

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

In re:)	
)	Chapter 11
PEABODY ENERGY CORPORATION, et al.)	Case No. 16-42529-399
)	
)	(Jointly Administered)
Debtors.)	
)	Hearing: August 17, 2016, 10:00am

**RESERVATION OF RIGHTS OF THE UNITED STATES OF AMERICA IN
RESPONSE TO MOTIONS OF DEBTORS AND DEBTORS IN POSSESSION
PURSUANT TO BANKRUPTCY RULE 9019, FOR ENTRY OF STIPULATIONS AND
ORDERS CONCERNING RECLAMATION BONDING OF THEIR SURFACE COAL
MINING OPERATIONS IN WYOMING, INDIANA, AND NEW MEXICO**

The United States of America (“United States”), on behalf of the U.S. Department of the Interior (“DOI”), including the Office of Surface Mining Reclamation and Enforcement (“OSMRE”), hereby files this Reservation of Rights in response to the Motions of Debtors and Debtors In Possession Pursuant to Bankruptcy Rule 9019 for Entry of Stipulations and Orders Concerning Reclamation Bonding of their Surface Coal Mining Operations in Wyoming, Indiana, and New Mexico (“Motions”), and the proposed Stipulations and Orders attached thereto (the “Stipulations and Orders”) [Docket Nos. 964, 965, 966].

RESERVATION OF RIGHTS

1. The United States, through OSMRE, oversees the protection of public health and the environment under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. §§ 1201 *et seq.* SMCRA is designed, *inter alia*, to ensure that coal mine permittees throughout



the United States take the necessary steps to protect the public from serious environmental and health risks that could arise from coal mining operations and activities.¹

2. SMCRA is designed to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 268 (1981) (quoting 30 U.S.C. § 1202(a)). In enacting SMCRA, Congress found that:

Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.

Id. at 277-78 (quoting 30 U.S.C. § 1201(c)). SMCRA deters environmental irresponsibility by holding regulated entities responsible for environmental harm. *Cf. Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 866 (4th Cir. 2001).

3. SMCRA establishes minimum standards for the regulation of mining, and allows a state to enact and administer its own regulatory program for mining, as long as a state develops and implements a program consisting of elements that are no less stringent than the minimum standards set forth in SMCRA and no less effective than its implementing regulations. 30 U.S.C. § 1253; 30 C.F.R. § 730.5; *see Hodel*, 452 U.S. at 289. SMCRA further requires the Secretary of the Interior to approve any state program that meets or exceeds the federal standards, thereby allowing individual states to gain primary control over the regulation of surface mining within their borders.

¹ SMCRA regulates both surface coal mining and some aspects of underground mining, and related effects on the environment.

4. States with an approved regulatory program must implement, administer, enforce, and maintain their program in accordance with SMCRA, federal implementing regulations, and the provisions of the approved state program.² 30 C.F.R. § 733.11. OSMRE retains ongoing authority to oversee the effectiveness of a state's implementation of its program, 30 U.S.C. § 1271, and under certain circumstances may take federal enforcement actions, including, but not limited to, inspections, notices of violation ("NOVs"), cessation orders ("COs"), and direct federal enforcement against owners and operators of coal mining operations, if necessary. *See* 30 U.S.C. §§ 1254(b), 1271; 30 C.F.R. Parts 842, 843, and 847.

5. For example, whenever OSMRE has "reason to believe" that "any person is in violation of any requirement [of SMCRA] or any permit condition required by [SMCRA]," OSMRE will notify the state regulatory authority ("RA"). 30 U.S.C. § 1271(a)(1). The RA then has ten days to take appropriate action to cause the violation to be corrected or show good cause for not taking action. *Id.*; *see also* 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2). If the RA fails to take appropriate action, or to show the requisite good cause for failing to act, OSMRE may order and conduct a federal inspection of the coal mining operation at which the alleged violation is occurring. 30 C.F.R. § 842.11(b)(1). If the inspection reveals that a violation exists, OSMRE may take an enforcement action, including issuance of an NOV or CO, as appropriate. *Id.* § 843.12(a)(2).

² Wyoming has had an OSMRE-approved, permanent program since 1980, which is administered by the Wyoming Department of Environmental Quality ("WYDEQ"). 45 Fed. Reg. 78684 (Nov. 26, 1980); *see also* 30 C.F.R. Part 950. In accordance with 30 C.F.R. Part 745, Wyoming and DOI have entered into a cooperative agreement that allows Wyoming to regulate coal mining operations on federal lands under certain conditions. *See* 30 C.F.R. § 950.20 (State-Federal Cooperative Agreement for Wyoming). New Mexico has had an OSMRE-approved permanent program since 1980, which is administered by the New Mexico Energy, Minerals and Natural Resources Department's Mining and Minerals Division (New Mexico MMD), 45 Fed. Reg. 86489 (Dec. 31, 1980); *see also* 30 C.F.R. Part 931. In accordance with 30 C.F.R. Part 745, New Mexico and DOI have entered into a cooperative agreement that allows New Mexico to regulate coal mining operations on federal lands under certain conditions. *See* 30 C.F.R. § 931.30 (State-Federal Cooperative Agreement for New Mexico). Indiana has had an OSMRE-approved permanent program since 1982, which is administered by the Indiana Department of Nature Resources ("IDNR"). 47 Fed. Reg. 32107 (July 26, 1982); *see also* 30 C.F.R. Part 914.

6. Thus, OSMRE retains the concurrent enforcement authority described above with the States of Wyoming, Indiana, and New Mexico. Further, Debtors' coal mining operations in Wyoming and New Mexico are conducted, in part, under federal coal leases and the Wyoming operations take place, in part, on federal lands.

7. Like all operators, Debtors may not engage in coal mining operations without first obtaining the required SMCRA permits from the relevant regulatory authority, as applicable -- either OSMRE or the RA under the oversight of OSMRE. 30 U.S.C. § 1256. A key component of a SMCRA permit application is a detailed plan for reclaiming affected areas to the standards of the approved regulatory program, commonly referred to as a reclamation plan. *Id.* §§ 1257(d), 1258. The reclamation plan must include a detailed description and timetable for the backfilling of open pits, grading, topsoil replacement, revegetation, removing drainage control facilities, highwall reduction, underground mine sealing, shaft and mine entry sealing, demolition of coal preparation and processing plants and related surface structures, reclamation of refuse and waste rock disposal areas/storage areas, restoring the hydrologic regime, and potentially long-term water treatment, among other activities, to ensure that the proposed post-mining land use is achieved. *Id.* SMCRA requires that "adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations." *Id.* §§ 1202(e), 1265(b)(16). This concept of "contemporaneous reclamation" is built into a SMCRA permit and reclamation plan and failure to contemporaneously reclaim in accordance with a permit is a SMCRA violation. *Id.* § 1258(a)(7).

8. As a condition precedent to issuing a SMCRA permit, an operator must post a performance bond payable to the RA in an amount sufficient "to assure the completion of the reclamation plan *if the work had to be performed by the regulatory authority in the event of forfeiture.*" *Id.* § 1259 (emphasis added). Bond amounts are not based on an operator's own estimate

of reclamation costs, and liability under the bond must be for the duration of the coal mining and reclamation operation. *Id.* The bonding obligations include, but are not limited to, performance of the activities included in the reclamation plan. *See* 30 C.F.R. §§ 715.10 – 715.20.

9. SMCRA’s requirement for full reclamation bonding, 30 U.S.C. § 1259, is an additional and distinct requirement from the requirement for contemporaneous reclamation during ongoing mining operations, 30 U.S.C. § 1265(b)(16). SMCRA’s bonding requirements take contemporaneous reclamation into account when determining the financial assurance necessary “to assure the completion of the reclamation plan *if the work had to be performed by the regulatory authority in the event of forfeiture.*” 30 U.S.C. § 1259 (emphasis added). Even with perfect compliance with contemporaneous reclamation principles, a reclamation bond is necessary to ensure that the actively mined area can be reclaimed according to the environmental standards set forth in the SMCRA permit should, for example, forfeiture occur.

10. SMCRA allows for operators to “self-bond” for the reclamation liability without separate surety if, among other criteria, an applicant or its corporate guarantor demonstrates a history of financial solvency and continuous operation. 30 U.S.C. § 1259(c); 30 C.F.R. § 800.23 (requiring, *inter alia*, that the total amount of outstanding and self-bonds shall not exceed 25 percent of the applicant or corporate guarantor’s net worth in the United States). Where an applicant or corporate guarantor no longer satisfies the requirements for self-bonding, regulations provide that an alternative bond in the same amount be posted within 90 days or the operator shall cease coal extraction. 30 C.F.R. §§ 800.16-(e)(2), 800.23(g). Acceptable replacement bonds include surety bonds or collateral bonds including cash, negotiable bonds or certificates of deposits, and irrevocable letters of credit. *Id.* §§ 800.5, 800.12.

11. Allowing coal mining operations to proceed without adequate reclamation bonding assurances violates SMCRA, 30 U.S.C. § 1259, corresponding state program counterparts, Wyo. Stat. § 35-11-417(d), N.M. Stat. § 69-25A-13, and Ind. Code § 14-34-6, and state-federal cooperative agreements to the extent Federal coal and lands are affected, 30 C.F.R. § 950.20 and 30 C.F.R. § 931.30. Allowing mining without adequate bonding also creates an unfair economic advantage over those operators acting in compliance with the applicable law, a problem that SMCRA was specifically designed to address. *See* 30 U.S.C. § 1201(g).

12. Enforcement of requirements for financial assurance under environmental laws, such as the bonding requirement under SMCRA, falls within the police and regulatory exception to the automatic stay, 11 U.S.C. § 362(b)(4). *Safety-Kleen*, 274 F.3d at 865-66; *Bickford v. Lodestar Energy, Inc.*, 310 B.R. 70, 78-79 (E.D. Ky. 2004).

13. In Wyoming, Debtors³ self-bonded four of their coal mining operations (the “Peabody Wyoming Operations”). Debtors’ reclamation bonding obligations for the Peabody Wyoming Operations amount to over \$726.8 million. In New Mexico, Debtor Peabody Natural Resources Company self-bonded two coal mining operations (the “Peabody New Mexico Operations”). Debtors’ reclamation bonding obligations for the Peabody New Mexico Operations amount to over \$181 million.⁴ In Indiana, Debtors Peabody Midwest Mining, LLC and United Minerals Company self-bonded numerous coal mining operations (the “Peabody Indiana Operations”), including three active surface mines, and one active underground mining site, as well

³ Specifically, Debtors Peabody Caballo Mining, LLC, Peabody Powder River Mining LLC, Peabody School Creek Mining LLC, and Shoshone Coal Corporation.

⁴ This amount reflects a reduction in the prior bond amount of approximately \$281 million approved by New Mexico on April 5, 2016, days before Debtors filed their Chapter 11 petitions on April 13, 2016. The United States reserves all rights relating to the reduction in bond amount.

as several presently inactive sites. Debtors' reclamation bonding obligations for the Peabody Indiana Operations amount to approximately \$145 million.

14. The Peabody Wyoming Operations⁵ and New Mexico Operations⁶ are, in part, conducted on federal coal leases and federally-owned land, including the [names]. To protect the significant federal interest, on behalf of the public, in these federally-owned resources, the United States is a required co-beneficiary on any performance bond involving federal coal and land.

15. OSMRE is currently engaged in administrative oversight processes with Wyoming, New Mexico, and Indiana regarding the adequacy of bonding for the Peabody Operations in those states. On February 21, 2016, OSMRE issued five Ten Day Notices⁷ ("TDNs") to WYDEQ pursuant to 30 C.F.R. § 842.11. On February 16, 2016, OSMRE issued two TDNs⁸ to New Mexico MMD pursuant to 30 C.F.R. § 842.11. On February 18, 2016, OSMRE issued one TDN⁹ to IDNR pursuant to 30 C.F.R. § 842.11. All three states have provided initial responses to the TDNs, which OSMRE is reviewing, and under which OSMRE has sought additional information.

16. The United States is not a party to and should not be construed to endorse the Stipulations and Orders. The United States hereby expressly reserves all of its rights under SMCRA and its implementing regulations and other applicable law, including its rights to pursue administrative proceedings, including the administrative process identified in Paragraph 15, and may exercise such rights at any time in accordance with the police and regulatory exception to the automatic stay.¹⁰ The United States further notes that, notwithstanding the Motion or Stipulation and

⁵ Specifically, the North Antelope Rochelle Mine, Caballo Mine, School Creek Mine, and Rawhide Mine.

⁶ Specifically, the El Segundo Mine.

⁷ TDN #s X16-010-549-010, X16-010-549-011, X16-010-549-012, X16-010-549-013, and X16-010-549-014.

⁸ TDN #s X16-020-532-001 and X16-020-532-002.

⁹ TDN # X16-060-966-001.

¹⁰ Debtors' New Mexico and Indiana Motions mistakenly state that the New Mexico and Indiana Stipulations stay any proceedings relating to the Debtors' self-bonding. *See* Docket No. 965 at 13; Docket No. 966 at 15. In fact, the Stipulations clearly only stay such proceedings "by New Mexico" and "by Indiana", New Mexico Stipulation ¶5; Indiana Stipulation ¶8. The United States believes the inconsistent language in the Motion is inadvertent (it does not

Order, Debtors must at all times during this Bankruptcy Case act expeditiously to bring themselves into full compliance with the valid laws of the State, which include SMCRA's reclamation bonding requirements, as required by 28 U.S.C. § 959(b) and *Safety-Kleen*, 274 F.3d at 865-66.

FOR THE UNITED STATES

Dated: August 10, 2016

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General Environment and
Natural Resources Division

RICHARD G. CALLAHAN
United States Attorney

JANE RUND
Assistant United States Attorney

/s/ Alan S. Tenenbaum
ALAN S. TENENBAUM
National Bankruptcy Coordinator
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
(202) 514-7519
Alan.tenenbaum@usdoj.gov

/s/ Frederick H. Turner
FREDERICK H. TURNER
Attorney
Law and Policy Section
Environment and Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7415
Washington, D.C. 20044-7415
(202) 305-0641

appear in the Wyoming Motion), *see also* Docket No. 965 at 12 n.5 (in the event of any conflict between the terms of the Motion and Stipulation and Order, the terms of the Stipulation and Order govern); Docket No. 966 at 12 n.5 (same). To the extent that the Debtors are seeking to stay any proceedings before or by the United States, the United States objects and notes that any such request by Debtors has not been properly brought before the Court.

frederick.turner@usdoj.gov

/s/ Jason A. Hill

JASON A. HILL

Natural Resources Section

Environment and Natural Resources Division

United States Department of Justice

P.O. Box 7611

Washington, D.C. 20044-7611

(202) 514-1024

jason.hill@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2016, a true and correct copy of the foregoing was served via ECF.

/s/ Alan S. Tenenbaum
Alan S. Tenenbaum