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PANDORA IN THE COAL FIELDS: ENVIRONMENTAL LIABILITIES, ACQUISITIONS, AND DISPOSITIONS OF COAL PROPERTIES

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I. INTRODUCTION

Evaluation of a prospective acquisition disposition of interests in coal and mining operations traditionally has led parties to direct their attention to tax considerations, title, valuation of assets, quantity and quality of reserves, employee liabilities, securities regulation requirements, and similar concerns. Liabilities arising from existing or potential environmental hazards attendant the mineral reserve at issue are frequently overlooked.

The focus of this Article is the potential consequences of ignoring environmental concerns in negotiation and agreements relating to the disposition and acquisition of coal properties. The general issue of environmental liability "running with the land" in the context of hazardous waste disposal has been the topic of some scholarly discussion and increasing litigation.¹ Suggestions are made as to possible approaches to such transactions which may be helpful in identifying and avoiding environmental liabilities. It should be noted that in the process of indicating potential statutory and common law environmental liabilities, this Article does not attempt to review possible defenses of the vendor or lessor, or the vendee or lessee. The primary goal of this Article is to heighten the awareness of environmental considerations of parties engaged in coal property transactions and to point out the extremely onerous consequences that may result from ignoring environmental problems.

II. POTENTIAL LIABILITIES GENERALLY

Potential environmental liabilities may arise from acid mine drainage, soil erosion, stream sedimentation, impaired water well quality and quantity, fugitive air

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¹ See, e.g., Hall, *The Problem of Unending Liability for Hazardous Waste Management*, 38 BUS. LAW. 593 (1983); Note, *Successor Landowner Liability for Environmental Torts: Robbing Peter to Pay Paul*, 13 RUTGERS L.J. 329 (1982). See also Zazzali & Grad, *Hazardous Wastes: New Rights and Remedies?*, 13 SETON HALL L. REV. 446 (1983); Note, *Toward Strict Liability for Abandoned Mine Drainage*, 71 KY. L.J. 193 (1982-83); Note, *Commonwealth v. Barnes & Tucker Co.—The Burden of*

emissions from tipples and truck traffic, air pollution from burning coal refuse piles, underground mine fires, flooding caused by stream obstructions or diversions, and mine subsidence. At the outset, both the buyer and seller should disabuse themselves of the notion that they can easily avoid environmental liabilities if they structure their transaction properly. This optimistic view is inaccurate and irresponsible. It is exceedingly difficult to avoid liability by private contract. To put it bluntly, the owner of coal property can rarely, if ever, dispose of its environmental liability by sale or lease; however the buyer, simply by virtue of assuming ownership, *can acquire* environmental liability.

Following disposition of coal properties, the seller may have continuing responsibility for environmental hazards he created, allowed to continue, or to which he contributed. That liability may be based on common law, statute, or permit requirements. Once coal assets are conveyed, the seller may find that large sums of money will be needed to abate environmental hazards without the availability of offsetting income from the property. The lessor can expect similar liabilities, but may be able to derive offsetting income from royalties.²

The buyer too, is exposed to potentially enormous liability upon acquisition.³ In some cases the buyer may offset abatement expenditures with income from the acquired property. However, the presence of an environmental hazard on the land may result in a regulatory agency refusal to issue required permits or a later administrative decision to revoke or suspend the buyer's permit. In such an event the buyer would have the choice of accepting the cost of abatement or losing the entire investment because of the inability to obtain the required permits. If such a scenario is not bleak enough, the buyer also may be required to abate and yet still be refused permission to engage in mining activities.

Moreover, the buyer's risks extend not only to existing environmental problems but also to potential hazards as well. Thus, for example, the buyer may find mining of the acquired reserves prohibited by provisions of state and federal law which

Treating Acid Mine Drainage, 80 W. VA. L. REV. 519 (1977-78); Schwin, *Tort Liability Resulting from Mine Operations*, 8 ROCKY MTN. MIN. L. INST. 461 (1963).

² AMERICAN LAW OF MINING § 132.05[6] (2d ed. 1984) [hereinafter cited as AMERICAN LAW OF MINING] for a general discussion of lessor's liability. Note that another situation may arise when a landowner may be exposed to liabilities similar to that of the lessor. That situation arises in the context of contract mining arrangements between a landowner and a contractor. In this regard, *see generally* COAL LAW AND REGULATION] § 83.07 [3] (Vish and McGinley eds. 1983), [hereinafter cited as COAL LAW AND REGULATION]. *Cf.* West v. National Mines Corp., 285 S.E. 2d 670 (W. Va. 1981) (the court held a coal operator liable for a nuisance created by noise and dust caused by an independent contract coal hauler).

³ The choice of the words "enormous liability" was not a cavalier one. On the contrary, those words are used to impress upon the reader the extreme gravity of potential environmental liabilities. One need only consider the cost of treatment of a gravity discharge of five million gallons per day of acid water to comprehend the point here emphasized. *See* Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977) [hereinafter cited as *Barnes II*].

allow certain areas to be designated as unsuitable for mining.⁴ The buyer may also find that although a permit can be obtained, environmental problems attendant to mining will so inflate the cost of mineral extraction and reclamation that operations are financially infeasible. The buyer also may be hindered by local zoning and land use restrictions.

A buyer may be liable for payment of minimum royalties, even if he cannot mine coal because of the inability to obtain permits, or unexpected reclamation or abatement costs. Such a possibility should be recognized and provided for in a conveyance agreement.⁵

The spectre of such potential environmental liability clouding disposition and acquisition noted above is a compilation of worst case scenarios. While such problems may not exist in many transactions, counsel need to understand the potential liabilities so their clients will not be exposed to maximum risks; risks which the uninitiated may have no reason to foresee.

III. COMMON LAW LIABILITY

A. *Post-Transfer Liability of Seller and Lessor for Pre-Existing Conditions*

As stated above, a seller or lessor of coal property cannot expect to avoid environmental liability by virtue of the transaction. Common law liability remains with the seller or lessor if there is a condition on the land conveyed for which liability would have attached if the seller or lessor had remained in possession. Such common law liability is founded upon public and private nuisance principles.

The *Restatement (Second) of Torts* sets forth the prevailing view as to the imposition of such liability on the seller and lessor:

§ 840A. Continuing Liability After Transfer of Land

(1) A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land.

⁴ See, e.g., Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272 (1977). See also Gorrell and Russell, *The Petition Process for Designating Lands Unsuitable for Surface Mining Operations, Extreme Solutions or Unnecessary Exercise*, 71 Ky. L.J. 57 (1982-83).

⁵ But see *Olbum v. Old Home Manor, Inc.*, 314 Pa. Super. 46, 459 A.2d 757 (Pa. Super. Ct. 1983). In *Olbum*, the court held that a coal operator was not required to pay its lessor minimum royalties when the coal seam it had leased proved unmineable. Although the court's opinion does not discuss the nature of the unmineability, the trial court's unreported opinion recognized that it was due in substantial part to the Pennsylvania Department of Environmental Resource's refusal to issue a permit to the operator because of acid mine drainage problems. See also *Boyer v. Fullmer*, 176 Pa. 282, 35 A. 235 (1896); RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 263 (1970). For a discussion of *Olbum*, see Burke, *Recent Cases Relating to Coal Properties*, 5 E. MIN. L. INST. 4-21 (1984). For other cases on this subject, see 4 AMERICAN LAW OF MINING § 132.06; Annot., 28 A.L.R.2D 1007 (1953) (construction and effect of provisions in mineral leases excusing payment of minimum royalties).

(2) If the vendor or lessor has created the condition or has actively concealed it from the vendee or lessee the liability stated in Subsection (1) continues until the vendee or lessee discovers the condition and has reasonable opportunity to abate it. Otherwise the liability continues only until the vendee or lessee has had reasonable opportunity to discover the condition and abate it.⁶

Thus common law nuisance liability attaches if the seller or lessor would have been liable if he had remained in possession. The comments to the section emphasize the continuing nature of such liability:

If the vendor or lessor has himself created on the land a condition that results in a nuisance, he cannot escape liability for the continuation of the nuisance by selling or leasing the land to another. . . . [H]is responsibility toward those outside the land is such that he is not free to terminate his liability to them for the condition that he has himself caused or concealed, by passing the land itself on to a third person.⁷

Many cases and commentators adhere to the *Restatement* view that “[t]he essence of a nuisance is an interference with the use and enjoyment of land. As a general rule, one who creates a nuisance is liable for the resulting damages and ordinarily his liability continues for as long as the nuisance continues.”⁸

In a situation where a lessee trespasses on an adjoining property and mines coal from that tract, a lessor can be held liable for the trespass. In such a situation the West Virginia court has held that if the lessor “had knowledge of or acquiesced in its lessees’ trespass or failed to adequately warn its lessees about [the adjoining landowner’s] reservation [of coal], it can be held jointly accountable for the trespass on a common purpose theory.”⁹

A seller or lessor may also have continuing liability for surface subsidence damage where a portion of a tract has already been mined by deep mining methods.¹⁰ If subsequent to such transfer subsidence damage occurs, the seller or lessor may be exposed to liability provided that such damage occurs over an area undermined prior to the transaction.

Another liability of a seller or lessor for prior conditions may arise if an area has been contaminated by hazardous or toxic wastes used as part of a previous

⁶ RESTATEMENT (SECOND) OF TORTS § 840A [hereinafter referred to as RESTATEMENT].

⁷ *Id.* Comment c. See also Department of Env'tl. Protection v. Exxon Corp., 151 N.J. Super. 464, 376 A.2d 1339 (1977).

⁸ Philadelphia Elec. Co. v. Hercules, Inc., 587 F. Supp. 144, 152 (E.D. Pa. 1984), citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89 (4th ed. 1971); *Exxon Corp.*, 151 N.J. Super. 464, 376 A.2d 1339; *Ryan v. Commonwealth Dept. of Env'tl. Resources*, 30 Pa. Commw. 180, 373 A.2d 475 (1977).

⁹ *Reynolds v. Pardee & Curtin Lumber Co.*, 310 S.E.2d 870, 876-77 (W.Va. 1983). See also *O'Dell v. McKenzie*, 150 W.Va. 346, 145 S.E.2d 388 (1965); *Flanagan v. Gregory & Poole, Inc.*, 136 W.Va. 554, 67 S.E.2d 865 (1951).

¹⁰ See, e.g., *Campbell v. Louisville Coal Mining Co.*, 39 Colo. 379, 89 P. 767 (1907).

mining operation. An example of such a situation would be the on-site disposal of toxic PCB-contaminated electrical transformers or capacitors. Even very small amounts of PCB's contained in such devices can be extremely toxic to humans.

Other examples of a seller's continuing liability are numerous. A company that has developed a coal refuse pile may find it's liability continues after sale if the coal refuse later begins to burn. The post-sale collapse of a sediment pond or lagoon also could invoke a seller's liability; the spectre of a catastrophe the magnitude of the 1972 Buffalo Creek, West Virginia, coal refuse dam collapse makes this example particularly compelling.

In addition, the seller or lessor would also be subject to liability if a nuisance resulted from artificial conditions on the land created by third persons, with or without the consent of the seller or lessor, where the transferor would have been liable because of *failure to abate*:

Thus when the transferor, if he had remained in possession, would be subject to liability for a nuisance resulting from a condition created by trespassers on his land or by his predecessor in title before he acquired the land, he remains subject to liability after he has sold or leased the land to another.¹¹

A lessor or seller may also be exposed to liability when strip mining and reclamation operations have been conducted on a site and the reclamation fails subsequent to lease or sale. In this context a Pennsylvania court has held that a lessor's liability

was not predicated on the creation of the artificial condition, nor need it be, but rather, upon its maintenance and continuance. With notice and knowledge of the unreasonable risk to the lower adjoining landowners, [the lessor] took no measures, preventive or corrective, to eliminate the danger which subsequently caused damage to [the adjoining landowner's] property. A finding against [the lessor] was clearly not dependent upon a finding against either or both coal strippers (lessees).¹²

B. *Post-Transfer Liability of Seller and Lessor For New Conditions*

Even though a seller or lessor takes no active part in causing a nuisance after possession of land has been transferred, he or she may nonetheless be liable for abatement. The *Restatement* identifies the nature of this liability:

A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and (b) he then knows or should know that it will necessarily involve or is already causing the nuisance.¹³

¹¹ RESTATEMENT, *supra* note 6, at § 840A comment d.

¹² *McArthur v. Balas*, 402 Pa. 116, 122, 166 A.2d 640, 643 (1961).

¹³ RESTATEMENT, *supra* note 6, at § 837.

A West Virginia case, *O'Dell v. McKenzie*,¹⁴ aptly illustrates the application of this type of liability. In that action an upstream riparian landowner sued the downstream lessor of mineral rights and his mining company lessee for flooding damages caused by the lessee's casting of spoil into the stream running through both tracts. McKenzie, the lessor, denied any responsibility or even knowledge whatsoever of the actions of his lessee. The West Virginia court rejected such a defense stating:

The evidence . . . shows that the defendants, lessors, and the lessee had a common purpose in the stripping of coal from the defendants' land, that is, the defendants received a certain sum of money per ton for all coal removed and the lessee, it may be assumed, received or expected to receive a sum for each ton of such coal so as to show a profit upon the enterprise. We hold therefore that, under the circumstances of this case, the defendants are jointly liable with the lessee for the resulting damage to plaintiff.¹⁵

The Kentucky Court of Appeals has also addressed the issue of landowner-lessee liability where a lessee strip mining operation damaged the lands of an adjoining landowner. The Kentucky court focused on the landowner-lessee's knowledge of the likelihood that damages might occur as a result of strip mining operations:

The [lessor] was in the mining business. The leasing of this land was for the purpose of carrying out mining operations through a third party. Strip mining by the lessee was authorized. The topography of the land involved was such that debris from the operation would likely be cast or eroded into mountain streams, as a result of which damage to lower riparian owners could be reasonably anticipated.¹⁶

As in *O'Dell*, the Kentucky court emphasized the profit making nature of the lessor's interest in the mining enterprise:

Here we have a potentially harmful activity, conducted on the owner's land for his profit. The only difference between this case and the blasting cases is that the

¹⁴ *O'Dell*, 150 W.Va. 346, 145 S.E.2d 388. *But see* *Kutsch v. Miller*, 436 Pa. 392, 265 A.2d 631 (1970) (no liability was imposed on a lessor whose only control of lessee's operation was to ensure payment of tonnage royalties).

¹⁵ *O'Dell*, 150 W.Va. at 350, 145 S.E.2d at 391.

¹⁶ *Green v. Asher Coal Mining Co.*, 377 S.W.2d 68, 72 (Ky. 1964). *See also* HARPER & JAMES, THE LAW OF TORTS § 27.20 (1956). W. PROSSER, *supra* note 8 § 64, at 360.

The Kentucky court made a pertinent and revealing observation when it stated that: "In a sense the leasing of land for exploitation is a method of use of it by the owner. He may not utilize it so as to cause injury to others." *Green*, 377 S.W.2d at 72.

Green also addressed the situation where mining operations have ended, the leasehold has terminated, and the lessor resumed possession. In that case, the Kentucky court indicated that liability would attach to the landowner for conditions created by its lessee.

[T]he plaintiffs could prove that the defendant had assumed or had the right to assume actual control of it's land. In such an event the [lessor] would be in the position of a landowner continuing to maintain a nuisance created by his lessee and of course this could be a wrong committed directly by the owner.

Id. at 72.

potentiality of harm is more immediate in the latter. The substantial time lapses between the mutual activity on the land and the resulting injury to others does not affect the question of liability.¹⁷

The Kentucky court however, did not suggest that a lessor would be held strictly liable in such circumstances.¹⁸ Recognizing the great potential for damage and injury that accompanies coal mining operations, one must wonder whether the court's caveat about strict liability limits liability. In what situation would damage and injury from mining operations be so unforeseeable as to exempt a lessor from liability? The lesson of *O'Dell* is obvious. If one sells or leases coal reserves in exchange for the payment of royalties, liability for environmental problems may attach even though the seller's or lessor's only contact with the land after transfer of possession is the receipt of royalty checks. Although no cases address the issue of seller's liability in this context, an obvious analogy may be drawn where the seller received royalties as part of a land sale agreement.

C. Buyer or Lessee's Liability

1. Generally

It is axiomatic that buyers or lessees will be liable for any nuisance they create, cause to be created, or allow to continue after transfer has taken place. In addition, liability may attach if the buyer or lessee is, or should be, aware of an artificial nuisance on the land and fails to abate it.

The Supreme Court of the United States has recently confirmed the vitality of this view of landowner liability in *Ohio v. Kovacs*, a case involving hazardous waste and environmental liabilities in the context of Kovacs's bankruptcy:

we do not question that anyone in possession of the site—whether it is Kovacs or another in the event receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio. Plainly that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.¹⁹

¹⁷ *Green*, 377 S.W.2d 68.

¹⁸ With regard to a plaintiff's burden of proof in such cases the court stated: we cannot close our eyes to the fact that an operation of this nature is obviously disruptive and destructive of substantial surface areas. While the landowner may consent to having his own land practically destroyed, he may not knowingly expose neighboring lands to injury likely to ensue therefrom and claim immunity from wrongdoing by virtue of a lease. He must act with reasonable prudence, and proof relating to the nature of the operation, the topography of the land, and the likelihood of injury may support a finding of liability.

Id. at 72.

¹⁹ *Ohio v. Kovacs*, 105 S.Ct. 705, 711-12 (1985). Bankruptcy is no stranger to the coal fields. Acquisitions of bankrupt coal mining companies and/or the mineral reserves they own is commonplace.

See Walker, *Mineral Bankruptcies: Special Consideration*, 4 E. MIN. L. INST. Ch. 7 (1983). Dobbs & Campbell, *The Researcher's Position @ Wyo. 1985 Pitfalls*, 4 E. MIN. L. INST. Ch. 8 (1983).

Thus, liability may be incurred notwithstanding the fact the buyer or lessee has done absolutely nothing to create the nuisance condition.

2. The Faultless Buyer and Lessee

A party seeking to purchase or lease a mineral reserve should be aware that he or she may be held responsible, upon transfer, for abatement of nuisance conditions on the land which were created by predecessors in title and interest.

A buyer who is considering purchase of all or a substantial part of an existing coal mining entity must exercise care with regard to the manner in which a purchase agreement is drafted, lest the transaction be construed as a "de facto merger." When such a merger takes place some courts view the buyer as acquiring the liabilities of the seller.²⁰ It should be noted, however, that some courts have refused to impose liability on a land possessor where such liability is based solely on possession or ownership of real property.²¹

The majority view, however, is that liability without fault may be imposed in many situations.²² The *Restatement* reflects this common law view:

A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land, if the nuisance is otherwise actionable, and

- (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and
- (b) he knows or should know that it exists without the consent of those affected by it, and
- (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.²³

In *Commonwealth v. Barnes & Tucker Co.*, a Pennsylvania case involving imposition of public nuisance liability for a post-mining discharge of acid mine drainage to surface waters, the court held:

Kovacs and similar cases put the prospective buyer on express notice that any acquisition of a bankrupt corporate entity or its assets would carry with it the environmental common law and statutory liabilities of the buyer's predecessor in interest.

²⁰ For a case discussion of environmental liability in the context of a "de facto merger," see *Hercules*, 587 F. Supp. 144.

²¹ See, e.g., *Tennessee Coal, Iron & R. Co. v. Hartline*, 244 Ala. 116, 11 So.2d 833 (1943); *Terrel v. Alabama Water Serv. Co.*, 245 Ala. 68, 15 So.2d 727 (1943); *Wiggins v. Brazil Coal & Clay Corp.*, 452 N.E.2d 958 (Ind. 1983); *Exxon, Corp.*, 151 N.J. Super. 464, 376 A.2d 1339. Cf. *State of Harrington*, 407 S.W.2d 467 (Tex. 1966), *cert. denied*, 386 U.S. 144 (1967).

²² See, e.g., *City of Jackson v. Filtrol Corp.*, 624 F.2d 1384 (5th Cir. 1980); *Hercules*, 587 F. Supp. 144; *Meadowlark Farms, Inc. v. Illinois Pollution Control Bd.*, 17 Ill. App. 3d 851, 308 N.E.2d 829 (1974); *Maynard v. Carey Constr. Co.*, 302 Mass. 530, 19 N.E.2d 304 (1939); *State v. Ole Olsen, Ltd.*, 352 N.Y.S.2d 97 (1973); *National Wood Preservers, Inc. v. Commonwealth*, 489 Pa. 221, 414 A.2d 37 (1980).

²³ RESTATEMENT, *supra* note 6, at § 839.

The absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance. The assumption that such might be the case is "based upon an entirely mistaken emphasis upon what the defendant has done rather than the result which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance."

In *Barnes & Tucker Co.*, the company was held responsible under a public nuisance theory for a 7.2 million gallons per day gravity discharge of acid mine drainage. The defendant was required to abate the entire discharge even though 6 million gallons was attributable to fugitive mine water generated in the adjacent mines of other companies.²⁵

In a subsequent Pennsylvania decision, *National Wood Preservers, Inc. v. Commonwealth*,²⁶ the court rejected the argument that it was an unconstitutional taking to impose "liability upon appellants solely on the basis of their ownership or occupancy of the land in question . . . absent a showing of the party's responsibility for causing the polluting condition."²⁷ Said the court: "It is clear that the validity of an exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation."²⁸

The drafters of the *Restatement (Second) of Torts* have aptly described the parameters of this type of common law liability:

A possessor of land is liable for failure to take affirmative action to protect another against harmful physical conditions on the possessor's land. His liability is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it and should

²⁴ *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974) [hereinafter cited as *Barnes I*] (quoting W. PROSSER, *LAW OF TORTS* § 88 (3d ed. 1964). See also *Barnes II*, 472 Pa. 115, 371 A.2d 461.

²⁵ *Barnes I*, 455 Pa. at 418, 319 A.2d at 885.

²⁶ *National Wood Preservers*, 489 Pa. 221, 414 A.2d 37.

²⁷ *Id.* at 237, 414 A.2d at 45.

²⁸ *Id.* at 238, 414 A.2d at 45. The Pennsylvania court found support for its view in a recent development in the United States Supreme Court's "taking" jurisprudence:

For example in *Penn Central Transportation Co. v. New York*, . . . the New York City Landmarks Preservation Commission designated Grand Central Station a "landmark" as part of the City's comprehensive program to preserve historic landmarks and districts. Such a designation meant that the terminal owner was required to maintain the exterior architecture of the terminal . . . that the terminal facade could not be altered without approval of the Commissioner, and that the terminal's economic potential could not be fully developed. . . . This Supreme Court held the City's landmark designation to be constitutional. It is clear from the facts in *Penn Central* that the terminal owner was in no way responsible for causing the terminal's landmark status: the owner did not "cause" the condition, nor can be viewed as being "at fault." The Supreme Court disregarded the owner's lack of responsibility, however, and found the City's action constitutional. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

National Wood Preservers, *id.* at 238-39, 414 A.2d at 45-45. See also *Hercules*, 587 F. Supp. 144;

Bonzer v. Commonwealth, 69 Pa. Commw. 633, 452 A.2d 280 (1982).
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have the responsibility of taking reasonable measures to remedy conditions on it that are a source of harm to others. Thus a vendee or lessee of land upon which a harmful physical condition exists may be liable . . . for failing to abate it after he takes possession, even though it was created by his vendor, lessor or other person and even though he has no part in its creation.²⁹

Liability without fault which is based on mere ownership or possession of real property, while subject to some exceptions,³⁰ is obviously a potentiality that should be factored into the decision to buy or lease. The risk of a faultless buyer of coal property being saddled with the tremendous financial burden of abatement of an acid water breakout on the acquired land should certainly encourage parties to an acquisition to tread very carefully indeed.

Buyer's counsel might well bear in mind the observations of the court in *United States v. Price*,³¹ with respect to the "faultless" purchase of a property upon which a hazardous waste dump was located:

They bought the property several years after all dumping had ceased and therefore argue that they never have and are not now "contributing to" the disposal of any hazardous wastes. This argument, however, is predicated on the . . . erroneous premise . . . that "disposal" requires some active behavior. This is simply not so. . . . The idea that ownership imposes responsibility for hazardous conditions on one's lands is certainly not novel As sophisticated investors, they had a duty to investigate the actual conditions that existed on the property or take it as it was. They deliberately chose the latter course Under these conditions, the . . . defendants may be responsible to stop the continued leaking of contaminants from the site.³²

IV. EFFECT OF PERMIT TRANSFERS ON ENVIRONMENTAL LIABILITIES

As a prospective purchaser contemplates the acquisition of the assets of a coal mining company, the purchaser's rights and responsibilities under federal and state environmental statutes must be taken into consideration. Conversely, a seller must determine whether disposition of ownership will simultaneously "dispose" of previously incurred or future liability for operations conducted under the authority of those same statutes.

It is important to note at the outset that statutes regulating the environmental aspects of mining often operate independently of any private agreements or contracts between mining companies. This is true not only during actual ownership but also after a transfer of ownership has occurred. As noted elsewhere in this

²⁹ RESTATEMENT, *supra* note 3, at § 839 comment d.

³⁰ The Commonwealth Court of Pennsylvania held that where the state seeks to impose liability simply because of ownership of the land alleged to be the source of pollution the burden of proving the feasibility of the abatement should fall on the state. *Commonwealth v. Wyeth Laboratories*, 12 Pa. 227, 315 A.2d 648 (1974).

³¹ *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

³² *Id.*, 523 F. Supp. at 1073.

Article, a succinct principle upon which to operate is: One can buy liability, but not so easily sell it.

A surface coal mine operation is subject to numerous federal and state laws pertaining to protection of the environment. Any person considering entry into the coal market should conduct a preliminary study to identify these laws, assess their impact on the particular operation, and structure a plan for compliance. The time, expense, and work involved should not be underestimated. Information must be collected and then provided to regulatory agencies, permits applied for, public notification requirements satisfied, and time allotted for public and agency response. When a transfer of an ongoing operation is contemplated, the potential buyer will have access to much of this data, but should conduct an independent study in order to assure that the information gathered is accurate and complete.

This section of the Article will focus primarily on the requirements for transfer of rights under the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA),³³ but also will include a cursory look at other laws requiring permits. Federal statutes and regulations provide the basis of discussion because, although state programs do vary somewhat, the essential issues and rules governing liability are the same from state to state.

A. *Federal Surface Mining Control and Reclamation Act*

The Federal Surface Mining Control and Reclamation Act of 1977 regulates the conduct of surface coal mining operations as well as the surface effects of underground operations.³⁴ Its primary goal is to protect the natural environment from the adverse effects of mining and, therefore, as a remedial measure, its scope is broad. It regulates activities from initial site preparation through actual mining operations until completion of final reclamation of the disturbed area. The agency operates through a permitting system under which an operator must obtain approval for its planned mining operation from the federal or state regulatory authority.³⁵ There are strict penalties for violations of the approved permit conditions or of other applicable regulations governing the conduct of mining activities.³⁶ Because of this extensive regulation of coal mining operations, private parties seeking to change ownership of control of mining operations, or prospective buyers or lessees who intend to initiate such operations on acquired land, cannot ignore the impact of SMCRA's regulatory process of their transaction. Permitting issues and the potential for continued or acquired liability resulting from past, current,

³³ Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (Supp. III 1979).

³⁴ *Id.* § 1291(28) (1982).

³⁵ *Id.* §§ 1256-60, 1263.

³⁶ *Id.* §§ 1268, 1271. See generally 4 AMERICAN LAW OF MINING, *supra* note 2, at § 132.05 [5] [a]; COAL LAW AND REGULATION, *supra* note 2.

or future operations are the areas of primary concern for both parties to the transaction.

1. State Permit Issued Pursuant to SMCRA

a. *Requirements for Transfer.* There are only two provisions of SMCRA which address the transfer of coal mining permits. Section 511(b) of the Act provides that: "No transfer, assignment, or sale of the rights granted under any permit issued pursuant to this Act shall be made without the written approval of the regulatory authority."³⁷ This is a clear prohibition against private contractual agreements of which the regulatory authority is unaware. The practical implications are, ultimately, not that such a private agreement has no effect, but that its effect remains a legal matter between the two parties and that, without more, it will not be recognized by the regulatory authority with respect to operations covered by that permit.

The second relevant provision of the Act, section 506(b), states, in pertinent part:

A successor in interest to a permittee who applies for a new permit within thirty days of succeeding to such interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until such successor's application is granted or denied.³⁸

Prior to a review of procedures to be followed, a definition of terms is in order. The federal Office of Surface Mining (OSM) included definitions of "successor in interest" and "transfer, assignment, or sale of rights" in its permanent program regulations³⁹ which are the standards for state regulatory programs.⁴⁰ A "successor in interest" is simply "any person who succeeds to rights granted under a permit."⁴¹ The latter definition is intended to cover a broad range of transfers including not

³⁷ U.S.C. § 1261(b) (1982).

³⁸ *Id.* § 2356(b) (1982).

³⁹ SMCRA provides for state primacy in permitting, enforcement, and overall implementation of the regulatory program. 30 U.S.C. § 1253 (1982). The federal regulatory authority, the Office of Surface Mining (OSM), retains authority to set guidelines for such state programs and to oversee their operation. States must promulgate rules and regulations which are consistent with the federal regulations. *Id.* § 1253 (a) (7). Discussions in this Article of federal regulatory provisions are, therefore, generally applicable to state law, although specific state provisions may differ in language or effect.

For extensive discussions of both the concept of the federal-state relationship contemplated by SMCRA and its implementation, see McGraw, *Surface Mining Primacy for Kentucky: The Legal Implications*, 71 KY. L.J. 37 (1983); Eichbaum & Babcock, *A Question of Delegation: The Surface Mining Control and Reclamation Act of 1977 and State Federal Relations. An Inquiry Into the Success with Which Congress May Provide Detailed Guidance for Executive Agency Action*, 86 DICK L. REV. 615 (1982); Macleod & Means, *The Federal Threat to State Primacy and Effective Regulation Under the Surface Mining Act*, 2 E. MIN. L. INST. 5-1 (1981); Friedman & Siedzikowski, *Federal and State Regulatory Authority Under the Surface Mining Control and Reclamation Act of 1977*, 82 W. VA. L. REV. 1053 (1980).

⁴⁰ C.F.R. § 788.5 (1979).

⁴¹ C.F.R. § 701.5 (1984).

only a change in technical ownership but also any changes in effective control over the right to mine.⁴²

In its attempt to implement the two sections of the Act quoted above, OSM has created a two-stage regulatory process. The agency has correctly interpreted the Act as not requiring every successor in interest to obtain a new permit. Thus, the successor may apply for a transfer of the original permit and conduct operations under the provisions of that permit or the successor may obtain a new or revised permit to operate under different or modified conditions.

The key concept in section 511(b) is the requirement of "written approval" by the regulatory authority. The agency thereby retains its authority to review the capability of the successor in interest to meet the legal, financial, ownership, and compliance requirements imposed initially on the original permittee. Obtaining regulatory approval, therefore, is not merely a routine matter of informing the agency of the transfer, assignment, or sale, but rather it requires the successor to provide information to show that the successor in interest is as capable of conducting the mining operation and reclamation as was the original permittee. The regulation outlines the following requirements for gaining agency approval: 1) obtain the performance bond coverage of the original permittee (with options provided as to the manner in which this can be done), 2) provide all of the same legal and financial information previously required of the original permittee (e.g., identification of interests, past compliance record, right of entry, insurance, other licenses and permits), and 3) advertise in the locality of the operations.⁴³ After this information has been submitted, the agency can approve or deny the transfer. If the successor intends to conduct the operations in the same manner as did the original permittee, the original permit can be transferred and the successor need not take any further action.

It is only if the successor in interest intends to make changes in the terms or conditions of the original permit that a new permit or a permit revision must be sought. The provisions ordinarily governing initial or revised permit applications are then applicable. As indicated in section 506(b), if such application is made within thirty days of the transfer, assignment, or sale of rights, the successor may continue to operate under the terms and conditions of the original permit until a decision is made on its new application.⁴⁴

b. *Liability of Original Permittee.* The original permittee should be aware of potential liability for actions taken by a successor in interest if the steps described above are not followed. It is clear that the person to whom a regulatory authority issues a permit retains responsibility for the condition of the mine site, including both on-going operations and necessary reclamation, *at least* until the regulatory

⁴² *Id.*

⁴³ C.F.R. § 788.18 (1979).

⁴⁴ U.S.C. § 1256(b) (1982).

authority has approved a transfer of the permit or until the original permittee has formally relinquished all rights as a permittee.

The Interior Board of Surface Mining and Reclamation Appeals (the Board)⁴⁵ has rendered several opinions addressing the liability of an original permittee vis-à-vis a third party for violations of permit conditions. In one such case, the Board held that a lease agreement between the permittee and a private party did not relieve the permittee of liability for a notice of violation issued in response to the lessee's activity in the permit area.⁴⁶ The Board quoted from the Preamble to OSMs interim regulations as follows: "Anyone working on the mine is there for the benefit or at the sufferance of the permittee. To excuse the permittee from violations resulting from activity of such people would undermine the permittee's motivation to exercise his control to protect against violations."⁴⁷

The same philosophy was expressed by an administrative law judge in upholding the issuance of a cessation order to a permittee who had entered into a mining agreement with a third party. The judge commented that "[t]he practical effect of imposing liability of this nature upon the permittee is that of causing permittees to be more selective in their choice of operators, assignees, and/or sublessees."⁴⁸

The notion of permittee liability was extended by the Board to a permittee where a third party had signed an "Application for Operator Reassignment" for the purpose of transferring mining rights but there was no evidence that the State of West Virginia (the permitting authority) had approved a permit transfer.⁴⁹

The question of precisely when the liability of the original permittee ends is not clear, however. One Board decision has held that once the original permittee no longer has any rights over an area under state law, then it is no longer liable for violations of permit terms or conditions. In *Marco, Inc.*⁵⁰ a notice of violation was issued to Marco, which, according to state records, held the permit for the area in question. At the hearing, however, Marco submitted evidence that it had surrendered its lease and, at the request of a third party which had submitted a new permit application, had executed a relinquishment on a form provided by the State of Virginia. Since the relinquishment was part of the new application and no decision had yet been made on that application, the record of the permit remained in Marco's name. The Board found, however, that Marco no longer had a right to mine the area, had not actually conducted any operations, nor could

⁴⁵ The Interior Board of Surface Mining and Reclamation Appeals was abolished in December, 1983 and its functions were assumed by the Interior Board of Land Appeals.

⁴⁶ Wilson Farms Coal Co., 2 I.B.S.M.A. 118, *aff'd* 87 Interior Dec. 245 (June 27, 1980).

⁴⁷ *Id.* at 122 (quoting 42 Fed. Reg. 62671 (1977)).

⁴⁸ Straight Line Coal Corp. v. O.S.M., No. NX-0-104-R (April 29, 1981).

⁴⁹ Pierce Coal and Constr., Inc., 3 I.B.S.M.A. 350 (September 25, 1981).

⁵⁰ Marco, Inc., I.B.S.M.A. 128 (April 27, 1981).

it have taken any action to abate the violation caused by the third party applicant. The notice of violation was vacated.

The *Marco* case is not determinative of the end of liability in every case because state laws differ regarding requirements of relinquishment of rights by the original permittee. Applicable state law must be examined to determine whether or not it contains a similar provision. Furthermore, now that states have achieved primacy under SMCRA⁵¹ and are issuing permits and conducting inspections, determination of liability will become more a matter of state agency and state court interpretation of state law, with Board rulings constituting informal, non-binding authority. For example, the Kentucky Department for Natural Resources and Environmental Protection assessed penalties against both the original permittee and a second company which had entered into a contract with the permittee, where the successor company had signed a settlement order assuming full liability for the site. The Department ordered that the reclamation bond held by the permittee be forfeited and indicated that the surety's remedy was against the permittee in another forum.⁵²

It is unlikely that a state will allow an original permittee to relinquish liability without either 1) requiring that reclamation be completed, 2) forfeiting the bond, or 3) obtaining assurance that the successor in interest can and will assume all of the original permittee's liabilities for the entire permit area. If, however, the successor applies for a revision or a new permit, the original permittee is likely to retain responsibility for the old permit area.

c. *Liability of Successor in Interest.* Just as the state regulatory authority is unlikely to allow the original permittee to avoid liability easily, so too a regulatory authority is likely to attempt to place responsibility on the successor in interest. Although there are no cases decided on this issue, there is every reason to believe that a successor will be responsible for all terms and conditions of the original permit where approval of the transfer is sought from the regulatory authority. Thus, at least in the government's eyes, the successor must not only comply with permit conditions while conducting its own mining operations, but could also be required to complete reclamation on land and previously mined by the original permittee. The solution for the successor, of course, is to attempt to 1) contract out of those responsibilities, and 2) apply for a new or revised permit. The conjunctive "and" is particularly crucial because contractual remedies affect only the parties to the agreement and will not be recognized in proceedings under SMCRA unless a new or revised permit is secured.

Furthermore, before making final commitments to the original permittee, the successor should carefully review the financial and legal requirements which must be met for approval by the regulatory authority. Those requirements are strict and

⁵¹ See *supra* note 30 for a brief description of the concept of primacy.

⁵² *Dixie Energy and Commercial Union Ins., Co., Ky. D.N.R.E.P. No. 1521-1-03 (June 10, 1982).*

a potential successor is not guaranteed approval. Permit transfers are by no means automatic under SMCRA.

2. Other Potential Problem Areas Under SMCRA

a. *The Successor in Interest.* A prospective buyer or lessee who wishes to establish coal mining operations on the acquired land must take numerous provisions of SMCRA into consideration before entering into a final agreement. This is particularly true when the purchase or lease involves land not already under permit. The same considerations applicable to purchasing or leasing land for mining purposes are applicable to a successor here.

Some land, depending upon its location or condition, may not be minable. For example, with limited exceptions,⁵³ federally owned land within the boundaries of any national forest may not be mined. All prospective successors in interest to mineral rights on such land should attempt to verify their status with respect to such land before making financial or legal commitments. Similar considerations are applicable to land which has been or may be designated unsuitable for surface coal mining under section 522 of SMCRA.⁵⁴

Another item to review is whether previous mining has been conducted on the land. If mining was done before 1977, and the land inadequately reclaimed, the state regulatory authority has the authority to conduct reclamation operations under the Abandoned Mine Land program established by Title IV of SMCRA.⁵⁵ Plans for future mining of such a site should be reviewed with the state for compatibility with state plans and to avoid state reclamation work being conducted with a lien placed on the land. If a potential buyer or lessee intends to mine an abandoned site, extensive studies should be conducted to determine the existing condition of the land and liability for prior environmental harm.⁵⁶

b. *The Original Permittee.* Even if a permit is successfully transferred to a successor in interest, the original permittee may not be free of responsibilities under

⁵³ U.S.C. § 1272(e) (1982). This section prohibits mining on land within certain designated areas such as national parks, wildlife refuge areas, wilderness areas and national forests, except where such mining is subject to "valid existing rights" (VER). VER is defined at 30 C.F.R. § 761.5 (1984). This is a revised definition. [See 44 Fed. Reg. 15342 (1979) for the original definition].

For an analysis of this section as it relates to private property "taking" issues under the Fifth Amendment to the U.S. Constitution, see McGinley & Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional taking?*, 16 TULSA L.J. 418 (1980-81). See also Macleod & Means, *When it is Suitable to be Unsuitable: An Analysis of the Exemptions from the Surface Mining Act's Prohibitions on Mining*, 3 E. MIN. L. INST. 7-1 (1982).

⁵⁴ Under 30 U.S.C. § 1272 (1982), the regulatory authority can designate land as unsuitable for surface coal mining operations based on such factors as feasibility of reclamation, compatibility with local land use plans, and the nature of the land itself, including whether it is fragile or historic, contains renewable resources, or is subject to natural hazards such as flooding or earthquakes.

⁵⁵ U.S.C. §§ 1231-1243 (1982).

⁵⁶ See generally *supra* notes 20-29 and accompanying text.

SMCRA, although the liability remaining would only be for past actions. For example, if bond release is not obtained simultaneously with the permit transfer, forfeiture of the bond could result. The law is unclear as to which entity would assume liability if both the original permittee and a successor held bonds on the same permit area; but if such a situation should develop, the original permittee may not escape liability at least for land that it disturbed. Although the permittee may have entered into a written agreement with a third party, such an agreement would not be recognized by the regulatory authority which might move to obtain forfeiture on the bond. The permittee might then be liable to its surety for breach of contract.

Other areas of liability which would continue for the original permittee include collection of previously imposed civil penalties and collection of delinquent abandoned mine land reclamation fees. Assuming that the original permittee has received income from the disposal of its assets and to the extent that it holds additional unrelated assets, regulatory authorities can continue to pursue enforcement and collection actions. In fact, even in the event of a bankruptcy or reorganization the abandoned mine land reclamation fee is a nondischargeable tax debt under the Bankruptcy Code.⁵⁷ Although the status of civil penalties is not entirely clear, there is at least a good argument that under the bankruptcy laws that enforcement and collection actions for civil penalties would be exempt from the automatic stay provisions as a proceeding by a governmental unit to enforce its regulatory power.⁵⁸

B. *Permits Issued Pursuant to Other Environmental Laws*

The Surface Mining Control and Reclamation Act constitutes the most comprehensive regulation of the environmental aspects of coal mining; but other federal and state laws are applicable independently of SMCRA. This Article does not attempt a complete analysis of all of those statutes,⁵⁹ but will describe only the

⁵⁷ U.S.C. § 523(a)(1)(A)(1978).

⁵⁸ *Id.* § 362(b)(4)-(5)(1978).

⁵⁹ For an in-depth discussion of the major federal environmental statutes which are of concern to both parties in a mining property transaction, see Barr & Slaughter, *Environmental Rights and Liabilities Associated with the Sale or Acquisition of Coal Mining Properties: Do They Run With the Land*, 4 E. MIN. L. INST. 12-1 (1983). For a description of the unsuitability designation process and discussion of its potential application, see Gorrell & Russell, *The Petition Process for Designating Lands Unsuitable for Surface Coal Mining Operations: Extreme Solution or Unnecessary Exercise?*, 71 KY. L.J. 57 (1983); Macleod & Means, *When It Is Suitable to Be Unsuitable: An Analysis of the Exemptions from the Surface Mining Act's prohibitions on Mining*, 3 E. MIN. L. INST. 7-1 (1982); Van Buskirk & Drago, *The Designation of Coal Lands as "Unsuitable" for Surface Coal Mining Operations*, 27 ROCKY MTN. MIN. L. INST. 339 (1982).

Some additional areas of concern for counsel are identified in a presentation by Donald H. Vish, *Litigating Coal Mergers and Acquisition Agreements*, Eighth Annual Seminar on Mineral Law, Mineral Law Center, University of Kentucky College of Law (Oct. 21-22, 1983) (printed in PROCEEDINGS EIGHTH ANNUAL SEMINAR ON MINERAL LAW). Vish suggests that counsel should check laws pertaining to "mine health and safety permits . . . air pollution control permits (important for processing plants), refuse disposal authorizations (frequently regulated by more than one agency) and self-insurance certificates Disseminated by The Research Repository at WVU, 1985

transfer provisions applicable to mining operations under the Clean Water Act.⁶⁰ These provisions originally governed the Environmental Protection Agency's (EPA) consolidated permit program, which was abolished in 1983 pursuant to the Reagan Administration's regulatory review and reform program.⁶¹ The provisions are, however, still applicable to other environmental statutes as well as the Clean Water Act.⁶²

EPA's regulations for transferring a consolidated permit provide two options. Similar to a transfer under SMCRA, if the successor in interest intends to make any changes in the permit terms or conditions, a modification or revocation and reissuance must be sought and procedures under those provisions are followed.⁶³ If the successor does not intend to change the permit terms but instead plans to utilize the same permit, the transfer can be either automatic or may be considered a "minor modification" which requires submission of very limited information.

The regulation provides that a NPDES permit may be automatically transferred if notice is given at least thirty days prior to the transfer date.⁶⁴ Such notice must include the written agreement which contains a date for transfer of permit responsibility, coverage and liability. The transfer is then effective unless the agency requires a modification or revocation and reissuance. This is a much simpler process than the OSM approval process previously described. Minor modifications include such items as an increase in monitoring or reporting by the permittee, changing an interim compliance date, and changing control or ownership of a facility.

Likewise, a "minor modification" of an EPA consolidated permit requires only minimal information from the parties (the written agreement assigning liability). But in this case the agency must affirmatively approve the transfer.⁶⁵

(or membership in state fund)." *Id.* at 10.

He also warns counsel to examine securities laws and to ask such questions as:

[W]ill expansion of the mine constitute a "new source" coal mine for purposes of the Federal Water Pollution Control Act or its state counterpart? Do limitations on fugitive dust inhibit expansion of the tippie under the permits issued pursuant to the Clean Air Act or its state counterpart? If a washing plant is to be built, or an existing plant expanded, is there a licensed coal refuse disposal area? If so, can it be expanded? Does the mine safety record disclose an emerging "pattern or practice" violation which would result in closure after transfer of the mine license?

Id. at 11.

⁶⁰ U.S.C. § 1311 (1982).

⁶¹ See 48 Fed. Reg. 14146 (1983) (explanation of the deconsolidation action).

⁶² The Clean Water Act transfer provisions discussed here are the same as those applicable to the Resource Conservation and Recovery Act of 1976 (RCRA), 43 U.S.C. §§ 6901-87 (1982), by EPA regulations promulgated at 40 C.F.R. §§ 270-71 (1984); the Underground Injection Control (UIC) Program under Part C of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300e-h (1976), 40 C.F.R. §§ 144-45 (1984) and the Dredge or Fill Program under section 404 of the Clean Water Act, 40 C.F.R. § 233 (1984).

⁶³ C.F.R. §§ 122.61-122.63 (1983).

⁶⁴ *Id.* at § 122.61(b).

⁶⁵ *Id.* at § 122.63.

The primary difference, then, between transfers under the NPDES permit program and those under SMCRA is that the former is based upon an acceptance of the private agreement between the original permittee and the successor, whereas under SMCRA the regulatory authority conducts its own review of the successor to determine whether it is capable of conducting mining operations in accordance with applicable law and regulation.

V. LOCAL ZONING ORDINANCES

Local government bodies may also enact ordinances designed to protect environmental amenities. The potential impact of such ordinances should not be ignored. For example, in *DeCoals, Inc. v. Board of Zoning Appeals*,⁶⁶ the court upheld a city zoning ordinance which prohibited the construction of a coal tippie on industrially zoned property where the tippie operator could not show that its operations would confine all fugitive dust emissions within the boundaries of its own property. Said the court:

If people jointly resolve that no more dust or noise inspired by industry in their community is acceptable, we should not interfere. They live there; they breath the air; their lifestyles are affected by the noise and traffic; and they suffer whatever economic loss that results from regulations that eliminate certain potential industries that might there be put but for strict performance zoning rules. Any city is entitled to that choice.⁶⁷

One should note the possibility that the power to enact zoning ordinances that regulate the conduct of mining or auxiliary operations may be preempted by a state surface mining reclamation statute.⁶⁸

VI. CONCLUSION

The preceding discussion was intended to apprise and advise counsel of potential environmental liabilities involved where coal properties are leased, bought and sold. Each sale or lease transaction should be rigorously analyzed and potential risks and benefits carefully weighed.

Prudent business judgment necessitates a comprehensive legal, technical-scientific, and economic analysis of the properties subject to a coal sale or lease.⁶⁹ As part of such analysis, the scope of existing and potential environmental liabilities must be fully reviewed by counsel and technical experts, including geologists, min-

⁶⁶ *DeCoals, Inc.*, 284 S.E.2d 856.

⁶⁷ *Id.* at 860.

⁶⁸ For a discussion of land use regulations and their impact on coal mining operations, see 2 COAL LAW AND REGULATION, *supra* note 2, at § 61.

⁶⁹ See Weinberg & Wiseman, *Acquisition of Mining Concerns*, in 4 COAL LAW AND REGULATION, *supra* note 2, at § 85. For excellent suggestions on the parameters of such a comprehensive analysis, see Edward B. Weinberg, *Legal Documentation and Coal Interests*, EIGHTH ANNUAL SEMINAR ON MINERAL LAW, Mineral Law Center, University of Kentucky College of Law (Oct. 21-22, 1983); Vish, *supra* note 58.

ing engineers, and hydrologists. Such an environmental audit⁷⁰ must be performed well in advance of the time when a decision on sale or lease of coal properties is made. A client exposed to potentially enormous environmental liabilities or impediments is ill-advised by a coal lawyer of the 1980s who fails to fully and vigorously explain the business necessity which makes an environmental audit an imperative feature of modern coal property transactions.

Of course counsel's responsibilities do not end with recommending an environmental audit. After such an audit has been performed its result should be factored into drafting of instruments of sale or lease. In that regard, consideration must be given to drafting provisions relating to such issues as insurance, indemnity, warranties, minimum royalties, termination, *force majeure*, and bonding. Some commentators have suggested possible language that could be considered to deal with potential environmental liabilities.⁷¹ These suggestions should be mere points of departure for conscientious counsel who zealously seek to protect their client's interests; they must draft provisions in coal property sales or lease agreements that will be tailored to the specific facts of each situation.

Certainly the price a seller asks or the price a buyer is willing to pay for coal property would be adjusted depending upon the extent and relative gravity of environmental liabilities. Indeed, the decision to execute a sales or lease agreement may hinge on a favorable environmental and existing and potential environmental problems.⁷² An obvious necessity for the buyer is a specific indemnity clause to

⁷⁰ Environmental audit is a term used to describe the intensive and thorough review of existing and potential environmental liabilities attendant to specific coal properties which are being considered for sale or leasing. Among the areas to be examined are whether outstanding environmental administrative or judicial proceedings or enforcement actions are pending or have been resolved against a party to the prospective transaction.

The surface area of the mineral reserve in question should be the subject of a thorough "on the ground" inspection to determine if any conditions or practices are, or have the potential to be, common law nuisances. The area should also be scrutinized to determine whether the coal reserves are overlying or adjacent to any areas designated by SMCRA as unsuitable for mining (e.g. federal lands, public parks, cemeteries, roads, churches, occupied dwellings).

If a coal property was mined prior to the effective date of the SMCRA, one should determine whether a state agency plans to reclaim the land under SMCRA's Abandoned Mine Land reclamation program. Certainly one should know whether such reclamation would interfere with a buyer's or lessee's mining plans.

The area should be examined for evidence that the land or any facilities located thereon have been used for treatment, storage or disposal of hazardous or toxic wastes. These are some of the more obvious elements of an effective environmental audit.

⁷¹ See, e.g., 4 AMERICAN LAW OF MINING, *supra* note 2, Chap. 132, Appendix 4 (sample clause in private coal leases). "Suggested clauses deal with lessee's duty to remove and abate environmental hazards, provide lateral and subjacent support, comply with environmental laws, and dispose of wastes and other material. The sample clauses also address the lessor's warranties regarding environmental hazards on the property and disclosure of material facts. In addition, the suggested lease clauses include insurance and indemnity provisions. See also 4 COAL LAW AND REGULATION, *supra* note 2, at § 83.07 [3][f]."

⁷² For companies subject to federal securities regulations, disclosure of environmental liabilities is already required. Thus, a review of Securities and Exchange Commission reporting documents should

facilitate shifting of financial responsibility to the seller in the event that an undisclosed environmental hazard exists on the land.⁷³ The seller or lessor must take care that a vendee, leasee, or contract miner has the expertise and equipment to ensure that mining operations will be conducted competently and that environmental problems and attendant liabilities be avoided. To the extent it is available, the parties should obtain insurance to cover potential environmental liabilities.⁷⁴

Engaging in complex and heavily regulated business enterprises like coal mining will almost always involve substantial risks. If one heeds the warnings and concerns expressed in the foregoing discussion, those risks relating to environmental liabilities in the selling and leasing of coal properties may be significantly reduced.

give a buyer relevant information on such issues as extraordinary expenditures and capital expenditures necessary to bring a company in compliance with environmental requirements. See SEC Release Nos. 33-6130, 34-16224 (Sept. 27, 1979); *In re United States Steel Corp.*, Release No. 34-16,223 (Sept. 27, 1979). See also *Natural Resource Def. Couns., Inc. v. SEC*, 12 F.R.C. 1321 (D.C. Cir. 1979); SEC Regulation S-K Item 1(c)(2)(iii), 17 C.F.R. § 229.20 (1979).

⁷³ Cf. Lettow & Byam, *Generator-Disposer Indemnity Agreements*, 39 BUS. LAW. 315 (1983).

⁷⁴ See 4 AMERICAN LAW OF MINING, *supra* note 2, at § 132.05[5][d] (insurance and indemnity agreements); Note, *Liability Insurance Against Environmental Damage: A Status Report*, 38 BUS. LAW. 217 (1982); Smith, *Environmental Damage Liability Insurance—A Primer*, 39 BUS. LAW. 333 (1983).

