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## **West Virginia DEP Receives Notice of Intent to Sue Under SMCRA Based on Deficiencies in Mine Reclamation Fund**

For many years, national and regional environmental interest groups have objected to the alternative bonding system (ABS) administered by the West Virginia Department of Environmental Protection (WVDEP) as a part of WVDEP's approved coal mine regulatory program under the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et seq., (SMCRA). Unlike other bonding programs that require full-cost bonds to secure performance of reclamation requirements under mining permits, the West Virginia ABS involves two components: (1) site-specific bonds posted by mine permittees based on the anticipated costs of reclamation, limited to a maximum of \$5,000 per acre; and (2) a Special Reclamation Fund (SRF), funded by a tax on coal production (currently set at 27.9 cents per clean ton). The SRF is intended to fund reclamation expenses in the event WVDEP revokes a permit and the proceeds of site-specific bonds are insufficient to cover the costs to reclaim a disturbed area governed by the revoked permit.

In February 2016, the Ohio Valley Environmental Coalition and other groups filed a petition with the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM - the oversight agency under SMCRA), asking that OSM take over the bonding program for mining permits in West Virginia. That petition (which also raised concerns about allowing large companies to self-bond) was never acted upon prior to the change in presidential administrations in January 2017. Long before that, a SMCRA citizens suit was brought in early 2000 in the federal District Court for the Southern District of West Virginia, challenging OSM's failure to invalidate the West Virginia ABS and impose a federal mine permit bonding system. In response to that suit, the court declined to order OSM to take the requested actions in light of commitments by agency officials to address the groups' concerns. The court held the case open for further proceedings in the event OSM did not fulfill its promises. *See West Virginia Highlands Conservancy v. Norton*, 190 F.Supp.2d 859 (S.D. W.Va. 2002).

Those same groups have now seized upon a new basis for challenging the ABS. They served their first volley in that renewed effort on WVDEP Secretary Austin Caperton on May 8, 2020, in the form of a Notice of Intent to Sue under SMCRA (the NOI). Technically, the NOI only requests that WVDEP perform its nondiscretionary duty under SMCRA to notify OSM as to "significant changes in funding or budgeting" related to WVDEP's mine regulatory program approved under SMCRA. However, as explained in more detail in the NOI, the point of requiring that notification is to alert OSM to the need to fully explore the apparent insolvency of the West Virginia ABS. If the ABS is determined to be insolvent, that could lead to OSM taking over the administration of at least that part of WVDEP's SMCRA program.

Though the NOI alludes to various coal company bankruptcies, the precipitating event is identified as WVDEP's recent filing of civil action and emergency motion for appointment of a special receiver against mine permittee ERP Environmental Fund (ERP). ERP accepted the transfer of nearly 100 mining permits (along with related WV/NPDES water discharge permits) from Patriot Coal Corporation during Patriot's bankruptcy in 2015. WVDEP strongly opposed those proposed transfers in bankruptcy court before agreeing to a multi-party settlement. As described in a WVDEP affidavit filed in the special receivership case, as of March 25, 2020, ERP had ceased all operations, with more than 200 WVDEP enforcement actions pending against it.

WVDEP has sixty (60) days to address the concerns raised in the NOI. If WVDEP does not address those concerns to the satisfaction of the environmental groups within that time frame, a new lawsuit could be filed against the agency.

Should you have questions about the WVDEP coal mine regulatory program or other environmental permitting matters, please contact Christopher B. "Kip" Power at (681) 265-1362 or [cpower@babstcalland.com](mailto:cpower@babstcalland.com) or Robert M. Stonestreet at (681) 265-1364 or [rstonestreet@babstcalland.com](mailto:rstonestreet@babstcalland.com).

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