

**Rocky Mountain Mineral Law Foundation
Special Institute on Mine Closure, Financial
Assurance and Final Reclamation**

UNDERSTANDING THE RECLAMATION SURETY RELATIONSHIP
BEFORE AND AFTER OPERATOR DEFAULT

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i. Preface

The extractive industries are highly regulated by state and federal natural resource and environmental management agencies. Along with requiring detailed environmental performance and reclamation standards, the laws relating to mine reclamation require operators to provide financial guarantees (a/k/a “reclamation bonds”) to assure that environmental and reclamation performance standards are met. Although the regulations requiring financial guarantees appear straight forward, when an operator fails to reclaim the mines many other aspects of business and law come to life in what is often a very chaotic legal experience for all parties involved. This article discusses the relationships, practice and trends seen throughout the United States when the mine operator ceases to perform, ultimately defaults on its reclamation obligations and the bonds are called into play.

I. INTRODUCTION

All mining operations throughout the United States whether energy related, metals or nonmetals are subject to significant state and federal law governing environmental performance, land reclamation and water quality. The coal industry is regulated by the federal Surface Mine Control and Reclamation Act (“SMCRA”)¹ under the auspices of the U. S. Department of Interior, Office of Surface Mining, and its state analogs. Among its purposes, SMCRA is to . . . “protect society and the environment from the adverse effects of surface coal mining operations”² and to “assure that adequate procedures are undertaken as to protect the environment.”³ Under federal SMCRA each State may assume primary enforcement responsibility under the concept of “primacy”.⁴ With the exception of Tennessee,⁵ Washington⁶ and Georgia⁷ which have federal programs⁸ all other coal producing states have primacy to enforce SMCRA⁹ and have enacted their own state statutes, which must meet and may exceed

¹ 30 U.S.C. § 1201 et seq.

² 30 U.S.C. § 1202(a).

³ 30 U.S.C. § 1202(d).

⁴ *See* 30 U.S.C. § 1235.

⁵ 30 C.F.R. § 942.700.

⁶ 30 C.F.R. § 947.700.

⁷ 30 C.F.R. § 910.700.

⁸ 30 U.S.C. § 1254.

⁹ *See generally* 30 C.F.R. § 900 regarding federal approval of individual coal producing states regulatory programs.

the federal regulatory requirements to control environmental impacts of coal mining activities.¹⁰

Unlike their coal mine counterparts, non-coal mines on private property are not regulated by federal reclamation laws.¹¹ While coal mines on federal land are regulated under SMCRA, non-coal mines on federal land however, are subject to extensive regulation by both state and federal agencies under various laws. If the mine is on federal land the U.S. Department of Interior, Bureau of Land Management¹² has extensive performance and reclamation requirements under the Federal Land Policy and Management Act. (“FLPMA”).¹³ Under FLPMA the Secretary of Interior is required to take any action required to prevent the “undue degradation of public land and its resources.” BLM issued regulations effective in 1981 that require all operators to reclaim BLM land disturbed by their hardrock operations.¹⁴ However it wasn’t until 2001 that BLM established rules requiring operators to include reclamation plans and cost estimates in their notices and plans of operations to BLM for approval. The new regulations require that financial assurances be provided to cover those estimated reclamation costs for notice and plan-level hardrock operations.¹⁵ By comparing the history of the regulatory programs in the coal and non-coal industries it is easily determined that regulation of the coal industry regarding reclamation and financial guarantees is significantly more mature than that found in the non-coal arena. For the purposes of this paper the references to reclamation and financial assurance requirements will address federal law, however there is significant parallel state law regarding the topics.

Under both SMCRA and FLPMA mining companies must apply for surface and underground mining permits or approvals which include detailed background and baseline environmental information, operations plans, environmental performance and reclamation plans. Prior to receiving its permit, the operator must post adequate financial guarantees to assure final reclamation in compliance with the law and as detailed in the approved permit. Both federal statutes define the types of financial assurance mechanisms that are acceptable.¹⁶

SMCRA allows financial guarantees to be in the form of a corporate surety bond, cash collateral or securities.¹⁷ In 2001 the BLM revised its bonding requirements for hardrock operations on federal lands to include corporate surety bonds, cash, irrevocable letters of credit,

¹⁰ 30 U.S.C. §1253.

¹¹ State laws governing non-coal operations on private property have varying degrees of reclamation stringency, however they are governed by other environmental laws including but not limited to the Federal Clean Water Act, Clean Air Act, Endangered Species Act and other applicable federal and state standards.

¹² The Bureau of Land Management is responsible for managing 261 million acres of public land in 12 western states. Approximately 90% is open to the public for hardrock mining. Source: GAO “Hardrock Mining – BLM Needs to Better Manage Financial Assurance to Guarantee Coverage of Reclamation Costs” (2005).

¹³ 43 U.S.C. § 1701 et. seq.

¹⁴ United States Government Accountability Office, 1, “Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs” (2005).

¹⁵ *Id.* at p. 3.

¹⁶ See 30 U.S.C. § 1259; 30 C.F.R. § 800.11 related coal mine performance bonds and 43 C.F.R. § 3809.500 regarding financial guarantees on federal land for non-coal operations.

¹⁷ 30 C.F.R. § 800.12.

cd's, government securities or bonds, investment grade rated securities or insurance.¹⁸ The majority of mining operators throughout the United States choose to post corporate surety bonds as the preferred form of reclamation financial guarantee. The term “*reclamation bond*” is generally used throughout the industry to cover all forms of reclamation financial guarantees.

The obligations under the bonds assure that the reclamation plan contained in the mine permit application is completed to regulatory standards. The reclamation obligations include, but are not limited to, the backfilling of open pits, grading, topsoil replacement, revegetation, reclaiming the surface effects of underground mining, underground mine sealing, demolition of mineral preparation and processing plants and related surface structures, reclamation of refuse and waste rock disposal/storage areas, and long term water treatment.¹⁹ One aspect of the mining operation that often eludes critical review by bonding company underwriters is the prospect of unanticipated adverse surface or ground water pollution problems, including acid mine drainage or other forms of leachate seeps which were not predicted during the pre-mine planning and permitting process. Nevertheless, hydrologic quality concerns and in particular, long term treatment obligations often arise in the context of defaulted or bankrupt operators and are expressly considered as bonded obligations.²⁰ Every component of the mine footprint must be addressed in order to mitigate the environmental, health and safety concerns inherent to a newly abandoned mine. It is usually when the mining company defaults that the remaining parties look at the substantive nature of reclamation bonds and the relationship of the parties for the first time.

Members of the regulated community and the regulatory agency often do not appreciate or have little experience with the legal and practical framework of suretyship in the event of the default and/or bankruptcy of the mining company. Although the regulations provide a bare bones framework for “bond forfeiture” there is much more to the equation when balancing the needs and obligations of getting a mine (or very often a family of mines) reclaimed, creditors paid and land owners satisfied. The failure of a mining company leads to absolute legal and regulatory chaos and impacts many parties including vendors, landowners, mineral owners, financial institutions, the community and the environment by proxy through the regulatory agencies. The bonding company or “*Surety*” plays a unique and very important role in how the regulatory requirements are or can be met under many circumstances which are discussed below. It is important to understand how the Surety fits into the reclamation program structure.

II. THE NATURE OF THE SURETY RELATIONSHIP

“Suretyship” is an ancient principal²¹ and is a subject of its own unique area of law.²² Principles of “Surety Law,” which is contractual in nature, including the specifics regarding “statutory bonds,” apply in these cases; however, many of the parties involved in a reclamation bond forfeiture matter are unaware of even the most basic principles of suretyship.

¹⁸ 43 C.F.R. § 3809.555(e).

¹⁹ 30 C.F.R. §§ 715.10-715.20; 43 C.F.R. § 3809.42(b)(1)-(13).

²⁰ See Section VI regarding Long Term Water Pollution.

²¹ Genesis 43:9.

²² See 74 Am. Jur. 2d Suretyship (2001); Restatement (Third) of Suretyship & Guarantee.

A. Suretyship Is a Three Party Relationship

The surety relationship involves three distinct parties, including the **Principal** who is the primary obligor, the **Obligee** is the party to whom the principal and surety owe a duty and the **Surety** is the secondary obligor.²³

Each party in the three part surety relationship has distinct obligations, responsibilities and rights. Surprisingly to many who encounter the topic after there has been a default, a surety bond is not an insurance policy. It is blackletter law that suretyship is not insurance.²⁴ The surety relationship is a three-party relationship wherein the surety can seek reimbursement from the principal once it has paid due to the principal's default. Insurance is a two-party relationship where an insurer makes an independent agreement (an insurance policy) with its insured to indemnify the insured against a particular risk. The insurer cannot seek to recover its own loss from the insured, unlike a surety.

The Kentucky Supreme Court distinguished insurance policies and surety bonds as follows: [For an insurance policy], [t]he insurer undertakes the obligation based on an evaluation of the market's wide risks and losses. An insurer expects losses, and they are actuarially predicted. . . . In contrast, a surety bond is written based on an evaluation of a particular contractor and the capacity to perform a given contract. Compensation for the issuance of a surety bond is based on a fact-specific evaluation of the risks involved in each individual case. No losses are expected.²⁵ Far different from insurance, a surety bond is more like a credit transaction, and "surety bonds, issued by compensated sureties, are meant to function as credit accommodations in which the surety anticipates no loss."²⁶

B. Parties to the Relationship

The parties to a reclamation surety relationship:

1. Principal/Permittee: The principal is the party who has received the mining permit from the regulatory agency. The mining company, as the "permittee," has the principal obligation to conduct mining and reclamation activities according to the terms of its mining permit issued by the regulatory authority which incorporates applicable operational, reclamation and environmental performance standards.

2. Obligee/Regulatory Agency: The obligee in a reclamation bond generally is the regulatory agency that has enforcement authority under SMCRA or FLPMA and their regulations to assure compliance with applicable law. Where a state regulatory program is

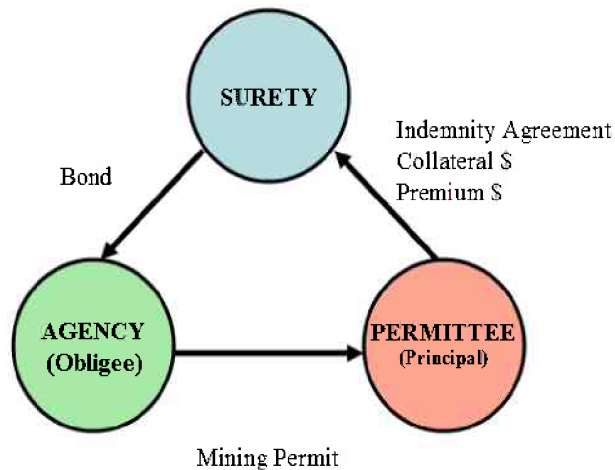
²³ Gallagher, *The Law of Suretyship* § 1 (American Bar Association, Tort and Insurance Practice Section, 1993).

²⁴ *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 139 n.19, 83 S. Ct. 232, 9 L.Ed.2d 190 (1962) ("Suretyship is not insurance."); *Meyer v. Building & Realty Service Co.*, 196 N.E. 250, 254 (Ind. 1935) ("We are clearly of the opinion that the contract here in question is a contract of suretyship and not an insurance policy."); *Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc.*, 983 S.W.2d 501, 504 (Ky. 1998) ("A contract of suretyship is not a contract of insurance.")

²⁵ *Buck Run Baptist Church*, 983 S.W.2d at 504-05.

²⁶ Armen Shahinian, *The General Agreement of Indemnity*, in *The Law of Suretyship* 487 (Edward G. Gallagher ed. 2nd ed. 2000) (emphasis added).

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implemented on federal lands, both the state and the United States will be obligees.²⁷ The Surety underwrites the risk assuming that the agency will enforce the reclamation regulations.

3. Surety/Bonding Company: The surety is a secondary guarantor of performance of the bonded operational and reclamation obligations incorporated into the surface mining permits. The surety relationship between the permittee and the surety is a credit relationship under which the corporate surety a/k/a the “bonding company” will ordinarily require collateral and indemnification rights against the principal. Most bonding companies are divisions within insurance companies, but suretyship is not to be confused with insurance. Under principles of surety law the principal is an “*indemnitor*” to the surety. Ordinarily the permittee must also execute a general agreement of indemnity²⁸ and the bonding company usually requires collateral that will be returned to the permittee when the bonds are released.

Another concept in suretyship is that of “*subrogation*.” Generally the surety on the principal’s performance bond is entitled to all the rights and equities of the principal, the obligee and others benefitting from the surety’s performance.²⁹ This right of subrogation includes the claims of the principal and obligees against third parties. In simple terms, the bonding company can step into the shoes of either the permittee or the agency to pursue claims of either of them in the right circumstances.³⁰

²⁷ 30 C.F.R. §740.15(b) For example, a bond written for a gold mine on federal land in Nevada includes both the Nevada Department of Environmental Protection and the U.S. Bureau of Land Management as obliges.

²⁸ There are very important and inherent rights that a surety has in its relationship with the principal that are not addressed in this paper such as indemnity and subrogation that a practitioner in this field must be aware.

²⁹ *Muncy Trust Co. v. United States*, 332 U.S. 234 (1947).

³⁰ See Section V regarding Bankruptcy.

III. THE BONDED OBLIGATIONS

A. Reclamation Plans

Under SMCRA, surface mining coal activities have been interpreted to include almost all of the surface effects to land and facilities related to extraction and processing of coal resources and expressly includes the surface effects incidental to underground mines.³¹ Mining regulations and its permits impose many obligations on the operator, including restoration of land affected by mining to a condition capable of supporting pre-mining or alternative uses, backfilling and grading to the approximate original contour, topsoil replacement, restoring the hydrologic regime and establishing successful revegetation on the permit area. These and other reclamation obligations required under the mining permit continue until reclamation is completed and revegetation requirements are met.³²

For non-coal operations on federal lands, FLPMA has similar requirements. The performance standards require that the plan of operations approved by the agencies be fulfilled. Reclamation standards include topsoil storage and placement, erosion and control measures, standards for “reshaping” the area disturbed (as opposed to SMCRA’s requirement for “approximate original contour”), revegetation and habitat restoration and other site specific requirements contained in the approved plan of operations.³³

It should be noted that both the coal and non-coal programs require protecting surface and ground water quality and quantity and, therefore protection of hydrologic regimes has been held to fall within the bonded obligations.³⁴ Depending on the nature of the property and the approved reclamation plan, there may be other site specific environmental conditions to be restored on mined property, including prime farmland, fish and wildlife habitat restoration and enhancement areas, wetlands, stream reconstruction, road restoration or other features required by law or agreed to in the permitting process.

B. Bond Release Standards

Since mining and reclamation occurs in a series of stages, e.g. spoil placement/grading, topsoil placement, revegetation, drainage control removal, in all mine regulatory programs bond releases are also provided in “phases” or “stages” as reclamation is completed.³⁵ Requesting bond release is an administrative process, subject to public notice and an opportunity for objections.³⁶ Bond release or bond release denial therefore is an administrative action and subject to appeal.³⁷

³¹ 30 C.F.R. § 700.5.

³² 30 U.S.C. § 1258; *See generally* 30 C.F.R. §§ 715.10-715.20.

³³ 30 U.S.C. § 1258(a)(13); 43 C.F.R. § 3809.420.

³⁴ *See* 30 C.F.R. § 715.17; and 43 C.F.R. § 780.21. *See* Section VI regarding Long Term Water Pollution.

³⁵ 30 C.F.R. § 800.40.

³⁶ 30 C.F.R. §§ 800.40(a)(2), 800.40(f); 43 C.F.R. § 3809.590(c).

³⁷ 30 C.F.R. § 301.1 referring to 43 C.F.R. §§ 4.1100-4.1394; 43 C.F.R. § 1840.

In the coal program although each state may vary the percent release or even combine phases for purposes of considering bond releases generally, Phase I releases 60% of the bond for the mine or mine increment when backfilling, and grading to approximate original contour has been completed. Phase II bond release may reach an additional 25% when the site has achieved Stage 2 reclamation including topsoil replacement and successful revegetation. Phase III (or final bond release) of the remaining balance may occur five years after the completion of Phase II, however arid western states generally require ten years of successful vegetation. It is routine for the mine site to require “maintenance” during the Stage 3 vegetation establishment period.

Bond release under FLPMA follows a similar procedure requiring public notice and comment by the permittee as required under the coal program. The agency may release up to 60% of the financial guarantee for a portion of the mine site when the agency determines that it has successfully completed backfilling, regrading, establishment of draining control and stabilization and detoxification of leaching solutions, heaps, tailings and similar facilities on the applicable portion of the mine area.³⁸ The balance of the bond may be released when it is determined that reclamation has been successfully completed including revegetation of the disturbed area and any effluent discharges from the area meet applicable effluent criteria for at least one year without treatment.³⁹

In neither program can bonds be fully released if there is a long term polluttional discharge unless financial accommodations for perpetual treatment has been established.⁴⁰

C. Bond Forfeiture

Under SMCRA the regulatory authority can forfeit bonds for numerous reasons⁴¹ including:

- the permittee violates and continues to violate the terms or conditions of the permit;
- the permittee fails to conduct mining or reclamation in accordance with the law;
- the permittee abandoned the permitted area;
- the permits under the bond have been revoked and the permittee has failed to complete reclamation, pollution abatement or revegetation;
- the permittee has failed to comply with a compliance schedule as ordered by the regulatory authority; and
- the permittee has become insolvent.

³⁸ 42 C.F.R. § 3809.591(b).

³⁹ 43 C.F.R. § 3809.591(c).

⁴⁰ See Section VI regarding Long Term Water Pollution.

⁴¹ 30 C.F.R. § 800.50.

FLPMA recites more general standards for forfeiture but essentially allows forfeiture under similar criteria⁴² with the exception of “insolvency”.

In all instances the permittee will receive significant opportunity to correct deficiencies or abate the violations long before the agency actually moves to bond forfeiture. When it is clear that the permittee is going to default, the surety has several choices. It is a general principle of surety law that the surety has the right to perform the bonded obligation.⁴³ Alternatively the surety can pay the penal amount to the obligee and its contractual obligations are met.⁴⁴ The statutes recognize the surety’s right to perform and state generally that in the event of forfeiture, (or to avoid forfeiture) a corporate surety issuing surety bonds which are forfeited may have the option of reclaiming the forfeited site in lieu of paying the bond amount upon the consent and approval of the regulatory authority, which consent often depends on the surety’s ability to demonstrate that it can complete the reclamation.⁴⁵

IV. SURETY RECLAMATION WORKOUTS

A. Rationale and Framework for Workouts

If the agency forfeits a bond, then the agency may conduct reclamation under its own specific, time consuming procedures.⁴⁶ However in many cases throughout the country, working with the agencies, bankruptcy trustees and parties with an interest in the estate it is apparent that a private sector solution may create the most effective way of reclaiming land and getting the best use of available funds, notwithstanding that agencies have “abandoned mine reclamation” divisions. Surety reclamation quite often provides expedience in bidding, contracting and implementation. In negotiating to conduct reclamation in lieu of paying the penal amount of the bonds, the surety must investigate the status of the mining operation in relation to the bonded and permitted reclamation plan. Technical details involved with the mine site and the bonded obligations may include, but are not limited to:

Open Pits	Cyanide Leach Pads and Ponds
Highwalls	Acid Mine Drainage
Erosion	Refuse/Waste Disposal
Geology	Slurry Impoundments
Water Quality	Presence of Mine Shafts
Postmining Land Uses	Boreholes
Topsoil availability	Extent of Prime Farmland
Revegetation Plan	Wetlands
Chemical Disposition	Drainage Structures and Facilities
Processing Facility and Structure Removal	

⁴² 43 C.F. R. §§3809.595.

⁴³ See also *The Law of Performance Bonds*, 458 Laurence Moelmann, et al. eds Am. Bar Ass’n. (1999), *Mercantile Trust Co. v. Hensey*, 205 U.S. 298 (1907).

⁴⁴ There is a bedrock principle in suretyship that the liability of the surety is limited to the penal sum of the bond. Restatement (Third) of Suretyship and Guarantee § 73.

⁴⁵ 30 C.F.R. § 800.50(a)(2)(ii); 43 C.F.R. §3809.596(d)(2)

⁴⁶ 30 C.F.R. § 800.50(b).

Following review of site conditions and successful negotiations with the agency, the parties, including in many cases the bankruptcy trustee, will enter into a reclamation agreement. (eg: Consent Agreement, Consent Order or other administrative agreement.) (“Agreement”) The Agreement with the agency can be viewed as akin to a “takeover agreement” in a private contract surety context and will primarily establish performance criteria for the performing surety and a bond release schedule, among many other terms that must be addressed.

Negotiating surety reclamation agreements occurs at the intersection of highly technical and regulatory pathways. A strong background in the technical and regulatory aspects of mining and land reclamation is necessary in order to optimize the reclamation alternatives. An understanding of suretyship, knowledge of administrative law and the regulatory aspects under SMCRA, FLPMA is necessary for dealing with the agencies. Experience in bankruptcy law as applied to environmental remediation is very valuable when the matter is under the jurisdiction of the Bankruptcy Court. As an example of where knowledge of various aspects of law are necessary to a successful negotiation is in cases where there may be insufficient bond, and alternative reclamation plans may be proposed by the Trustee or surety and approved by the agency with proper design and landowner consent in order to optimize available funds. In cases with many mines, the framework under the statutes is wholly inadequate and it is the creativity of the negotiating parties to develop a solution that is acceptable to all parties.⁴⁷

B. Issues In Negotiating Agency Agreements - Inherent Tension

Mine company bankruptcies create very complicated situations – technically and legally. It must be kept in mind that bankruptcy law overshadows the entire matter. These matters represent the classic conflict between bankruptcy law and environmental law as each party in the bankruptcy: secured and unsecured creditors, debtor and related parties are all jockeying to better their positions to recover from the bankrupt estate, and the bankruptcy code is to treat all creditors fairly, whereas environmental law tends to impose the costs of environmental remediation on the businesses that caused the pollution.⁴⁸

Due to the usual negative history developed over time by the permittee leading to bond forfeiture, the surety is often initially faced with an adverse audience at the agency and with landowners. For example, very often, the principal/permittee has failed to pay royalties to mineral owners, has left surface owner’s property upside down and has created bad relations with the regulatory agency, or land managers due to nonperformance. Often, regulatory staff does not fully understand suretyship and associates the surety as a surrogate mine operator. A common issue notwithstanding regulations for calculating bond amounts is that is that the bond amount does not cover full reclamation since operations are usually halted in mid-stream with significant disturbance. In cases of underbonded sites, the agencies have authority to pursue alternative enforcement by pursuing “owners or controllers” under SMCRA⁴⁹ or mine owners

⁴⁷ See e.g. *In re Horizon Natural Resources*, Case No. 02-14261 (Bankr. E.D. Ky. 2005) where the company and subsidiaries left behind 425 mines in six states with bonds totaling approximately \$250 million.

⁴⁸ *Environmental Issues in Bankruptcy Cases*, 18, Adam Strochak, *et al.* Collier Monograph (2009).

⁴⁹ 30 U.S.C. § 1271(c); *United States v. Dix Fork Coal Company* 692 F.2d 436 (6th Cir. 1982); *United States v. Peery* 862 F.2d 567 (6th Cir. 1988); *United States v. Aiken* 867 F.2d 965 (6th Cir. 1989).

under FLPMA.⁵⁰ In some cases the agencies may consider such an action but it is fact specific and intensive.⁵¹ With the right set of underlying facts, this option may be advisable and the Surety, under its subrogation rights may pursue it even if the agency does not. Obviously, this subject could be the topic of an entire article.

V. BANKRUPTCY ISSUES - ELEVATING RECLAMATION CLAIMS

Bankruptcy of a mining principal leads to conflict of legal issues since the Bankruptcy Code is intended to benefit debtors by giving them a “fresh start” and to creditors by maximizing their recovery, whereas as stated previously environmental laws such as SMCRA and FLPMA are meant to protect the environment and public health and safety. Frequently in bankruptcies, debtor companies and their secured creditors attempt to sell attractive assets to maximize the dollar recovery but ignore and attempt to leave behind their environmental reclamation obligations. It is not unusual for a Trustee who is unfamiliar with the extensive regulatory structure surrounding the mining industry to actually sell the mineral resources in the ground without permits and related reclamation obligations associated with them in order to maximize the recovery of funds for the creditors and his/her commission.

Federal law, 28 U.S.C. § 959(b), requires a bankruptcy trustee to “manage and operate the property in his possession . . . according to the requirements of the valid laws of the State.” In *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*,⁵² the Supreme Court acknowledged the § 959(b) and held that:

[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public’s health and safety [W]e hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identifiable hazards.⁵³

The Sixth Circuit applied *Midlantic* in *In re Wall Tube & Metal Products Co.*,⁵⁴ where the court stated: “It follows that if the . . . trustee could not have abandoned the estate in contravention of the State’s environmental law, neither then should he have *maintained or possessed* the estate in continuous violation of that same law.”⁵⁵ The court further found § 959(b) applicable to liquidating trustees and recognized that the Supreme Court “noted Congress’ intentions that the trustee’s efforts ‘to marshal and distribute the assets of the estate’ give way to the governmental interest in public health and safety.”⁵⁶ Finally, the Sixth Circuit addressed the impact of this requirement on creditors when it stated “the protection of innocent

⁵⁰ 43 C.F. R. § 3809.598.

⁵¹ See *In re Lodestar Energy, Inc. et al.*, Case No. 01-50969 (Bankr. E.D. Ky. 2005).

⁵² 474 U.S. 494, 106 S. Ct. 755, 88 L.Ed.2d 859 (1986).

⁵³ *Midlantic*, 474 U.S. at 507.

⁵⁴ 831 F.2d 118 (6th Cir. 1987).

⁵⁵ *In re Wall Tube*, 831 F.2d at 122.

⁵⁶ *In re Wall Tube*, 831 F.2d at 122.

creditors would not be furthered by a contrary holding that permits creditors to benefit from their silence while the debtor violates the law.⁵⁷

Although many cases citing *Midlantic* relate to liability associated with hazardous waste or hazardous substances⁵⁸ certainly mining statutes endear the same principals - namely protecting the environment and human life, health and safety. For example, in SMCRA Congress recognized the hazards that are associated with surface coal mining and found that, among other effects:

[M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land . . . [and] by creating hazards dangerous to life and property⁵⁹

The hazardous nature of abandoned mine features are widely recognized and include dangerous highwalls, hazardous equipment or facilities, dangerous impoundments, and underground mine openings.⁶⁰ Therefore, it can logically be argued that these mining laws are within that class of laws that debtors and trustees must obey in accord with *Midlantic* and *In re Wall Tube*, and under these and related cases, regulatory authorities should advocate compliance and should encourage courts to formulate conditions that will adequately protect the public's health and safety. Certainly the same conditions found at non-coal mines should be accorded the same concern. Since the surety is subrogated to the position of the obligee agency it can make these arguments and often joins the agencies in advocating that reclamation must be considered and given high priority in any reorganization or liquidation plan.

As stated throughout this paper, the issues that are presented to the parties and the court in mine company bankruptcies are very complicated and intensive negotiations between all of them are necessary to result in reclamation, abatement of pollution and recovery to creditors.

VI. LONG TERM WATER POLLUTION TREATMENT TRUSTS

Water pollution associated with mining operations including acid mine drainage, heavy metal contamination, dissolved and suspended solids has been a cause of concern throughout the country for many years. The primary concern in the eastern United States and through the Illinois Basin is acid mine drainage from coal mines although the industry is receiving significant attention related to heavy metals. Heavy metals from non-coal mines have also presented a problem. Hardrock, mineral and coal mining in the western United States has contaminated streams in the head waters of more than 40% of the watersheds in the west.⁶¹ Although the

⁵⁷*In re Wall Tube*, 831 F.2d at 123 (emphasis added).

⁵⁸ Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. § 9601 et seq.; Resource Conservation and Recovery Act 42 U.S.C. § 6901 et seq.

⁵⁹ 30 U.S.C. § 1201(c).

⁶⁰ See U.S. Department of Interior, Office of Surface Mining, White Paper on People Potentially at Risk from Priority 1 and 2 AML Hazards (2003) and the U.S. Department of Labor's Mine Hazard Awareness Campaign, <http://www.msha.gov/PLACES/fatalstats.htm>.

⁶¹ U.S. Environmental Protection Agency, Liquid Assets 2000: America's Water Resources at a Turning Point 10 (2000).

federal Clean Water Act is the primary federal statute for dealing with point source discharges from mine sites, SMCRA and FLPMA both addressed hydrologic quality as one of many criteria required to be addressed in a mine reclamation plan.

Under SMCRA the mine plan must include “a detailed description of the measures to be taken during the mining and reclamation process” to assure the protections of: “quality of service, both on and off site, from adverse affects of the mining and reclamation process: ...”⁶² The coal mine permit application must include a hydrologic reclamation plan which includes providing water plan treatment facilities if necessary.⁶³

The operations plan requirements under FLMPA, as noted previously describe how the permittee will address surface and ground water hydrologic conditions associated with or impacted by the mining operations. Other than dealing with processing facilities and heap leach operations, surface and ground water pollution associated with the mining operations are not anticipated and are not permitted. Very often polluttional discharges from abandoned heap leach operations, process ponds and unclaimed waste rock facilities are the source of surface and ground water pollution from non-coal hardrock or metal mines.

Bonding underwriters will not provide a surety bond if it is determined that a site will have long term polluttional discharges since it is clear that the bond will not be released. Therefore, most water quality issues (including long term polluttional treatment) relate to unanticipated polluttional discharges that were not part of any reclamation bond calculation.

Under SMCRA the development of long term treatment trusts to provide financial assurances for acid mine drainage treatment developed first in Pennsylvania, a state with a long history of mining and acid mine drainage from abandoned and active mines. The federal Office of Surface Mining in Tennessee then developed a model based in large part on the Pennsylvania protocol. In order to address long term polluttional discharges specifically, the Pennsylvania analog to SMCRA was amended to state:

The department may establish alternative financial assurance mechanisms which shall achieve the objectives in purposes of the bonding program. These mechanisms may include, but are not limited to, the establishment of a site specific trust fund, funded by the operator for the treatment of post mining discharges of mine drainage.⁶⁴

The main purpose of the trust fund is to generate sufficient income to cover the cost of treatment into the future. The regulatory authority, Department of Environmental Protection is the trust beneficiary. The Trust is implemented through a negotiated Consent Order and Agreement defining the applicable trust contribution amounts, timeframe for deposits and a companion trust agreement with a third party Trustee. Once the Trust is established and fully funded, the Permittee may also be reimbursed from the trust for the yearly cost of treatment.

⁶² 30 U.S.C. § 1258(a)(13).

⁶³ 30 C.F.R. § 780.21.

⁶⁴ 52 P.S. §1396.4(d.2).

The federal Office of Surface Mining recognized this situation in developing a system to address long term pollutional discharge problems in the federal coal regulatory program in Tennessee:

A system that provides an income stream may be better suited to insuring the treatment of long term pollutional discharges, such as AMD, than conventional bonds. Surety bonds, the most common form of convention bond, are especially ill suited for this purpose because surety companies normally do not write a bond when there is no expectation of release of liability.⁶⁵

SMCRA regulation in Tennessee is administered directly by a federal Office of Surface Mining.⁶⁶ Finding that it had authority under SMCRA as an alternative bonding program, OSM specified the details of its trust fund program in 2007.⁶⁷ In the preamble to the Tennessee federal rule making, OSM determined that since the Pennsylvania program was successful and unchallenged as was the Tennessee program that adequate authority for the use of trust funds and annuities is available under SMCRA under the provision allowing for alternative bonding programs⁶⁸ and therefore a national rule was not needed.⁶⁹ Therefore, for coal mining states with primacy, the Department of Interior, of Surface Mining has essentially developed the frame work for long term pollutional treatment at the state level and under the Bush administration was leaving it up to the states to address.

Under FLPMA, until the 2001 rule making, the cost of long term water treatment were overlooked as part of the bonding requirements for mining operations and BLM noted that “ the existing regulations are silent on the need to provide bonding for any necessary water treatment or site maintenance. BLM believes that it is necessary to specific this requirement to eliminate any argument about requiring such resource protection measures.”⁷⁰ In the 2001 final rule calling for a trust, the BLM imposed an additional yet distinct requirement for water treatment guarantees separated from reclamation financial guarantees:

When BLM identifies a need for it you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long term treatment to achieve water quality standards and for other long term post mining maintenance requirements.⁷¹

Financial guarantees therefore are required for long term water pollution treatment in both the coal and non-coal programs and the trust fund concept is gaining nationwide

⁶⁵ 72 Fed. Reg. 41 March 2, 2007 at 9618.

⁶⁶ 30 C.F.R. § 942.700.

⁶⁷ 30 C.F.R. § 942.800(c).

⁶⁸ 30 U.S.C. § 1259(c).

⁶⁹ 72 Fed. Reg. 9619.

⁷⁰ 66 Fed. Reg. 54847.

⁷¹ 43 C.F.R. §3809.552(c) (emphasis added).

acceptance. In all instances the trust corpus must be sufficient for pollution treatment in perpetuity. In determining the amount needed to fully fund a trust the agencies generally consider and model the quality and quantity of the discharge, treatment, capital costs, support facilities needed, treatment facility maintenance, chemicals required, renovation, maintenance and replacement, and factors necessary to ensure perpetual treatment. In any mining company failure where perpetual water pollution is expected, there is a balance that must be struck regarding completion of actual site reclamation and funding long term treatment trusts. In many cases, at this time the programs are being developed and negotiating to optimize the use of limited funds presents a challenge. The problem facing the sureties, however is that they did not underwrite the bonds anticipating the risk of long term pollution and that their bonds would be forfeited for water quality issues.

VII. CONCLUSION

The mining regulatory programs addressed in this paper have been developed to prevent the lands and waters of the United States from the long term adverse affects of extracting important energy and mineral resources. As one step in forcing the industry to “internalize” the costs associated with environmental protection, the use of third party financial assurances has become the primary backstop to prevent the creation of additional unreclaimed abandoned mine lands. When the regulatory agencies finally call on the surety, it is generally just the beginning of a complicated process which often occurs under the jurisdiction of the United States Bankruptcy Courts, to restore the land and waters in accord with the approved mine plans. With all of the competing interests related to the defaulted mining company, the agencies’ and sureties’ interests are aligned in obtaining land reclamation. With cooperation and an open mind by negotiating parties, surety reclamation can provide a very cost effective and efficient procedure for returning the land and waters to adequate form.

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