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## Confusion in Regulating Coal Mine Water Pollution: Regulatory Overlap in SMCRA and the CWA

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# CONFUSION IN REGULATING COAL MINE WATER POLLUTION: REGULATORY OVERLAP IN SMCRA AND THE CWA

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## I. INTRODUCTION: ACID MINE DRAINAGE

Acid mine drainage (“AMD”) impairs, degrades and destroys thousands of miles of streams and waterways in the United States.<sup>1</sup> AMD is water polluted with acids, sulfates, and metals.<sup>2</sup> The sulfate and acid contents increase when coal, which contains iron desulfides (pyrite and marcasite), is exposed to air and water by surface mining. During the surface mining process, a chemical reaction occurs

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<sup>1</sup> 59 Fed. Reg. 28,164 (1994).

<sup>2</sup> See 30 C.F.R. § 701.5 (1996) (defining “acid drainage” as “water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations”).

which oxidizes the desulfides to form ferrous sulfate and sulfuric acid.<sup>3</sup> Once this initial oxidation occurs, the sulfuric acid-producing reaction can become self-sustaining, causing acids, sulfates, and iron hydroxides to flow into receiving streams.<sup>4</sup> The increased level of iron hydroxides gives affected water the characteristic red and yellow color associated with AMD.<sup>5</sup>

AMD discharged from inactive and abandoned mines causes extensive damage. For example, AMD from abandoned mines degrades more than 7,600 miles of streams and waterways in eleven states.<sup>6</sup> The eight states comprising the Appalachian region suffer more from abandoned mine AMD than any other area of the United States.<sup>7</sup> A 1993 report submitted by the West Virginia Division of Environmental Protection ("WVDEP") identified eighty-nine abandoned and forfeited coal mine sites currently discharging AMD.<sup>8</sup> The WVDEP estimated that approximately 10,000 tons of AMD per year flow into the state's streams from abandoned mines.<sup>9</sup> Even more disturbing, AMD from abandoned mines represents only ten percent of the state's total AMD problem.<sup>10</sup>

Acidic discharges from abandoned mines pose a major environmental problem. The acidic discharges can continue for years after all mining activity has ceased.<sup>11</sup> The burden of cleaning up these discharges falls on mine operators, landowners and the state environmental regulatory authorities — a fact that can give rise to complicated legal problems for all three.

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<sup>3</sup> Commonwealth v. Barnes & Tucker Co., 371 A.2d 461, 465-66 n.9 (Pa. 1977).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> S. 1479, 104th Cong., 1st Sess. (1995).

<sup>7</sup> *Id.*

<sup>8</sup> W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Env't'l Protection, 447 S.E.2d 920, 921 (W. Va. 1994).

<sup>9</sup> *Id.* at 921 n.5.

<sup>10</sup> *Id.* at 921.

<sup>11</sup> See, e.g., Ingram v. Dep't of Env't'l Resources, 595 A.2d 733 (Pa. Commw. 1991) (involving an abandoned mine that continued to discharge AMD for more than 12 years after mining ceased).

## II. FEDERAL LEGISLATION GOVERNING ACID MINE DRAINAGE

The two major pieces of federal legislation governing water pollution caused by coal mines are the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”),<sup>12</sup> and the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”).<sup>13</sup> In general, the CWA regulates water pollution discharges from all industries, while the more narrowly-tailored SMCRA governs only mining operations.<sup>14</sup>

### A. *The Surface Mining Control and Reclamation Act*

The Carter administration passed SMCRA in 1977 in order to regulate the environmental impacts of surface coal mining.<sup>15</sup> In turn, SMCRA created the Office of Surface Mining Reclamation and Enforcement (“OSM”) to administer, to oversee and to implement the program.<sup>16</sup> According to SMCRA, the OSM may delegate primary regulatory responsibility to any state which meets OSM’s specified criteria.<sup>17</sup> The first criterion a state must meet to obtain primary authority (“primacy”) is the adoption of the state’s own regulatory program. The state regulatory program must contain laws and regulations that are no less stringent than those imposed by SMCRA.<sup>18</sup> Next, the state regulatory programs must also set forth a method of allocating adequate funding.<sup>19</sup> If primacy is granted to the state by OSM, the state enjoys exclusive jurisdiction over the enforcement of its regulatory

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<sup>12</sup> 33 U.S.C. §§ 1152-1378 (1994).

<sup>13</sup> 30 U.S.C. §§ 1201-1328 (1994).

<sup>14</sup> The CWA’s broad language prohibits “any person” from discharging “any pollutant” except as permitted by the act. 33 U.S.C. §§ 1311(a), 1312, 1316, 1317, 1328, 1342, 1344 (1994). SMCRA, on the other hand, has the more narrow mission of “protect[ing] society . . . from the adverse effects of surface coal mining operations.” 30 U.S.C. § 1202(a) (1994). SMCRA incorporates the requirements of the CWA and applies them to the mining industry. 30 C.F.R. § 816.42 (1996).

<sup>15</sup> 30 U.S.C. § 1202(a) (1994).

<sup>16</sup> 30 U.S.C. § 1211 (1994).

<sup>17</sup> 30 U.S.C. § 1253 (1994).

<sup>18</sup> *Id.*

<sup>19</sup> 30 U.S.C. § 1253(a)(1), (7) (1994).

program subject only to federal approval and oversight.<sup>20</sup>

SMCRA governs the surface mining industry by requiring surface coal mining operators<sup>21</sup> to apply for and obtain mining permits.<sup>22</sup> Regulatory authorities must deny a mining permit to any operator whose permit application does not contain a reclamation plan<sup>23</sup> which guarantees that reclamation can be accomplished.<sup>24</sup> One requirement for a reclamation plan is that it must contain an “assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance” inside and outside the permit area.<sup>25</sup> Furthermore, to help preserve the hydrological balance, SMCRA requires coal operators to anticipate water pollution, minimize it,<sup>26</sup> and avoid producing AMD.<sup>27</sup>

To add some reliability to the reclamation plan, the permitting process requires the regulatory authority to postpone issuance of a mining permit until the applicant posts a performance bond covering “that area of land within the permit

<sup>20</sup> 30 U.S.C. § 1253(a) (1994).

<sup>21</sup> Under SMCRA, an “operator” is “any person, partnership, or corporation engaged in coal mining.” 30 U.S.C. § 1291(13) (1994).

<sup>22</sup> 30 U.S.C. § 1257 (1994).

<sup>23</sup> 30 U.S.C. § 1257(d) (1994).

<sup>24</sup> 30 U.S.C. § 1260 (1994).

<sup>25</sup> 30 U.S.C. § 1260(b)(3) (1994). Hydrology is the “science dealing with the occurrence, circulation, distribution, and properties of the waters of the earth and its atmosphere.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 938, (2d ed., unabridged, 1987). Congress showed its concern for the way surface mining can change an area’s hydrological balance by including in the United States Code sections dealing with applications for: (1) mining permits at title 30, section 1257(b)(11); (2) the plan for reclaiming the mining area at title 30, section 1258 (b)(13); and (3) the performance standards pertaining to both surface mining and underground mining at title 30, section 1265(b)(10) and title 30, section 1266(b)(9) respectively.

<sup>26</sup> Among the actions that operators are required to take to minimize disturbance to the hydrologic balance are “(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.” 30 U.S.C. § 1265(b)(10)(A) (1994).

<sup>27</sup> See *McElroy Coal Co. v. Callaghan*, No. 94-56-SMB, 1995 WL 65225, at \*2 (W. Va. Surface Mining Bd. Feb. 11, 1995) (In rejecting *McElroy Coal Company’s* application to construct a coal refuse pile which would have produced acid mine drainage, the court interpreted the West Virginia Code which is nearly identical to its federal counterpart, to mean that acid mine drainage must be avoided *completely*.) W. VA. CODE § 22-3-13(b)(10)(A) (1994); 30 U.S.C. § 1265(b)(10)(A) (1994).

area upon which the [applicant] will initiate and conduct surface coal mining and reclamation operations[.]”<sup>28</sup> Furthermore, the amount of the performance bond must be “sufficient to assure the completion of the reclamation plan if the work [is] to be performed by the regulatory authority in the event of forfeiture[.]”<sup>29</sup> Some flexibility is built into the bonding requirement. For example, the regulatory agency is required to adjust the bond if the cost of reclaiming the permit area changes during mining.<sup>30</sup> The ability to adjust the amount of the performance bond is particularly important when regulating AMD because the costs of cleanup may easily exceed original estimations.<sup>31</sup>

The period of liability for bond coverage begins with the issuance of the permit and continues throughout both the term of the original permit and all additional periods necessary to achieve compliance with the reclamation plan.<sup>32</sup> Partial bond releases are also permitted by SMCRA. For instance, when an operator “completes the backfilling, regrading and drainage control of a bonded area, in accordance with his approved reclamation plan,”<sup>33</sup> he may request release of sixty percent of the bond amount.<sup>34</sup> However, even after this partial release, the amount of the bond must remain “sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority.”<sup>35</sup>

SMCRA’s bonding provision is the most important assurance that mining reclamation will be accomplished. SMCRA expressly prohibits release of bonds on

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<sup>28</sup> 30 U.S.C. § 1259(a) (1994).

<sup>29</sup> *Id.*

<sup>30</sup> 30 U.S.C. § 1269(e) (1994).

<sup>31</sup> For example, at a mining site operated by the Southern Ohio Coal Company (“SOCCO”) in 1993, some highly acidic drainage unexpectedly broke through a barrier between an abandoned mine works and the active mining area. *Southern Ohio Coal Co. v. OSM*, 20 F.3d 1418, 1420 (6th Cir. 1994). SOCCO claimed that in order to salvage its mining operation, it was forced to pump millions of gallons of untreated and inadequately treated water into surrounding creeks and streams. *Id.* The discharged water — containing iron sulfates, nickel, zinc and other metals — killed virtually all aquatic life along fifteen miles of Leading Creek and also damaged Raccoon Creek, both tributaries of the Ohio River. *Id.*

<sup>32</sup> 30 U.S.C. § 1259(b) (1994).

<sup>33</sup> 30 U.S.C. § 1269(c)(1) (1994).

<sup>34</sup> *Id.*

<sup>35</sup> 30 U.S.C. § 1259(e) (1994).

sites that continue to discharge either AMD or other pollutants.<sup>36</sup> Although SMCRA also provides for other penalties for noncompliance including criminal sanctions,<sup>37</sup> injunctions,<sup>38</sup> and individual civil penalties,<sup>39</sup> none of these penalties can truly achieve SMCRA's goal of "mitigat[ing] adverse environmental effects of present and future surface coal mining operations."<sup>40</sup>

#### B. *SMCRA's Abandoned Mine Reclamation Fund*

Title IV of SMCRA establishes the Abandoned Mine Land ("AML") program which provides for the restoration of lands and waters adversely affected by past coal mining.<sup>41</sup> The AML is funded by fees which OSM collects from all active mining operations.<sup>42</sup> OSM deposits them in an interest bearing Abandoned Mine Reclamation Fund ("AML Fund") which is used for the reclamation of AML projects.<sup>43</sup>

SMCRA provides authority to use money from the AML Fund to reclaim and to restore land and water resources adversely affected by past mining. Most of

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<sup>36</sup> JAMES M. MCELFIN, JR. & ANN E. BEIER, ENVIRONMENTAL REGULATION OF COAL MINING; SMCRA'S SECOND DECADE 142 (1990).

<sup>37</sup> 30 U.S.C. § 1268(e) (1994).

<sup>38</sup> 30 U.S.C. § 1271(c) (1994).

<sup>39</sup> 30 U.S.C. § 1268(f) (1994).

<sup>40</sup> 30 U.S.C. § 1201(k) (1994).

<sup>41</sup> 30 U.S.C. §§ 1231-1243 (1994).

<sup>42</sup> The fees collected vary depending on the type of coal being mined. The United States Code sets a fee of:

35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

30 U.S.C. § 1232(a) (1994).

<sup>43</sup> AML projects are chosen according to a priority schedule. 30 U.S.C. § 1242(g)(4)(C). According to the United States Code, abandoned sites are to be assigned a priority and "[t]he Secretary shall ensure that priority is given to those sites which are in the immediate vicinity of a residential area or which have an adverse economic impact upon a local community." *Id.* The priorities are listed in title 30, section 1233(a) of the United States Code.

the lands and waters eligible for reclamation under the AML program are those which were mined (or affected by mining) and abandoned or inadequately reclaimed prior to August 3, 1977, and for which there is no continuing reclamation responsibility under state or federal law.<sup>44</sup>

Recently, Congress has acknowledged the shortfall in the AML trust fund.<sup>45</sup> To help overcome this shortfall, Congress dedicated forty percent of the federal share of the funds for use by the states and Indian tribes to reclaim the highest priority sites until all priority 1 and 2 sites have been adequately reclaimed.<sup>46</sup> Despite the forty percent given in 1990, states are still experiencing funding problems in AMD reclamation under the AML Fund. Therefore, Congress is trying again to amend the AML program to “provide greater flexibility for States to use existing abandoned mine reclamation funds for acid mine drainage . . . [by] increas[ing] from 10 to 30 percent, or \$1 million, whichever is greater, the portion of a State’s AML funds that could be set aside for addressing environmental problems caused by acid drainage.”<sup>47</sup>

### C. *The Clean Water Act*

In 1972, Congress enacted the Federal Clean Water Act to protect the quality of the nation’s waters.<sup>48</sup> The CWA prohibits the discharge of pollutants<sup>49</sup>

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<sup>44</sup> 30 U.S.C. § 1243 (1994).

<sup>45</sup> 136 Cong. Rec. 4423, 4426 (1990).

<sup>46</sup> 30 U.S.C. § 1232(g)(5) (1994). Priorities for spending AML funds are established by ranking sites by the extent of adverse effects of past mining on lands and water. 30 U.S.C. § 1233 (1994). The highest priority is given to reclamation that will protect public health, safety and general welfare, and property from extreme danger due to the existing condition left by prior coal mining. 30 U.S.C. § 1233(a)(1) (1994). Second in priority is reclamation that will protect public health, safety and general welfare from the remnants of past mining. 30 U.S.C. § 1233(a)(2) (1994). Third is restoring land and water resources and the environment degraded by past coal mining practices. 30 U.S.C. § 1233(a)(3) (1994). Fourth is research and demonstration projects to develop methods and techniques of surface mining reclamation and water quality control. 30 U.S.C. § 1233(a)(4) (1994). Fifth priority is given to protection, repair, replacement, construction, or enhancement of public facilities adversely affected by coal mining practices. 30 U.S.C. § 1233(a)(5) (1994).

<sup>47</sup> S. 1479, 104th Cong., 1st Sess. (1995).

<sup>48</sup> See 33 U.S.C. § 1251(a) (1994).

<sup>49</sup> The term “pollutant” encompasses a long list of substances, including industrial, municipal, and agricultural wastes. 33 U.S.C. § 1362(6) (1994).



from point sources<sup>50</sup> into navigable waters<sup>51</sup> of the United States.<sup>52</sup> There are two major permit programs in the CWA, commonly referred to by their section numbers, 402<sup>53</sup> and 404.<sup>54</sup> Section 402 provides the permitting system framework for pollution dischargers, known as the National Pollutant Discharge Elimination System (“NPDES”).<sup>55</sup> The NPDES system is the only means by which a discharge of pollutants may escape the total prohibition of point source discharges established by the CWA.<sup>56</sup> Section 404 of the CWA provides the framework for an Army Corps of Engineers permitting system for discharges of dredged or fill material into the waters of the United States.<sup>57</sup>

The CWA overlaps with SMCRA in controlling discharges of AMD. Because AMD is composed, in part, of copper and zinc, the CWA classifies it as a pollutant subject to effluent limitations established by the Environmental Protection Agency (“EPA”) for active mines.<sup>58</sup> SMCRA states that “[n]othing in this chapter shall be construed as superseding, amending, modifying, or repealing . . . The Federal Water Pollution Control Act, . . . the State laws enacted pursuant thereto, or

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<sup>50</sup> The term “point source” is defined in the United States Code as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14) (1994).

<sup>51</sup> “Navigable waters” is defined as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7) (1994). This term has been interpreted to include virtually any surface waters, navigable or not. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985).

<sup>52</sup> See 33 U.S.C. § 1342 (1994).

<sup>53</sup> 33 U.S.C. § 1342(a)(1) (1994).

<sup>54</sup> 33 U.S.C. § 1344(a) (1994).

<sup>55</sup> *Id.* NPDES permits often govern specified pollutants by imposing numerical limits on the amounts that may be discharged. 33 U.S.C. § 1342(a)(1). These “effluent limitations” implement both technology-based and water quality-based requirements of the Act. See, e.g., 33 U.S.C. §§ 1311-1317 (1994); 33 U.S.C. § 1362(11) (1994). Where the EPA has set no effluent guidelines for a particular category of point sources, the agency is authorized under title 33, section 1342(a)(1) of the United States Code to develop such limitations in an NPDES permit on a case-by-case basis. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1378-79 (D.C. Cir. 1977).

<sup>56</sup> See *Costle*, 568 F.2d at 1374.

<sup>57</sup> See 33 U.S.C. § 1444 (1994).

<sup>58</sup> 40 C.F.R. § 440.100 (1996).

other Federal laws relating to preservation of water quality.”<sup>59</sup> Furthermore, SMCRA incorporates by cross-reference the water quality standards set forth in the CWA by the EPA.<sup>60</sup> The CWA imposes effluent standards for coal mining operations, and state primacy programs must obtain the consent of the EPA Administrator before water quality standards may be modified.<sup>61</sup>

#### D. *The CWA’s Storm Water Program*

Discharges which emanate from general areas rather than from “discernible, confined and discreet conveyance[s]” are not controlled by the EPA’s permitting authority.<sup>62</sup> The EPA, however, has interpreted its jurisdiction to include channels created by erosion caused by storm waters.<sup>63</sup> Congress has recognized that storm water discharges are a significant source of environmental pollution.<sup>64</sup>

After the CWA was enacted, NPDES permit regulations exempted uncontaminated storm water discharges from regulation on the basis of “administrative infeasibility.”<sup>65</sup> In *Natural Resources Defense Council, Inc. v. Costle*,<sup>66</sup> the permit regulations were set aside on the ground that the EPA could not exempt categories of point sources from the CWA’s permitting requirements.<sup>67</sup> Despite the decision in *Costle* and the subsequent passage of NPDES storm water regulations in 1984,<sup>68</sup> the EPA maintained its policy of non-enforcement in this

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<sup>59</sup> 30 U.S.C. § 1292(a) (1994).

<sup>60</sup> 40 C.F.R. §§ 434.10-434.65 (1996).

<sup>61</sup> 30 C.F.R. § 732.13(b) (1996).

<sup>62</sup> *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

<sup>63</sup> *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980).

<sup>64</sup> 55 Fed. Reg. 47,990-92; see 132 Cong. Rec. 32,381 (1986).

<sup>65</sup> *American Mining Congress v. United States Env’tl. Protection Agency*, 965 F.2d 759, 762 (9th Cir. 1992).

<sup>66</sup> 568 F.2d 1369 (D.C. Cir. 1977).

<sup>67</sup> *Id.* at 1377.

<sup>68</sup> 49 Fed. Reg. 37,998 (Sept. 26, 1984).

area.<sup>69</sup> To remedy this, Congress passed the Water Quality Act (“WQA”)<sup>70</sup> amendments to the CWA, which set specific deadlines for the EPA’s regulation of storm water discharges. Although the WQA established a moratorium until October 1, 1992 on storm water discharge permits, the moratorium did not apply to “discharge[s] associated with industrial activity.”<sup>71</sup> The CWA also outlines an incremental approach to issuance of storm water discharge permits in order to “allow EPA . . . to focus [its] attention on the most serious problems.”<sup>72</sup>

In 1990, the EPA issued the final storm water discharge rule<sup>73</sup> which defines “discharge[s] associated with industrial activity” to include contaminated discharges from both active and inactive<sup>74</sup> mines, but to exclude discharges from inactive coal mines reclaimed under SMCRA.<sup>75</sup> EPA’s decision to submit inactive mines to the control of the storm water regulations has caused confusion for both landowners and state regulatory authorities performing hydrological reclamation under SMCRA’s Abandoned Mine Lands program.

### 1. Effects of the Storm Water Program on the Coal Industry

The coal industry, represented by the American Mining Congress<sup>76</sup> (“AMC”), attacked the new rule shortly after it passed. In *American Mining Congress v. EPA*, the AMC argued that the EPA ignored SMCRA’s AML program

<sup>69</sup> See 53 Fed. Reg. 49,416 (Dec. 7, 1988).

<sup>70</sup> Pub.L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.).

<sup>71</sup> 33 U.S.C. § 1342(p)(2)(B) (1994). In addition to the exception for discharges associated with industrial activity, this section also creates exceptions for (1) discharges associated with respect to which a permit has been issued before February 4, 1987; (2) discharges from municipal storm sewer systems serving populations of 100,000 or more; and (3) discharges for which the Administrator or the State, as the case may be, determines that the storm water discharges contribute to a violation of water quality standards or are significant contributors of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2)(b) (1994).

<sup>72</sup> 133 Cong. Rec. 991 (1987).

<sup>73</sup> 55 Fed. Reg. 47,990 (1990).

<sup>74</sup> As defined by the EPA, “inactive” mining sites are simply those that “are not being actively mined, but which have an identifiable owner/operator.” 40 C.F.R. § 122.26(b)(14)(iii) (1996).

<sup>75</sup> 55 Fed. Reg. at 48,033, 48,065-66.

<sup>76</sup> The AMC is a national trade association representing the interests of the mining industry. *American Mining Congress*, 965 F.2d at 759.

in promulgating its storm water rule, and that the rule was arbitrary and capricious.<sup>77</sup> In refuting the AMC's arguments, the court held that there was nothing in the AML's language or in its legislative history to support the AMC's proposition that Congress intended for the AML to be the exclusive means of addressing pollution from inactive mines.<sup>78</sup> Thus, the court found that the EPA's storm water discharge rule is not incompatible with SMCRA's AML program.

One of the concerns expressed by the AMC is that the storm water rule confuses the extent of landowner liability for hydrological reclamation of lands with abandoned mines on them. Although the storm water rule excludes coal mining operations that have completed reclamation and have had their bonds released, the regulations do not exclude inactive mining sites that are eligible for AML Fund expenditures pursuant to Title IV of SMCRA. This creates confusion as to who is responsible for the reclamation — the government or the landowner?

EPA regulations exclude from the storm water rule discharges from mines which have been reclaimed under SMCRA<sup>79</sup> because "as a general matter, areas which have undergone reclamation pursuant to such laws have concluded all industrial activity in such a way as to minimize contact with overburden, mine products, etc."<sup>80</sup> Lands that are unreclaimed, however, provide no such guarantee that AMD will not be discharged.

Prior to the actual reclamation, the AML program does nothing to regulate the discharge of pollutants from abandoned mine lands.<sup>81</sup> The storm water rule, on the other hand, does regulate abandoned mine land discharges.<sup>82</sup> Thus, SMCRA and the CWA approach the liability issue in two distinct ways: the CWA focuses on the offender while SMCRA focuses on the actual clean up. The AMC argued that the CWA approach is illegally retroactive.<sup>83</sup> When one compares the two approaches, the CWA approach does seem to impose retroactive liability.

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<sup>77</sup> *Id.* at 766.

<sup>78</sup> *Id.*

<sup>79</sup> 40 C.F.R. 122.26(b)(14)(iii).

<sup>80</sup> 55 Fed. Reg. at 48,033 (1990). "[T]he term 'overburden' has been clarified to mean any material of any nature overlying a mineral deposit that is removed to gain access to that deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations." *Id.* at 48,032-33.

<sup>81</sup> 965 F.2d at 767.

<sup>82</sup> *Id.* at 769.

<sup>83</sup> *Id.*

Liability imposed by SMCRA for hydrological reclamation certainly is not retroactive because the AML Fund was established not to punish those responsible for acid mine drainage on pre-SMCRA abandoned sites, but to lessen or eliminate the deleterious effects of the pollution left behind. Furthermore, the AML Fund is designed to spread the costs of reclaiming these abandoned sites throughout the mining industry instead of holding individuals responsible. By not holding individuals liable, the design of the AML Fund helps guarantee that current landowners who had nothing to do with the abandoned mines are not held responsible for reclamation. Accordingly, SMCRA recognizes that operators and permittees alone must bear the costs of reclamation,<sup>84</sup> and it does not permit actions against landowners.<sup>85</sup>

The Clean Water Act, however, does permit civil and criminal actions against landowners.<sup>86</sup> Thus, those who own lands which are eligible for AML Fund expenditures are still liable under the CWA to take AMD abatement actions themselves. The AMC argued that the EPA's rule requiring NPDES permits for discharges from inactive mines amounts to a "retroactive liability" being imposed on innocent landowners.<sup>87</sup> The court did not agree.<sup>88</sup>

The court maintained that "[a]lthough the rule may reduce the financial attractiveness of mine ownership, it does not impose liability for past conduct."<sup>89</sup> It reasoned that

the EPA's rule does not penalize inactive mine owners for mining activities or contaminated discharges that occurred in the past; it regulates discharges of contaminated storm water that occur in the future. The fact that the present contamination is the result of past mining activities does not make

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<sup>84</sup> See 30 C.F.R. § 800.50(d)(1) (1996) (stating that the regulatory authority may complete reclamation and "recover from the operator all costs of reclamation in excess of the amount forfeited").

<sup>85</sup> "Indeed, it is the purpose of the SMCRA to 'assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations.' 30 U.S.C. § 1202(b)." *Cat Run Coal Co. v. Babbit*, 932 F. Supp. 772, 780 n.14 (S.D.W. Va. 1996).

<sup>86</sup> See generally *United States v. Law*, 979 F.2d 977 (4th Cir. 1992).

<sup>87</sup> *American Mining Congress*, 965 F.2d at 769.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

EPA's rule retroactive.<sup>90</sup>

This holding is completely consistent with Congress' intent to require any person discharging pollutants to minimize or to eliminate the discharges so as to achieve the CWA's water quality goals.<sup>91</sup>

The Fourth Circuit also addressed the issue of landowner liability, but used a slightly different argument. In *United States v. Law*,<sup>92</sup> Law, the defendant purchased property containing an existing mining operation that was discharging acid mine drainage.<sup>93</sup> He was held criminally liable under the CWA for knowingly discharging a pollutant from a point source into navigable waters of the United States without an NPDES permit.<sup>94</sup> On appeal, Law argued that to be held liable for a "discharge" under the CWA, the landowner must have generated the pollution.<sup>95</sup> In rejecting Law's argument, the United States Court of Appeals, Fourth Circuit held that, regardless of whether a person generates AMD, he may be criminally liable for pollution emanating from a point source on his property where he knows the pollution is being discharged into navigable waters without an NPDES permit.<sup>96</sup>

In Pennsylvania, the Commonwealth Court reached a similar result in *North Cambria Fuel Company v. Department of Environmental Resources*.<sup>97</sup> In *North Cambria*, Pennsylvania's environmental regulatory authority, the Department of Environmental Resources ("DER"), ordered a strip mine operator to take AMD abatement actions on his land even though the AMD originated on property not owned by him.<sup>98</sup> The Pennsylvania court, in construing its own version of the

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<sup>90</sup> *Id.* at 770 (citation omitted).

<sup>91</sup> See 33 U.S.C. §§ 1251(a), 1311(a), 1342(a) (1994).

<sup>92</sup> 979 F.2d 977.

<sup>93</sup> *Id.* at 978.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 978-79

<sup>96</sup> *Id.* at 979-80.

<sup>97</sup> 621 A.2d 1155 (Pa. Commw. 1993).

<sup>98</sup> The court called this type of runoff "fugitive water" and defined it as "mine water entering a particular mine by gravity or under pressure from adjacent mines." *Id.* at 1157 n.2 (citing *Barnes & Tucker*, 371 A.2d 461, 465 (Pa. 1974)).

CWA,<sup>99</sup> held that “[t]o impose liability under this provision, the courts of this Commonwealth have held that neither fault nor causation is necessary to impose liability.”<sup>100</sup> In upholding the DER’s order, the court reasoned that the statute is primarily concerned with the discharge of pollutants and not the source.<sup>101</sup>

## 2. Effects of the Storm Water Program on Regulatory Authorities

A recent West Virginia case illustrates how the EPA regulation of abandoned mine AMD continues to have an effect on SMCRA enforcement authorities. In *Cat Run Coal Company v. Babbit*,<sup>102</sup> the plaintiff, a company owning land with abandoned mines, brought suit against OSM after it approved an amendment to West Virginia’s version of the surface mining program, the West Virginia Surface Coal Mining Reclamation Act (“WVSCMRA”).<sup>103</sup> On June 28, 1993, the WVDEP sought OSM approval of numerous amendments, among them, an amendment to the West Virginia Code of State Regulations regarding reclamation expenses incurred by the WVDEP. Prior to the amendment, chapter thirty-eight, article two, section 12.4 provided that “[t]he permittee shall be liable for all reclamation costs, and the [Director of the WVDEP] shall collect from the permittee all costs in excess of the amount forfeited.”<sup>104</sup> The amendment to section 12.4(e), article two, chapter thirty-eight of the West Virginia Code of State Regulations stated that “[t]he operator, permittee, or other responsible party shall be liable for all

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<sup>99</sup> The CWA’s permit programs are based upon water quality standards that are set by the states pursuant to title 33, section 1311(b)(1)(C) of the United States Code. The CWA requires each state to adopt its own water quality standards for its interstate and intrastate waters. 33 U.S.C. § 1313(a)-(c) (1994). The EPA must approve the water quality standards set by the states. 33 U.S.C. § 1313(c)(1), (3) (1994). When the EPA is the permitting authority, states have the opportunity to certify whether a discharge under the proposed permit will be consistent with its water quality standards. 33 U.S.C. § 1341 (1994). If the state concludes that its water quality standards will not be achieved, then the permit cannot issue unless it is modified to comply with the standards. *Id.*

<sup>100</sup> *North Cambria*, 621 A.2d at 1159.

<sup>101</sup> *Id.* (citing *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 318 (Pa. 1973)).

<sup>102</sup> 932 F. Supp. 772 (S.D.W. Va. 1996).

<sup>103</sup> W. VA. CODE §§ 22-3-1 to -32 (1994 Supp. 1996). The West Virginia Division of Environmental Protection (“WVDEP”) is the state regulatory authority responsible for implementing WVSCMRA. W. VA. CODE § 22-3-2(b)(8)(c).

<sup>104</sup> *Cat Run Coal Co.*, 932 F. Supp. at 774 (quoting W. VA. CODE STATE R. § 38-2-12.4 (1996) (effective date June 1, 1991) (emphasis removed) (modification in original)).

costs in excess of the amount forfeited.”<sup>105</sup>

Upon receiving the proposed amendments, OSM invited public comment in a Federal Register notice published August 12, 1993.<sup>106</sup> The National Council of Coal Lessors (NCCL), of which the plaintiff coal company was a member,<sup>107</sup> submitted its opposition to the amendment. The NCCL maintained that

there are no ‘responsible parties’ other than ‘permittees’ and ‘operators’ under the SMCRA and the WVSMCRA, and therefore the addition of ‘other responsible parties’ was at best confusing surplusage; . . . [furthermore,] any attempt to shift reclamation costs away from ‘permittees’ or ‘operators’ . . . to landowners or royalty owners . . . was unauthorized by the State Program, and was inconsistent with the SMCRA and the WVSMCRA, both of which were intended to protect landowners and to require that ‘operators’ and ‘permittees’ fully reclaim their mine sites (footnote omitted).<sup>108</sup>

The OSM response to the NCCL’s comments was that

West Virginia’s proposed requirement is neither specifically authorized nor prohibited by SMCRA. However, it is consistent with the principles and purposes of SMCRA to ensure the reclamation of surface areas disturbed by coal mining. Therefore, since the proposed provision does not conflict with any Federal Requirements under SMCRA, the Director finds that the proposed provision does not conflict with SMCRA or the Federal regulations, and he is approving it.<sup>109</sup>

In holding in favor of the plaintiff, the court stated that the OSM-approved amendment is inconsistent with the act because it illegally “allows WVDEP to transfer the costs of reclamation from operators and permittees (and the reclamation bond pool they finance) to the landowners expressly protected under the

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<sup>105</sup> 932 F. Supp. at 774 (quoting W. VA. CODE STATE R. § 38-2-12.4(e) (emphasis added)).

<sup>106</sup> 58 Fed. Reg. 42,903. A nearly verbatim summary of the amendment to WEST VIRGINIA CODE STATE R. § 38-2-12.4(e) appeared in the Federal Register. 58 Fed.Reg. at 42,909.

<sup>107</sup> 932 F. Supp. at 774.

<sup>108</sup> *Id.* at 775-76.

<sup>109</sup> 932 F. Supp. 772, 776 (quoting 60 Fed.Reg. 51,900, 51909 at B.9.d(3) (Oct. 4, 1995)) (citations omitted).



SMCRA.”<sup>110</sup>

*Cat Run* is an example of the type of confusion caused by the EPA’s extension of CWA liability under the storm water regulations to include discharges from abandoned mines. Because the funds available to the state SMCRA regulatory authorities for hydrological reclamation are so inadequate,<sup>111</sup> states like West Virginia are looking to pass on the costs of AMD reclamation to the landowners — a method that obviously offends SMCRA.<sup>112</sup> This tendency highlights a need for SMCRA and CWA enforcement authorities to recognize the overlap in the laws in their efforts to control AMD from abandoned mines.

The goal of the AML program is to complete reclamation on abandoned mine sites.<sup>113</sup> When the program is followed, proper reclamation of the sites by the operators or permittees ameliorates any water pollution problems.<sup>114</sup> Proper reclamation also eliminates the need for NPDES permits for these sites, since presumably after proper reclamation, storm water discharges would no longer contact AMD-producing agents.<sup>115</sup>

SMCRA envisions complete hydrological reclamation of abandoned mines, yet the task cannot be accomplished through the AML program. Because SMCRA regulates mining through a permitting system,<sup>116</sup> it has no authority over discharges from abandoned mines over which no one holds a permit. Thus, the AML fund is used to abate the acid discharges from these sites without shifting the cost to anyone.<sup>117</sup> The AML program is designed to repair the damages caused by mining, no matter who caused them.<sup>118</sup> The owners of the properties on which there are

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<sup>110</sup> 732 F. Supp. at 781.

<sup>111</sup> 136 Cong. Rec. 4423, 4426 (1990) (estimating reclamation costs for abandoned mine sites to be about 6 billion dollars while the AML fund generated only 3 billion dollars from 1977 through 1990).

<sup>112</sup> See 932 F. Supp. at 781.

<sup>113</sup> *American Mining Congress*, 965 F.2d at 766.

<sup>114</sup> *Id.* at 767.

<sup>115</sup> *Id.* See also, 55 Fed. Reg. 47990, 48033. (“EPA believes that, as a general matter, areas which have undergone reclamation pursuant to such laws [as the SMCRA] have concluded all industrial activity in such a way as to minimize contact with overburden, mine products, etc.”).

<sup>116</sup> 30 U.S.C. § 1265(a) (1994).

<sup>117</sup> 30 U.S.C. § 1231(b)(1) (1994).

<sup>118</sup> 30 U.S.C. § 1231(c) (1994).

abandoned mines are not required to apply for permits under the AML program. Thus, state SMCRA regulatory authorities are responsible for eliminating the discharges from these sites even though the AML Fund is grossly inadequate and the costs cannot be shifted.<sup>119</sup> This causes state regulatory authorities like the WVDEP to attempt to hold landowners liable for the costs of reclamation under its SMCRA statute in violation of SMCRA's scope and authority.<sup>120</sup>

The problem of cleaning up AMD from abandoned mines may also be the result of problems in the enforcement of the SMCRA and the CWA.<sup>121</sup> SMCRA's enforcement program calls for periodic inspections of mine sites and mandatory citations for any violations observed.<sup>122</sup> NPDES permits, on the other hand, set terms for a more passive monitoring and reporting system.<sup>123</sup> James M. McElfish, Jr. and Ann E. Beier, in their book *Environmental Regulation of Coal Mining: SMCRA's Second Decade*, assert that the EPA and its state counterparts assume that the OSMRE and its state counterparts are handling water regulations from coal mines,<sup>124</sup> and another author asserts further that the OSM and the state mining regulators "have made the converse assumption."<sup>125</sup> Recognizing this lapse in enforcement, a few environmental groups have made clear their intentions to sue their state regulatory authority for failing to enforce the CWA in several areas "including the failure to enforce the monthly average effluent limitations of title forty, part 434 of the Code of Federal Regulations, the failure to require all operators to have NPDES permits and the failure of OSM to enforce these requirements

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<sup>119</sup> According to one authority, the fund has been used almost exclusively to repair priority one and two problems because of the budget shortfall. MCELFISH & BEIER, *supra* note 38, at 257. Estimates of the funds needed to reclaim the priority 1 and 2 sites remaining as of 1989 are in the billions of dollars and the price tag for restoring and reclaiming land and water resources in the priority 3 category range up to \$30 billion. *Id.* at 264.

<sup>120</sup> See generally *Cat Run Coal Co.*, 932 F. Supp. 772.

<sup>121</sup> For an example of problems in enforcement of the two acts, see Courtney Shea, *Regulating for the Long Term: SMCRA and Acid Mine Drainage*, 10 J. NAT. RESOURCES & ENVTL. L. 193, 204 (1995).

<sup>122</sup> See 30 U.S.C. § 1271 (1994).

<sup>123</sup> 40 C.F.R. 122.41 (1996).

<sup>124</sup> MCELFISH & BEIER, *supra* note 36, at 159.

<sup>125</sup> Caroline Henrich, *Acid Mine Drainage: Common Law, SMCRA, and the Clean Water Act*, 10 J. NAT. RESOURCES & ENVTL. L. 235, 244 (1995).

through its oversight of the [state's] regulatory program."<sup>126</sup>

### III. TREATMENT PONDS

A second controversy that arises from the overlap of SMCRA and the CWA is the regulation of treatment ponds at active mines. Coal operators often form treatment ponds when working in mountainous areas by depositing excess spoil into low-lying areas where streams are flowing.<sup>127</sup> Waste materials from these fill areas, known as "valley fills," flow downstream into man-made treatment ponds constructed in the waterway.<sup>128</sup> SMCRA generically approves of and encourages the use of these siltation and sedimentation ponds to treat polluted waters.<sup>129</sup> However, as was previously mentioned, coal operators are also required to comply with the regulations set forth by the EPA.<sup>130</sup> Since the CWA only governs discharges made into "navigable waters," there is no doubt that discharges from sedimentation ponds into streams should require an NPDES permit. However, one might think, as coal operators have in the past, that discharges into sedimentation ponds would not be governed by the CWA.<sup>131</sup> This, however, is not the case.<sup>132</sup>

The term "navigable waters" is interpreted broadly by the EPA as all the waters of the United States including the territorial seas.<sup>133</sup> Coal operators once contended that in-stream treatment ponds were not waters of the United States, citing as evidence the definition of navigable waters at title forty, section 122.2

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<sup>126</sup> Courtney Shea, *supra* note 116, at 204 (citing "Letter from National Wildlife Federation and West Virginia Highlands Conservancy to Bruce Babbitt, Robert Uram and David Callaghan, U.S. Dept. of the Interior, (Jan. 1995) (on file with author)").

<sup>127</sup> Thomas C. Reed, *Some Recent Developments in the Water Resource Protection Obligations of the Coal Industry: Can Coal and Water Mix?*, 12 E. MIN. L. FOUND. § 13.05[1] (1991).

<sup>128</sup> *Id.*

<sup>129</sup> 30 U.S.C. § 1265(b)(10)(C) (1994).

<sup>130</sup> *See* 40 C.F.R. § 434 (1996).

<sup>131</sup> *See generally* West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276 (S.D.W. Va. 1989), *aff'd mem.*, 932 F.2d 964 (4th Cir. 1991).

<sup>132</sup> *Id.*

<sup>133</sup> 40 C.F.R. § 122.2 (1996).

which excludes some or all treatment ponds.<sup>134</sup> However, this ambiguity was put to rest by the Fourth Circuit in *West Virginia Coal Ass'n v. Reilly*.<sup>135</sup>

A. West Virginia Coal Association v. Reilly

In *Reilly*, several industry groups in West Virginia challenged the EPA's claim of jurisdiction over the construction of in-stream waste treatment facilities. According to the CWA,<sup>136</sup> the Secretary of the Army, acting through the Chief of Engineers, has the authority to issue permits for the discharge of dredged or fill material into the navigable waters of the United States at specified disposal sites.<sup>137</sup> The EPA Administrator may "deny or restrict" the use of any defined area as a disposal site for dredged and fill material whenever he determines that the discharge of such material will have an unacceptable adverse impact on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.<sup>138</sup>

The two issues brought before the court were (1) who has authority over the placement of fill material used to construct in-stream water treatment ponds in small streams for disposal of waste associated with surface coal mining operations, and (2) does the EPA have the authority to encompass these ponds and the waters flowing into them as "waters of the United States?"<sup>139</sup> Arguing the first question, the plaintiffs asserted that under the CWA, the Secretary of the Army has the authority to issue permits "for the discharge of dredged or fill material in the navigable waters at specified disposal sites."<sup>140</sup> In response, the Court considered the Army Corps of Engineers ("COE") definition of "fill material," which excludes pollutants discharged into the water "primarily to dispose of waste,"<sup>141</sup> and supplemented this definition with the contents of a memorandum of agreement ("MOA") between the

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<sup>134</sup> The federal regulations state that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States." 40 C.F.R. § 122.2

<sup>135</sup> 728 F. Supp. 1276.

<sup>136</sup> 33 U.S.C. § 1344 (1994).

<sup>137</sup> 33 U.S.C. § 1344(a) (1994).

<sup>138</sup> 33 U.S.C. § 1344(c) (1994).

<sup>139</sup> *Reilly*, 728 F. Supp. at 1277.

<sup>140</sup> 33 U.S.C. § 1344 (1994).

<sup>141</sup> 33 C.F.R. § 323.2(e) (1991).

EPA and COE entered into on February 28, 1986.<sup>142</sup> The MOA provided that fill material will be subject to the CWA if its “discharge has as its primary purpose or has as one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation.”<sup>143</sup> The MOA, however, also provided that fill will be subject to Section 402 of the CWA if it is “in liquid, semi-liquid, or suspended form or if it is a discharge of a solid material of a homogenous nature normally associated with single industry wastes . . . .”<sup>144</sup> Using this definition, the court concluded that the types of fill used to construct in-stream impoundments rightly fall under the definition and therefore should be governed by the EPA under Section 402 of the CWA as pollutants.<sup>145</sup>

In answer to the second part of the authority issue, the district court rejected the claim that the EPA acted beyond its authority in regulating waters flowing into the impoundment ponds.<sup>146</sup> The Court held that the in-stream treatment ponds and the waters above such ponds fall within the definition of “waters of the United States,” and the EPA did not act beyond its statutory authority in regulating these waters.

### B. *The Future of In-Stream Treatment Ponds*

Thus far, *Reilly* has been the only case to address specifically whether the EPA may govern in-stream treatment ponds as “waters of the United States.”<sup>147</sup>

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<sup>142</sup> 51 Fed. Reg. 8871 (Mar. 14, 1986).

<sup>143</sup> *Id.* at § B.4.a.

<sup>144</sup> *Id.* at § B.5.

<sup>145</sup> *Reilly*, 728 F. Supp. 1287.

<sup>146</sup> *Id.* at 1288.

<sup>147</sup> One author has noted that *Reilly* has a “limited application” because:

[f]irst, the case does not preclude a change of position by the EPA because the court merely held that the EPA’s interpretation was acceptable, not that the coal association’s position was legally untenable. The holding was based on deference to the EPA’s interpretation: the court held that the EPA’s position was a permissible interpretation of the CWA, but did not conduct a *de novo* review of the merits of that position. . . . Third, the EPA ultimately did not seek to forbid the use of in-stream sedimentation ponds. . . . The EPA essentially was willing to permit violations of effluent limits in areas not containing “the designated use of aquatic life.”

Beth Leibowitz, Note, *The New Gold Rush: Mine Tailings in Southeast Alaska and Perversion of the Clean Water Act*, 27 U. MICH. J.L. REF. 919 (1994).

According to this decision, any mine operator utilizing in-stream impoundments to treat polluted water to comply with the EPA's regulations could be required to obtain a Section 404 permit for any work done on the impoundment itself, a Section 402 permit for any discharge to the impoundment, in addition to the NPDES permit which governs discharges from the impoundment. This procedure raises the question of why the EPA is concerning itself with the quality of the water contained in industrial impoundments that are not used for recreational or aquatic wildlife. It appears to be a case of excessive regulation.

#### IV. CONCLUSION

Whenever a government uses two major pieces of legislation to combat a single public enemy, complaints of over-regulation and questions of jurisdiction from the individuals and industries affected are inevitable. Acid mine drainage is a harmful and elusive enemy which threatens the integrity of our nation's waters. The threat it poses to our environment cannot be solved without the awesome power of government; however, a fair and consistent enforcement of these two acts is imperative.

The mining industry's push to exempt landowners from liability for the acid discharges from abandoned mines<sup>148</sup> is questionable in light of the serious AMD problems from these sources. The burden imposed on landowners to take abatement measures under the CWA is far outweighed by the continuing threat of abandoned mine AMD.

The state environmental authorities who must completely reclaim these abandoned mine lands must pursue the landowners and make them pay the costs. In order to accomplish this, the state SMCRA regulators must increase coordination with the EPA's state counterparts. The deficit problem in the AML trust fund is not likely to improve anytime soon. Since SMCRA prohibits holding landowners liable for reclamation costs, the only way the abandoned mine AMD problem can be effectively remedied is by state environmental authorities seeking sanctions under the CWA.

Finally, the mining industry is probably correct in claiming that the current CWA laws governing in-stream impoundments are overly burdensome.<sup>149</sup> The EPA's interest in protecting the quality of industrial impoundments that have no meaningful wetlands or recreational use seems to serve no rational purpose,

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<sup>148</sup> See *Clean Water Act: Hearings on Clean Water Act Reauthorization Before the Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment*, 104th Cong. 1st Sess. (Feb. 24, 1995) (statement of Douglas E. McAllister, Esq.) 1995 WL 76955.

<sup>149</sup> *Id.*

especially in light of the onerous burden it places on coal operators attempting to comply with the CWA.

SMCRA and the CWA are both competent, formidable weapons in the war against acid mine drainage. If the regulatory authorities coordinate the two properly, the acts provide comprehensive protection against mine pollution. If they are not, the acts have the potential to create tension and justified anger among those individuals and industries affected.