VIEWS & VISIONS

A publication of Bowles Rice LLP

Summer 2014

Whose Selenium Is It, Anyway?

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Mr. Hogan earned an undergraduate degree in aerospace engineering from Virginia Polytechnic Institute and State University in 1989. He received his law degree from the College of William & Mary's Marshall-Wythe School of Law in 1992.

In a preceding article of this magazine, author Jennie Henthorn comments on the challenge selenium discharges and related regulation presents to the mining industry. Ms. Henthorn's views, and her perspective on related scientific issues, are well-taken. But, selenium is an issue not just for active mine operators, but all landowners in the Appalachian coal fields.

Government regulation of selenium discharges generally focuses on discharges from point sources associated with active mining. Those discharges are principally regulated through a permit program, the National Pollutant Discharge Elimination System (NPDES), established by the Clean Water Act (CWA). NPDES permits include both technology-based and water quality-based limitations. Some permit limitations address the water treatment capabilities of a particular industry, while others focus on maintaining quality criteria applicable to a body of water and its designated uses.

In practice, the key question to be resolved may be who is actually responsible: a mine owner whose activities may have ceased long ago, the current landowner, or someone else.

The CWA also authorizes citizen suits against those who violate any effluent standard, limitation, or related administrative order. In addition, citizen suits may compel the United States Environmental Protection Agency to perform its non-discretionary acts and duties under the CWA. A meritorious citizen suit based on an alleged discharge of pollutants into "waters of the United States" potentially may result in (i) injunctive relief, such as a requirement to treat or remediate the source of the pollutant, (ii) a requirement that any ongoing discharge be made subject to an NPDES permit, (iii) imposition of civil penalties, and (iv) if the citizen substantially prevails on his claim, an award of litigation costs, including attorney and expert fees. (Traditional common law claims, such as nuisance, also may provide a remedy to those who claim to be aggrieved by the effects of water pollution.)

Mine operators are a frequent target of CWA citizen suits, and in recent years, selenium discharges have been a focal point of many suits. Active mining often causes selenium to be discharged into nearby waters. But, mining-related selenium may discharge from passive sources exposed to rainfall or groundwater, such as valley fills and gob piles (piles of waste rock removed during mining).

In an emerging trend, environmental groups have begun targeting landowners who have never engaged in mining or other land-disturbing activities, but who are alleged to be responsible for passive sources of selenium. The initial targets appear to be large land-holding companies whose lands contain or are adjacent to valley fills or gob piles.

Why target landowners who are not engaged in mining and, in many instances, acquired their property many years after mining ceased? The mine operator whose activities created the discharges may no longer exist or, at best, may be difficult to identify due to subsequent mergers and acquisitions. Bonding required by the Surface Mining Reclamation and Control Act and intended for the reclamation of surface mined lands may be exhausted or released.

Cynics might suspect a landowner's status as an out-of-state corporation is also a factor.

Those alleged to be responsible for discharging selenium or other pollutants from long-dormant valley fills and gob piles will undoubtedly raise arguments, like whether the environmental group plaintiff has standing to pursue the citizen suit, whether the apparent source of the pollutant is a "point source" as defined by the CWA, and in some cases whether the pollutant has entered regulated "waters of the United States." Courts routinely answer questions such as these, and the answers are often unfavorable to defendants. In practice, the key question to be resolved may be who is actually responsible: a mine owner whose activities may have ceased long ago, the current landowner, or someone else.

Whether a private landowner is responsible for selenium or other discharges associated with past mining activities should turn on basic property law principles. It has been said that a landowner holds exclusive rights and title to his property "from the center of the earth to the heavens above." But in Appalachia, the title to surface lands is frequently severed from the rights to the mineral estate below.

The common law of property generally holds that a mineral rights owner has the right to make reasonable use of the surface to extract the coal. This includes the right to construct and maintain appurtenances, such as roads, buildings, sediment ponds, fills and the like. Specific rights and any limitations on those rights for a particular property may be spelled out in the deed, by which the surface and mineral estates were severed.

Consequently, should citizen suits against non-mining landowners persist, the real questions to be answered could be these: If the mineral rights owner has the common law right to construct valley fills and gob piles, does it also bear responsibility for selenium or other pollutants discharged from those features? Does language in the deed of severance (or any associated, non-recorded sales agreement) impact these rights and responsibilities more specifically? And, for that matter, is the discharged selenium – itself, an elemental mineral – part of the mineral owner's estate? V


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