordingly, the effluent limitations were set with the view that water treatment would be used to meet them.

\textsuperscript{68} \textit{44 Fed. Reg.} 15149 (March 13, 1979). In this preamble, OSM also recognized the validity of treatment with respect to underground mining specifically, stating:
Indeed, in response to comments that treatment ponds may not always be needed to meet effluent limitations required under SMCRA, OSM stated in the preamble that treatment ponds were a “necessary element” of reclamation:

Treatment ponds for treatment of acid and other toxic mine drainage, including chemical treatment and settling are required under Sections 515(b)(10)(A) and 515(b)(24) of the Act. Such facilities are a necessary element of effective acid and toxic mine drainage treatment. Moreover, commentors submitted no data whatsoever to show that effluent limitations of 816.42(a)(7) could be met without the use of sediment ponds. To the contrary, available data show, that untreated sediment discharges will ordinarily far exceed the effluent limits.69

Additional, when OSM issued its bonding rules in 1980, it again recognized that water treatment facilities might be necessary after active mining ceased, again affirming the concept that post-mining water treatment was an acceptable method of complying with SMCRA’s performance standards. For instance, in discussing one of the 1980 bonding regulations, OSM stated that the regulation provides for “bonding of surface facilities constructed to provide treatment of mine drainage. Such facilities may remain indefinitely to treat drainage or may be removed with the termination of mining.”70 More recently, in considering when bond release should occur and when its jurisdiction over an operation

Water pollution control for underground coal mining operations is largely restricted to at source methods for reducing water inflow into the mine workings and to treatment of collected mine drainage and surface runoff. [AMD] can be controlled in underground mines through the proper location, design construction, utilization, and sealing of drifts, adits and slopes . . . . Use of some of these methods to control drainage during the active mining phase is to be supplemented with collection and conveyance of drainage to treatment facilities as necessary to comply with applicable standards and limitations prior to discharge to receiving streams. Id. at 15264-15267.

69 Id. at 15152.
should terminate, OSM again recognized that long-term water treatment was a contemplated and lawful method of AMD avoidance:

One commentor questioned how OSMRE will apply the rule to mining operations with post-closure drainage which will continue to require chemical and physical treatment to meet effluent limitations.

This rule does not affect the standard required for full bond release which requires full compliance with the applicable performance standards. In order for a release to be appropriate under such circumstances, it should include assurances which provide through a contract or other mechanism enforceable under other provisions of law to provide, for example, *long-term treatment of acid discharge or an alternative water supply*. When such assurances are provided, the failure of such maintenance following bond release is not sufficient reason to reassert regulatory jurisdiction under the regulatory program. If, subsequent to bond release, a problem occurs related to inadequate maintenance, the contract or agreement would be enforceable through other provisions of law. Should such contract or agreement prove unenforceable, then the bond release would have been based on misrepresentation and jurisdiction should be reasserted.\(^{71}\)

In summary, it appears clear from OSM’s regulations and the preambles to them that water treatment is an accepted method of avoiding AMD, whether during mining or for long terms after mining.

[iii] — *Case Law.*

The only court to consider the issue of permitting operations where long-term treatment may be involved held explicitly that regulatory authorities must recognize and consider water treatment as a method of avoiding AMD. This occurred in *Skyline Coal Co. v. OSM.*\(^{72}\) In *Skyline*,


\(^{72}\) Skyline Coal Co. v. OSM, C.A. No. 3-93-0042 (E.D. Tenn. 1993).
an administrative law judge denied temporary relief to a coal operator whose permit renewal had been denied on the grounds that its hydrologic reclamation plan did not sufficiently avoid AMD. On appeal to federal court, Skyline argued that “the ALJ failed to properly consider its back-up plan to meet discharge compliance levels through water treatment, as specifically recognized by law and regulations.”  

The Skyline court agreed, and overturned the ALJ’s decision, stating:

I am of the opinion that the ALJ failed to properly consider Skyline’s plan to avoid acid/toxic mine drainage off the mining site through water treatment and/or wetlands as provided by 30 U.S.C. §1265(b)(10) . . .  


In addition to relying upon questionable interpretations of SMCRA to combat AMD in the permitting process, federal and state agencies have recently begun to use water pollution laws to compel the remediation of AMD by persons not regulated under SMCRA, such as landowners and lessors. In the recent past, landowners and lessors have been held liable for AMD problems without regard to their responsibility for the formation of the AMD. Importantly, this result has even occurred where reclamation bonds — which are designed to pay for such remediation — are still available.

[a] — Landowners and Water Pollution Laws: Liability for AMD Without Regard to Fault.

The Federal Clean Water Act (CWA) makes it unlawful to discharge a pollutant from a point source into a navigable water of the United States without, or in violation of, an NPDES permit. State programs designed to implement the CWA at the local level institute this same requirement. As some landowners have recently discovered, this broad prohibition can

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73 Id. at 13.
74 Id., slip op. at 12.
75 33 U.S.C.A. §§ 1311(a), 1319(c)(2), 1342(a).
resort in liability for AMD pollution with little regard to the landowner’s actual responsibility for the problem.

This was demonstrated by the West Virginia Supreme Court in Rayle Coal v. Chief Div. of Water Resources. In that case, Rayle Coal Company purchased property from Valley Camp Coal Company (Valley Camp) on which was located both a large coal mining refuse pile (“gob pile”) and a preparation plant. A sedimentation pond existed at the base of the gob pile to collect AMD before it entered a nearby stream. Valley Camp had pumped effluent from the pond over a hill to a water treatment facility which discharged the treatment effluent pursuant to a NPDES permit.

Immediately after acquiring the property, Rayle Coal altered the method of collecting, draining and treating the AMD generated by the gob pile. Rayle Coal utilized a series of settling ponds and ditches in the stream bed through which the effluent was discharged. The West Virginia Department of Environmental Protection (WVDEP) ordered Rayle Coal to apply for a permit for this system, but Rayle Coal refused to do so and appealed the WVDEP’s order. The case eventually found its way to the West Virginia Supreme Court.

Before the West Virginia Supreme Court, Rayle Coal argued that it did not have to obtain a NPDES permit because the AMD problem was caused by an abandoned mining operation and was already in existence when Rayle Coal acquired the property. The court rejected this argument, ruling that liability for discharge of pollutants did not turn on whether the source of pollution was utilized in conjunction with active operations. The court also distinguished Rayle Coal’s situation from those in which pollutants

77 In this regard, the court noted that West Virginia’s Water Pollution Control Act expressly required an application for a permit where the source of pollution ceases operation but pollution nonetheless continues. Id. at 686 (citing W. Va. Code § 20-5A-11 (1969)).
were already in the water, 78 noting that “acid mine drainage was not always in the waters” in question. 79

Concepts of fault were similarly found to be unimportant in United States v. Law. 80 In that case, Lewis Law purchased approximately 240 acres from the New River Company in 1980. The property included pre-SMCRA refuse disposal sites and an active drainage treatment facility for AMD leaving the refuse disposal area. Soon after Law bought the property, the state ordered him to obtain a NPDES permit, but Law refused to do so. After years of wrangling with Mr. Law, state officials turned the matter over to federal prosecutors, who charged Law with discharging pollutants without a permit under the criminal provisions of the Clean Water Act.

Law claimed to be unaware of either the presence of AMD or the treatment facility when he purchased the property. In addition, he claimed that the cause of the AMD was not the refuse piles on his property but rather an old deep mine located above his property. According to Law, his property was merely a conduit for the AMD.

Law’s protests proved to be unsuccessful. The district court convicted him of criminal violations of the CWA for discharging pollutants without an NPDES permit. On appeal, the Fourth Circuit affirmed, ruling that it was irrelevant whether Law had known of the presence of AMD when he acquired the property or whether the AMD originated on adjacent property. The court ruled that because the discharge from the treatment facility was a point source which contributed pollutants to waters of the United States, the origins of the pollutants were irrelevant.

78 Rayle Coal had relied upon National Wildlife Fed’n v. Consumers Power Co. 862 F.2d 580 (6th Cir. 1988), in which the Sixth Circuit had found that a hydroelectric dam that killed fish did not result in the “addition” or “discharge” of a pollutant because the fish were always in the water.
79 Rayle Coal also argued that it was not required to obtain a NPDES permit because its treatment pond system actually reduced the AMD which was discharged. This argument was similarly rejected. The West Virginia Supreme Court found that Rayle Coal was still required to obtain a NPDES permit because Rayle had not eliminated the AMD pollution. 401 S.E.2d at 686.
80 United States v. Law, 979 F.2d 977 (4th Cir. 1992).

In addition to learning that liability for AMD does not depend on traditional concepts of fault, landowners and lessors have recently discovered that they may be held liable for AMD even where SMCRA bond funds — which were designed for the very purpose of remediating AMD — exist to clean up AMD problems. This has been established through both litigation and rule making.

[i] — Case Law.

In *Cat Run Coal Co. v. Chief, Office of Water Resources*, 81 F & M Coal Company (F & M) surface mined coal pursuant to a lease with Cat Run Coal Company (Cat Run” in which Cat Run held the following property interests:

Site 1: Cat Run owned the deep minable coal (which was not mined by F & M) and a small portion of the surface (from which there was no point source discharge);

Site 2: Cat Run owned only the deep minable coal (which F&M did not mine);

Site 3: Cat Run owned both the coal mined by F&M as well as the surface.

Cat Run leased its coal and surface rights to F&M in 1985, and F&M obtained three separate sets of surface mining and NPDES permits to conduct surface mining operations on the three sites. F&M’s operations produced acid mine drainage which F&M could not afford to treat. F&M forfeited its surface mining permit and reclamation bond and filed for bankruptcy protection.

Downstream riparian owners sued F&M, its principals, its insurers and the West Virginia Division of Environmental Protection (DEP) when the water quality in the receiving stream deteriorated. The complaint against DEP alleged that the agency had a mandatory duty under the state surface mining law to use reclamation bond funds to complete reclamation of the property and that reclamation included any necessary long-term water cleanup.

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treatment. The state supreme court agreed with the riparian owners and held that DEP had to use the site specific bond funds to complete reclamation, including any necessary water treatment. The court did not reach the issue whether DEP was likewise obligated to use the state bond pool (Special Reclamation Fund) to supplement the site specific bonds.82

DEP, after receiving the Supreme Court’s order and in an effort to avoid use of the bond pool for long-term treatment costs, issued administrative orders under the State Water Pollution Control Act to Cat Run and other owners of the three sites. The orders claimed that, as owners of the sites, these entities were “causing or allowing” pollution to the waters of the State and required each to obtain water pollution control/NPDES permits for discharges from the three sites.

Cat Run appealed to the Environmental Quality Board, and argued that
1) As a mere landowner which leased coal properties, Cat Run was not thereby “causing or allowing” pollution to waters of the state under the State Water Pollution Control Act;
2) The state NPDES regulations impose liabilities only on “owners and operators” of mining operations and Cat Run fell into neither category with respect to F&M’s mining operations;
3) DEP’s interpretation of the state water laws was expressly prohibited by the surface mining laws, which were more recent and more specific in their scope. Cat Run argued that the surface mining laws imposed the costs of reclamation, including water treatment, on the bonding mechanisms established under the surface mining laws.

The Board ruled that Cat Run had no liability for sites 1 and 2 because it did not “benefit from F&M’s mining operation, for it does not have the level of ownership requisite for liability to attach . . . .”83 However, the Board ruled that Cat Run was required to obtain an NPDES permit for Site 3.84 The Board concluded that not only did Cat Run have the requisite property interest in Site 3 to be liable, but that it:

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84 Id. at 17.
played an affirmative role in the cause of the acid mine drainage . . . by virtue of leasing the . . . coal which F&M extracted from that site. The fact that Cat Run did not directly participate in the extraction of its coal as an “operator” nor had control over the way in which the operator conducted mining operations of the site does not excuse Cat Run’s duty to comply with the [Water Pollution Control Act].85

The Board avoided altogether any real analysis of Cat Run’s argument that the interplay between the state surface mining laws and water laws precluded the State from holding Cat Run responsible for discharges from any of the three F & M sites. Initially, the board agreed with Cat Run’s contention that the state surface mining laws require the mine operator and the operator’s bonds to pay for water treatment costs, finding that:

SMCRA seeks to impose the costs of reclaiming a surface mining site upon the coal industry by requiring the operator to post a reclamation bond and by the creation of a Special Reclamation Fund of per ton tax revenues. Further, regulations promulgated in accordance with SMCRA require surface mining permittees to comply with all federal and state water quality laws.86

The Board then concluded that the costs of treating acid mine drainage were a “reclamation” cost covered by the state surface mine bonding program, a point which DEP hotly contested. Nonetheless, the Board simply concluded that “the fact that financial resources may be available for reclamation under SMCRA does not absolve Cat Run of liability for the discharge of acid mine drainage in this case.”87 Likewise, the Board did not analyze whether DEP, as trustee of the Special Reclamation Fund paid for by permittees and operators, should have to apply for and hold permits before landowners such as Cat Run may be responsible.


The policy of holding landowners and lessors responsible for AMD without regard to the existence of reclamation bonds has also been the

85 Id. at 8.
86 Slip op. at 3.
87 Slip op. at 8.
subject of recent rulemaking. In 1993, West Virginia proposed a change to its surface mining regulations which provided that the “operator, permittee or other responsible party will be liable for all costs in excess of the [bond] amount forfeited” in the event of a bond forfeiture. Commentors to this proposed rule objected to OSM, noting that (1) there are no “responsible parties” other than “permittees” and “operators” under SMCRA and WVSCMRA, and the addition of “other responsible parties” was at best confusing surplusage; and (2) any attempt by the WVDEP and OSM to shift reclamation costs away from “permittees” or “operators” and the bond funds created by them to landowners or royalty owners was not properly noticed and was inconsistent with SMCRA and WVSCMRA, both of which were intended to protect landowners.

On October 4, 1995, OSM approved the proposed change to West Virginia’s regulations. In response to the commenters, OSM found the proposed change was not prohibited by SMCRA and stated that “under the Federal Clean Water Act, a permittee, operator and/or landowner can be held responsible for the treatment of point source discharges that do not meet effluent limitations after forfeiture.” As OSM’s statement makes clear, it essentially relied on the rule’s consistency with the federal Clean Water Act to approve the rule’s consistency with SMCRA. OSM’s approval of this rule is, as of this writing, currently being challenged in federal court.

[c] — A Critical Evaluation of the Use of Water Pollution Laws to Remediate AMD.

While there is legal support for holding landowners liable for AMD under water pollution laws without regard to their responsibility for the

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89 See Admin. Record No. WV 910.
91 Id.
92 See Cat Run Coal Co. v. Babbitt, No. 2:95-1063 (S.D. W. Va.). The rule is being challenged on the grounds that it was inadequately noticed, unconstitutionally vague, inconsistent with SMCRA, and that OSM breached its duties under SMCRA and the Administrative Procedure Act in approving the regulation.
problem, the application of such measures can be inconsistent with SMCRA. SMCRA is a statute designed to internalize the costs of mining so that they are not borne by others — such as landowners and lessors — and its dictates should be followed before those of water pollution laws because SMCRA is more recent and specific in scope.93 The inconsistency under SMCRA of imposing reclamation costs on landowners where, for instance, bond funds are available is demonstrated by the express language and legislative history of SMCRA, as well as the regulations promulgated pursuant to it.

[i] — SMCRA and Its Legislative History.

At its outset, SMCRA provides that one of its stated purposes is to protect “landowners” from the effects of mining.94 From there, SMCRA goes on to provide, in a manner consistent with Congressional intent, that the costs of mining are to be internalized by those in the coal industry.

In plain language, SMCRA requires operators alone to reclaim mine sites operated both before and after SMCRA. With regard to pre-SMCRA sites, operators are required to pay a reclamation fee that is deposited into the Abandoned Mine Lands Trust Fund, which is used to reclaim mining sites created before SMCRA.95 For mine sites created after SMCRA, operators are required to follow both permitting and performance standards which require the operators alone to reclaim post-SMCRA mine sites.96 These requirements ensure that only operators pay the costs of reclamation.

The internalization of these costs is further mandated by SMCRA’s bonding provisions. SMCRA requires permittees to file reclamation bonds “sufficient to assure the completion of the reclamation plan . . . in the event of forfeiture.”97 Accordingly, the bonding scheme ensures that

93 As a general rule of construction, when two statutes conflict, the statute that is more recent and specific should control. See generally, 82 C.J.S. Statutes §§ 363-364 (1953 & 1995 Cum. Supp.).
95 See 30 U.S.C. § 1232 (imposing reclamation fee on “operators”).
96 See 30 U.S.C. §§ 1258 (requiring “permittee” to submit a reclamation plan to state agency for approval as part of the surface mining permit) and 1265(b)(2), (3), (6), (7), (16), (19), (20) and (23)(imposing reclamation standards on “operators”).
permittees alone remain financially responsible for all reclamation costs, and accordingly, dictates that others will not have to bear them.

These results are consistent with and supported by the legislative history of SMCRA. For instance, Congress characterized the purpose of Senate Bill 425 — the “Surface Mining Act of 1973” — as follows:

The purpose of this bill is to effect the *internalization of mining and reclamation costs, which are now being borne by society* in the form of ravaged land polluted water, and other adverse effects, of coal service [sic] mining. The Committee recognizes that in some instances, compliance with the provisions of this Act may result in increased production costs for some mine operators. *The cost of the environmental controls and reclamation requirements provided for under the Act are properly borne by the mine operators*, although any resultant increases in mining costs will almost certainly be passed on to coal consumers.

This statement indicates that Congress intended that the costs of reclamation be borne solely by those in the mining industry.

[ii] — OSM Regulations.

The regulations promulgated by OSM pursuant to SMCRA similarly provide that the costs of mining are to be borne solely by coal operators.

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98 SMCRA is the descendant of a number of bills dating back to the 92nd Congress that were designed to address the effects of coal mining. See H.R. Rep. No. 95-218, 95th Congress, 1st Session, at 57 (1977). Two of these bills were passed, but both met a Presidential veto. *Id.* These bills were then “fine-tuned” and passed as SMCRA in 1977. *Id.* The legislative history of the earlier bills demonstrates Congress’ intent that the costs of mining be borne solely by those engaged in the mining industry. 99 119 Cong. Rec. 33181 (October 8, 1973)(emphasis added). Similarly, after President Ford vetoed the “Surface Mining Control and Reclamation of 1975,” Congressman Jackson urged Congress to override the veto, describing the bill as follows: The Surface Mining Control and Reclamation Act will *internalize mining and reclamation costs, which are now being borne by society* in the form of ravaged land, polluted water, and other adverse effects, of coal surface mining. This can be done without significant losses in coal production. 121 Cong. Rec. 15,238 (May 20, 1975)(emphasis added).
For instance, OSM recognized in promulgating its expansive “ownership and control” regulations that direct liability for reclamation costs and for compliance with SMCRA belong solely to the operator or permittee. In response to concerns that OSM’s rule would actually shift direct liability from one entity to another, OSM stated:

OSM disagrees. As explained more fully in the October 3, 1988 ownership and control rule, neither that rule nor this one make one legal entity responsible for abating the violation or paying the penalty or fee of another.100

*The responsibility for reclamation will continue to fall on the permittee and its agents, as the law requires.*101

Thus, OSM has specifically recognized that neither SMCRA nor the expansive ownership and control rules extend reclamation liability beyond the “operator” or permittee.

OSM has also recognized that “operator” liabilities do not extend to mineral lessors or other landowners. For example, in its original ownership and control rulemaking, OSM recognized that lessors and mineral owners should not be presumed to control operators, much less be directly responsible for the operator’s compliance with SMCRA, unless the lessor had the right to receive the coal after-mining:

OSMRE has decided not to establish a standard whereby a coal owner or lessor would be presumed to control the conduct of a surface coal mining operation if it receives any economic benefit from the mining or marketing of coal. Such a presumption would be too broad because in almost every contract mining situation the coal owner or lessor derives some economic benefit from the mining and marketing of the coal produced. What is more relevant is whether the coal owner or lessor can control the manner in which the surface coal mining operation is conducted.102

Thus, SMCRA does not extend direct liability to landowners and lessors unless they are also operators and it does not even allow a

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presumption of control to arise in a standard leasing arrangement unless the lessor retains the right to the coal after mining.

Additionally, OSM’s bonding regulations provide that the costs of reclamation are to be borne strictly by the operator or permittee. In the event of bond forfeiture, regulations provide that the regulatory authority may complete reclamation and “recover from the operator all costs of reclamation in excess of the amount forfeited.” 103 Also, OSM has provided that alternative bonding systems (like West Virginia’s, for example) must provide permittees with “substantial economic incentives” to reclaim mine sites. 104 These provisions demonstrate that “operators” and “permittees” are the only parties responsible for the costs of reclamation.

§ 10.05. Conclusion.

While the new permitting and enforcement measures used by environmental agencies have questionable legal support, they are nevertheless very difficult to challenge. Challenges to OSM’s unofficial policy of refusing permits where long-term treatment of AMD may be involved, for instance, are difficult to maintain because the policy has not undergone rulemaking procedures where attacks on its validity may be made, but rather, has been disseminated in a draft form that is largely unassailable to formal challenges. Similarly, challenges to the imposition of reclamation liability on landowners even where bond funds exist have proven difficult because agencies have been successful in focusing

103 30 C.F.R. 800.50 (d).
104 30 C.F.R. 800.11 (e)(2). OSM recently restated its position in this regard. In response to West Virginia’s proposal to increase the maximum site-specific bond from $1,000 to a maximum of $5,000 per acre, OSM found that requiring the permittee to increase the amount of bond posted for a site provided additional economic incentives for the permittee to complete reclamation as follows:

The State’s development of site-specific bonding requirements should provide greater assurance that reclamation will be completed by the permittee and will improve the financial stability of the special reclamation fund. The increase in bond should also provide a substantial economic incentive for the permittee to complete all reclamation requirements to avoid the economic loss in case of bond forfeiture. Therefore, the director finds this provision is not inconsistent with the requirements of . . . SMCRA. . . . 60 Fed. Reg. 51900 at 51903, 51904 (October 4, 1995).
attention away from the inconsistencies with SMCRA and on the validity of such measures under the water pollution laws.

The success that environmental agencies have had in pursuing these legally questionable solutions is especially regrettable because these “solutions” are bad policy in the first place. As described above, the biggest source of AMD is from abandoned, pre-SMCRA mines. OSM and primacy states should be focusing their attention on this problem instead of wasting time and resources in an attempt to rewrite SMCRA. Until this occurs, significant improvement in the problem of AMD cannot be expected.