KRC Director Participates on Panel on Coal Mine Reclamation Bonding Posted: October 9, 2012

Comments of Tom FitzGerald Regarding Performance Bonds
Governor's Conference on the Environment

Louisville, Kentucky
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I appreciate being invited by my colleagues in the DNR to participate in this panel. I was asked to provide my perspective on what the recent regulatory changes to the bonding program mean to the organization I direct and to our clients and members.

The failure of the state to require full-cost reclamation bonding is a regulatory decision that may save costs to the coal industry, but it imposes costs of a different and more significant nature on landowners whose properties are mined and left unreclaimed. Just as the failure to conduct five-year reviews of air quality standards under the Clean Air Act would result in failure to maintain currency with the emerging health science regarding air pollution exposure, the conscious decision of the Beshear Administration to defer requiring full-cost performance bonds imposes costs on those least able to bear those costs, rather than on the industry that is in a position to greatly mitigate and reduce the bond liability through better mine planning.

The obligation to file a performance bond arises under Section 509 of the 1977 Surface Mining Control and Reclamation Act, which requires that a permit applicant shall

"File with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond for performance payable, as appropriate, to the United States or to the State, and conditional upon faithful performance of all the requirements of this chapter and the permit. The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit."

As to the amount of the bond, Section 509 provides that "[t]he amount of the bond shall be 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 and in no case shall the bond for the entire area under one permit be less than $10,000."

SMCRA Section 509(a), 30 U.S.C 1259(a).

As the regulatory authority managing a delegated program pursuant to the federal Act, the Cabinet is obligated to "implement, administer, enforce and maintain" the approved program in accordance with the Act, the Secretary's regulations, and the provisions of the approved State program. 30 CFR 733.11.

In response to the May 1, 2012 Letter sent from the OSM Director Pizarchik, initiating the process of

removing state authority and substituting a federal program for the state program, the Cabinet Secretary acknowledged at several points in the June 4, 2012 response that the amounts proposed in the recently revised 405 KAR 10:015 were not adequate to assure completion of the reclamation plans in the event of bond forfeiture. While acknowledging the problem, the Secretary stated that:

"[W]e have determined that requiring adequate full-cost reclamation bonds for each coal mining operation in Kentucky is impractical and unaffordable to many operators in the Commonwealth. The cost of backfilling required on most of the coal operations in Kentucky is prohibitively expensive under a full-cost bonding regime. We strongly believe that this approach would create an economic situation that would cause multiple forfeitures of underbonded permits, thereby defeating what we wish to achieve."

The letter proceeded to describe a two-step process in which “new bonding protocols” would be implemented through 405 KAR 10:015 and the Cabinet will move forward to develop, under new legislation that would have to be approved by the General Assembly (which meets again in Regular Session in January 2013), a mandatory bond pool that would supplement the individual performance bonds “where individual bonds are insufficient to achieve adequate reclamation.”

The Cabinet acknowledged later in the same letter that the implementation of the new bonding protocols (which are contained in the proposed regulation) would reduce those cases where forfeiture occurs and the bond funds are inadequate to complete the reclamation plan, but that in 34% of the cases, based on a review by DNR applying these protocols to a list of permit forfeited between 2007 and 2011, the revised bonds would yet be insufficient to cover the reclamation costs.

Still later in the letter, the Secretary acknowledged that the key factor in most of those cases where the bonds are deficient is the cost of earthmoving to backfill and grade the operations to the approximate original contour:

"Simply put, for most large mining operations the bond is not sufficient to fund the backfilling and grading necessary to achieve full reclamation if the operation was (sic) forfeited under the worst case scenario described in the permit."

Having acknowledged that, even with the application of the new protocols proposed in 405 KAR 10:015, the resulting bond would have been inadequate in 34% of the cases in which bond forfeitures have occurred during the last four years, and that the proposal is less than “full-cost” reclamation bonding, the Cabinet breached a mandatory, nondiscretionary obligation under the federal Act to revise the regulations in order to achieve full-cost bonding.

Notably missing from the response letter of the Cabinet Secretary to the Office of Surface Mining Reclamation and Enforcement, are several things of interest to the constituency I have represented for the past 33 years. First, there is no recognition that the obligation for full-cost bonding has been in place in Kentucky since 1982, and yet despite the identification of the issue as a state program deficiency

many years ago by the federal Office of Surface Mining, and for al ost every year since, the problem remains unresolved.

Second, and much more troubling, is the complete apparent lack of understanding or empathy by the Secretary that the failure to require full-cost bonding has real costs that are borne on the backs of the landowners who trusted that the reclamation plans would be completed, that mining would be a temporary use of land and that a post-mining land use of higher or better value would be achieved, and that the Cabinet would protect their interests by requiring full-cost bonding. The professed concern with the continued economic vitality of mining operations if they are required to back their promise or reclamation with adequate performance bonds, is misplaced sympathy. The Cabinet is without the statutory authority to amend the law to require proper reclamation bonds only where convenient or affordable for the permittee, and by failing to require adequate bonds, the Cabinet misses an opportunity to encourage more compact, better designed mine plans.

The letter missed a third, and fairly fundamental point, which is that the design of a mining plan is almost entirely under the control of the permittee, and since the most significant costs identified by the Cabinet are the haulage of material for backfilling and grading and completion of the reclamation plan, the permittee can control and significantly reduce those costs by maintaining more contemporaneous reclamation, thus reducing the bonding costs in the "worst-case scenario."

The Council requested that the Cabinet modify the proposed bond amounts in order to require, either through a flat per-acre rate or, more preferably, a "pit-bond" approach that calculates the costs of movement of material for backfilling and grading at the most vulnerable point in the mine plan design (worst-case scenario). The Cabinet chose not to do so.

With respect to the creation of a new mandatory bond pool, my view is that there is no need for additional statutory authority to create a mandatory pool, since the existing law already authorizes a voluntary bond pool. To the extent that the individual permittee believes that the posting of additional individual bonds is too expensive or that the bond is unavailable, the option already exists to apply for coverage of a portion of the mine bonding liability under the bond pool.

My quarrel is not with the line workers of DNR, who have worked in the public interest at short pay trying to implement this program under difficult conditions. It is the lack of political leadership that has resulted in the adoption of new bond protocols that the agency acknowledges will not, during the period before a new bond pool is established and funded (which would likely be a minimum of a year or more from present) assure proper reclamation plan completion for up to 34% of the permitted sites that will become forfeit. In making that decision, the Cabinet has knowingly consigned those landowners to whom the promise of completion of the reclamation plan was made, to a loss of the value and utility of those lands, and has opened the Commonwealth of Kentucky to potential liability for a knowing failure to properly implement state and federal law. During this interim, before each permit is properly bonded, every single mining operation under permit is vulnerable to a collateral challenge for failure to maintain

adequate bonding, and the Cabinet is vulnerable under both state and federal law for failure to require such a bond.