

A recent court decision has implications for grass-roots organizations cleaning up acid mine drainage.

Bruce Golden, WPCAMR, February 13, 2007

Most grass-roots organizations who are working to clean up acid mine drainage (AMD) are addressing water pollution stemming from abandoned mines. "Abandoned mines" has a legal meaning: those operations occurring prior to the 1977 passage of Surface Mining Control Reclamation Act (SMCRA). In the vast majority of these cases, no legal entity bears responsibility for the creation or the cleanup of the resulting polluted water. However, acid mine drainage whose origins occurred from coal mining operations after SMCRA's passage fit into another legal category. Here the coal mining operator does bear the responsibility of cleaning up polluted mine water. To ensure that polluted water can be cleaned up even if the coal mining operator is unable to fulfill its obligations, the operator must first post a performance bond. That bond will be forfeited to the state if the operator is unable to comply with its obligations. The following court decision involves bond forfeiture sites, yet the reasoning applied in reaching the decision presumably could find its way to situations where the pre-1977 "abandoned mine" rules are in effect.

A summary of the Decision.

In a January 14, 2009 US District Court decision, the court "*DECLARES that the WVDEP is violating the NPDES permit requirements of the Clean Water Act and ORDERS the WVDEP to apply for and obtain NPDES permits for all eighteen sites at issue in this case.*"

At issue were 18 sites in which former coal mining operations created acid mine drainage (AMD) discharges. These coal mining operations occurred after the 1977 passage of SMCRA, and thus, the mining operators were required to treat, to acceptable water quality standards, any AMD discharges that were created. They were required to post bonds that would pay for AMD treatment should they not comply with their obligations. In these 18 cases, those operators did not comply for a variety of reasons and forfeited their bonds. The West Virginia Department of Environmental Protection (WVDEP) assumed responsibility for the sites and control of the forfeited bond monies. WVDEP itself did not treat the AMD nor acquire NPDES permits, reasoning that with its limited resources the bond forfeiture money would be used to much better effect at other AMD impaired sites. WVDEP asserted it has the authority to act in this way. The court disagreed and ruled that the Clean Water Act (CWA) applies to the situation and does not allow the flexibility of action taken by the WVDEP, no matter how well intentioned. The court provided a lengthy decision which spelled out its reasoning in considerable detail to support its ruling. WVDEP will likely appeal the ruling and it may be some time before this ultimately plays out.

[The court's ruling is 35 pages long but is written in fairly plain English. A non lawyer can make sense of much of it. This is recommended reading if this subject has importance for you.]

How the decision might be problematic for grass roots groups.

The court decision itself applies only to 18 bond forfeiture sites in West Virginia. However some of the reasoning detailed in the decision, if applied to an AMD treatment system built to treat water from an abandoned (pre 1977) mine, could conceivably result in a similar ruling for abandoned mine discharges, i.e. requiring an NPDES permit for the system.

It is generally accepted that AMD discharges from abandoned (pre-1977 SMCRA) coal mines themselves are considered to be non-point source (NPS) discharges. However if such a discharge is diverted into man-made structures as are present in treatment systems, an argument could conceivably be made that would classify the effluent water of that system as a point source discharge. Building on that argument, it might further be asserted that an NPDES permit is therefore required for that treatment system. Costs associated with obtaining and complying with an NPDES permit can be substantial.

We aren't aware of any challenge of this sort having been made nor are we aware that any is in the offing. Our concern is that a legal door has been opened through which other challenges may be able to pass. Those affected by a successful challenge would then be strapped with the obligations of an NPDES permit and all that goes with it.

[NPDES is the National Pollution Discharge Elimination System. The federal Clean Water Act (CWA) requires an NPDES permit when a point source discharge containing pollutants enters navigable waters of the US. When an NPDES permit is granted, a variety of conditions must be met including the attainment of specified pollutant levels and actions to maintain these levels.]