The Law of Commercial Surety and Miscellaneous Bonds

Third Edition

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AMERICANBARASSOCIATION

Tort Trial and Insurance
Practice Section

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CHAPTER 7

RECLAMATION BONDS

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I. Introduction to Reclamation Bonds[1]

A. The Nature of the Industries

Reclamation bonds occupy a unique position in the universe of surety bonds. Like other bonds, they guarantee the principal's performance. But these bonds protect not only the obligee, they also safeguard environmental quality from the well-known adverse impacts of extracting earthen resources.[2] Performance is directly linked to compliance with complex laws intended to limit, and ultimately repair, the environmental impacts of extractive processes. The compliance framework may vary according to the resource (coal or other mineral), land ownership (federal, tribal, or private), jurisdiction (state, federal, or combined), and the requirements of a variety of local climatic, geophysical, and hydrologic settings. These variables challenge the surety from the inception of underwriting to monitoring the principal's performance to formulating practical responses in the event of a principal's default.

Reclamation bonds support American industrial and consumer uses of mineral resources that have been the foundation of much of the U.S. economy. Products from extraction of natural resources have led to a quality of life unknown in history. Coal continues to be an important source of materials and energy for steelmaking and other industrial processes, heating, and generating electricity. A

2017 survey conducted by the U.S. Government Accountability Office (GAO) revealed that the regulatory authorities held approximately $10.2 billion in financial assurances to cover reclamation liabilities; $7.8 billion of that total (76 percent) were commercial surety bonds.[3] Although coal resources are found in 38 states, at this time only 23 states have active coal mining operations.[4] Regulatory oversight consists of a mixture of state, federal, and tribal programs.[5] In 2017, more than 4.1 million acres were covered by a coal mining permit issued by one of these regulatory authorities.[6]

Trends in electricity generation show a marked reduction in consumption of coal and increased reliance on natural gas and renewables. In recent decades coal as a source of electricity peaked in 2007 but steadily declined through 2020 in favor of other sources. During this 13-year period, electricity generation sourced from coal dropped from more than two trillion kilowatt hours (kWh) to 774 billion kWh, while electricity generation from natural gas rose from 897 billion kWh to 1.6 trillion kWh and renewables from 353 billion kWh to 792 billion kWh.[7] Tracking this decrease in coal-related electricity, coal production in the United States has declined from more than one billion tons in 2007 to about one-half billion tons in 2020.[8]

Forces causing these changes include economic and practical (market changes) and policy or philosophical (climate change and environmental impacts of coal mining). The 2016 bankruptcy of Peabody Energy Corporation and many of its subsidiaries reveals market forces driving the decline in coal production and consumption.[9] Peabody, then the largest private-sector coal company by volume production, explained its poor financial performance due to “reduced demand and lower coal prices created by sluggish economic growth, an abundance of extremely low priced natural gas and increased regulatory hurdles.”[10] The role of coal and other fossil fuels in causing climate change has been studied and debated, but the consensus that they do cause climate change has reached a critical inflection point.[11] The result is growing public sentiment that has caused businesses and communities across the

country to reduce their use of coal and other fossil fuels and to adopt resolutions and other commitments to convert to “100% clean energy” by a date certain, sometimes as early as 2035.[12]

Although natural gas, like coal, is also a fossil fuel, it is thought to have a smaller impact on greenhouse gas emissions and related climate change. High-efficiency natural gas-fired generating units figured prominently in the now-abandoned Clean Power Plan adopted in 2015 under President Obama’s administration.[13] The increased availability and low cost of natural gas as an alternative to coal is related to the increased production of oil and gas by the technique of hydraulic fracturing, or “fracking.” Environmental concerns about this technique have spurred discussions of additional financial assurance to be supplied by the oil and gas industry.[14] Whether these new proposed requirements are adopted, current law requires bonds to secure obligations including compliance with lease terms and conditions and closure of the wells.[15]

Despite coal’s decline, it continues to be an important part of the energy supply chain, and in 2020 coal-fired power plants provided more than 19 percent of U.S. electricity generation, which accounted for 91.5 percent of the coal used in 2020.[16] Industrial coke plants important in steelmaking and other industrial uses of coal other than heat combined for about 6.3 percent of the coal consumed.[17] Therefore, it appears that the need for coal reclamation bonds will continue.

The non-coal minerals industry includes the metal ore and nonmetallic mineral mining industries, which provide many of the raw materials used in modern life. It is estimated that every American consumer uses close to 40,000 pounds of newly mined minerals every year.[18] The Internal Revenue Service has projected that every person born in America will use 3.7 million pounds of minerals, metals, and fuels during their lifetime.[19] Many of today’s high-technology devices such as phones and electric vehicle batteries require up to 40 different minerals for production, including aluminum, copper, gold, silver, iron, limestone, silica, boron, and rare-earth minerals. The construction industry accounts for more than half of U.S. copper demand.

Natural aggregates, including crushed stone, sand, and gravel, are abundant and a basic raw material used in construction, agriculture, and industries employing complex chemical and metallurgical processes.[20] More than 90 percent of asphalt pavements and 80 percent of concrete are aggregates. In 2020 the United States produced 1.46 billion tons of crushed stone from 3,440 quarries for a value of more than $17.8 billion.[21] Many of these operations are on privately owned lands. Production of non-coal, hardrock minerals on federal lands is significant, with 798 operations occupying more than 815,106 acres.[22] The use of fertilizers sufficient to support the United States' large agricultural industry requires production of more than 45 million tons of phosphorus and potash along with smaller amounts of other minerals each year.[23]

After many decades of merely abandoning mined lands following resource extraction in the United States, it is now public policy to minimize, mitigate, and remediate the adverse effects of mineral extraction and processing while obtaining the benefits of our natural resources. Mining in the United States is highly regulated at both the state and federal levels and has evolved to include the surety industry as the preferred guarantor that land and waters affected by mining and mineral processing operations will be restored.

Considered under the regulatory moniker of "financial assurances,"[24] state and federal laws and regulatory agencies with permitting and enforcement authority require mining companies to provide financial guarantees assuring that their operations will be conducted and closed according to technical criteria and affected lands and waters will be reclaimed according to mandatory environmental quality standards. Some states and federal regulatory agencies have a long history of requiring financial assurances for mine reclamation while to others the concept is relatively recent.[25] The maturity of those programs and the experience of the regulatory staff that administers them can also be important to a surety in working through complicated claims matters, as discussed below.

Although the mining regulatory programs allow various forms of financial assurances, in most cases they are in the form of surety bonds. In many instances throughout the United States the

reclamation bond has come to be used for addressing issues other than "traditional reclamation"[26] through judicial interpretation[27] and what could be characterized as retroactive rulemaking.[28] Sureties with little experience in these specialized commercial bonds should be aware of the idiosyncrasies in this market niche.

This chapter addresses the nature of surety bonds in the context of the extractive industries including underwriting suggestions and the relevant legislative history associated with development of financial assurance programs. It also addresses how the corporate surety is a party to the administrative process surrounding the environmental laws under which the bonds were issued, and the procedures involved in obtaining bond releases and dealing with defaults.

B. Underwriting Reclamation Bonds

As statutory bonds, reclamation bonds are unique to the mineral industry and the regulatory programs requiring them, and an experienced underwriter should review more than a principal's balance sheet.[29] Since reclamation bonds are not cancelable for liabilities already incurred, they are long-term commitments.[30] Understanding the applicable regulatory procedures and the bonded obligations discussed below is important. Sureties successful in the reclamation bond segment of the market are represented by insurance agents or brokers and have underwriters that are familiar with mining operations and those sectors of the commodity markets. Important business considerations include whether a coal mine produces metallurgical-grade coal or a grade of coal more suitable for steam production at a power plant and whether the coal is being sold on the spot market or is committed to a long-term contract. Surety underwriters also review each mine to determine the remaining mine life—a mine life of at least ten to 15 years is typically viewed as more favorable—as well as the proven and probable reserves, average annual production, and location of each mine.

Related to mine locations are the site-specific characteristics of each operation in relation to local regulatory requirements; the physical location of each mine may bring its own set of underwriting

concerns. It is helpful to involve claims staff who are aware of the particular pitfalls that may be common in a certain environmental setting or regulatory regime. For example, mines in Central Appalachia are more likely to have significant water contamination issues (discussed in more detail in Part VIII) than mines located in other areas, such as the Powder River Basin. Therefore, those mines that may be impacted by water quality or contamination issues must be underwritten with an understanding that water treatment may be long-term or perpetual and very costly. Underwriters will also consider how coal is transported. Mines that do not have cost-effective access to transportation (typically rail lines) may have higher transportation costs that reduce profitability.

From a financial perspective, the surety underwriter will review the historical profitability of the mining concern, its current debt structure, maturities and covenant compliance, additional credit availability under established bank facilities, and capital expense budget needs. In addition, the underwriter will look for adequacy in establishing reclamation cost accruals, goodwill amortization, and the potential for asset impairment charges. The surety underwriter will also want to review future projections and business strategy with management. The underwriter may also consider whether any third parties, such as utility customers, guarantee the reclamation. If this is the case, a close review of any related documents (e.g., reclamation services agreements or trust documents) is required. Finally, the underwriter will review the sales of coal from each mine. Factors such as what percentage of the production is committed by contract to certain customers and whether the contracts are fixed-price or cost-plus are very important to assessing the potential profitability of the mine.

Factors that may escape the ordinary contract bond underwriting process but that provide useful insights to a commercial bond underwriter relate to the principal's operating history. A technical review of the principal's existing and prospective operations by a professional familiar with mining operations *and* the regulatory framework can provide relevant information regarding compliance and a company's overall commitment to timely reclamation. A review of whether the company's reclamation is contemporaneous with

extraction is indicative of compliance. A mining company that has idled mines or mines in temporary cessation[31] should be reviewed closely. Typically, mining has ceased because it is unprofitable to continue operations. This could be an indication of financial distress and would pose a higher risk to the surety. For a financially distressed mining company, it is not unusual to lag behind in meeting reclamation obligations. A well-engineered mine may accomplish many of the activities associated with reclamation such as final overburden placement and grading, as part of its mining operation. A mine that leaves most of the reclamation activities until the resource is removed is a much higher surety risk because cash flow from the sale of the mineral has ceased.

A review of the principal's regulatory compliance history, along with that of its officers, directors, and senior management, should also be conducted.[32] Not addressed in this chapter but equally important to the surety-principal relationship is the form of indemnity agreement and collateral requirements. There are peculiarities in the mining regulatory programs that can cause the traditional indemnity agreement to be inadequate for protecting the surety under certain circumstances. A common example is whether a permit transfer or change in ownership of a parent company should be a cause for reviewing whether the surety relationship should be revised. A transfer, assignment, or sale of a mining permit must first be approved by the regulatory agency.[33] If the agency views the transfer as a change in the actual permittee and not merely a change in the ownership and control structure, then the agency may require a complete transfer of the permit and a replacement of the existing surety bonds. If the transfer is not required, then the surety may find that it has now bonded a principal under the control of persons that it did not have the opportunity to evaluate. These and other issues known by practitioners familiar with both the surety industry and the mining industry can help to provide an underwriting protocol for mitigating surety risk in a critical industry.

II. Mining Program Financial Assurances Requirements

All mining operations throughout the United States, whether energy-related, metals, or nonmetals, are subject to significant state and federal law governing environmental performance and have financial assurance requirements. Notwithstanding any primary mining and reclamation statutes, all mines and processing facilities are also subject to the compliance requirements of the Clean Water Act (CWA)[34] related to water quality and wetlands protection, the Clean Air Act (CAA)[35] related to fugitive and process emissions, the Resource Conservation and Recovery Act (RCRA)[36] related to the management of non-mining/beneficiating wastes,[37] and other applicable environmental laws. Many of these other environmental protection statutes also require financial assurances for some aspect of their performance standards.[38] It should be noted that in all of the regulatory programs requiring financial assurances, the amounts required are finite based on regulatory or statutory minimums or on an engineering cost analysis of specific, defined activities. The following discussions describe the primary mining statutes' requirements for financial assurances.

A. Coal Industry: The Surface Mining Control and Reclamation Act

The coal industry is regulated by the U.S. Department of Interior, Office of Surface Mining Reclamation and Enforcement (OSM) under the federal Surface Mining Control and Reclamation Act (SMCRA).[39] Purposes of SMCRA include to "protect society and the environment from the adverse effects of surface coal mining operations"[40] and to "assure that adequate procedures are undertaken to protect the environment."[41] Under SMCRA, each state may assume primary enforcement responsibility under the concept of "primacy." [42] SMCRA also authorizes Indian tribes to seek authorization to administer a mining program on reservation land.[43] With the exception of Tennessee,[44] Washington,[45] and Georgia,[46] which have federal programs,[47] all other coal-producing states have primacy to enforce SMCRA[48] and have enacted their own state-law

analogues to SMCRA. These statutes must meet and may exceed the federal regulatory requirements to control environmental impacts of coal mining activities.[49] A comparison of the regulatory programs in the coal and non-coal mineral industries illustrates that while SMCRA, adopted in 1977, is a relative newcomer, regulation of the coal industry is significantly more refined than that found in the non-coal arena, particularly with regard to individual responsibilities, reclamation, financial guarantees, and longterm pollution issues.

Consistent with the command-and-control nature of many environmental laws, a threshold aspect of SMCRA requires that surface coal mining be conducted only under authority of a permit issued by the applicable regulatory agency.[50] Surface coal mining activities have been interpreted to include almost all of the surface effects to land, facilities related to extraction and processing of coal resources, and the surface effects incidental to underground mining.[51] Permit applications require detailed background and baseline environmental information, geologic information, engineering design, operations plans, environmental performance standards, and reclamation plans consistent with an approved final land use.[52]

Prior to receiving its permit, the operator/permittee must post adequate financial assurance to provide funds necessary for the regulatory agency to complete final reclamation in compliance with the law and as detailed in the approved permit if the operator fails to do so.[53] SMCRA allows financial guarantees to be in the form of a corporate surety bond,[54] cash collateral bond (including letters of credit and securities),[55] or a self-bond.[56] Most coal companies use corporate surety bonds, but it is not uncommon for a mining company to use a combination of financial assurance instruments.[57] Difficulties with the self-bonding programs are coming under intense scrutiny and self-bonding may soon cease to be an option.[58]

The amount of financial assurance is to be “sufficient to assure the completion of the reclamation plan if the work has to be performed by the regulatory agency in the event of forfeiture.”[59] Reclamation obligations include, but are not limited to, backfilling

open pits, grading, topsoil replacement, revegetation, removing drainage control facilities, highwall reduction, underground mine sealing, shaft and mine entry sealing, demolition of coal preparation and processing plants and related surface structures, reclamation of refuse and waste rock (spoil) disposal/storage areas, restoring the hydrologic regime, and, surprisingly to many sureties' underwriters, long-term water treatment.[60] Although under OSM's policies mining permits should *not* be approved "if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of post mining pollutional discharges that would require continuing long term treatment without a defined end point,"[61] it is not uncommon for a permitted coal mine to develop an unforeseen pollutional discharge based on site geochemical and hydrologic conditions.

Federal law provides that the bond amount is adjusted "from time to time as the area requiring bond coverage is increased or decreased or where the cost of future reclamation changes."[62] Some states calculate bond amounts annually, while others may wait years to determine changes. Whether the bond amounts truly reflect the cost of completing reclamation is an increasingly important question in light of concerns about the abilities of financially challenged mining companies to complete reclamation. A possible reason for the discrepancy is delay in enforcing SMCRA's requirement for contemporaneous reclamation.[63] If the permittee is not required to complete reclamation as mining progresses, then reclamation liability may accrue far above the predictions of an acceptable mining and reclamation plan. A study of mines in the Appalachian region found that the operations were under-bonded because their bonds available totaled $3.8 billion but estimated reclamation costs ranged from $7.5 to $9.8 billion.[64] Although this discrepancy does not subject the surety to additional liability beyond a bond penal sum, a site that is significantly under-bonded will limit the surety's options on principal default and bond forfeiture.

A final aspect of SMCRA important to the relationship of surety and principal is SMCRA's consideration of whether a particular person or entity is ineligible to be granted a permit or permit

amendment because of outstanding violations of law.[65] An applicant for a mining permit must "file with his permit application a schedule listing any and all notices of violations of [SMCRA] . . . incurred by the applicant in connection with any surface coal mining operation."[66] If the agency determines that a "surface coal mining operation owned or controlled by the applicant is currently in violation of [SMCRA] . . . the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected."[67] OSM uses a computerized database known as the Applicant Violator System (AVS) to analyze ownership and control links among permit applicants and existing or former permittees. If an owner or controller is linked to certain violations and bond forfeitures, then the person is said to be "permit blocked."

B. Hardrock Industry (Federal Land): Federal Land Policy and Management Act

Unlike their coal mine counterparts, non-coal mines on private property are not regulated by *federal* reclamation laws[68] though most do have analogous state reclamation and associated financial assurance requirements.[69] Under the General Mining Act of 1872 (Mining Act)[70] an individual or business entity can establish a claim to any hardrock mineral on public land upon recording the mining claim and paying a de minimis location fee and annual maintenance fee. The Mining Act was designed to encourage the settlement and development of the West, not to regulate the associated environmental effects of mining.[71] Until the passage of the Federal Land Policy and Management Act of 1976 (FLPMA),[72] development of hardrock minerals on public land remained largely unregulated.[73] Non-coal mines on federal land are therefore subject to regulation by *both* state and federal agencies under various laws. On federal land other than national forest lands, the U.S. Department of Interior, Bureau of Land Management (BLM)[74] administers performance and reclamation requirements known as the "3809 Regulations" based on their location in the *Code of Federal Regulations*. 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 the initial 3809 Regulations effective in 1981 that require all operators to reclaim BLM land disturbed by their hardrock operations.[75] It was not until 2001, however, that BLM revised the rules requiring operators to include reclamation plans *and* cost estimates in their notices and plans of operations for BLM approval. The 2001 regulations require that financial assurances be provided to cover those estimated reclamation costs for notice- and plan-level hardrock operations.[76]

The revised bonding requirements for hardrock operations on federal lands expanded the acceptable types of financial assurances to include corporate surety bonds, cash, irrevocable letters of credit, certificates of deposit, government securities or bonds, investment-grade rated securities, or insurance.[77] The majority of mining operators throughout the United States choose to post corporate surety bonds as the preferred form of reclamation financial guarantee.

For non-coal operations on federal lands, FLPMA has reclamation requirements similar to SMCRA that require the plans approved by the agencies to 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.[78] Unlike SMCRA, however, FLPMA's concept of "concurrent reclamation" is not generally applied and may allow the entire permitted mine footprint to be disturbed at one time[79] and actual major reclamation activities to be deferred until the mineral resource is depleted.

C. Other Lands

The U.S. Forest Service (USFS) within the U. S. Department of Agriculture manages approximately 193 million acres of public forest lands, some of which are sites of various mining operations: coal,

hardrock, and other non-coal mining.[80] USFS, in balancing all public land stewardship obligations, has stated that "[it] recognizes that prospectors and miners have a statutory right, not a mere privilege under the Mining Law of 1872, the Surface Resources Act[81] and the Organic Administration Act of 1897,[82] to go upon certain National Forest System Lands for the purposes of locatable mineral exploration, development and production."[83] Statutes governing the use of public forest lands expressly allow use of those lands for mineral development,[84] but USFS is required to protect the lands from "depredations."[85] USFS regulations governing environmental protection and financial assurance (bonds) relating to mineral operations have remained relatively unchanged since 1974.[86]

In 2004, USFS adopted an augmented program to (1) analyze the potential for environmental impact of mining operations; and (2) impose requirements for financial assurance that would yield amounts adequate to do the necessary environmental remediation if the mine operators did not. USFS undertook this program "to capture the lessons learned by the Forest Service and other state and federal agencies, as a result of having to close a number of bankrupt and abandoned hard rock mines."[87] Based on these lessons, USFS has developed a procedure to estimate the tasks and costs of environmental reclamation to be covered by the financial assurance, yet recognizes that it needs to be updated.[88] In 2008, USFS recognized shortcomings in its regulatory framework and proposed revisions to address them,[89] but the proposed rules were not promulgated. In 2008, USFS attempted to reconcile its program with that of its sister agency, BLM, and the recommendations of the National Research Council following its publication *Hardrock Minerals on Federal Lands*. USFS proposed rules to, among other items, "provide additional detail with respect to the process the Forest Service uses to review and adjust reclamation bonds to ensure that those bonds cover the full cost of reclaiming National Forest Service lands."[90]

Mineral extraction on Indian lands presents unique requirements. At this time, no tribal nation has primacy under SMCRA, although

some tribes have approved reclamation programs under the abandoned mine lands provisions of SMCRA.[91] Therefore, operations will proceed by authorization from the appropriate state or federal agency. If Indian lands are involved, the agency will generally consult with the affected tribe. In instances where the tribe owns surface and/or mineral interests, the operator must obtain a lease entered into with the U.S. Department of Interior, Bureau of Indian Affairs (BIA) as trustee for the tribe. Regulations under the Indian Mineral Development Act,[92] administered by the BIA governing coal mining on tribal lands, require a coal lessee to provide a bond in an amount sufficient enough to ensure compliance with all terms of the coal lease. These leases and the related bonds themselves often require compliance with all applicable laws. Therefore, the lease bond may become a supporting reclamation bond. In an action that raises the question of which regulatory agency or interested party is responsible for making permit- and bond-related decisions, in 2021 OSM issued notice to the state of Oklahoma that OSM was asserting jurisdiction over coal mining on Indian lands in Oklahoma based on the decision by the U.S. Supreme Court in *McGirt v. Oklahoma*.[93] Oklahoma has challenged OSM's actions, and the case is pending in federal court.[94] The impact of the *McGirt* decision and the reach of the definition of "Indian lands" remain to be determined.

III. Suretyship in an Environmental and Administrative Law Framework

General principles of surety law, which is contractual in nature, and the law regarding statutory bonds apply to reclamation bonds.[95] Therefore, the language of the bond establishes the parties' obligations, which the statutes involved further define. In practice, the form of the reclamation bond differs among jurisdictions. For example, the Wyoming bond form refers primarily to the principal's performance of permit obligations, while the Pennsylvania bond form incorporates several other environmental laws related to air, water, waste, and dam safety. These parameters establish the obligations in each jurisdiction.

On a fundamental question of surety law, however, it is common for mining and regulatory professionals, principals, and courts to confuse the concept of suretyship with insurance. Suretyship often is not considered until there is a default or, in the mining regulatory context, the mining company fails to perform its reclamation obligations and the agency is forced to forfeit the bond.[96] Another time that the nature of suretyship comes into focus is in the bankruptcy of a mining company when interested parties are asserting their priorities. It is critical in any legal context, especially in administrative and bankruptcy proceedings, that the parties (including the court) be educated on the nature of the surety relationships because, unlike the construction industry, there is a general unfamiliarity with the nature of suretyship.

A. Suretyship Is a Three-Party Relationship

The surety relationship involves three distinct parties, including the principal (permittee) who is the primary obligor, the obligee (regulatory agency), the party to whom the principal and surety owe a duty, and the surety (bonding company), the secondary obligor.[97] Understanding the roles of the parties is critical. Along with general surety rights, each party has distinct regulatory responsibilities and rights. Surprisingly to many who encounter the topic after there has been a reclamation bond forfeiture, a surety bond is not an insurance policy. It is black-letter law that suretyship is not insurance.[98] The surety relationship is a three-party relationship in which 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. 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."[99]

B. Parties to the Relationship

The parties to a reclamation surety relationship are as follows:

1. **Permittee**. The mining company, as the permittee, is the principal and the party who has received the mining permit from the regulatory agency. The permittee has the primary obligation to conduct mining, reclamation, and environmental remediation activities according to the terms of its mining permit issued by the regulatory agency, which incorporates applicable operational, reclamation, and environmental performance standards. Often referred to as "contract miners," it is common industry practice for a permittee to engage a separate, unrelated mining company to actually operate the mining and/or reclamation activities. The permittee, however, remains primarily responsible for performance.
2. **Regulatory agency**. The regulatory agency is the obligee on a reclamation bond that has enforcement authority under SMCRA or FLPMA (or state laws if not on federal land) and its regulations. Where a state regulatory program is implemented on federal lands, both the state and the United States will be obligees.[100] The surety underwrites the risk assuming that the agency will enforce the reclamation regulations, and the agencies are responsible for inspecting the mines to assure reclamation performance and bond releases upon completion.[101] The regulatory agencies have significant authority and may issue notices of violation and cessation orders, and even suspend or revoke permits due to uncorrected violations.[102] They may also assess civil or criminal penalties to the permittee.[103]
3. **Bonding company**. The bonding company is the surety and is a secondary guarantor of performance of the permitted reclamation obligations. The principal retains the primary duty to perform its obligations; it may not merely hand off that duty to the bonding company or rely on the reclamation bond.[104] The relationship between the permittee and the bonding company is a credit relationship under which the bonding

company will ordinarily require collateral and, along with its common law indemnification rights against the principal, will also require a written indemnity agreement.[105] In order to adequately protect its rights, the bonding company should be familiar with the regulatory program under which it writes the bonds, other environmental regulatory requirements that may be interwoven in the concept of "reclamation" (e.g., hazardous waste disposal, water pollution treatment), and, just as importantly, the relevant regulatory administrative process since these are statutory bonds.

IV. Bond Releases

The procedures and performance standards for obtaining reclamation bond releases are controlled by statute and agency regulation. It is important to recognize that in dealing with state and federal agencies, each official agency decision is an administrative action and, as such, occurs under the additional legal umbrella of administrative law. Bond release is a good example of the administrative law concept of "procedural due process," requiring public notice, opportunity for comment by interested parties, and possibly an appeal.[106] A bond release request must be filed with the agency in a formal application. The site will be inspected to assure the standards are met and may be granted or denied.

A. Release of Coal Mining Reclamation Bonds

Although SMCRA allows release of the bond upon a determination that reclamation has been successfully completed, the bond is released in phases or stages: Phase I releases 60 percent of the bond amount when the operator completes basic reclamation tasks of backfilling, regrading, top soil replacement, and drainage control; Phase II usually releases about 25 percent, when successful revegetation has been established.[107] Final release of a reclamation bond may be applied for after full performance of the reclamation plan and a demonstration that the site is stabilized (usually five years in eastern states and ten years in western states, depending on

success of the revegetation). Some statutes do allow for partial and incremental bond releases as reclamation progresses. However, unless the bond is written to accrue proportionally to the acreage affected (i.e., incrementally), a deficiency anywhere on the bonded area caused by mining is a basis for a bond release denial or forfeiture.[108]

B. Release of Hardrock Mining Reclamation Bonds

Bond release under FLPMA on hardrock mines may be obtained when the operator has completed all or any portion of the reclamation on its mine in accord with its approved plan of operations.[109] Like its coal regulatory counterparts, the federal regulations governing hardrock operations follow a percentage-release approach. For example, BLM may release up to 60 percent of the bond for a portion of the project area when successful completion of backfill, regrading, establishment of drainage control, and stabilization and detoxification of leaching solutions, heaps, tailings, and similar facilities.[110] Final bond release of the remaining amount for the same portion of the area may be sought following a demonstration of successful revegetation and any effluent (water discharge) meets specific permitted water quality standards for one year without needing additional treatment.[111] In the event of a long-term pollutional discharge, the bond can only be released if the operator has established a long-term treatment funding mechanism such as a treatment trust.[112] Due to the nature of hardrock mineral mines, as distinguished from coal mines, it is common for the *entire* permitted mine and associated mineral processing areas to be affected until the minerals are depleted. Hence, the amount of bond exposure is often 100 percent until mine closure upon successful reclamation.

V. Principal Default: Bond Forfeiture

In both the coal and non-coal programs, there are several bases for the regulatory agency to forfeit reclamation bonds. The agency will initiate actions to forfeit the bond if

- an operator is unable to conduct reclamation of an unabated violation;
- the terms of the permit are not met; or
- the operator defaults on the condition under which the bond was accepted.[113]

Forfeiture is an administrative process and involves two procedural steps: (1) a notice to the permittee and the surety that the agency has determined forfeiture is appropriate and advising how the forfeiture may be avoided,[114] and (2) if no agreement is reached between the agency and the operator or surety, actual forfeiture of the bond.[115] Many states have made insolvency or bankruptcy grounds for bond forfeiture.[116] If there is no negotiated agreement with the surety to perform reclamation activities, the agency is to proceed to collect the bond amounts to complete the reclamation plan on the permit area to which the bond applies.[117] Unless the surety continues to monitor its principal, the surety may first learn of the permittee's noncompliances when it receives the notice of the agency's intent to forfeit the bond. When the surety engages the agency, it is important for it to be familiar with the business background of its principal, the site conditions leading to forfeiture, the technical issues associated with the violations, and, very importantly, the regulatory framework under which the bonds were written. As discussed below, it may have to appeal the forfeiture to maintain the surety's right to perform in lieu of payment and develop a workout amidst a complicated legal process.[118]

Financial difficulties in the extractive industries challenge the reclamation surety. Myriad reasons may cause the principal's economic woes (making it important for the surety to continue to be vigilant in its underwriting).[119] By the time the principal's troubles are plainly evident it is probably too late to obtain additional collateral support by a place-in-funds provision common in many indemnity agreements; the principal and indemnitors either do not have the resources to comply or, if they do, receiving the additional collateral may be held to be a voidable preference in the likely soon-to-be-filed bankruptcy action.[120] In a bankruptcy case, the environmental

compliance obligations covered by the reclamation bonds become claims along with the claims of other creditors. Ordinarily, debtors in bankruptcy must "manage and operate property . . . according to the requirements of the valid laws of the State in which such property is situated."[121] In an optimistic, theoretical scenario, therefore, a debtor in possession would be required to utilize its available resources to maintain compliance with environmental and reclamation laws. In reality that may not happen. In some cases, such as the Peabody bankruptcy case, the bankruptcy restructuring provided for continued operation of the mines. Difficult choices must be made when the available financial resources do not provide for compliance with law and a subsequent permittee cannot be found.

The recent case *In re Blackjewel* is particularly troubling for reclamation sureties.[122] Mining company Blackjewel and its affiliates had acquired more than 300 coal mining permits and related assets in Kentucky, West Virginia, Virginia, and Wyoming. Many of these acquisitions came from the bankruptcy proceedings of other companies, and Blackjewel was the last one standing in this unfortunate game of mining musical chairs. A plan of liquidation proposed in late 2020 would have transferred some assets and a number of remaining mining permits and related real and personal property interests to a reclamation trust for the benefit of the affected sureties and the states that were home to the operations.[123] Objectors to the plan included affected sureties and the Kentucky regulatory agency with responsibility to implement SMCRA in Kentucky, the Energy and Environment Cabinet. That agency estimated the reclamation costs for the 32 mining permits to be abandoned in Kentucky exceeded the available bond amounts by $20 million.[124] By early 2021, the reclamation trust approach had failed, and the bankruptcy court confirmed a plan of liquidation that deleted all reference to the reclamation trust and left as many as 200 permits (and the associated bonds) with fates uncertain, but likely ending in bond forfeiture.[125]

In a recent case involving offshore oil operations, *Fieldwood Energy*,[126] the bankruptcy court overruled objections, based in part on *Midlantic*, made by various sureties to the debtor's abandonment

of bonded oil and gas infrastructure. As a result, the court confirmed a plan that provided for abandonment of the infrastructure to prior responsible parties that the court found jointly and severally responsible for decommissioning. A provision of the regulation that governs bonds for offshore operations states that the bonds "must continue in full force and effect even though an event occurs that could diminish, terminate, or cancel a surety obligation under State surety law."[127] Because these statutory reclamation bonds are interpreted along with the laws and regulations that require them, the reclamation surety is cautioned to be aware of requirements that may dramatically alter the usual surety rights.

In another case involving bankruptcy of oil and gas development companies, *In re Falcon V, L.L.C.*,[128] the court held that the oil and gas bonds that secured payment and performance of lease obligations including plugging, abandoning, and decommissioning wells remained in place for the benefit of the reorganized debtors and the bond obliges.[129] But the bankrupt principals' obligations to the surety, including indemnity obligations, remained with the debtors with no meaningful chance of recovery.[130] The decision was based in part on the noncancelable character of these bonds and whether bonds and related indemnity agreements are executory contracts that can be assumed in bankruptcy.[131] As in the Fieldwood Energy matter, this is a harsh result for the sureties and urges caution in underwriting and in claims management in the time leading up to, and through, a bankruptcy proceeding.

VI. Appeals of Administrative Actions

Appeals of administrative decisions, including appeals of bond releases, bond forfeiture, and bond release denials, must be taken in the prescribed time frame and to the specific agency or tribunal that has jurisdiction to hear the appeal.[132] A party adversely affected by a bond-related decision—for instance a landowner who opposes a bond release, a permittee that disagrees with a denial of a bond release, or a surety subject to a bond forfeiture—may seek review of the decision but must first exhaust its administrative remedies.[133]

Many sureties have failed to recognize that the time frame for appealing a forfeiture is jurisdictional and process the actual forfeiture notice as they normally would a non-statutory contract bond claim. By failing to timely appeal the forfeiture, the surety loses significant bargaining power to mitigate its loss with the obligee regulatory agency. The standard of review of administrative action is whether the agency action was arbitrary, capricious, or otherwise inconsistent with law. Under SMCRA, the affected party has 30 days to appeal the action.[134] Under FLPMA, an adverse decision by BLM may be appealed within 30 days to the U.S. Department of Interior Office of Hearings and Appeals.[135] FLPMA also allows, on a discretionary basis, a less formal review of the issue with the state director prior to a formal appeal.[136]

VII. Surety Performance

SMCRA itself does not refer to a corporate surety's rights or accommodations made in the interest of the surety when the bond is forfeited. The federal regulations, however, do provide guidance on this murky area for the surety claims representative. Under the federal framework, the regulatory agency is required to send written notice of its determination to forfeit the bonds to both the permittee and the surety.[137] The notice advises the permittee and surety "of the conditions under which forfeiture may be avoided."[138] The regulations state:

> The regulatory authority may allow a surety to complete the reclamation plan, or a portion of the reclamation plan applicable to the bonded phase or increment if the surety can demonstrate an ability to complete the reclamation in accordance with the approved reclamation plan . . . . [N]o surety liability shall be released until successful completion of all reclamation under the terms of the permit . . . .[139]

In some states, this initial notice is referred to as the "notice of intent to forfeit."

Most states address surety reclamation in their regulations. Some programs, such as Ohio, have significant detail regarding surety reclamation.[140] Indiana encourages surety reclamation as a way to avoid forfeiture.[141] Kentucky addresses surety reclamation in both statutes and regulations,[142] whereas the Pennsylvania program has only one statutory provision, which states, “A corporate surety issuing bonds which are forfeited by the department shall have the option of reclaiming the forfeited site, in lieu of paying the bond amount to the department, upon consent and approval of the department.”[143] This limited statement of law leaves a lot of discretion to the regulatory agency and puts a significant burden on counsel for the surety to propose, negotiate, and conduct a successful reclamation workout. Most states, like Colorado, allow a surety to avoid forfeiture if it can demonstrate the ability to complete the reclamation plan.[144]

Surety performance of defaulted reclamation obligations is supported in the federal non-coal program. As noted above, the surety will receive notice of an impending forfeiture prior to actual agency actions to collect the funds. The surety then may seek to investigate and, if advisable, enter into a written agreement with BLM for surety reclamation if it can demonstrate an ability to complete the reclamation in accordance with the permitted reclamation plan.[145]

Although the surety may have the right to perform, the decision to do so is carefully considered, and sureties typically proceed with caution. The surety must scrutinize many factors. These include an analysis of the cost of the remaining reclamation and the potential for any credit or reduction of the bond amounts. The surety also weighs whether the mining company is capable or willing to continue the reclamation with financial support from the surety, which may be holding some collateral, or whether the surety must retain a third-party contractor to complete the work. If the surety decides to perform, it must draft specific reclamation agreements with the obligee detailing the performance and limitation of liability of the surety, and the conditions required for the phase reductions and eventual full release of the bond.

If the surety would not benefit by performing, the surety may make the decision to forfeit the bond. If the surety proceeds with forfeiture, an agreement regarding the release of the bond may be advised.

VIII. Unexpected Obligations

A. Water Quality

To the surety underwriter, reclamation bonds are intended to address traditional and quantifiable reclamation activities such as earthwork and revegetation. Until very recently, regulatory agencies did not set the amount of required financial assurance to account for the increased costs of pollution abatement. In recent years, though, concerns about hydrologic quality have caused reevaluation of the extent of reclamation bond liability. In the coal and non-coal programs, bonds will not be fully released if there is a long-term pollutional discharge unless other financial accommodations for perpetual treatment have been established.

Underwriters would not ordinarily provide a surety bond if it is known that a site will have long-term pollutional discharges since it is highly likely that the bond will not be released. Therefore, most water quality issues (including long-term pollutional treatment) relate to unanticipated pollutional discharges that were not part of any reclamation bond calculation. These conditions may be caused by acid mine or acid rock drainage or other forms of leachate seeps that were not predicted during the pre-mine planning and permitting process. The existing regulatory framework, while perhaps unfair to the corporate surety that did not envision pollutional problems, does allow an alternative mechanism for the regulatory agency to seek additional and appropriate financial assurances to address long-term pollution treatment or abatement if the permittee is financially able, although often it is not.

Water pollution associated with mining operations includes acid mine drainage, heavy metal contamination, and dissolved and suspended solids, and it 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 associated with heavy metals that have not historically been monitored. 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 headwaters of more than 40 percent of the watersheds in the West.[146] Although the federal CWA is the primary federal statute for dealing with point source discharges from mine sites, SMCRA and FLPMA both address 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 effects of the mining and reclamation process."[147] The coal mine permit application must include a hydrologic reclamation plan that includes providing water treatment facilities if necessary.[148]

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

Long-term treatment trusts are an effective alternative to traditional reclamation surety bonds for the financial assurance for operations that exhibit these polluted discharges. Under SMCRA, the development of long-term treatment trusts to provide funds for treatment of 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 OSM in Tennessee then modeled the Pennsylvania protocol for the federal

program in Tennessee.[149] In order to address long-term pollutional discharges specifically, the Pennsylvania analogue 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.[150]

Under FLPMA, until the 2001 rulemaking, the costs of long-term water treatment were overlooked as part of the bonding requirements for mining operations. 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 specify this requirement to eliminate any argument about requiring such resource protection measures."[151] In the 2001 final rule calling for a trust, 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 longterm treatment to achieve water quality standards and for other long term, post mining maintenance requirements."[152]

The main purpose of the trust fund is to generate sufficient income to cover the cost of treatment in perpetuity. The amount needed to fully fund a trust considers and models the quality and quantity of the discharge, treatment and capital costs, support facilities needed, treatment facility maintenance, chemicals required, renovation, maintenance and replacement, and factors necessary to ensure perpetual treatment. Those values are reduced to net present value to determine the trust corpus. The regulatory agency is the trust beneficiary. The trust is implemented through a negotiated agreement defining the applicable trust contribution amounts, the time frame 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. In a bond forfeiture context where there is long-term pollution at the bonded mine, the agencies may seek to use the bond as part of the trust corpus.[153]

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 acceptance. The major problem for the surety is that if the regulatory agency does not require the permittee to establish and fund a trust for long-term pollution treatment, the bonds are at risk. In the case of default, however, contribution of a portion, or even all, of the bond penal sum to a long-term treatment trust can be an effective strategy to resolve the bond liability.

B. Other Potential Liabilities

Numerous articles in the surety literature about performing sureties draw attention to unanticipated liabilities under other environmental laws. Most of them caution sureties about environmental law-related risks, particularly those associated with hazardous materials. Because of the types of operations covered by reclamation bonds, it is reasonable for the surety to be cautious in deciding whether the proper action when the principal defaults is payment or performance. Under some sets of facts and circumstances, it might be possible for a performing surety to find itself considered an owner/operator/permittee of a discharge of pollutants to surface waters under the CWA,[154] an owner/operator or otherwise generator of hazardous waste under RCRA,[155] or a potentially responsible party for the release of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[156] It might even be possible for a performing surety to be so involved in the decision-making and control of coal mining operations of a coal company that the surety would be deemed an owner/controller and made subject to individual liabilities and alternative enforcement under SMCRA.[157] We have found, however, that proper due diligence about a site prior to making a

decision on performance can avoid needless risk of involvement with long-term environmental liabilities. Once a decision is made to perform, careful planning and definition of the surety's role and authority in the conduct of reclamation operations can maintain the surety's role as a secondary obligor and financial creditor, and protect it from liability as permittee or operator of a troubled site.

Conclusion

Reclamation bonds are complex combinations of traditional surety law and environmental law intended to mitigate the harmful effects of extractive industries. The surety's obligations on these bonds are tied directly to the terms of the bond, of course, but also to the terms of the regulatory framework under which the bond is written. Effective underwriting and claims management require a thorough understanding of these laws, the characteristics of the principal, and the facts and circumstances related to each operation.

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1. Selected portions of this chapter have been published in William T. Gorton et al., *Reclamation Bonds*, *in* THE LAW OF COMMERCIAL SURETY AND MISCELLANEOUS BONDS 261 (2d ed. 2012).
2. *See*, *e. g.*, Preston S. Chiaro & G. Frank Joklik, *The Extractive Industries*, *in* THE ECOLOGY OF INDUSTRY 13 (Deanna Richards & Greg Pearson eds., 1998) ("Extractive industries are commonly viewed as having unacceptable impacts on the environment.").
3. GAO, COAL MINE RECLAMATION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN MANAGING BILLIONS IN FINANCIAL ASSURANCES (2018) [hereinafter GAO COAL MINE RECLAMATION].
4. *Id*.
5. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR, 2017 ANNUAL REPORT. *See also* 30 C.F.R. pt. 900 (2020).
6. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *supra* note 5, at 36.
7. *Electricity Explained: Electricity in the United States*, U.S. ENERGY INFORMATION ADMINISTRATION, https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php (last updated Mar. 18, 2021).
8. NATIONAL MINING ASSOCIATION, http://www.nma.org (last visited Jan.17, 2022) (citing data from the Energy Information Administration).

9. *In re* Peabody Energy Corp., No. 16-42529, (Bankr. E.D. Mo. Apr. 13, 2016).
10. Declaration of Amy B. Schwartz at 25, *In re* Peabody Energy Corp., No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016), Doc. No. 7. *See also* Second Amended Disclosure Statement at 34, 44, and 131, *In re* Peabody Energy Corp., (Bankr. E.D. Mo. Jan. 17, 2017), Doc. No. 2231.
11. See, for example, the discussions throughout the INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS (Valérie Masson-Delmotte et al. eds., 2021), https://www.ipcc.ch/report/ar6/wg1/.
12. *See*, *e. g.*, *Ready for 100*, SIERRA CLUB, https://www.sierraclub.org/ready-for-100 (last visited Jan. 17, 2020) (documenting more than 180 cities across the country that have pledged to convert to using only "clean renewable energy").
13. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).
14. *See*, *e.g.*, W. Blaine Early III, *Bond What You Know and Insure What You Don't: A Comment on a Market Approach to Regulating the Energy Revolution*, 45 ENV'T L. REP. 10756 (2015) (responding to David A. Dana & Hannah J. Wiseman, *A Market Approach to Regulating the Energy Revolution: Assurance Bonds, Insurance, and the Certain and Uncertain Risks of Hydraulic Fracturing*, 99 IOWA L. REV. 1523 (2014), and Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145 (2013)).
15. *See*, *e. g.*, 30 C.F.R. § 556.900 (bonds for offshore, outer continental shelf wells); 43 C.F.R. § 3104.1 (onshore operations).
16. U.S. ENERGY INFORMATION ADMINISTRATION, ELECTRIC POWER MONTHLY (Feb. 2021).
17. *Id*.
18. NATIONAL MINING ASSOCIATION, *supra* note 8 (citing data from the U.S. Geological Survey, Energy Information Administration, and U.S. Census Bureau).
19. INTERNAL REVENUE SERVICE, U.S. DEPARTMENT OF THE TREASURY, OVERVIEW OF THE MINING INDUSTRY (2006).
20. U.S. GEOLOGICAL SURVEY, NATURAL AGGREGATES—FOUNDATION OF AMERICA'S FUTURE (1997) (Fact Sheet No. 144-97), https://pubs.er.usgs.gov/publication/fs14497.
21. U.S. GEOLOGICAL SURVEY, MINERAL COMMODITY SUMMARIES (2021).
22. Letter from Anne-Marie Fennell, Director, GAO, to Representative Raul Grijalva, Chairman, House Committee on Natural Resources, Mining on Federal Lands: More Than 800 Operations Authorized to Mine and Total Mineral Production Is Unknown (May 28, 2020).

23. U.S. GEOLOGICAL SURVEY, FERTILIZERS—SUSTAINING GLOBAL FOOD SUPPLIES (1999) (Fact Sheet No. 155-99), https://pubs.usgs.gov/fs/fs155-99/fs155-99.pdf.
24. The term "reclamation bond" is used commonly throughout the mining industry to cover *all* forms of reclamation financial guarantees.
25. Reclamation bonds were required in Pennsylvania under what evolved to become the Surface Mining Conservation and Reclamation Act, 52 Pennsylvania Statutes section 681.6, as early as 1947 under the Anthracite Strip Mining Law section 6, Act of June 27, 1947, Pub. L. No. 1095, amended, whereas U.S. Bureau of Land Management (BLM) regulations requiring the present form of financial assurances on federal land in the hardrock industry were promulgated in 2001, 30 C.F.R. § 3809.555, 66 Fed. Reg. 32,575 (June 15, 2001).
26. Traditional reclamation includes backfilling highwalls and pits, grading, topsoil replacement, revegetation, and drainage control removal. *See*, *e.g.*, 30 C.F.R. §§ 715.13–.20.
27. *See generally* W. Va. Highlands Conservancy v. Norton, 238 F. Supp. 2d 761 (S.D. W. Va. 2003) (discussing bond forfeiture funds for water treatment and traditional reclamation).
28. *See* discussion *infra* Part VIII; *see also* BLM discussion regarding the use of existing bonding for water treatment in relation to clarifying regulations. 66 Fed. Reg. 54,847 (Oct. 30, 2001).
29. *See infra* note 95 (regarding statutory bonds in Part III).
30. *See* 30 C.F.R. § 800.13(a)(1) ("[B]ond liability shall be for the duration of the surface coal mining and reclamation operation and for a period which is coincident with the period of extended responsibility for successful revegetation . . . ."); *see also id*. § 800.20(b) ("Surety bonds shall be noncancellable during their terms . . . .").
31. *Id*. § 816.131.
32. *See infra* Part II.A.
33. *See*, *e.g.*, 30 C.F.R. § 774.17(a) ("No transfer, assignment, or sale of rights granted by a permit shall be made without the prior written approval of the regulatory authority.").
34. 33 U.S.C. §§ 1251–1387.
35. 42 U.S.C. §§ 7401–7671.
36. *Id*. §§ 6901–6992k.
37. RCRA does not regulate mineral extraction, beneficiation, and processing wastes under the "Bevill Amendment," which excludes them. *See* 42 U.S.C. § 6982(f); 40 C.F.R. § 261.4(b)(7).
38. Under RCRA, financial assurances for waste treatment, disposal, or storage area closure and post-closure must be provided. *See* 40 C.F.R. §§ 264–265; *id*. §§ 264.143, 264.145. Under the Outer Continental Shelf Lands Act, financial assurances to fund oil well closure and to address spills are required.

See 30 C.F.R. §§ 256.52–.59 regarding well closure and *id*. § 253.14 regarding one-time catastrophic events. Under the CWA, financial assurances can be required to ensure that wetlands mitigation projects are completed. *See* 33 C.F.R. § 332.3(n)(1)–(6). Under the Safe Drinking Water Act, financial assurances are required for underground injection wells. *See* 40 C.F.R. §§ 144.28(d), 144.52(a)(7), 144.60–.70.

39. 30 U.S.C. § 1201 *et seq*.
40. *Id*. § 1202(a).
41. *Id*. § 1202(d).
42. *See id*. § 1235.
43. *Id*. § 1300(j).
44. 30 C.F.R. § 942.700.
45. *Id*. § 947.700.
46. *Id*. § 910.700.
47. 30 U.S.C. § 1254.
48. *See generally* 30 C.F.R. pt. 900 (federal approval of individual coal-producing states' regulatory programs).
49. 30 U.S.C. § 1253.
50. *Id*. § 1256(a).
51. 30 C.F.R. § 700.5.
52. *Id*. §§ 779, 780.
53. 30 U.S.C. § 1259; 30 C.F.R. §§ 800.4, 800.12.
54. 30 C.F.R. §§ 800.12, 800.20.
55. *Id*. §§ 800.5(b), 800.21.
56. *Id*. § 800.23.
57. Surety bonds constitute approximately 76 percent of the financial assurances held by state and federal regulators. *See* GAO COAL MINE RECLAMATION, *supra* note 3.
58. *Id*. at 20.
59. 30 C.F.R. § 800.14(b).
60. *Id*. §§ 715.10–.20.
61. *See* Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Pollutional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues, 67 Fed. Reg. 35070 (May 17, 2002). *See also* OSM, U.S. DEPARTMENT OF THE INTERIOR, POLICY GOALS AND OBJECTIVES ON CORRECTING, PREVENTING, AND CONTROLLING ACID/TOXIC MINE DRAINAGE (1997), http://www.osmre.gov//lrg/docs/amdpolicy033197.pdf.
62. 30 C.F.R. § 800.15(a).
63. *Id*. § 816.100.
64. ERIN SAVAGE, APPALACHIAN VOICES, REPAIRING THE DAMAGE: THE COSTS OF DELAYING RECLAMATION AT MODERN-ERA MINES (2021), https://appvoices.org/resources/RepairingTheDamage_ReclamationAtModernMines.pdf.

65. The individual connection to, and vetting of, the leadership of the principal may play a role in evaluating the nature of the bond as a financial accommodation within the meaning of § 365 of the Bankruptcy Code. *See*, *e.g.*, SURETY ASPECTS OF BANKRUPTCY LAW AND PRACTICE ch. V.F (Chad Schexnayder & Michael E. Collins eds., 2021).
66. 30 U.S.C. § 1260(c).
67. *Id*.
68. State laws governing non-coal operations on private property have varying degrees of reclamation stringency; however, they are governed by *other* federal environmental laws including but not limited to the federal CWA, CAA, Endangered Species Act, and other applicable federal and state standards.
69. See, for example, surface effects of noncoal mining regulations implemented by the Kentucky Department of Natural Resources (405 KY. ADMIN. REGS. ch. 5 (2022)) and the non-coal rules and regulations implemented by the Oklahoma Department of Mines (OKLA. ADMIN. CODE tit. 460, ch. 10 (2017)).
70. 30 U.S.C. §§ 22–47.
71. GAO, HARDROCK MINING: BLM NEEDS TO BETTER MANAGE FINANCIAL ASSURANCES TO GUARANTEE COVERAGE OF RECLAMATION Costs 12 (2005).
72. 43 U.S.C. § 1701 *et seq*.
73. GAO, *supra* note 71, at 12.
74. *Id*. at 1 n.3, 8. BLM is responsible for managing 261 million acres of public land in 12 western states. Approximately 90 percent is open to the public for hardrock mining.
75. GAO, *supra* note 71, at 3.
76. *Id*.
77. 43 C.F.R. § 3809.555(e).
78. 30 U.S.C. § 1258(a)(13); 43 C.F.R. § 3809.420.
79. Compare SMCRA's requirements for contemporaneous reclamation, 30 C.F.R. § 816.100, and the regulations promulgated under FLPMA associated with concurrent reclamation, 43 C.F.R. § 3809.420(a)(5), (b)(3). While the concepts may be similar, due in part to the nature of hardrock mining practices, the enforcement is quite different (e.g., allowing a pit to remain open or allowing waste rock dumps to remain unreclaimed based on the potential for increases in the resources price that then may allow another cut at the pit or, arguably convert "waste rock" into a resource worth processing).
80. *See*, *e.g.*, GAO, HARDROCK MINING: INFORMATION ON ABANDONED MINES AND VALUE AND COVERAGE OF FINANCIAL ASSURANCE ON BLM LAND 6 (2008).
81. 30 U.S.C. §§ 611–615 (Multiple Use Mining Act of 1955).
82. 16 U.S.C. §§ 471–5466.
83. 73 Fed. Reg. 15,695 (Mar. 25, 2008). *See also* 39 Fed. Reg. 31,317 (Aug. 28, 1974).

84. 16 U.S.C. § 478.
85. *Id*. § 551.
86. 36 C.F.R. § 228.8; 39 Fed. Reg. 31,317 (Aug. 28, 1974).
87. USFS, TRAINING GUIDE FOR RECLAMATION BOND ESTIMATION AND ADMINISTRATION 5 (2004).
88. *Id*. at 13 (identifying the following tasks: "Interim Operation and Maintenance; Hazardous Materials; Water Treatment; Demolition, Removal and Disposal of Uncontaminated Structures, Equipment and Materials; Earthwork; Revegetation; Mitigation; Long-term Operation, Maintenance and Monitoring").
89. 73 Fed. Reg. 15,694 (Mar. 25, 2008).
90. It appears that the USFS financial assurance program is the least mature of the federal mining agencies.
91. *See*, *e.g.*, 30 C.F.R. § 756.16.
92. 25 U.S.C. §§ 2101–2108.
93. 149 S. Ct. 2452 (2020).
94. Oklahoma v. U.S. Dep't of Interior, No. 21-cv-00719 (W.D. Okla. July 16, 2021).
95. A bond written in conformity with a statute must be read with the statute. The statute that provides for the giving of a bond becomes part of the bond. *See*, *e.g.*, Am. Cas. Co. of Reading v. Irvin, 426 F.2d 647, 650 (5th Cir. 1970) ("A statutory bond will be reviewed in the light of the statute creating the duty to give security."); United States v. De Visser, 10 F. 642, 648 (S.D.N.Y. 1882) ("The bond cannot in fact be understood or applied without reference to these laws."); Reliance Universal, Inc. v. Ernest Renda Contracting Co., 454 A.2d 39, 44–45 (Pa. Super. Ct. 1982); Am. Cas. Co. v. Dep't of Env't Res., 441 A.2d 1383, 1387 (Pa. Commw. Ct. 1982) ("[S]tatutory bonds are construed in the light of the statute creating the obligation secured and the purposes for which the bond is required, as expressed in the statute.").
96. Forfeiture of bonds or other financial assurances is an administrative action preceded by significant notice requirements and, as such, is also an appealable action. *See* WILLIAM T. GORTON III, UNDERSTANDING THE RECLAMATION SURETY RELATIONSHIP BEFORE AND AFTER OPERATOR DEFAULT: MINE CLOSURE, FINANCIAL ASSURANCE, AND FINAL RECLAMATION 11-7 (Rocky Mountain Mineral Law Foundation, Paper No. 11, 2009). *See* discussions *infra* Parts V and VI.
97. EDWARD G. GALLAGHER, THE LAW OF SURETYSHIP § 1 (1993).
98. Pearlman v. Reliance Ins. Co., 371 U.S. 132, 139 n.19 (1962) ("Suretyship is not insurance."); Meyer v. Bldg. & Realty Serv. 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.").

99. Armen Shahinian, *The General Agreement of Indemnity*, *in* THE LAW OF SURETYSHIP 487 (Edward G. Gallagher ed., 2d ed. 2000).
100. 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* BLM as obligees; a bond written for a coal mine on federal land in Wyoming includes the Wyoming Department of Environmental Quality *and* the OSM as obligees.
101. 30 C.F.R. § 840.
102. *Id*. §§ 840 (SMCRA state enforcement), 348 (SMCRA federal enforcement); 43 C.F.R. §§ 3809.600–.605.
103. 30 C.F.R. § 845; 43 C.F.R. § 3809.700.
104. *See*, *e.g.*, RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 21(1) (1996) ("[T]he principal obligor has the duty to the secondary obligor [the surety] (a) to perform the underlying obligation . . . and (b) to refrain from conduct that impairs the expectation of the secondary obligor that the principal obligor will honor its duty of performance."); *id*. § 21 cmt a. ("As between the principal obligor and the secondary obligor, it is the principal obligor that should perform or bear the cost of performance. . . . The existence of the secondary obligation, typically having served as inducement to an action or forbearance by the *obligee*, is beneficial to the principal obligor . . . [T]he secondary obligor is entitled to the principal obligor's performance, not merely a cause of action for its failure to perform.").
105. A surety has certain very important and inherent rights in its relationship with the principal such as indemnity, subrogation, and equitable remedies that this chapter does not address but that a practitioner in this field should be aware of.
106. This framework allows the landowners or other interested party to object to bond release if dissatisfied with the reclamation results.
107. 30 C.F.R. § 800.40(c)(1)–(3).
108. *See* James E. Martin & Am. Ins. Co. v. Pa. Dep't of Env't Res., 570 A.2d 122 (Pa. Commw. Ct. 1990).
109. 43 C.F.R. § 3809.590(a).
110. *Id*. § 3809.591(b).
111. *Id*. § 3809.591(c)(1), (2).
112. *Id*. §§ 3809.591(c)(2), 3809.552(c).
113. 30 C.F.R. § 800.50(a); 43 C.F.R. § 3809.595.
114. 30 C.F.R. § 800.50(a)(1), (2); 43 C.F.R. § 3809.596.
115. 30 C.F.R. § 800.50(b); 43 C.F.R. § 3809.597.
116. *See*, *e.g.*, 25 Pa. Code § 86.181(a)(6) (2022).
117. 30 C.F.R. § 800.50(b)(2); 43 C.F.R. § 3809.597(d).
118. 43 C.F.R. §§ 3809.596, 3809.597; 30 C.F.R. § 800.50.
119. *See supra* Part I.B.

120. *See*, *e.g.*, SURETY ASPECTS OF BANKRUPTCY LAW AND PRACTICE, *supra* note 65, ch. VII.
121. 28 U.S.C. § 959(b). In the context of complying with environmental laws this statute does not allow a bankrupt estate to abandon property that exhibits ongoing environmental hazards. Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot., 474 U.S. 494, 507 (1986).
122. No. 19-bk-30289 (Bankr. S.D. W. Va. July 1, 2019).
123. Notice of Plan Supplement, *In re* Blackjewel, LLC, No. 19-bk-30289 (Bankr. S.D. W. VA. Nov. 20, 2020), Doc. No. 2602.
124. Objection of the Commonwealth of Kentucky, Energy and Environment Cabinet, to Debtors' Joint Plan of Liquidation, *In re* Blackjewel, LLC, No. 19-bk-30289 (Bankr. S.D. W. Va. Dec. 10, 2020), Doc. No. 2642.
125. Findings of Fact, Conclusions of Law, and Order (I) Approving the First Amended Disclosure Statement for Joint Chapter 11 Plan of Liquidation for Blackjewel, LLC and Its Affiliated Debtors, and (II) Confirming the First Amended Joint Chapter 11 Plan of Liquidation for Blackjewel, LLC and Its Affiliated Debtors, *In re* Blackjewel, LLC, No. 19-bk-30289 (Bankr. S.D. W. Va. Mar. 22, 2021), Doc. No. 3147.
126. Findings of Fact, Conclusions of Law, and Order (I) Confirming Eighth Amended Joint Chapter 11 Plan of Fieldwood Energy LLC and Its Affiliated Debtors and (II) Granting Related Relief, *In re* Fieldwood Energy LLC, No. 20-33948 (Bankr. S.D. Tex. June 25, 2021), Docket No. 1751.
127. 30 C.F.R. § 556.902(d).
128. No. 19-10547 (Bankr. M.D. La. Sept. 22, 2020).
129. *See* Ruling and Order, Argonaut Ins. Co. v. Falcon V, L.L.C., No. 20-00702 (M.D. La. Sept. 29, 2021) (affirming the bankruptcy court's order).
130. *Id*.
131. *See supra* note 65.
132. 30 U.S.C. §§ 1275, 1276.
133. *See*, *e.g.*, S. Ohio Coal Co. v. Off. of Surface Mining, U.S. Dep't of Interior, 20 F.3d 1418 (6th Cir. 1994).
134. 30 U.S.C. § 1264; 30 C.F.R. § 775.1.
135. 43 C.F.R. § 3809.800(b).
136. *Id*. § 3809.801.
137. 30 C.F.R. § 800.50(a)(1).
138. *Id*. § 800.50(a)(2).
139. *Id*. § 800.50(a)(2)(ii).
140. OHIO ADMIN. CODE § 1501:13-7-06(E) (2021).
141. IND. ADMIN. CODE tit. 312, r. 25-5-17, sec. 17(b) (2022).
142. KY. REV. STAT. ANN. § 350.130(1) (2022); 405 KY. ADMIN. REGS. 10:050 sec.1(2) (2022).
143. PA. STAT. ANN. tit. 52, § 1396.4(h) (2022).
144. COLO. CODE REGS. § 407-2:3.04.2(5) (2022).

145. 43 C.F.R. § 3809.596(d)(2).
146. U.S. Environmental Protection Agency, Liquid Assets 2000: America's Water Resources at a Turning Point 10 (2000).
147. 30 U.S.C. § 1258(a)(13).
148. 30 C.F.R. § 780.21.
149. Tennessee Federal Regulatory Program: Final Rule, 72 Fed. Reg. 9,616 (Mar. 2, 2007) (codified at 30 C.F.R. § 942.800(c) (Special consideration for sites with long-term postmining pollutional discharges).
150. PA. STAT. ANN. tit. 52, § 1396.4(d)(2) (2022).
151. 66 Fed. Reg. 54,847.
152. 43 C.F.R. § 3809.552(c).
153. *See*, *e.g.*, Stipulation and Consent Order, *In re* Mon View Mining Co., No. 05-50219 (Bankr. W.D. Pa. Apr. 22, 2010), Docket No. 1119.
154. 33 U.S.C. §§ 1251–1387.
155. 42 U.S.C. §§ 6901–6992k.
156. 42 C.F.R. §§ 6901–6975 (CERCLA or "Superfund").
157. United States v. Dix Fork Coal Co., 692 F.2d 436, 440 (6th Cir. 1982).