

**OPINION NO. 79-038****Syllabus:**

1. An operator or permittee of an underground coal mine, or agent thereof, located in Ohio and abandoned before May 15, 1978, does not have a reclamation responsibility under state law with respect to unstable conditions, such as slips and landslides, caused by water seepage from those mines.
2. The State of Ohio has no continuing reclamation responsibility as a result of bond forfeiture with respect to unstable conditions such as slips and landslides caused by water seepage from underground mines located in Ohio and abandoned before September 16, 1978.

**To: Robert W. Teater, Director, Ohio Dept. of Natural Resources, Columbus, Ohio**

**By: William J. Brown, Attorney General, July 24, 1979**

I have before me your request for my opinion concerning whether the State of Ohio, any operator or permittee of an underground coal mine, or any agent thereof, has a "continuing reclamation responsibility" as those terms are employed in the

Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 30 U.S.C. 1201 et seq. (1977) (hereinafter the "Federal Act") with respect to unstable conditions, such as slips and landslides, caused by water seepage from an abandoned underground coal mine.

Section 401 of the Federal Act, 30 U.S.C. 1231 (1977), creates the Abandoned Mine Reclamation Fund to be administered by the Secretary of the Interior for the purpose of reclaiming and restoring land and water resources adversely affected by past coal mining. The lands and water located within a state which are eligible for federal grants are described in Section 404 of the Federal Act, 30 U.S.C. 1234 (1977), which provides:

Lands and water eligible for reclamation or drainage abatement expenditures . . . are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to the date of enactment of this Act, and for which there is no continuing reclamation responsibility under State or other Federal laws. (Emphasis added.)

The regulations accompanying Section 404 of the Federal Act, 30 U.S.C. 1234 (1977), set forth in 43 Fed. Reg. 49942 (1978), 30 C.F.R. §874, provide, in part, that lands and water are eligible for reclamation activities if there is no continuing responsibility for reclamation by the operator, permittee, or agency of the permittee under state law, or the State as the result of a bond forfeiture.

With respect to the continuing reclamation responsibility of the operator, permittee, or agent of the permittee under state law, the provisions of the Ohio Revised Code dealing with deep mines, which are set forth in R.C. Chapter 4151, have not in the past required, nor do they presently require, operators of deep mines to carry out reclamation activities to prevent water seepage, or to divert water seepage from an affected area. Not until the promulgation of underground mining rules by the Division of Reclamation pursuant to Executive Order No. 18-3, dated May 10, 1978, were operators of underground coal mines required by state law to perform such reclamation.

Executive Order No. 18-3 specifically granted to the Division of Reclamation the power to adopt rules, including emergency rules, pursuant to R.C. Chapter 119, in order to implement the initial regulatory program established by the Secretary of the Interior pursuant to the Federal Act.

Accordingly, the Division of Reclamation promulgated OAC 1501:13-11-09. Part II, Subsection E of the rule provides, in part, that:

The operator shall plan and conduct underground coal mining and reclamation operations to minimize disturbance of the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from underground coal mining operations, both on and off site. Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized and applicable Federal and State statutes and regulations shall not be violated.

The rule generally reflects the performance standard set forth in Section 515(b)(10)(A)(iii) of the Federal Act, 30 U.S.C. 1265 (1977) which states that the underground mining operations as a minimum must:

minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of the water in surface and ground water systems both during and after coal mining operations and during reclamation by . . . (iii) casing, sealing, or otherwise managing boreholes, shafts, and wells. . . .

Pursuant to Section 701(28)(A) of the Federal Act, 30 U.S.C. 1291 (1977) "surface coal mining operations" is defined to include surface impacts incident to an underground coal mine.

Clearly, the prevention and the diversion of water seepage from abandoned underground coal mines is a reclamation responsibility under the above performance standard contained in the Federal Act, and is a reclamation responsibility pursuant to the corresponding administrative rule of the Division of Reclamation.

The effective date of the underground mining rule promulgated under Executive Order No. 18-3 was May 15, 1978; therefore, operators of underground coal mines abandoned before that date have no reclamation responsibility under state law regarding water seepage.

With respect to those operators of underground coal mines in operation on or after May 15, 1978, state law has consistently imposed reclamation responsibilities on the operators since the adoption of the original underground mining rule. Although Executive Order No. 18-3 expired on June 30, 1979, the underground mining rule promulgated pursuant to that order has since been replaced by a similar rule promulgated pursuant to legislative enactment.

Specifically, R.C. 1513.02(A)(1)(c), effective August 2, 1978, provides that the Chief of the Division of Reclamation shall adopt, amend, and rescind rules to implement the initial regulatory procedures under section 502 of the Federal Act. The new underground mining rule promulgated under the above section, OAC 1501:13-11-09, took effect on August 28, 1978, and, through adoption of virtually identical language contained in the original rule, requires that operators of underground coal mines prevent harmful water seepage.

It should be noted that at the time of passage of R.C. 1513.02(A)(1)(c), the General Assembly also enacted R.C. 1512.02(F) which states:

If it is determined by the United States District Court for the District of Columbia that the United States Congress did not intend that surface impacts incident to underground coal mines be regulated under Section 502 of the federal "Surface Mining Control and Reclamation Act of 1977," 91 Stat. 445, 30 U.S.C. 1201, the chief shall immediately cease enforcement of those provisions of Chapter 1513. of the Revised Code, and rules thereunder, which apply to the surface impacts of underground coal mines.

On August 24, 1978, the United States District Court for the District of Columbia in *In re Surface Mining Regulation Litigation*, 11 ERC 2078, \_\_\_ F. Supp. \_\_\_ (D.D.C. 1978), upheld the validity of the interim regulations regarding the surface effects of underground mining set forth in Section 502 of the Federal Act. Thus OAC 1501:13-11-09, adopted pursuant to R.C. 1513.02(A)(1)(c), remains in effect.

With respect to the State of Ohio's continuing reclamation responsibility as a result of bond forfeiture, the provisions of the Ohio Revised Code dealing with deep mines, which are set forth in R.C. Chapter 4151, have never required that operators of underground mines provide the State of Ohio with any kind of performance bond insuring land reclamation.

Part I, Subsection B, of the original Division of Reclamation rule, OAC 1501:13-11-09, promulgated pursuant to Executive Order No. 18-3, required the Chief of the Division of Reclamation to obtain bonds from all operators of underground coal mines equal in an amount to the estimated cost of reclamation in case of default by the operator. It did not, however, provide a mechanism whereby default by an operator entitled the State of Ohio to the bond money for use in reclaiming the affected land.

Thus, although the operator of an underground coal mine was required to

divert water seepage from abandoned underground mines in operation on or after May 15, 1978, the State of Ohio did not have such a continuing reclamation responsibility as a result of bond forfeiture with respect to these mines. Not until enactment of R.C. 1513.12 in August of 1978, were there provisions for the forfeiture of bonds and the expenditure of monies by the State to reclaim the mined lands.

Under the statutory scheme set forth in R.C. 1513.12, and corresponding sections, all operators of underground coal mines operating within the State of Ohio must submit a surety bond, certificate of deposit, or cash in an amount determined by the Chief of the Division of Reclamation in compliance with R.C. 1513.08(A) and R.C. 1513.16(F).

R.C. 1513.08(A) provides that the return of the bond payable to the state is conditioned upon the faithful performance by the operator of his reclamation responsibilities. As already discussed above, these responsibilities include the prevention of harmful water seepage. Failure to reclaim on the part of the operator results in the forfeiture of the certificates of deposit or cash to the state in accordance with R.C. 1513.16(F). In the event the defaulting operator has deposited with the state a surety bond, failure to reclaim results either in the satisfactory completion of the reclamation by the surety, or payment of the amount due by the surety. The amount of money collected from the surety, as in the case of certificates of deposit and cash, becomes the property of the state and available for use by the chief in reclaiming the land in accordance with R.C. 1513.18.

R.C. 1513.18 is the specific section of the Revised Code which imposes upon the State of Ohio a continuing reclamation responsibility for abandoned underground mines. That section requires that all cash that becomes the property of the State of Ohio pursuant to R.C. 1513.16 be deposited in a special fund known as "the Strip Mining Reclamation Fund and that monies be spent by the State of Ohio to reclaim the land as required by law. Thus, where the operator, in reclaiming the land, has failed to divert water seepage from underground mines, it is the continuing responsibility of the State of Ohio to perform such reclamation with the forfeited bond money.

The effective date of R.C. 1513.12 was August 2, 1978. However, only those operators of underground coal mines in operation as of 45 days after the effective date of the section, or September 16, 1978, are required to submit performance bonds which are forfeitable to the State of Ohio upon default by the operator. It follows that the State of Ohio has a continuing responsibility for reclamation with respect to unstable conditions caused by water seepage only from those underground mines in operation on or after September 16, 1978. Prior to that date, although operators of underground coal mines were required to submit a bond under the rule originally promulgated pursuant to Executive Order No. 18-3, there was no continuing reclamation responsibility imposed on the State of Ohio as a result of bond forfeiture.

Thus, it is my opinion, and you are advised, that:

1. An operator or permittee of an underground coal mine, or agent thereof, located in Ohio and abandoned before May 15, 1978, does not have a reclamation responsibility under state law with respect to unstable conditions, such as slips and landslides, caused by water seepage from those mines.
2. The State of Ohio has no continuing reclamation responsibility as a result of bond forfeiture with respect to unstable conditions such as slips and landslides caused by water seepage from underground mines located in Ohio and abandoned before September 16, 1978.