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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	Chapter 11
ARCH COAL, INC., *et al.*,	)	Case No. 16-40120 (KRH)
Debtors.	)	(Jointly Administered)

RESERVATION OF RIGHTS OF SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, AND OHIO VALLEY ENVIRONMENTAL COALITION TO DEBTORS' THIRD AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

Sierra Club, Ohio Valley Environmental Coalition, and West Virginia Highlands Conservancy (collectively, the "*Environmental Groups*"), by their undersigned counsel, submit this Reservation of Rights (the "*Reservation of Rights*") to the *Debtors' Third Amended Joint*

Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "*Plan*"). In support of their Reservation of Rights, the Environmental Groups state as follows:

PRELIMINARY STATEMENT

1. In order to conduct the coal mining operations that form the core of their business, the Debtors must comply with the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("*SMCRA*"). At the heart of SMCRA lies the requirement that before a permittee can begin coal mining it must provide financial assurances in the form of a reclamation bond guaranteeing that a third party will completely reclaim any area disturbed by the authorized mining. The Debtors have ostensibly been satisfying their reclamation bonding obligations in Wyoming via self-bonding, which is only available to companies who meet certain financial criteria. The Debtors no longer meet these criteria. Whether or not the Debtors' Plan is confirmable will therefore depend in significant part on the Debtors' ability to replace, or commit to replacing on a defined and limited time frame, their self-bonds in Wyoming.

2. Pre-Petition Date, the Environmental Groups brought multiple civil actions (collectively, the "*Actions*") in the United States District Court for the Southern District of West Virginia (the "*District Court*") against certain of the Debtors (defined below) (namely, Debtors Mingo Logan Coal Company ("*Mingo Logan*") and Coal-Mac, Inc. ("*Coal-Mac*")) under state and federal environmental statutes, including, *inter alia*, the Clean Water Act, 33 U.S.C. §§ 1251-1387 ("*CWA*") and SMCRA, pursuant to citizen suit provisions of those statutes. These provisions authorize aggrieved persons to bring civil enforcement lawsuits to remedy and prevent harm to their legally protected interests where a federal or state authority is not "diligently prosecuting" such an action. *See* 33 U.S.C. § 1365(a)-(b) (authorizing citizen suits); 30 U.S.C. § 1270(a)-(b) (authorizing civil action to compel compliance by "any person having an

interest which is or may be adversely affected."). These Actions were pending as of the Petition Date of the Debtors' chapter 11 cases.

BACKGROUND

I. The Debtors and the Chapter 11 Cases

3. On January 11, 2016 (the "*Petition Date*"), Arch Coal, Inc. and certain of its affiliates (collectively, the "*Debtors*") filed petitions for relief under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*"), thereby commencing these jointly-administered chapter 11 cases. The Debtors continue to operate and manage these businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. The Debtors are primarily in the business of owning and operating coal mines. These mines are both surface mines and deep mines, located in West Virginia, Kentucky, Maryland, Virginia, Colorado, Illinois and Wyoming. In connection with their coal mining operations, the Debtors are subject to federal and state laws and regulations (as defined in the Disclosure Statement, "*Environmental Law*").

II. Federal and State Laws Governing the Debtors' Mining Operations and Reclamation Obligations

5. Among other things, federal law prohibits the Debtors or other coal mining operators from operating without valid permits, and from operating in violation of such permits. The purposes of these laws, as implemented in the permits, are as follows.

A. The Surface Mining Control and Reclamation Act of 1977

6. The Surface Mining Control and Reclamation Act of 1977 ("*SMCRA*"), 30 U.S.C. §§ 1201 *et seq.*, sets certain minimum requirements for coal mining operations such as those maintained by the Debtors. Some states, including Wyoming, implement SMCRA's

requirements through their own delegated surface mining programs. Federal law requires that these programs must be no less stringent than SMCRA and no less effective than SMCRA's implementing regulations. 30 U.S.C. § 1253; 30 C.F.R. § 730.5. Among SMCRA's fundamental goals is to ensure that the mine owners and operators, which have profited from the operation of the mines, prevent environmental harm and pay for the costs of environmental reclamation and clean-up necessitated by their mining activities.[1]

7. To achieve this goal, SMCRA and all approved state surface mining programs require that mine operators provide, and maintain at all times, financial assurances guaranteeing that funds will be available to cover the full costs of mine clean up and reclamation in the event the mine operator is unable to complete these tasks itself. These requirements are central to SMCRA's purpose:

> SMCRA was passed, in part, to address known results of unregulated surface mining: 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. 30 U.S.C. § 1201(c). *With mandated reclamation plans and reclamation bonds required by federal law to be adequate*, SMCRA was a promise to remedy the abuses, protect the environment, and yet permit the recovery of mineral reserves with approved practices and regulatory oversight.

W. Virginia Highlands Conservancy v. Norton, 161 F. Supp. 2d 676, 684 (S.D. W. Va. 2001)

[1] Prior to SMCRA's enactment, it was common practice for mine operators to abandon a mine once it ceased to be profitable, leaving a "large number of abandoned and unreclaimed coal mining sites strewn across the nation." *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337, 340 (3d Cir. 2007). Communities located near the mines would suffer from the damage caused by mining operations, including but not limited to toxins in the drinking water, and the mine operators were not held responsible for these indirect costs.

(emphasis added). In short, SMCRA imposes financial and other obligations on mine operators, so that the mine operators, rather than the taxpayers or surrounding communities, bear the cost of their mining operations. The ultimate beneficiaries of SMCRA are the environment, the public interest, and people with particular interests in avoiding and mitigating further severe environmental destruction from surface mining.

i. SMCRA's Reclamation Bonding Mandates

8. Under SMCRA, a person may not receive a permit to conduct surface coal mining operations without first providing an adequate reclamation bond. 30 C.F.R. § 800.11. The reclamation bonds required by SMCRA must 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." 30 U.S.C. § 1259(a); 30 C.F.R. § 800.14; Wyo. Admin. Code § ENV LQC Ch. 12 s 2(b). The requirement that a permittee provide and maintain an adequate reclamation bond applies not only at the time of initial permit issuance, but throughout the life of the permit and of the authorized mining operation. *See* Wyo. Stat. § 35-11-415(a).

9. SMCRA's reclamation bonding requirements are in addition to, and separate from, the requirement that mine operators conduct reclamation as part of their ongoing mining operations. Wyo. Admin. Code § ENV LQC Ch. 4 s 2(b)(a)(i) ("[r]eclamation shall restore the land to a condition equal to or greater than the 'highest previous use.').

ii. The Self-Bonding Privilege

10. In certain limited circumstances, regulators may allow a permittee to meet the reclamation bonding requirements by providing a "self-bond." 30 C.F.R. § 800.23; *see also* Wyo. Stat. § 35-11-417(d). Any state program authorizing the use of self-bonding must "assure that the regulatory authority will have available sufficient money to complete the reclamation

plan for any areas which may be in default at any time" and "must provide a substantial economic incentive for the permittee to comply with all reclamation provisions." 30 C.F.R. § 800.11(e). Further, the regulatory authority may not accept a self-bond unless the mine operator can satisfy certain minimum financial criteria. 30 C.F.R. § 800.23(b), (d).[2] Self-bonding is a privilege available only to those operators who can establish that they pose only a minimal risk of insolvency.

B. The Clean Water Act

11. The Clean Water Act ("*CWA*") has the "objective . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," in part through the elimination of water pollution. 33 U.S.C. § 1251(a), (a)(1).

12. In particular, under CWA § 402 and its regulatory framework, the discharge of pollutants may not occur without a permit meeting requirements established by the U.S. Environmental Protection Agency ("*EPA*"), as well as any additional conditions a state permitting authority determines are necessary to carry out the CWA. *Id.* § 1342(a)(1)-(2), (b); *see* 40 C.F.R. §§ 122.41-50, § 123.25.

13. Further, under CWA § 404 and its regulatory framework, "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c); *id.* § 230.11(c)(1)-(4) (describing prohibited types of such degradation). As part of these fill permits, the Army Corps

[2] Among the requirements in 30 C.F.R. § 800.23 is the submission by the applicant of financial information in sufficient detail to show that the applicant meets at least one of the following criteria: (a) a current rating for its most recent bond issuance of "A or higher from Moody's or Standard & Poor's; or (b) tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or (c) fixed assets in the U.S. of at least $20 million, and a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater, *see* 30 C.F.R. § 800.23(b)(3); *see also id.* § 800.23(d) (further providing that the total amount of the outstanding and proposed self-bonds of the applicable for surface coal mining and reclamation operations shall not exceed 25 percent of the applicant's tangible net worth in the United States").

often requires "compensatory mitigation" for "unavoidable impacts." 40 C.F.R. § 230.91(c)(3); 33 C.F.R. § 332.1(c)(3)). In addition, any applicant for a CWA § 404 permit must receive and follow a "certification" regarding conditions the State determines are needed to fulfill certain CWA provisions, and which "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that [the] applicant . . . will comply with any applicable effluent limitations and other limitations" to protect water quality, as provided in § 401 of the Act. 33 U.S.C. § 1341(a)(1)-(2), (d).

14. All of these CWA requirements are in addition to Debtors' SMCRA reclamation obligations. Further, CWA permit conditions and mitigation obligations may be strengthened at any time for any given permit. For example, if necessary to assure compliance with the CWA or protect the public interest, the Army Corps may modify, suspend, or revoke a § 404 permit at any time. 33 C.F.R. § 325.7(a). The EPA also has independent authority to deny or restrict (including to withdraw) discharge authorization under any such permit at any time, "whenever" EPA determines it "will have an unacceptable adverse effect" on aquatic resources. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1; *see Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 616 (D.C. Cir. 2013) (affirming EPA's authority to take such action after the Corps issued one of Debtors' § 404 permits). The same is true for § 402 discharge permits. *See, e.g.*, 40 C.F.R. § 122.64 (authorizing termination of § 1342 permit if "permitted activity endangers human health or the environment"); *see also* 33 U.S.C. § 1364(a) ("[n]otwithstanding any other provision of this chapter," all CWA permits are subject to EPA's emergency power "to stop the discharge of pollutants.").

RESERVATION OF RIGHTS[3]

I. THE DEBTORS' RECLAMATION BONDING OBLIGATIONS

15. The Debtors currently maintain $485.5 million in self-bonded reclamation obligations in Wyoming. Doc. 289 at 7; Doc. 1091 at 49.

16. The federal Office of Surface Mining, Reclamation, and Enforcement ("*OSMRE*") has recently taken several important actions that establish that self-bonding is no longer appropriate given the extreme financial difficulties currently facing the coal mining industry. These OSMRE actions include compelling Alpha Natural Resources to replace all of its self-bonding in Wyoming as a condition of its own bankruptcy plan confirmation,[4] issuing a "Policy Advisory on Self-Bonding" in which OSMRE used strong language to suggest that self-bonding is no longer appropriate,[5] and announcing that it will initiate a rulemaking to revise the current self-bonding regulations.[6]

17. It is the Environmental Groups' understanding that the Debtors have now committed to Wyoming and OSMRE that they will replace all of their self-bonding with alternative financial assurances within 15 days of the Effective Date, as previously recognized was a possibility. [Doc. 289 at 9-11; Doc. 1091 at 49-50]. Should the Debtors fail to make that commitment in an amended Plan prior to the hearing on Plan confirmation, the Environmental Groups hereby reserve the right to file an objection to the Plan.

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[3] In the event the Plan is modified, the Environmental Groups further reserve their rights to assert objections to subsequent versions of the Plan, on these or any available grounds.

[4] *In re Alpha Natural Resources, Inc.*, Case No. 15-33896 (Bankr. E.D. Va.), Doc. 3040.

[5] OSMRE, U.S. Dep't of Interior, OSMRE Policy Advisory: Self-Bonding (Aug. 5, 2016), http://www.osmre.gov/resources/bonds/DirPolicyAdvisory-SelfBond.pdf.

[6] *See* OSMRE News Release, Ofc. of Surface Mining Reclamation & Enforcement to Initiate Rulemaking on Self-Bonding for Coal Mines, http://www.osmre.gov/resources/newsroom/news/2016/081616.pdf (Aug. 16, 2016) ("*OSMRE News Release*").

18. SMCRA guarantees the right of "[a]ny person having an interest which is or may be adversely affected" by a SMCRA permitting decision to participate in all stages of that decision, including through filing written objections to the permit application, requesting a hearing on a final permitting decision, and appealing the final decision of the regulatory authority. 30 U.S.C. §§ 1263 and 1264. Such permitting decisions include the amount of reclamation bonding liability and the acceptable form of reclamation bond. The Wyoming surface mining program provides these same rights of public participation. Wyo. Stat. § 35-11-406. The Environmental Groups hereby further reserve their rights to participate in any proceedings, whether before this Bankruptcy Court or in any other forum, related to the scope of the Debtors' reclamation bonding obligations or the form of financial assurance used to satisfy SMCRA's reclamation bonding requirements.

II. THE DEBTORS' POTENTIAL MATERIAL OBLIGATIONS ARISING FROM ENVIRONMENTAL ENFORCEMENT ACTIONS BROUGHT BY THE ENVIRONMENTAL GROUPS IN WEST VIRGINIA.

19. The Debtors, in the Disclosure Statement filed and approved in support of the Plan (the "*Disclosure Statement*"), have acknowledged that they "are defendants in certain citizen enforcement proceedings that are currently subject to the automatic stay, including two civil actions filed in the United States District Court for the Southern District of West Virginia, styled (i) *Ohio Valley Environmental Coalition, et al. v. Mingo Logan Coal Company, LLC,* Civil Action No. 2:15-cv-11150 (S.D. W.Va.); and (ii) *Ohio Valley Environmental Coalition, et al. v. Coal-Mac, Inc.,* Civil Action No. 3:15-cv-15232 (S.D. W.Va.)." Doc. 1091 at 146-47 (collectively, the "*Actions*"). The Debtors have further recognized that, "[i]f the relief sought in the foregoing proceedings is granted, the Debtors may incur material obligations." Doc. 1091 at 146-47. In the Disclosure Statement, the Debtors also acknowledged that: "To the extent that

any of these proceedings seek to enforce obligations that do not constitute Claims under the Bankruptcy Code, such proceeding will not be discharged upon the Effective Date." *Id.*

20. The Plan similarly makes clear that any obligation arising from the Actions that is not a "Claim" within the meaning of the Bankruptcy Code will not be discharged by the Plan, stating as follows:

> Nothing in this Plan or the Confirmation Order shall (i) release, waive, or discharge any liability or obligation of the Debtors sought to be enforced pursuant to [above-cited cases] or (ii) preclude the prosecution of such liabilities or obligations against the Reorganized Debtors to the fullest extent permitted by applicable law from and after the Effective Date, in each case of (i) and (ii), solely to the extent such liability or obligation is not a Claim.

Doc. 1090 § 11.4(e). The Environmental Groups have consistently maintained, including in their *Limited Objection and Reservation of Rights to the Debtors' Proposed Disclosure Statement* [Doc. 924], that because the relief sought in the pending enforcement actions is injunctive in nature – *e.g.*, stream restoration and water treatment to remove pollution and protect water quality – the Environmental Groups' interests do not constitute "claims."[7] Injunctive relief to prevent or address harm, whether for an environmental remedy or a commercial remedy like the enforcement of a covenant not to compete, which has no adequate remedy at law, is well-understood to be a liability that cannot be reduced to monetary damages or discharged as a monetary "claim" under the Code. *See, e.g., In re Printronics, Inc.*, 189 B.R. 995, 1001 (Bankr. N.D. Fla. Dec. 8, 1995); *see also*; *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150, 151 n.6 (3d Cir. 1993). Thus, there can be no doubt that the Environmental Groups can proceed to seek injunctive relief to ensure that the Debtors stop polluting, and ameliorate Environmental Law violations and resulting harm.

[7] Regardless, to the extent that violations continue post-Effective Date, new claims for injunctive relief may be pressed by the Environmental Groups (or other aggrieved parties) at that time.

21. Courts have repeatedly recognized that equitable remedies under Environmental Law, such as the remedies being sought by the Environmental Groups in the Actions, are not "claims" under the Bankruptcy Code: these liabilities cannot be satisfied merely by the payment of money or other consideration in lieu of compliance. *See* 11 U.S.C. § 101(5) (defining claim as a "right to payment" or "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment"); *United States v. Apex Oil Co.*, 579 F.3d 734, 738 (7th Cir. 2009) (order requiring cleanup of a groundwater plume was not a "claim"); *In re Mark IV Indus., Inc.*, 438 B.R. 460, 467-71 (Bankr. S.D.N.Y. 2010) (regulatory obligation to clean up contaminated former industrial site was not a "claim"); *United States v. Hubler*, 117 B.R. 160, 164 (Bankr. W.D. Pa. 1990) (injunctive relief to compel performance under SMCRA enforcement order was not a dischargeable "claim"), *aff'd* 928 F.3d 1131 (3d Cir. 1991).

22. The Environmental Groups' first Action, *Ohio Valley Environmental Coalition, et al. v. Mingo Logan Coal Company, LLC,* Civil Action No. 2:15-cv-11150 (S.D. W.Va.), seeks declaratory and injunctive relief, including an order directing the Debtors to complete a restoration and enhancement project on Seng Camp Creek which would, among other things, restore water flow and establish a riparian buffer to maintain the integrity of these waters, and to safeguard these and connected natural resources that are important to local communities. Such relief is needed to fulfill the CWA's requirements, prevent further harm to local waters, and to protect the ongoing use and enjoyment of this stream and the broader watershed it supports by nearby residents, including the Environmental Groups' members.

23. The Environmental Groups' second Action, *Ohio Valley Environmental Coalition, et al. v. Coal-Mac, Inc.*, Civil Action No. 3:15-cv-15232 (S.D. W.Va.), seeks declaratory and injunctive relief, including an order directing the Debtors to bring their pollution

discharges from multiple locations at the Phoenix 4 mine complex into compliance with the CWA and SMCRA. The pollutants the Debtors are discharging from the Phoenix 4 mine includes total dissolved solids, sulfates, and the ions that contribute to elevated conductivity, which EPA has recognized extirpates aquatic life and consequently the biological integrity of a stream and watershed. These pollutants are both devastating to the biological integrity of waterways and also extremely difficult and expensive to treat. The only technology currently available to treat conductivity pollution from coal mines is reverse osmosis. The EPA, in its March 2014 "Reference Guide to Treatment Technologies for Mining-Influenced Water," states that "[r]everse osmosis typically requires high capital costs for the purchase, installation and operation of the membrane system."[8] EPA estimates that the cost for a system designed to treat one million gallons a day would be over $42 million.

24. The Environmental Groups hereby reserve their rights to resist any effort by the Debtors to have the Actions or any injunctive relief sought in the Actions discharged under the Plan or any other proceeding before this Bankruptcy Court.

25. The Environmental Groups further reserve their rights to pursue the Actions following the Effective Date of any approved Plan, and to secure and enforce the injunctive relief sought in the Actions (including by opposing any attempt by the Debtors to rely on the Plan as a potential defense to such relief).

[8] EPA 542-R-14-001 (Mar. 2014) at 45 ("EPA Reference Guide"), *available at* https://www.epa.gov/sites/production/files/2015-08/documents/reference_guide_to_treatment_technologies_for_miw.pdf (last visited Aug. 25, 2016).

Dated: September 6, 2016

SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, AND OHIO VALLEY ENVIRONMENTAL COALITION

By: /s/ Thomas R. Fawkes
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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2016, a copy of the foregoing was served by: (1) electronic mail on the Core Parties, as set forth in the Core 2002 List posted on the Debtors' Case Information Website as of August 16, 2016; (2) through the Court's CM/ECF system on all parties that have registered to receive electronic notices; and (iii) by U.S. mail, postage prepaid, to the below notice parties, as set forth in paragraph 51 of the *Order (i) Approving Disclosure Statement; (ii) Approving Solicitation and Notice Materials; (iii) Approving Forms of Ballots; (iv) Establishing Solicitation and Voting Procedures; (v) Establishing Procedures for Allowing and Estimating Certain Claims for Voting Purposes; (vi) Scheduling a Confirmation Hearing, and (vii) Establishing Notice and Objection Procedures* (Docket No. 1101) and the *Order Establishing Certain Notice, Case Management and Administrative Procedures* (Docket No. 155).

/s/ Thomas R. Fawkes
Thomas R. Fawkes

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