Overview of Community Reclamation Partnership (H.R. 2937)

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The overall goal of this bill is to set a process by which State Title IV AML programs can clarify and rationalize their NPDES responsibilities for AMD water treatment projects and allow them to work with volunteer partner groups in conducting that work.

Under this bill, Sections 405 and 413 of the Surface Mining Control and Reclamation Act (SMCRA) Title IV would be amended. These modifications seek to allow the State AML programs and eligible AML “partners” (i.e. Good Samaritans) to proceed with their work unimpeded by unreasonable, prohibitive aspects of liability and NPDES requirements under the Clean Water Act.

The current language in Sec. 405(l) is intended to give the States protection from undeserved federal liability:

**Sec 405. (l) - No State shall be liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a State abandoned mine reclamation plan approved under this section. This subsection shall not preclude liability for cost or damages as a result of gross negligence or intentional misconduct by the State. For purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.**

This provision was added during the 1990 SMCRA amendments due to concern in western states that noncoal AML work conducted under SMCRA could be subject to federal liability under CERCLA. It does not seem that Congress considered potential Clean Water Act (CWA) liability at coal AML sites an issue at the time, mainly because SMCRA work is generally understood to be distinct from CWA work. Recent court decisions have created the expectation that the CWA may in fact apply to SMCRA Title IV AML work, hence the need for the relief offered by this bill.¹

Despite the fact that the federal liability protection afforded to the AML programs under the current language in 405(l) would seem to apply to the CWA, Sec. 413(d) of Title IV specifically says that any AMD treatment system operated or constructed by the AML programs must fully comply with the CWA. The current language is as follows:

**(d) Construct and operate plants for control and treatment of water pollution resulting from mine drainage - The Secretary or the State pursuant to an approved State program, shall have the power and authority to construct and operate a plant or plants for the control and treatment of water pollution resulting from mine drainage. The extent of this control and treatment may be**

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¹ See Environmental Defense Fund, Inc. v. East Bay Municipal Utility District and West Virginia Highlands Conservancy v. Huffman
dependent upon the ultimate use of the water: Provided, That the above provisions of this paragraph shall not be deemed in any way to repeal or supersede any portion of the Federal Water Pollution Control Act (33 U.S.C. 1151, et seq. as amended) and no control or treatment under this subsection shall in any way be less than that required under the Federal Water Pollution Control Act. The construction of a plant or plants may include major interceptors and other facilities appurtenant to the plant.

Through this bill, a new section 405(m) ("State Memoranda of Understanding for Remediation of Mine Drainage") would be added, which would essentially build on and solidify the provisional liability protection given to the States under 405(l). Approved State Title IV programs would be given the opportunity to develop (or formalize an existing) MOU with relevant water authorities outlining how the State will handle its water treatment work under Title IV vis-à-vis potential NPDES requirements.

“(2) MEMORANDA REQUIREMENTS.—Such memorandum shall establish a strategy satisfactory to the State and Federal agencies that are parties to the memorandum, to address water pollution resulting from mine drainage at sites eligible for reclamation and mine drainage abatement expenditures under section 404, including specific procedures for—

“(A) ensuring that activities carried out to address mine drainage will result in improved water quality;

“(B) monitoring, sampling, and the reporting of collected information as necessary to achieve the condition required under subparagraph (A);

“(C) operation and maintenance of treatment systems as necessary to achieve the condition required under subparagraph (A); and

“(D) other purposes, as considered necessary by the State or Federal agencies, to achieve the condition required under subparagraph (A).

With such an MOU in place, Title IV Sec. 413(d) (which explicitly requires the AML programs to comply with NPDES) will no longer apply to that State AML program. The State’s Title IV work, treatment systems in particular, will therefore be understood not to have to comply fully with NPDES, and to instead be guided by the mutually-agreed-upon requirements of the MOU. The expectation here, and the key from the States’ perspective, would be that these requirements would be more reasonable and achievable than NPDES requirements. The current language for 413(d), with the new language inserted in bold, is below:

Section 413(d) - The Secretary or the State pursuant to an approved State program, shall have the power and authority to construct and operate a plant or plants for the control and treatment of water pollution resulting from mine drainage. The extent of this control and treatment may be dependent upon the ultimate use of the water: Provided, That the above provisions of this paragraph shall not be deemed in any way to repeal or supersede any portion of the Federal Water Pollution Control Act (33 U.S.C. 1151, et seq. as amended) and no control or treatment under this subsection shall in any way be less than that required under the Federal Water Pollution Control Act unless such control or treatment will be conducted in accordance with a
State memorandum of understanding approved under section 405(m) of this Act. The construction of a plant or plants may include major interceptors and other facilities appurtenant to the plant.

This arrangement would most importantly result in clarity surrounding the States’ obligations for water treatment under Title IV, meaning that the risk of undeserved Clean Water Act liability (primarily due to citizen suits) would be virtually eliminated (as long as the projects meet the conditions of the MOU). This approach would also therefore - as the 2nd major component of the bill - allow the State to extend its own, now solidified, liability protection for these projects to eligible partners (i.e. Good Samaritans) under an established process (similar to what AML contractors enjoy).

Under a new section 405(n) (“Community Reclamation Partnerships”), an eligible State would work with the potential partner(s) to develop project parameters and determine the group(s) and the site’s/project’s eligibility (basically meant to establish that no existing party, particularly with respect to the project partners, is responsible/liable for the site). The project submission must also demonstrate that the project will meet the requirements of the MOU in the new Section 405(m). The State would submit a potential project to OSMRE for approval under this section, which if granted, would in essence certify that this project is now being conducted under the auspices of a States’ Title IV reclamation plan, meaning that it gains the protections of 405(1)+(m).

As a condition of the project receiving approval under this section, the State would agree to take on any potential liability stemming from the project (except for cases of gross negligence etc.) on behalf of all project participants - this is the key to facilitating participation by non-governmental partners (who need to be totally assured of their responsibilities and potential for liability before they can agree to participate in such a project). The State will, in turn, reserve the right to negotiate terms and conditions for the partner’s responsibilities with respect to the project before agreeing to the project. That agreement would presumably be outlined in a separate agreement between the State and the partner group, but in the eyes of federal law, the State will have taken on responsibility/potential liability. The key for the States here is that as long as the project is being conducted in accordance with the MOU in 405(m), the State is itself already secure from unreasonable liability from the project through the bill’s modifications to sections 405 and 413.