

## Chapter 15

# Beyond Checking the Box — Environmental Permit Due Diligence for Coal Transactions

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### Synopsis

<b>§ 15.01.</b>	<b>Introduction .....</b>	<b>484</b>
<b>§ 15.02.</b>	<b>Hypothetical Coal Transaction .....</b>	<b>485</b>
	[1] — The New Coal — Old Coal Deal .....	485
	[2] — When It All Goes Wrong .....	486
<b>§ 15.03.</b>	<b>Surface Mining Control and Reclamation Act</b>	
	<b>Permitting Issues.....</b>	<b>487</b>
	[1] — Permit Termination for Non-Disturbance .....	488
	[a] — Automatic Termination? — The West Virginia Controversy .....	489
	[b] — Due Diligence Impacts. ....	492
	[2] — Changes to Performance Bonding Programs .....	492
	[a] — The Kentucky Example .....	493
	[b] — Due Diligence Impacts .....	495
	[3] — Consent of Surface Owners.....	496
	[a] — The Kentucky Controversy .....	497
	[b] — Due Diligence Impacts .....	499
<b>§ 15.04.</b>	<b>Clean Water Act Permitting Issues .....</b>	<b>499</b>
	[1] — Background on the Clean Water Act.....	499
	[a] — Section 402/National Pollutant Discharge Elimination System (NPDES) Permit Program .....	500
	[b] — Section 404/Dredge and Fill Permitting .....	502
	[c] — “Check the Box” Clean Water Act Due Diligence .....	503
	[2] — NPDES Program Issues to Consider in Your Next Deal..	504
	[a] — Is the NPDES Permitting Current?.....	504
	[b] — Unidentified Compliance Issues/ Discharge Monitoring Reports.....	505
	[c] — Ability to Modify or Expand Operations Under Current Permit.....	507

	[d] — Assessing the Potential for Changed Permit Requirements for the Existing Operation .....	509
	[e] — The Uncertain Scope of the NPDES “Permit Shield” .....	510
	[3] — 404 Permitting Program Issues to Consider .....	512
	[a] — Mitigation Status .....	512
	[b] — Addressing the Pending Individual 404 Permit Application .....	513
	[c] — Section 401 Water Quality Certification.....	515
	[d] — Is Any 404 Permit Really Permanent in Light of the 404 Veto Power? .....	516
<b>§ 15.05.</b>	<b>Other Regulatory Programs.....</b>	<b>518</b>
	[1] — Air Pollution Regulation.....	518
	[2] — Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Liability Protection .....	520
	[3] — State-Specific Permitting Programs .....	522
<b>§ 15.06.</b>	<b>“Threatened” Environmental Litigation .....</b>	<b>523</b>
	[1] — Citizen Suit Notice Letters .....	523
	[2] — Permit Appeals/Objections/Unsuitability Petitions .....	525
	[3] — Government Information Requests .....	526
<b>§ 15.07.</b>	<b>“Resolved” Environmental Litigation .....</b>	<b>528</b>
<b>§ 15.08.</b>	<b>A Final Note on Materiality.....</b>	<b>528</b>
<b>§ 15.09.</b>	<b>Conclusion.....</b>	<b>529</b>

**§ 15.01. Introduction.**

It is no secret to the coal industry that environmental regulation is pervasive. To operate any mine, numerous permits from state and federal authorities must be obtained under the Surface Mining Control and Reclamation Act (SMCRA), the Clean Water Act (CWA) and a host of other state and federal environmental laws. Moreover, it is also well-known that the requirements of these environmental protection programs are in a state of near-constant change, and that the changes almost always make it harder to operate. While operators understand that they need to obtain necessary permits before they can begin mining, when faced with an attractive acquisition opportunity, companies often perform only a cursory investigation into environmental issues. Many times, they simply look to “check the box” on a due diligence form indicating that “all necessary permits” have been

obtained. However, simply looking to see if permits are in place ignores a host of potential environmental issues that make mining more costly, or worse, impossible. It is imperative to discover these issues before the deal closes. In order to do that, operators need to move beyond checking the box.

### **§ 15.02. Hypothetical Coal Transaction.**

To illustrate the need for a closer look at environmental permitting issues during the due diligence stage of a transaction, we begin with an example.

#### **[1] — The New Coal — Old Coal Deal.**

New Coal is looking to take advantage of the perceived “down” market in the coal business by acquiring new properties at bargain prices. The CEO of New Coal receives a call from the CEO of Old Coal. For years, Old Coal was a major player in eastern Kentucky, but it is looking to reduce costs and shift its production to the Illinois and Powder River Basins. Old Coal’s CEO is proposing to sell New Coal, its last major mining complex in Kentucky. The deal would involve the sale of a large, un-mined coal reserve, several “mined out” permitted areas in various phases of reclamation, and a loadout facility.

Old Coal assures New Coal that the un-mined reserve is a “shovel ready” project and New Coal can begin mining it right away, providing revenue to address the overhead associated with the old properties being transferred. Knowing New Coal will be skeptical, Old Coal assures New Coal that:

- Old Coal obtained a SMCRA permit for the new area, has a bond in place, and even obtained a Section 404 permit for the hollowfills required to surface mine the new area.
- No environmental-related lawsuits have been filed, and there are no major violations pending resolution.
- All of the mines have National Pollutant Discharge Elimination System (NPDES) permit coverage.
- Old Coal acknowledges that there was some trouble with Environmental Protection Agency (EPA) a few years back, but that has all been resolved. The environmentalists were also