DISPOSAL OF EXCESS SPOIL ON PREVIOUSLY-MINED LAND[1]

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Abstract. Since Abandoned Mine Land Reclamation Funds will not be sufficient to reclaim all of the abandoned sites, new ways need to be sought for completing this valuable reclamation. One promising method is to dispose of excess spoil from active operations in the reclamation of abandoned sites nearby. However, some believe the Surface Mining Control and Reclamation Act presents major obstacles to this type of reclamation because its full range of environmental protection provisions would apply to any abandoned site that an operator would undertake to reclaim using excess spoil. Thus, that operator would assume full responsibility for the previously-mined parcel even though the environmental damage would have been caused by another. This paper describes several methods that might help solve the problem without a major change in the Surface Mining Act, itself: (1) incidental permitting, (2) limited reclamation responsibilities, and (3) reclamation "credits."

Additional Key Word: Abandoned Mine Land Reclamation

Introduction

Public Law 95-87, the Surface Mining Control and Reclamation Act, contains in Title IV the Abandoned Mine Lands (AML) provisions. The provisions of Title IV require operators to pay a reclamation fee, a tax, into the AML fund according to tonnage of coal produced and for this fund to be used to reclaim lands mined and abandoned unreclaimed prior to the date of enactment of the Surface Mining Act. Very simply, there are not enough AML funds to go around and the fund would be exhausted long before all abandoned mine lands could be reclaimed using money from the fund.

Public Law 95-87 also contains in Title V the environmental protection performance standards that determine the level of environmental protection measures that an operator must maintain during surface coal mining and reclamation operations. The requirements of Title V can be quite costly to an operator. Unfortunately, the environmental costs associated with Title V's provisions act as a disincentive to any operator who would perform reclamation work on an abandoned site while conducting mining operations on an active site. The main reason for this is that any operator who would be willing to reclaim a previously-mined parcel as an adjunct to operations on an active permit would incur the full effect of Title V's provisions (and costs). That is, Title V would dictate that that operator assume full responsibility for environmental standards on the previously-mined parcel even though the environmental damage would have been caused by the operator who abandoned the site.

Because of Title V, it is believed that the abandoned parcel would have to be permitted and bonded and the participating

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operator would have to assume potential continuing liability for such things as improper drainage, acid seeps, failure of revegetation, unstable spoil, or anything else that might occur even though it may be through no fault of his own.

As a further consequence of the perceived lack of continuity between Title IV and Title V, Section 404 states that any surface mining and reclamation operation that has been active at any time after the date of enactment of SMCRA would not be eligible for Title IV funding. Consequently, sites abandoned before SMCRA, for which there are not enough AML funds, and sites abandoned after SMCRA, which are not eligible for AML funds anyway, sit and remain unreclaimed. The means for reclamation need to be considered and, if feasible, encouraged.

Disposal of Excess Spoil on Previously-Mined Land

One of the most likely possibilities for reclamation on abandoned sites is to use excess spoil generated from currently active operations. At present, excess spoil is disposed of by placement on the permitted area. Section 515(b)(21) mandates this; section 515(b)(22) tells how it is to be done. Fills are costly structures to build and they have environmental impacts of their own. At certain previously-mined sites, however, the excess spoil generated from active mining sites could be used to fill pits and depressions, to reclaim highwalls, cover toxic materials, eliminate benches, and so forth. Not only could environmental damage be corrected, but the need reduced for other disposal methods such as fills.

There are several facets to the present problem faced by an operator who otherwise would be willing to perform the reclamation.

One facet, as mentioned, is the belief that the previously-mined (i.e., the nonproductive) parcel would have to be permitted and fully bonded just like the productive parcel on which the active mining is taking place. This means, of course, that the full cost of permitting and bonding would have to be incurred by the participating operator for a site which has no potential for direct economic benefit. [Direct economic benefit meaning that there is no coal to be produced to offset the reclamation costs. There may be potential for some indirect economic benefit if somehow there would be less expense involved in placement of the excess spoil on an unreclaimed site as opposed to constructing, say, a head-of-hollow fill. It is doubtful whether such indirect economic benefit, if available at all, would offset the direct costs of permitting and bonding the site.]

There are, perhaps, two questions to be asked -- one: can we get around the permitting requirements of SMCRA; and two: if we cannot get completely around the permitting and bonding provisions of SMCRA, can we suggest to the Office of Surface Mining (OSM) some sort of what might be called an "incidental" permit and bond at a greatly reduced cost than that of a complete surface mining and reclamation permit under Title V?

A second facet of the problem facing any operator who would otherwise be willing to reclaim an abandoned site with excess spoil is that if the operator would be willing, he would have to assume, presently under the regulations that interpret Title V, full reclamation for the abandoned parcel. That is, he must, in effect, purchase all of the problems -- an acid seep, bad drainage, or any of a number of existing and possibly later-occurring problems that could result from the lack of care by the person who abandoned the site. Title V would not allow the operator to be discriminating in the problems he would want to correct; he could not fix some things and not be responsible for others. Thus, for example, he could not backfill the highwall and walk away from a drainage problem or an acid seep.

Perhaps, then, we need to consider a scenario where the operator could assume only some responsibility for the site or, perhaps, responsibility only for the work he actually performs so long as none of the other conditions at the site are made any worse by the operator's activities. Continuing our example scenario, it could involve the operator's assuming, for example, responsibility for proper elimination of a highwall and stabilized placement of spoil but no responsibility for, say, an acid seep that is unrelated to the backfilling operation. Placement of such limits on the operator's liability if he were willing to perform reclamation might help solve the problem.

The third facet of the problem is that an operator who would be willing to undertake reclamation work on an abandoned site nearby or adjacent to his active site has no mechanism, at present, by which he can receive "credit" for any work performed.

Perhaps the need here is for some sort of economic credit mechanism for the participating operator which would be reasonably equivalent to the value of any reclamation work which he would be performing, essentially, as a public service.

The basic problem, then, is a significant number of previously-mined coal mine sites across the country and a possible solution is to use, where practicable, excess spoil from nearby active mining operations to reclaim the previously-mined site. Unfortunately, there are perceived statutory and regulatory impediments to this possible solution and at least three of these impediments are:

- the permitting and bonding requirements of the Surface Mining Act or States' equivalent statutes

- the full panoply of environmental protection performance standards in Title V and Subchapter K of 30 CFR apply

- the fact that these previous two costly provisions have no economic setoffs to encourage otherwise willing operators to undertake such reclamation.

There are three possible solutions that might be framed so as to remain consistent with the intent of the Surface Mining Act and still provide operators who might be amenable to performing such reclamation work with incentives to do so. Taken in the order in which the problems were presented above, they are:

- "incidental" permits

- "limits on liability" and

- reclamation "credits."

Feasibility of Excess Spoil Disposal on Previously-Mined Land

There is an underlying question of feasibility. That is, is it feasible to expect that excess spoil from an active site could be used for reclamation work on a nearby or adjacent previously-mined site? In determining feasibility, at least two factors need to be examined -- the law and the money. It's not feasible if the law prohibits it; likewise, it's not feasible if it costs too much.

The primary concern in this paper is for the legality of the practice, but it is useful to look at both factors. First the legal factor -- that is, can it be done within the law as the law exists today?

There is nothing in the Surface Mining Act, I believe, that expressly prohibits the use of excess spoil from one site to reclaim another. There is a statement in section 407(e), in fact, which states that "states are encouraged ... to reclaim abandoned and unreclaimed land." And, while this is not the solution to the problem, it is at least somewhat of an encouragement.

The law says:

1.) In section 502(a) that "No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations ... unless such person has obtained a permit from the State's regulatory authority."

2.) In section 506(a) that "no person shall engage in or carry out ... any surface coal mining operations unless such person has first obtained a permit ..."

3.) In sections 701(27) and 701(28) that "Surface coal mining and reclamation operations" means surface mining operations and all activities necessary and incident to the reclamation of such operations after the date of enactment of this Act" and "surface coal mining operations" means activities conducted on the surface of lands in connection with a surface coal mine ..."

The statute contains no prohibitions and therefore I believe that some revised regulations could remove the legal impediments to the practice. Moreover, it is the overly-burdensome regulatory requirements that render disposal of excess spoil on previously-mined land economically infeasible because these regulations require not only the full measure of permitting and bonding but also full adherance to all of the performance standards with no accomodation for the circumstances of the site's having been previously abandoned by some other operator.

Turning briefly to the question of economic feasibility, suffice it to say that economic feasibility is, of course, a case-by-case determination and that if the regulatory impediments are removed or reduced, the mining industry will do its share to reclaim such sites as a public service. Even in today's poor coal market the coal industry has by no means lost its willingness to perform public services. But, there is little anyone can do, even the willing industry, if the present severe regulatory impediments to performing needed reclamation work on abandoned sites are not reduced or removed.

Reducing or Removing the Regulatory Impediments to Excess Spoil Disposal on Previously-Mined Land

There are, perhaps, three types of measures that can be taken that not only would remove or reduce the regulatory impediments to reclaiming previously-mined land with excess spoil, but would even encourage the practice. In this paper, they will be presented in the order in which their associated problems were presented above. They are: "incidental permits", limits on liability, and reclamation "credits."

Incidental Permits

The Surface Mining Act says that all surface mining and reclamation sites have to be permitted and the Act spells out a number of criteria that have to be met (including bonding) in order for a permit to be issued by the regulatory authority, whether state or federal. These criteria cover the full range of environmental concerns from hydrologic balance to revegetation to post mining land use and were designed to ensure that all areas related to environmental protection are addressed in the permit and the reclamation plan. The reason for this, of course, is that on ACTIVE sites the full range of environmental protection measures may be needed.

Nevertheless, if an operator is willing to invest some of his resources and perform what is tantamount to a public service by reclaiming a previously-mined site,

why not give that operator a small break? I'm not saying don't require the operator to permit the site because that, in my opinion, would be too inconsistent with SMCRA. [Sections 701(27) and (28) and 506(a) are too clear, I believe, on the question of permits and I just don't believe that the Act, as presently written, would allow the practice without some kind of permit.] But, let's let operators work with something less than the full permit as we now know it. I have been calling it an "incidental" permit basically for three reasons.

First, simply because I believe this permit should actually BE incidental to the practice, not vice versa. Reclamation is what we want to accomplish and the permitting system should be designed to expedite the practice, not prevent it.

Second, because the reclamation work, itself, would be incidental to mining on the active site.

Third, because I believe the costs of obtaining this permit should be of an amount "incidental" to the cost of obtaining a full mining permit including the bond. The bond should be incidental, too, and cover only the work performed.

Let the incidental permit's required information be limited to the information directly related to the reclamation work to be performed with the left-over spoil. That and perhaps indentification of any other environmental problems at the site are all that the reclamation plan should concern. In the reclamation plan it can be determined that existing but non-related environmental problems are not going to be made worse. Then the permit should be issued and the reclamation work carried out. SOME reclamation work is better than NO reclamation work in most instances, as long as other environmental problems are not made worse. Then, later, if there are sufficient AML funds, the other environmental problems can be corrected. In the mean time, some of the environmental degradation will have long been corrected or halted. And, the less that each site consumes from the AML fund, the more that the fund will be available for additional sites.

There should be no fees for these incidental permits and the regulatory authority should be willing to work closely with any operator who is willing to participate to provide available information such as hydrologic survey results, etc.

Limits on Liability

Section 515 of the Act and Subchapter K of the regulations place some stringent and costly environmental protection measures on surface mining operations. And, without arguing the need for or the benefits of these regulations, suffice it to say that if this full range of environmental protection performance standards continues to be brought to bear upon any operator who would undertake reclamation work on a previously-mined site, making him liable, essentially in perpetuity, for all the conditions at the site, he's simply not going to do it, even if he were willing to obtain an incidental, expedited permit. Regulations should be written and can be written, similar to regulations that have been issued in Pennsylvania, that would have the effect of limiting the operator's liability to only the work performed.

The key here is reasonableness i.e., reasonableness in what relevant responsibilities the operator would incur and agree to do, and reasonableness on the part of the regulatory authority as to what would be expected in the way of reclamation work. The bottom line for the regulatory authority is that a participating operator can be a very valuable resource. His willingness should not be taken for granted or abused -- the idea is encouragement, not opportunism.

An operator should not have to purchase all of the problems at the site forever. He will correct what reasonably can be corrected with the amount of excess spoil; the other problems will have to wait other means for correction.

Reclamation Credits

Several ideas for reclamation credits have come to the fore. These are:

- bonding credits where an operator could obtain credits for reclamation of previously-mined land which could be applied against the bond amount on the complementary active site or on other active sites.
- bond waivers where the regulatory authority could waive the bond in an amount equivalent to the value of the reclamation work performed.
- cost reimbursements where the regulatory authority could directly reimburse the operator for the value of the reclamation work performed.

The key here is realized economic benefit on the part of the operator for reclamation work performed on a previously-mined site. It would be a tremendous encouragement for the practice if these credits could be coupled with incidental permits and limited liability; but if credits had to stand alone, however, they would still be tremendously valuable.

What Can Be Done?

Three ideas have been proffered -- "incidental" permits, limits on liability, and reclamation "credits," none of which has been implemented.

It may be useful to take a brief look at what Pennsylvania has done. Pennsylvania recently submitted to OSM and received approval of a regulatory program amendment that creates special permits for and a limited exception to the regulations for previously-mined sites. The program amendment provides for bond release on sites where there are pre-existing discharges as long as the operator is satisfying the site-specific effluent limitations, has fully implemented the reclamation plan, and has not caused degradation of the baseline pollution load for a specified period of time. This example, while different from the practice we're addressing, is significant, I believe, because it indicates that in certain circumstances there CAN be special permits and there CAN be regulatory exceptions to perpetual liability for an operator who would reclaim a previously-mined site. The point is this -- if a regulatory exception is possible in Pennsylvania for pre-existing discharges, then there is no reason it cannot be possible in all states for reclaiming abandoned sites using excess spoil.

Conclusion

Incidental permits can reduce the operator's permitting costs; limits on liability can eliminate the operator's perpetual liability for conditions he did not create; and reclamation credits, in addition to or in place of incidental permits and limits on liability, can provide tremendous economic incentives for operators to perform a valuable public service by reclaiming some of the abandoned sites and improving the environment while conserving AML funds.

It is possible to have some of these changes made. Some related changes have already been made in Pennsylvania's program. Certain coal mining trade associations have suggested regulatory changes to OSM. OSM, itself, has undertaken at least two studies related to the issue. One study is designed to assess reclamation through remining. In it, OSM is looking specifically at reclamation "credits." In another study, OSM has hired a private consulting firm to assess exactly the question of using excess spoil to reclaim previously-mined sites. The hope is that full advantage will be taken of the practice.