



## Litigation Continues over West Virginia's Coal Mine Permit Bonding Program

Environmental interest groups are continuing litigation that appears ultimately aimed at challenging the sufficiency of West Virginia's bonding program for coal mine operations. On May 17, 2021, three environmental interest groups filed a [lawsuit](#) against the United States Department of Interior's Office of Surface Mining (OSM). The suit alleges that OSM has failed to determine whether changes to West Virginia's bonding program are needed after OSM received notice from the West Virginia Department of Environmental Protection (WVDEP) regarding the financial circumstances surrounding certain operators in the coal industry. This case is related to a prior suit originally filed on July 9, 2020 against WVDEP concerning the bonding program. As noted in our July 14, 2020 [Environmental Alert](#), the July 9, 2020 suit alleged that WVDEP had failed to properly notify OSM of the financial insolvency of certain coal operators and the purported inability of West Virginia's Special Reclamation Fund to cover the costs required to complete required reclamation work at mine sites formerly operated by one of those entities, ERP Environmental Fund. The Special Reclamation Fund receives revenue from a tax on coal production. When the amount of a forfeited bond associated with a revoked mining permit is insufficient to cover the costs of completing the required reclamation, the Special Reclamation Fund provides additional funding for use by WVDEP to perform the reclamation work. (For a more detailed explanation of the bonding system and the claims made by the plaintiffs in these lawsuits, see our May 18, 2020 [Environmental Alert](#), *West Virginia DEP Receives Notice of Intent to Sue Under SMCR A Based on Deficiencies in Mine Reclamation Fund*.)

WVDEP moved to dismiss the previous civil action on various grounds, including the argument that OSM was already aware of the insolvencies of certain operators and the circumstances surrounding ERP Environmental Fund. After the court denied WVDEP's motion to dismiss, WVDEP sent a formal notice to OSM dated [December 30, 2020](#) specifically identifying the circumstances described in the suit. In a response letter dated [January 29, 2021](#), OSM noted the "complexity" surrounding a solvency evaluation of the Special Reclamation Fund, and the need for additional analysis to determine whether a change to WVDEP's bonding program is necessary in light of the circumstances. OSM also pledged to coordinate with WVDEP to develop a detailed joint plan to outline goals and objectives along with a timeline for making such a determination.

The May 17, 2021 suit alleges that OSM was required to render a decision on the need for changes to WVDEP's bonding program within 30 days of receiving WVDEP's December 30, 2020 letter, and OSM has failed to do so. The suit does not seek a court ruling that changes to the bonding program are necessary. Rather, the suit only asserts a "procedural claim" – i.e. that OSM has failed to perform its duty to make the determination within 30 days as required by the applicable statutes and regulations. Based on the allegations set forth in the complaint concerning the sufficiency of the Special Reclamation Fund, it seems likely that these groups will pursue further litigation in the event OSM determines that a change to WVDEP's bonding program is not necessary, or if the groups believe any necessary changes identified by OSM are inadequate to ensure the long-term solvency of the Special Reclamation Fund.

Should you have questions about the WVDEP coal mine regulatory program or other environmental permitting matters, please contact Robert M. Stonestreet at 681.265.1364 or [rstonestreet@babstcalland.com](mailto:rstonestreet@babstcalland.com), or Christopher B. "Kip" Power at 681.265.1362 or [cpower@babstcalland.com](mailto:cpower@babstcalland.com).

MAY 24, 2021

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