INTRODUCTION

Financial guarantees, most commonly in the form of corporate surety bonds are required by state and federal law to fund reclamation should the permittee default. In the event of a mining company defaulting on its reclamation obligations, a bonding company may propose to perform the obligations of the permittee. The negotiations with the regulatory agencies, surface and mineral owners and other interested parties can create a very complicated scenario that requires an understanding of the law regarding environmental protection, bankruptcy and suretyship, along with technical expertise in land reclamation. Though presented in the context of the coal industry, the principles discussed below are generally applicable to the mining industry as a whole.

SMCRA

The regulation of coal mining in the United States is governed by the federal Surface Mining Control and Reclamation Act, (“SMCRA”). Several purposes of SMCRA include the establishment of a nationwide program to protect society and the environment from the adverse effects of surface coal operations; assuring the rights of surface landowners and other persons with a legal interest in the land are fully protected; and assuring that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal operations.

Under SMCRA a mining company must file an application for a surface mining permit which includes detailed operations and reclamation plans and the posting of reclamation performance bonds. SMCRA has specific regulatory frameworks for bonding the reclamation plans and performance of the coal mine permittee. Bonds may be in the form of a corporate surety bond, cash collateral or securities. The bonded obligations often include compliance with other environmental laws and regulations often including laws related to water quality, coal refuse disposal, mine subsidence and waste management.

Suretyship

Very few outside of the surety industry (including judges), fully understand exactly what a surety bond is. Many mistakenly regard "bonds" as insurance policies. **Suretyship is not insurance.** The distinction between the two concepts is as follows:

In **suretyship**: There is a three party contract where a **surety** provides a financial guarantee only if the **principal** (permittee) fails to meet its obligation to the **obligee** (regulatory agency). The principal is required to reimburse the surety; therefore a surety expects no loss. The principal is the primary obligor.
and the surety is the secondary obligor. The surety relationship with a mining company is basically an extension of credit by the bonding company to the permittee.

In insurance: There is a two-party contract where an insurance company spreads the risk of losses over a group of insureds and expects to take a loss during the policy period. If an insured event occurs, the insurance company pays with no recourse against the insured.

Many principles of surety law apply along with the regulatory framework. For example, "subrogation" is an important concept that allows the surety to "step into the shoes" of either the permittee or the regulatory agency depending on the situation. A surety is entitled to assert all of the defenses of its principal. A surety who pays the debts of another is entitled to all the rights of the person he paid (obligee) to enforce his rights to be reimbursed. The doctrine of subrogation also allows a surety to step into the shoes of the government for whom the job was completed.

In a bankruptcy context, there are often conflicts between secured creditors (lenders) who want money from the bankrupt estate and the regulatory agency, permittee and surety who all want reclamation accomplished. The surety, for example, can argue the state’s position regarding the need for compliance with state law under § 959 of the bankruptcy code.

BOND FORFEITURE

Until the recent surge in coal prices numerous companies with large coal mine environmental obligations have been dissolved or become bankrupt in the last ten years including most recently, Horizon Natural Resources, Lodestar Energy, LTV Steel, Bethlehem Steel, AEI Resources, Quaker Coal, Pen Holdings, Anker Energy and others. In such an event, notwithstanding a potential successful reorganization, coal operations that have stopped in mid-operation become "problem mines," and may be subject to bond forfeiture for various reasons.

Under SMCRA, the regulatory agency must notify the permittee and surety of its intent to forfeit the bonds and advise of conditions under which forfeiture may be avoided. By this time, however, it is usually very late in the game for the surety to be able to have significant influence over its bonded principal. Earlier notice to the surety when the agency anticipates a problem may have a more positive result and may avoid forfeiture altogether. As a matter of fact, during the SMCRA rulemaking process OSM recognized that “adequate latitude is available for the regulatory authority to withhold forfeiture if an operator or a surety agree to a compliance schedule for completing reclamation successfully.”

Under SMCRA the agency can generally proceed to collect the bonds unless there have been actions to avoid forfeiture or an appeal has been filed, however some states (e.g., Kentucky) require a pre-payment of the bond in order to pursue the appeal.

Principles of surety law ordinarily allow a surety to either perform the bonded obligation in the event of a default or to pay the bond amount. Under SMCRA and most state programs surety reclamation is allowed. Based on our experience in the field, under the most complicated technical and legal scenarios, surety reclamation should be encouraged.
SURETY RECLAMATION WORKOUTS

Many of the most complicated matters facing the regulatory agencies and sureties have involved the large company bankruptcies or dissolutions with numerous sites involving all aspects of mining. The handling of these matters particularly by the agency, affects other interests including landowners, neighbors, communities and environmental interests.

If the bond is forfeited and collected by the agency, the agency, usually through its abandoned mine reclamation program, may conduct reclamation under specific, time consuming and generally more expensive state procurement procedures.

It has been our experience that surety reclamation can provide more reclamation on the ground per dollar by using private sector resources, expedience and experience in bidding and contracting.

Recent successful surety reclamation projects have included:

- Open dragline pits
- Acid mine drainage passive system development
- Burning refuse piles
- Mine shaft closures
- Borehole sealing
- Prime farm land restoration
- Wetlands/habitat enhancement
- Preparation plant demolition
- Coal refuse/slurry impoundment reclamation
- PCB removal
- Aerial tram removal
- Contour mine reclamation
- Hydraulic seals to flooding deep mines.

Reclamation is conducted under a Consent Order and Agreement, Consent Agreement or Settlement Agreement which defines the scope of work, work schedule and bond release or "waiver of collection" schedule where the bond remains technically "forfeited."

A critical factor to the surety is "certainty" as to performance requirements since it will have conducted its own engineering/economic analysis regarding the project prior to signing an agreement to perform. The surety is not the permittee and is not subject to permitting requirements as is an operator.

Many of the larger cases are also subject to U.S. Bankruptcy Court jurisdiction therefore the surety, permittee and agencies must deal with a Trustee or Debtor in Possession and other creditors. Most real legal conflicts occur here due to the intersection of environmental law, surety law and bankruptcy law. There are inherent competing interests:

Goals of bankruptcy law: return funds to creditors;
Goals of SMCRA: get land reclaimed (*i.e.* put money in the dirt)

The surety and agency interests are usually aligned in bankruptcy proceedings, however, often the agency takes a back seat in the proceedings.

**PROBLEMS IN NEGOTIATING SURETY AGREEMENTS**

Large multi-mine bankruptcies create very complicated situations, technically and legally, and require significant time and effort to understand relevant relationships and prospects for successful emergence from bankruptcy in order to develop strategy or for a coordinated approach with all parties in the event of a liquidation.

Due to usual negative history with the permittee leading to bond forfeiture the surety is often faced with an irrate audience at the agency and with landowners.

Very often, the principal/permittee is in arrears regarding royalty payments to the mineral owners, has left surface owners’ property in disrepair, and has created bad relations with the regulatory agency.

More often that not, regulatory staff does not understand suretyship and often confuses the surety as a surrogate coal operator or an insurance policy issuer.

Regulatory staff often view the bond amounts as “agency money.”

Notwithstanding recent efforts by some states to require “full cost” bonding, it is not uncommon for the bond amount to not cover full reclamation since the operation was stopped in mid-stream.

Bankruptcy court jurisdiction may overlay the entire matter.

Landowners and mineral owners can be recalcitrant and litigious.

Bankruptcy court approval of any workout is necessary (remember, the primary environmental obligation is that of the bankrupt company).

**WHEN RECLAMATION EXCEEDS THE BOND AMOUNT**

SMCRA allows the agency to pursue the permittee for excess costs if the bond amounts do not cover the reclamation costs. However, most agencies appear reluctant to pursue alternative enforcement, relying only on the bond as possibly supplemented by government funds.

Contrary to the goals of SMCRA, in recent experiences with a few states we were told "OSM won't let the state enter a surety agreement if it's for less than the entire permitted reclamation plan" even though there are discreet, identifiable reclamation tasks that must be accomplished: e.g., eroding hollow fill on steep slopes; acid filled pits, where the surety would have been able to abate the hazard or make a substantial contribution to reclamation within the bond amount, but not reclaim the entire site.

In other cases, in resolution of appeals filed with the administrative hearing officers under SMCRA or in the bankruptcy cases we have been able to identify key tasks in the reclamation plan that
required immediate attention or high priority and come to an agreement on scope of work and waiver of bond collection. In such cases, it's a win for all parties and the state funds are preserved.

**BENEFITS OF SURETY RECLAMATION**

Facilitates the purposes of SMCRA in addressing the adverse effects of surface coal mining operations, protection of the environment and the rights of landowners.

Land gets stabilized; pollution gets abated using private sector resources instead of limited government resources (agency still has jurisdiction).

More actual reclamation activity can be conducted on a per dollar basis since there are no government procurement requirements in private contracts between the surety and contractors.

Surety can mitigate its loss.

Landowner gets property returned to stable status faster.

Surety is additional advocate for environmental protection in bankruptcy proceedings.

**CONCLUSION**

Addressing the many technical aspects of mine land reclamation and environmental remediation in the event of a permittee's default is complicated enough. When considered in the context of a bankruptcy with many other interested parties asserting aggressive legal positions regarding limited assets, environment compliance and liability, the matter may appear like a quagmire of legal and technical issues. The surety company must be a key player in reconciling many of the competing interests from a technical and legal perspective.