Report on Financial Assurance for Coal and Noncoal Commodities

Prepared by the
Interstate Mining Compact Commission
Bonding Work Group

Published:
November 1, 2017

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Introduction:

As the primary regulatory authorities for mining within their borders, over the past forty years the states have taken the lead and acquired a high level of experience and expertise in creating and implementing effective regulatory programs. These programs include financial assurance requirements to provide for reclamation and the mitigation of mining impacts should a mining company be unable to meet its obligations. The states are tasked with achieving a balance between the responsible production of natural resources within their borders while assuring the protection of the environment, public health and safety, and the health and safety of the Nation's miners. Throughout the past few years, regulatory actions and market forces have made financial assurance for the mining industry a focal point, particularly for coal.

The Interstate Mining Compact Commission (IMCC) established a Bonding Work Group to review financial assurance programs in the states. More recently, the Office of Surface Mining Reclamation and Enforcement (OSMRE) also began to place additional focus on financial assurance requirements for the coal mining industry following the bankruptcy filings of several major coal operators in 2015 and 2016. OSMRE established its own financial assurance review group entitled, Financial Assurance Coordination Team (FACT). Prior to and since the establishment of FACT, IMCC representatives have met with a broad spectrum of interested parties and experts including surety industry representatives, financial representatives, and individual state experts. Compact representatives have also had preliminary discussions with OSMRE FACT members regarding financial assurance.

IMCC has taken a leading role in reviewing this topic and developing information on financial assurance considerations to address the issue. IMCC allowed for the open communication of federal requirements, as well as an open discussion covering the various state-specific requirements. The information shared through IMCC revealed that the states are the closest to the situation, the most directly affected, and in the best position to understand the impacts of this issue. Mine size and operation methods vary from state to state, and each state actively addresses its interests to ensure reclamation liability is mitigated within the framework of its own laws. Thus, it has become apparent that the states demonstrate greater proficiency in applying financial assurance tools to address reclamation/environmental liability.

There is no one-size-fits-all financial assurance solution to account for the unique mining circumstances that arise in each state. A financial assurance program that works well in one state may result in adverse and unintended consequences in another. Therefore, it is crucial for those reviewing the information contained in this report to recognize the importance of flexibility in developing and implementing financial assurance regulations. Flexibility allows the state experts to tailor the regulations to be as stringent as, or in some cases more stringent than, the federal regulations. That said, the information gained by the IMCC work group provides insights from real world experience in handling financial assurance instruments.

The IMCC subgroups reviewed all financial instruments and gained information about the pros and cons of each from states that are experts on the financial instruments authorized in their programs. Every state balances the mining commodity liabilities with the underlying protection of the environment. In addition, each state implements its defined regulations to ensure the successful completion of reclamation practices. Differences in mining methods, mine lifespan, and mine size provide unique challenges to each state that require regulatory flexibility. Because of collaboration among the bonding subgroups, it may be possible to strengthen current review processes, allow informed state rule renovations on financial assurance, and potentially guide federal rule renovations on financial assurance. The Chairs of the Bonding Work Group would like to thank all of the member states for their input and support in developing this document.

Risk Considerations:
Working through four subgroups, the IMCC Bonding Work Group conducted an in-depth review of the various financial instruments related to mine reclamation. Following the review, they concluded that there are no current reclamation liability instruments that avoid all potential risks to the Regulatory Authority (RA), with the exception of cash bonds. All instruments require in depth administrative oversight to ensure the integrity of the instrument over time. The work group found that all instruments (except cash bonds) are subject to possible forfeiture and/or inclusion in a Chapter 11 or Chapter 7 bankruptcy proceeding, which may put reclamation at risk. RAs can mitigate much of this risk by consistently reviewing financial instruments, as well as monitoring both the financial markets and the condition of mine operators for potential Chapter 11 filings. It is important to recognize that Chapter 11 proceedings may freeze financial assets for a period of time. Those financial assets may then remain tied to the obligations for which they were established, or be directed to other liabilities during the Chapter 11 proceedings.

Considering the coal industry's 2015-2016 bankruptcy filings, IMCC conversations suggested that not all states assume the same reclamation risk of default. This held true even when the operator was the same entity and not all mines within a single state had the same risk of default. The default risk on a reclamation liability obligation was higher for those mines exhibiting a short remaining mine life, or if the operator's ability to amend future leasing actions was impaired.

The risk of reclamation liability was also different throughout the states depending on the method of mining involved. Mining methods that employ concurrent mining and reclamation operations mitigate the extent of reclamation obligations at the mine's end of life. The regulator ensures continued reclamation by keeping mines using these extraction methods operational. Concurrent reclamation also keeps the bond amount relatively constant, rather than reaching the peak of liability at the closure of the facility.

If the operator is not in a strong financial position at the end of the mine life there is significant risk of forfeiture of the reclamation bond and even the potential of filing Chapter 11 and/or Chapter 7. Mining methods and life of mine are key components for evaluating reclamation liability risk.

The insights gained from the IMCC subgroups were extremely beneficial regarding risk determination as it relates to individual mineral extraction projects. IMCC subgroups discussed the potential for including a review of mineral type and the extent of the reserve base, the status of the operational phase of the project in relation to the reserve base (life of mine), the ability of the operation to amend future mineral reserves (i.e. new reserve leasing actions), the environmental conditions of the operating site (e.g. arid vs. mesic), and the need to address long term care and maintenance items such as acid mine drainage or groundwater restoration. There are also regional physical and environmental factors to consider such as, surface vs. underground operations, field average strip ratios for surface reserves, post-mining land use requirements (e.g. agricultural vs. repurposed industrial), and regional climatic/ecological conditions and variations. The states are in the best position to review, mitigate, and take appropriate actions pertaining to these regional differences.

The subgroups concluded there are no zero-risk financial assurance instruments (apart from rarely used cash) or mineral extraction methods, and all financial instruments require oversight to maintain the intended use. States are a great resource for review of specific financial instruments and sharing lessons learned in various default situations. Each default situation has unique nuances. IMCC subgroups considered whether identifying risk associated with the life of mine assists in mitigating risk and managing the financial instruments. In addition, the states are in the best position to make financial assurance instrument determinations.

Diversity in financial instruments was a key take away from the discussions. For instance, some states allow 100% self-bonding, other states cap the amount of self-bonding that can be utilized, and other states do not allow self-bonding. Many states recognize that 100% self-bonding, although permitted by federal regulations, does not adequately account for the additional risk shifted onto the state when considering the mining method and life of mine. One method for reducing financial risk involves the use of self-bonding in combination with another financial instrument. This method may mitigate the financial risk by diversifying the financial assurance. Diversifying the instruments requires an operator to remain financially healthy on its own, as well as financially strong enough to maintain a third party financial instrument.

The following documents produced by the IMCC bonding subgroups are included in the Appendices as attachments:

IMCC Bonding Subgroup 1 - A review of how reclamation liabilities were calculated in the various states was undertaken by the subgroup. Since the circumstances and factors to be considered in bond calculations vary greatly from state-to-state, and each state has its own method of calculating bonds, the subgroup decided not to pursue the proposed work product.

IMCC Bonding Subgroup 2 – A review of the various bonding instruments used by the states was undertaken by the subgroup. The Subgroup documented the various bonding instruments, associated regulatory pros and cons of the instruments, and experience gained by handling the instruments. The documented information also provided a resource for lessons learned by the states in its experience of managing financial instruments.

IMCC Bonding Subgroup 3 – A review of the various levels of risk during the life of a mine was undertaken by the subgroup. The subgroup documented the reclamation risk stages during the life of mine, explored the risk and liquidity of the various financial instruments, and discussed how to mitigate financial risk as it changes throughout the life of mine.

IMCC Bonding Subgroup 4 - Knowledge and experiences gained by the various states pertaining to bankruptcy filings were examined by the subgroup and compiled into a list of warning signs and an accompanying "scorecard." The list flags financial warning signs for regulators that may suggest a company is in financial distress, while the scorecard details the materials needed to negotiate a Chapter 11 filing. While the work group focused on Chapter 11 filing relative to bond instruments, the group was also aware that financial institutions and sureties also file for Chapter 7. Since there was a strong focus on bonding and bankruptcy at the creation of the work group, the scorecard was focused on reviewing the financial reports associated with bonds, specifically signs for default by the mining operator or the guarantor of a self-bond. The group also discussed the difference between filing a Chapter 11 bankruptcy restructuring and a Chapter 7 bankruptcy default. All financial assets are subject to judgement by the bankruptcy court, which includes financial instruments tied to reclamation liabilities. The importance of working directly with the operator and keeping communication open as early as possible when warning signs appear, and before and during the bankruptcy proceeding, was highlighted in discussions by the states. Maintaining open communication with other states impacted by a Chapter 11 filing was also an important consideration. Some states favor the use of stipulations during the Chapter 11 filing, pursuant to which agreements between the regulator and the permittee regarding reclamation bonding requirements are then presented to the bankruptcy court for final decision. Stipulations may provide an opportunity for greater certainty regarding the financial instruments associated with reclamation liabilities during a bankruptcy proceeding.

Purpose:

The purpose of this document is to summarize the most common financial assurance instruments currently used to meet mining reclamation bond requirements by the participating states. More detailed

information on each instrument is provided in the appendix. The intent of this report is not to place a preference on one financial tool or instrument over another, but rather to provide summary information for financial integrity reviews when considering the application of these instruments to cover reclamation/environmental liability and liquidity needs. In other words, these reviews are not meant to shift liabilities from one financial instrument to another while maintaining the same underlying risk; rather they are meant to address and reduce the actual liability/risk to the best extent possible. Finally, there is additional discussion provided on areas identified as needing further review. The remaining sections of this Report will consist of the following:

1. Correct Liability Calculations
2. Self-Bonding
3. Surety
4. Collateral Bonds (Irrevocable Letters of Credit; Cash and Securities; Negotiable Bonds of the U.S., a State, or a Municipality; Negotiable Certificates of Deposit; Real Property (Perfected, First Lien Security Interest); Investment Graded Securities)
5. Alternative Bonding Mechanisms (Bond Pools)
6. Appendices

Correct Liability Calculations:
The work group held discussions on established methods for calculating reclamation liability within the various states. There are a variety of methods in use today, ranging from a cost per acre calculation to more elaborate line item full cost liability calculations. Again, this discussion was not intended to favor one method over another, but rather to provide examples of different methodologies. The goal of bond calculations is to as accurately as possible define the reclamation/environmental liabilities. This is for two reasons: first, a state RA does not want to have a shortage of funds to complete a reclamation forfeiture project; and second, the reclamation liability should ideally be aligned with the required funds necessary to complete the reclamation, as an RA cannot collect more than needed to complete the work. An over-bonding scenario may also place additional pressure on the marketplace and consume unnecessary financial capacity. Therefore, it is incumbent on RA's to review the reclamation calculations carefully with qualified personnel to ensure accurate liability determinations.

Self-Bonding:
Self-bond is a sum certain indemnity agreement executed by the applicant, or by the applicant and the corporate guarantor, and made payable to the RA with or without separate surety. Self-bonding is a financial tool that involves the practice of providing financial assurance based on financial information provided by the applicant. According to federal regulations (800.23), the applicant submits financial information in sufficient detail to show that one of the following criteria are met:

- A current rating for its most recent bond issuance of "A" or higher as issued by Moody's Investor Service or Standard and Poor's Corporation.
- A tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or
- Fixed assets in the United States of at least $20 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

The ability to self-bond was adopted by OSMRE in 1980. At the time, self-bonding was put into practice because the surety marketplace did not have the capacity to issue the necessary instruments to large scale western surface mines. Regulations were developed, and states with primacy began to use this financial instrument to cover coal reclamation liability. As mentioned previously, the states within IMCC allow varying levels of self-bonding, including a strict policy of no self-bonding, capped self-bonding, or 100% self-bonding. Through IMCC discussions, it was found that the states that do not allow self-bonding did not experience a difficult transition away from self-bonding, as it was not the primary financial instrument

used in these states before it was removed. Of the states that allow self-bonding, some use the exact language of the federal regulations where other states have tailored the regulations to be more stringent. In both situations, it is the larger mining operations that typically utilize self-bond instruments.

The 2015-2016 coal company chapter 11 filings shed light on changes that occurred in the financial sector and corporate structures since 1980. It is evident that the regulations have not kept pace with these developments over time. Corporate conglomerates are much bigger and more complex than in the 1980s. The parent entity over a mining operation is not necessarily the parent of the corporate conglomerate. In this situation, the management controlling the decisions and the flow of money through the corporate conglomerate may not be the operator of the mine, nor the guarantor of the self-bond. Thus, in today's corporate environment it is possible for an operator or guarantor to meet the self-bond criteria requirements when the parent or corporate conglomerate financial information would fail.

Another change since the 1980s involves corporate lending practices. Financial lending has allowed for the application of loans and lines of credit by a corporate parent, using the assets of one or more legal entities within the corporate conglomerate. A liability such as this does not appear on the financial statements of the entity that has its assets pledged. Rather this type of obligation only shows on the financial statements of the corporate conglomerate's parent company, and only when the loan is funded. Thus, it is possible for a guarantor on a reclamation bond to have its assets completely pledged on a loan or line of credit without the liability appearing on its financial statements. Showing that the assets are not fully pledged on the financials may allow the guarantor to pass the self-bonding financial criteria when it would not otherwise qualify. This arises because the definitions in the federal regulations tie directly to the balance sheet for the guarantor. Discussions within the IMCC subgroups revealed that the states could make this more stringent by requiring all or a portion of such liabilities to be included in the ratios.

Additionally, self-bonding is more prevalent in the corporate world today than it was in the 1980s. Companies may have reclamation liabilities in more than one state, and they may be self-bonding additional liabilities, such as workers' compensation plans. The degree and actual amount of self-bonding are not readily disclosed nor required to be disclosed. Guarantors may pass the self-bonding financial criteria when some self-bonded liabilities are not listed as liabilities in the self-bonding financial criteria.

Each state that currently uses self-bonding has developed a set of rules and regulations that meet the statutory and federal requirements. During the review the work group found that several major legislative and market actions have taken place since 1980 (e.g. Sarbanes Oxley Act 2002, Dodd Frank Act 2010, SEC requirements, and various corporate tax code changes) that have resulted in company structures being modified, including an increasingly common use of subsidiary companies. These events have also resulted in a perception by the work group that states using self-bonding may want to review their state rules and regulations to mitigate any additional risks that have shifted to the state. Among the items that could be considered for such a review are:

- The use of parent conglomerate companies, unless the self-bond is unencumbered at the subsidiary level (i.e. parent cannot access the assets covering the self-bond of the subsidiary).
- An evaluation of liquid cash flow in the event of forfeiture (consider liquid cash needs during the forfeiture proceedings and require a separate financial instrument for these needs). Move away from 100% self-bonding as the life of mine matures.
- If accepting a self-bond based on company financial performance, consider the use of both on- and off-balance sheet liabilities; attention should also be given to term loan and open, but not accessed, revolving credit lines.
- Consider requiring both the operator and the guarantor to pass the financial criteria individually.

The self-bonding tool is a recognized financial assurance instrument and is applied in a manner consistent with each state's statutory requirements, rules and regulations.

Surety:
A surety is an indemnity agreement in a sum certain payable to the RA. It is executed by the permit holder as principal, and is supported by the performance guarantee of a surety corporation licensed to do business in the state where the operation is located. Surety bonds are frequently used by most states to address reclamation liability. IMCC discussions revealed that much has changed in the casualty and property corporate structures since 1980. Surety corporate conglomerates are much bigger and more complex than in the 1980s. The regulations that ensure the surety is located in the United States do not extend to the parent of the surety's corporate conglomerate. This begs the question: is a financial instrument held at a subsidiary level protected from the financial challenges that may face the parent of the surety at the corporate conglomerate level? This is similar to the situation and limitations with self-bonds noted above. The difference is that many of the surety corporate conglomerate parents are not incorporated in the United States. Therefore, if the surety corporate conglomerate files for bankruptcy (Chapter 11 or 7), the proceeding would take place at an international location under international law and not under the US Federal law. Regulators need to understand the legal effort that may be involved if a surety defaults on its obligation and that not all surety battles before the courts are the same.

The work group has found that the surety market space providing large mining operation bond instruments may be limited in some circumstances. The surety capacity available today is based on a company's financial solvency, and an ability to make premium payments. In Wyoming, experience during recent bankruptcies has demonstrated that within the state surety companies have limited to no appetite for covering large mining reclamation liabilities in cases where the life of mine and commodity reserve is less than ten years. Wyoming has found that surety companies also have minimal to no interest in sites where reclamation has been completed and there is no revenue being generated from a mined commodity depending on the environmental exposure. Many other states, however, do not find this to be true within their borders. Ohio issues coal mining and reclamation permits for a five year period and has not had to face this issue. Five year permits are issued in many other states where obtaining surety bonds has not been an issue. In Virginia, where the life of all mines is five years, there have been no issues with obtaining surety bonds, including for large mines in the state. In addition, on sites where reclamation has been completed there is no outstanding liability, other than potentially a maintenance period, therefore the risk to the surety is minimal. It was also noted that surety industry representatives gave no indication that a shorter life of mine is a deterrent to issuing bonds. The limitations Wyoming has experienced may therefore be attributed to the size and scale of the mining operations. There were discussions about how much the mine size, mining method and, in some cases, life of mine may contribute to the risk of reclamation default. Genuine limits exist for substituting self-bonds with other surety instruments. There has been wide assumption that the surety market will fill substitution requirements should the need arise. However, the reality is that sureties are a case-sensitive market and the appetite to take on mining reclamation bonds can be limited in today's environment. Therefore, it is important to understand the perspective of the surety market, its exposure to other liability market spaces, and the limits regarding mining reclamation liabilities.

Throughout the IMCC discussions it became clear that the size of the mining operation also increased the regulatory oversight required of the financial instrument. Surety companies are reviewed by the US Treasury on an annual basis. Each year the US Treasury publishes "Circular 570," which is a list of certified surety companies and the states where they are authorized to conduct business. What is less widely known is that this list also details underwriting limitations for each company. The underwriting limitation means that any bond written for an amount exceeding the underwriting limitation is an excess risk policy. Federal reclamation liability regulations do not address sureties with excess risk. However, federal surety regulations indicate that excess risk can be mitigated with reinsurance. Thus, there is an

extra burden on the regulatory authority to identify excess risk in a surety instrument, and then mitigate and manage that risk by requiring a reinsurance policy. The reinsurance market is very small, and in fact many of the reinsurance entities are owned by the same corporate parent that the surety is under. In these situations, there is a valid argument that the risk is not truly mitigated by the use of a surety because the separate legal entities are under the same corporate parent. However, it is an acceptable practice under federal law.

In addition to the issues previously stated, current regulations do not restrict the underwriting limit to a specific entity. Rather surety limitations are linked to specific issuances. As state regulators know, a single operator may have multiple reclamation bonds in a single state and may have additional reclamation bonds in other states. In some states a single surety issuance may not exceed the underwriting limitation, but multiple bond issuances to the same operator may exceed the threshold limitation. There is no federal regulation restricting the surety underwriting limit to a single entity – only to a single permit. Thus, if a large operator were to default and all its surety bonds are provided from the same surety, the operator could have difficulty covering the total liability. The use of multiple surety companies is a way to diversify against risk posed by surety companies that hold large liabilities.

Although the federal coal mining financial assurance regulations do not require the use of the Circular 570, many states use the list in their review processes.

Consideration should also be given to the amount of reclamation/environmental liability that has been moved from self-bonding instruments to surety instruments and companies. As indicated above, moving to sureties simply transfers the liability but may not result in reducing the financial risk to the state RA.

The work group identified several items to consider when using sureties. These include the use of more than one surety to diversify risk on large reclamation liabilities (>50-100 million dollars), and in contrast, small operations should consider one surety to avoid competition for claim resolution. In addition, it would be beneficial for the RA to review the condition of the issuing surety company including the mining obligation already held by that company in the state and review of the surety's credit rating. If a reinsurance policy is required, the RA needs to know if the surety and reinsurance entities fall under the same corporate parent and be aware of the additional risks tied to that relationship. A review of the surety's parent corporation and its origin (e.g. the parent and/or subsidiary company domestic or based off-shore) would also be beneficial, including a review of the surety's status relating to the Department of Treasury Circular 570 and applicable state standards. It is important to remember that sureties are regulated by state and federal insurance rules -- not by environmental regulatory authorities. It should also be noted that in relation to sureties covering coal operations, there are no specific federal regulations or SMCRA guidance to reference when considering the financial health of a surety company and/or acceptance of a surety. Some states do not have the ability to choose not to accept a certain surety if it has been approved by the state's insurance commission.

Collateral

- **Letters of Credit:**

An irrevocable letter of credit (LOC) is a negotiated financial instrument issued by a banking institution to guarantee payment to a beneficiary. The instrument must be issued by a bank authorized to transact business in the United States and payable only to the regulatory authority.

In IMCC discussions, states reported that the FDIC does not insure LOCs. In addition, there is no federal regulation limiting the LOC underwriting limit to a single operator, or to a single permit. Some states have imposed a limit on the bank's capital surplus when issuing a LOC. Where limits are in place, the RA must understand branch office relationships to the bank it represents. Branches are not individual banks. Again, as with sureties, it is in the RA's best interest to be aware of the banks holding the most liabilities.

In an initial draft version of this document there was a reference to issues between "competing" banks when calls on letters of credit are made. Ohio does not face this issue. Under Ohio law, when the permit is forfeited the entirety of all letters of credit held are forfeited. The financial institution is not provided the same opportunity to provide a reclamation plan and reclaim the forfeited site as is the case with surety companies.

Even in instances where the RA is holding surety bonds as well as, or instead of, collateral bonds, the surety companies would have to reach an agreement with the RA ensuring that each surety company's proposed reclamation plan, as submitted, follows the approved permit's reclamation plan in its entirety on a forfeited permit. If an agreement cannot be reached between the bonding companies involved, the bond would be forfeited in totality.

When allowed for, LOCs are applied in a manner consistent with a state's statutory requirements, rules, and regulations. The work group suggested standby LOCs should not be utilized to fund reclamation liability.

- **Cash:**

Though not used regularly, some operations have used cash to post performance bonds. The use of cash has typically been confined to smaller scale operations. Although cash was identified as being the most readily available and liquid financial instrument accepted, states also commented that it is least commonly used.

- **Certificates of Deposit and Securities:**

Certificates of Deposit (CD) and Securities have been used to address environmental/reclamation liabilities. Like cash, the use of these instruments has typically been confined to smaller scale operations. However, they have limited application in large scale corporation level operations where capital restriction is difficult to accomplish. Concerns regarding the use of these instruments are similar to those related to LOC's. These include a review of the issuing banking or financial institution, making sure the CD/security asset pledged is unencumbered and documented as such; ensuring that legal access to the instrument in the event of forfeiture is unencumbered (e.g. CD does not become part of the cash asset of the bankruptcy); annual reviews of the CD/security asset should be conducted; and the annual valuation should also include a review of any change in the issuing institution and confirmation that no new encumbrance and/or assignment has been made. Virginia allows companies to utilize the Certificate of Deposit Account Registry Service (CDARS) through participating local banks for large CD amounts. CDARS allows access to Federal Deposit Insurance Corporation (FDIC) insurance on multi-million-dollar CD deposits located at one bank. The service is available in the majority of states, and is an option other states may want to consider allowing for large CD amounts (over FDIC limits). Information about CDARS is available at http://www.cdars.com.

Alternative Bonding Mechanisms (Bond Pools):
A Bonding pool is an alternative mechanism that can act as a potential safety net to cover a negative variance in the actual cost to complete reclamation and the estimated bond liability. The various types of this mechanism are largely used in the eastern coal region, and are typically funded by some type of initial payment into the pool or added tax per ton of coal. A standard cost per acre liability calculation is used to apply fees to the pool. Bonding pools tend to be used for smaller operations where a single event or claim is not likely to consume all the funds held in the pool. Alternative bonding mechanisms are unique to the regulations and statutory requirements of the state managing the mechanism.

Additional information on the financial instruments described above, as well as the pros and cons of the collateral bonds and trust agreements are available in the Appendix.

Additional Considerations:

In consideration of what had been learned over the past many months, the work group suggests it would be beneficial for each member state to review their respective financial assurance programs and protocols and utilize the information and practices discussed above that may fit their individual needs. The work group also believes ongoing productive and cooperative dialogue between state and federal partners on financial assurance issues for coal and noncoal mining would be advantageous.

Appendix

Life of Mine Reclamation Risk Stages

Typical Coal or Noncoal/Hardrock Company:		
Risk Level:	**Mine Stages:**	
Low	Start-up 1-3 yrs	*Prior to production/construction*
Low	Initial operations 3-5 yrs	*First permit term*
Low - Medium	Young (Investing)	*Second/third permit term*
Medium - High	Operation (Early - Expanding)	*Fourth permit term/middle part of mine life*
High	Operation (Late - Maturing)	*Nearing end of reserves and expected mine life/most activities focused on reclamation*
High	Closure	

Distressed Coal or Noncoal/Hardrock Company:		
Risk Level:	**Mine Stages:**	
Medium - High	Start-up 1-3 yrs	*Prior to production/construction*
Medium - High	Initial operations 3-5 yrs	*First permit term*
High	Young (Investing)	*Second/third permit term*
High	Operation (Early – Expanding)	*Fourth permit term/middle part of mine life*
High	Operation (Late – Maturing)	*Nearing end of reserves and expected mine life/most activities focused on reclamation*
High	Closure	

SMCRA Regulatory Authority
Identifying Permittees at Risk of Filing for Bankruptcy – Warning Signs Pre-Filing

The following inquiries may be beyond the scope of a State RA's regulatory focus (outside of self-bond evaluations), but the answers will shed some light on the financial health of the permittee.

General observations that could indicate a company is in financial trouble:

- How is the company's or parent company's stock performing?
- Is the company cash flow negative?
- Are profit margins eroding?
- Have there been significant changes in senior management personnel or membership of the Board of Directors?
- Have there been significant employee layoffs?
- Has the company stopped giving employees salary increases or shown other signs of constant cost-cutting?
- Has the RA been contacted by any lessors about failure to pay royalties?
- Is there an active secured Line of Credit (LOC) at the Corporate Parent level that is not being utilized?
- Is the LOC line significant? (i.e. more than any other individual debt obligation)
- Have there been creditor complaints that the company is more than two months behind on bill payments?
- Has the company been late or negligent in paying taxes?
- Does the auditor's letter as part of the proxy statement included in a company's audit note any growing concerns or discrepancies in accounting practices, particularly as to how the company books revenue?
- Has the company been selling off assets to raise money, such as land, buildings, or equipment?

From a regulatory perspective, the following may be signs a company is in financial trouble:

- Has the company lapsed in payment of required abandoned mine land (AML) fees?
- Low morale among mine employees. Is there any information your inspectors have gleaned from contact with mine employees that may have raised red flags, such as grumblings among employees about wages or cost-cutting affecting employee benefits?
- Have there been unexplained delays in planned expansions of operations?
- A lack of contemporaneous reclamation could be a signal of financial trouble. *See* 48 Fed. Reg. 36418, 35422.
    - What is the status of permit reclamation?
        - Is the permittee performing contemporaneous reclamation?
        - What do inspections reveal about reclamation progress?
        - Is the permittee conducting/maintaining any required water treatment?
        - Do inspections uncover any other environmental liabilities or warning signs?
        - Is the permittee or operator asking for multiple deadline extensions to complete reclamation?

SMCRA Regulatory Authority
Permittee Bankruptcy Scorecard

Prior to or Upon Filing

Prior to or upon filing for bankruptcy, the following information will inform and educate your AGO attorney about the permittee(s) seeking bankruptcy relief and their respective mining operations:

Permit Information

- Permit number(s)
- Name of permittee
- Initial date of permit(s) issuance
- Subsequent date(s) of permit(s) renewal(s)
- Name of mine
- County(ies) in which the mine is located
- Acres of surface permit facilities
- Type of mine operation (surface, underground, carbon recovery)
    - If underground room and pillar, acres of shadow area for purposes of determining unplanned subsidence liability
- Status (active extraction, temporary cessation, reclamation only, closed)

Pending Permit Decisions

- Identify pending permit applications for new permits, significant permit revisions, insignificant permit revisions, incidental boundary revisions, and permit transfers.

Performance Bond Information

- Total bonded acres
- Total affected acres
- Type of bond (surety, letter of credit, cash bond, CD, self-bond)

Surety Bond

- Bond number/ID
- Applicable permit number
- Current bond amount
- Bond issuance date
- Name of surety
- Bond issuer address/phone number
- Location of bond instruments (original copies)
- Pending bond releases/forfeitures
- Anticipated bond releases/forfeitures (if known)

Letter of Credit (LC)

- Bond number/ID
- Applicable permit number
- Original amount issued
- LC issuance date
- Name of bank issuing LC
- Address/phone number of bank
- Location of LC instrument and amendments, if any (original copies)
- Whether the LC has been drawn upon

- Current LC balance
- Pending bond releases/forfeitures
- Anticipated bond releases/forfeitures (if known)

Cash Bond

- Bond number/ID
- Applicable permit number
- Current cash bond balance
- Pending bond releases/forfeitures
- Anticipated bond releases/forfeitures (if known)

Certificate of Deposit (CD)

- Bond number/ID
- Applicable permit number
- CD amount
- Name of bank issuing CD
- Location of CD's (original copies)
- Pending bond releases/forfeitures
- Anticipated bond releases/forfeitures (if known)

Self-Bond

- Bond number/ID
- Applicable permit number
- Total amount of self-bond
- Date self-bond approved
- Name of parent or non-parent corporate guarantor (if any)
- Address/phone number of corporate guarantor
- Location of self-bond documents (including indemnity agreement, quarterly financials, yearly financials, RA evaluations of financials)
- Pending bond releases/forfeitures
- Anticipated bond releases/forfeitures (if known)

Permit Compliance Status

- Is the permittee compliant with the operations and reclamation plan, permit conditions?
- Describe any reclamation/compliance issues
  - Length/height of open highwall
- Are there pending enforcement actions (notices of violations, show cause orders, cessation orders)?
  - Date of issuance
  - Abatement status
  - Status of administrative appeal
  - Status of Circuit Court case (if applicable)
- Are there outstanding civil penalties owed to the RA?
  - How much?
  - Date of penalty assessment
  - Associated NOV/CO/other enforcement action

Environmental Concerns

- Identify compliance commitment agreements, consent orders, agreed orders, etc. regarding mitigation of environmental SMCRA violations (e.g. water quality).

- Identify landowner issues (e.g. repair of material damage to land, structures or facilities due to unplanned subsidence).

- Identify pending Clean Water Act (CWA) issues/enforcement actions and provide contact information for the agencies involved, e.g. USACE, USEPA, or the state EPA (if the State RA does not administer CWA laws/regs).

Ownership and Control

- Who are the surface and mineral owners for the mine area?
- Are surface and/or mineral leases current? (in order to successfully transfer a permit it is much easier for the purchaser to accept assignment of a lease rather than having to obtain a new lease)

Note: See final appendix document for Scorecard in spreadsheet checklist format.

Bonding Instruments Summary

Interstate Mining Compact Commission
Bonding Work Group

Published November 2017

Table of Contents

Information submitted by the following states was compiled in this summary:

Alabama, Alaska, Colorado, Mississippi, North Carolina, North Dakota, New York, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and Wyoming.

****Note Regarding "Best Practices" Referred to Regarding Various Bonding Instruments Throughout the Report:*** *The "best practices" identified in this document do not represent recommendations by the IMCC Bonding Work Group and are not intended as comparisons of practices between state programs. They are practices that the individual states have implemented within their respective bonding programs that have proven appropriate for that state's particular program and circumstances. Each state must refer to its own regulations and circumstances when determining "best practices" for that state.*

(1) Type of instrument: Cash/Check

Description: Personal check, certified check, cashier's check, money order, etc.

Regulatory Pros and Cons:

Pros	Cons
Easy to liquidate	Not commonly used
Easy to access	Not allowed to earn interest for some
Very secure – no/low risk	Potential for non-sufficient funds with personal check
Acceptable bonds for federal lands	Refund period -- releases can take 2 – 4 weeks for a check to be drawn with end of fiscal year cut-offs possibly extending for longer periods
Liquidity: High	

Regulated Community Pros and Cons:

Pros	Cons
Requires minimal work to maintain	Not commonly used
Low to no cost associated	Ties up capital
Acceptable for federal land use	Tax liens can be placed on these funds and paid out upon bond release
Funds deposited to State Treasury pay interest in some states	Funds do not earn interest in some states when held by the regulatory agency
Security that funds are available if needed for a closure	Refund period – releases normally take 2 – 4 weeks for a check to be drawn and end of fiscal year cutoffs may extend this for longer periods
Funds immediately released to permittee when reclamation is complete or permit is transferred or cancelled	

States where available/used (Coal Bonding): AL, AK, CO, ND, OH, PA, VA, WY.
States where available/used (Noncoal Bonding): PA, NC, CO, AK, OH, NY, VA, SC, WY.

Best Practices (Coal Bonding):
North Dakota - Requires an indemnity agreement between the ND Public Service Commission, permittee, and Bank of ND. Interest accrued on the escrow account is paid directly to the permittee. Non-cancellable.
Ohio – Cash/Check are final type of bond released, after surety bonds, letters of credit, and CDs.
Virginia – If check, ensure the funds are available to cover the amount required.
Colorado – Mine permittee operators are required to submit an annual report which includes permittee confirmation that any financial warranty bond type is adequate for reclamation costs.

Best Practices (Noncoal Bonding):
North Carolina – Ensure the check is made out to the agency to facilitate depositing it into the special non-reverting account. If cash, it must be handled more securely and immediately deposited.
New York – Accounting and tracking controls.
Colorado, Ohio, Virginia – If paid by check, ensure the funds are available to cover the amount required.

Experience/Lessons Learned (Coal Bonding):
Virginia – Cash/check is an easy option for the regulatory authority.
Wyoming – Cash cannot be transferred from one owner to another due to technical software limitations at state accounting level.
Experience/Lessons Learned (Noncoal Bonding):
North Carolina – Very few permittees post cash for their bond.
Colorado – Never lost a cash bond since funds are held in State Treasury.
New York – Not many permittees opt to use this type of financial surety. Little experience. Cashier's checks or postal money order are preferred. If provided personal or business checks wait to ensure check clears.
Virginia, Wyoming – (see coal).

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(2) Type of instrument: Certificate of Deposit

Description: Issued in sole favor of the department by a bank or other financial institution authorized to do business in the state. Must be FDIC Insured.

Regulatory Pros and Cons:

Pros	Cons
Liquid	Must maintain to ensure instrument integrity
Insured by FDIC up to $100-250K (varies) if properly set up	Some states are not allowed to keep interest earned
Acceptable bonds for federal lands	Must be deposited with the state Treasurer's Office (off-site)
An assignment form is completed that legally assigns the certificate to the agency if forfeiture is required, even if the certificate is improperly released by the bank, in which case the agency has been successful in obtaining the funds from the bank due to the assignment form	Can be cashed out by permittee if not property set up in regulatory authority's name or if financial institution does not have good controls to prevent release of funds by other than the regulatory authority
Easy for foreclose	No requirement to be automatically renewable and no notice requirements for expiration or transfer of ownership
Relatively easy for companies to obtain	Must be tracked to avoid exceeding FDIC insurance
	Must be deposited with State Treasurer (off-site) in some states
	Must get a written waiver of set-off and lien from bank
	Banks must have "Special Handle" IRS form 1099's to show permittee's name and SSN while regulatory authority is shown as depositor
	May be retained by court in bankruptcy situation
Liquidity: High	

Regulated Community Pros and Cons:

Pros	Cons
Requires minimal work to maintain	Ties up capital
Interest bearing account	May need to use several institutions to keep FDIC insured
Funds insured by FDIC	Cannot be used as collateral
No qualifying process	Tax liens can be placed on the funds and paid out upon bond release
No recurring annual costs	Ease of release (held at State Treasurer's Office)
Funds immediately released to permittee when reclamation is complete or permit is transferred/cancelled	Early withdrawal penalties

States where available/used (Coal Bonding): AL, AK, CO, MS, ND, OH, PA, VA, WY.

States where available/used (Noncoal Bonding): PA, NC, CO, AK, MS, OH, NY, VA, SC, WY.

Best Practices (Coal Bonding):
Ohio – Frequent communication with the banking institution and bankruptcy trustees. Released after surety bonds and letters of credit, and before cash.
Virginia –
- Bank must certify the instrument is not and will not be considered as, or used as collateral for any other purpose by the bank.
- Regulatory authority (RA) holds the original document. Bank must document in writing that the original instrument must be presented in order to withdraw any funds.
- Bank must certify that they will notify the RA and the permittee regarding any notice received or action filed alleging the insolvency or bankruptcy of the bank, or alleging any violation that could result in the suspension or revocation of the institution's charter or license to do business.
- A rating service approved by the state must be used to check the banks rating prior to accepting a CD for bond.
- Attorneys must prepare any forms used by the RA in accepting this type of bond.
Colorado –
- The Financial Assurance Specialist for the state reviews every financial warranty document that is delivered to the Division for audit compliance to ensure the state will be able to collect the funds provided as financial warranty if necessary in the event of forfeiture of the bond. Bank used for the CD account is a Colorado Bank, registered to accept public deposits under the states PDPA number.
- The Financial Assurance Specialist performs an annual audit of select bond types to confirm validity with the issuing company
- These banks are registered with the state to guarantee the deposited funds above the $250,000 FDIC insurance amount, by pledging collateral for the deposited amount over $250,000 per account.
- The CD account is in the name of the operator or a third party for the operator, assigned to the state of Colorado/Mined Land Reclamation Board. The Assignment Form is signed by the operator and the bank states the depositor of the monies relinquishes all claims to the funds to the state until released.
North Dakota – In addition to the federal requirements, the certificate of deposit must be automatically renewable and the permit applicant must deposit sufficient collateral to assure the commission will be able to liquidate the certificates prior to maturity for the amount of the bond, upon forfeiture. Except for

certificates issued by the Bank of North Dakota, we do not accept individual certificates in excess of $100,000 or the maximum amount insured by the FDIC and the FSLIC, whichever is greater.

Wyoming –

- The issuing bank waives their rights of setoff, liens, or attachments it may have against the CD.
- Does not accept individual certificates in excess of $100,000 or the maximum amount insured by the FDIC and FSLIC, whichever is greater. Requires the financial institution to confirm account does not exceed FDIC limit.
- Issuing bank must be located in the same state of the reclamation bond.
- Permit applicant must deposit sufficient collateral to assure the commission will be able to liquidate the certificates prior to maturity, upon forfeiture, for the amount of the bond.

Best Practices (Noncoal Bonding):

North Carolina – The assignment form has worked well. We need to pursue changing the form to require that the CD be issued in the agency's name to avoid improper release by the bank to the permittee. Also, if resources allow, we should begin checking with banks annually to be sure the account is still open, and check the stability of the bank annually (see VA).

New York –

- Close review of required elements on CD assignment letter prior to accepting as financial assurance.
- Automated SPAM email if cancellation is coming due.

South Carolina – Contemplating full revision of current bonding forms. In addition, the Department requires "3rd party collateral agreement" to help prevent unauthorized fund withdrawal.

Colorado, Ohio, Virginia – (see coal).

Experience/Lessons Learned (Coal Bonding):

Ohio – Recent forfeitures resulted in total collection of CDs held due to early communication with the banking institution and bankruptcy trustee.

Virginia –

- Had one cashed out prior to a forfeiture due to being in the depositor's name. The bank was still required to provide the funding due to Virginia Department of Mines, Minerals and Energy documents presented.
- Make sure CD is in the regulatory authority's name.
- Include any early withdrawal penalty in addition to the actual bond amount considering the CD may have to be collected early.

Colorado – Have had CD account cashed in by operator without state authorization. Audit verification annually to confirm account balance and Assignment to State on file of the account.

Wyoming – Banking institutions must be tracked. Wyoming has experienced difficulty collecting these instruments in a couple of scenarios. Specifically, the state was not provided notice prior to banks releasing the instrument. The state was also not provided notice when a bank was sold.

Experience/Lessons Learned (Noncoal Bonding):

North Carolina – This has been a reliable bonding instrument.

Ohio – At a minimum, Account Verification Requests must be done annually at maturity.

New York – Good practice to periodically check on them as in the past some banks have prematurely released the CD to the owner.

South Carolina – Assignments should be audited on a regular basis to ensure account(s) have not been closed or funds have been withdrawn.

Colorado, Virginia, Wyoming – (see coal).

(3) Type of instrument: Letter of Credit

Description: Must be issued by a bank organized in the US. Letters of Credit (LOC) shall be irrevocable for a term of at least one year and automatically renewable for additional terms unless the bank gives 90 days written notice to the commission and permittee of its intent to terminate the LOC at the end of the current term and a replacement bond is approved. The state has the right to draw upon the letter of credit before the end of its term and convert it into a cash collateral bond upon forfeiture demand. Language must be precise to be irrevocable, automatically renewable, and non-cancellable.

Regulatory Pros and Cons

Pros	Cons
Liquid	Must maintain and track to ensure instrument integrity
Acceptable bonds for federal lands	Not FDIC insured
Widely available	No guarantee it does not get frozen in a bankruptcy filing
Automatically renewable each term unless properly notified	Difficult to monitor bank's financial status
Bank is fully responsible for the face value of the required bond – there is no instrument that could be improperly released to the permittee	Must keep track of need to draw if it may be cancelled
Easy to foreclose	Must be renewed annually and some banks will choose not to renew
Available to small operators	Does not require collateral for full amount
Held in house	When banks change hands, the current bank has at times denied liability for a past bank's commitment, however state Attorney General's office has been successful in enforcing the terms
Liquidity: High	

Regulated Community Pros and Cons

Pros	Cons
Widely available	Requires collateral that limits future credit/borrowing power
Costs less than surety bonds, cash & other securities	Must qualify to use and may require collateral
Does not require collateral during its term	Ties up asset
Can be obtained quickly	Requires a good credit rating
Irrevocable during their terms	Permittee must pay back the bank if LOC is paid to regulatory authority
	Early withdrawal penalties

States where available/used (Coal Bonding): PA, ND, AK, MS*, OH, AL, VA, CO, TX, WY**.
**MS allows Irrevocable Standby LOC.*
***WY is considering not allowing amendments to LOCs in the future.*

States where available/used (Noncoal Bonding): PA, NC, CO, AK, MS*, OH, NY, VA, SC, WY**.
**MS allows Irrevocable Standby LOC.*
***WY is considering not allowing amendments to LOCs in the future.*

Best Practices (Coal Bonding):
Mississippi – LOC is required to be written on the bank letterhead using specific wording provided by the state's legal staff.
North Dakota – LOC must provide that the bank gives prompt notice of bank's insolvency or bankruptcy or alleging violations of regulatory requirements that could result in suspension or revocation of the bank's charter or license to do business. ND does not accept LOCs from a bank in excess of ten percent of the bank's total equity (stock, surplus capital, and retained earnings) as shown on a balance sheet certified by a certified public accountant or as reported in the UBPR report from the Federal Financial Institutions Examination Council (FFIEC). A copy of the bank's most recent balance sheet must be provided with the LOC and updated balance sheets must be submitted annually to the commission within ninety days after the close of the bank's fiscal year. ND reviews annually and during permit renewal/revision to ensure bank meets criteria.
Ohio – Implement Account Verification Requests; released after surety bonds and before CDs and Cash.
Texas – The LOC must be irrevocable during its term and issued by a bank organized or authorized to do business in the U.S. These documents are reviewed by staff attorneys for sufficiency prior to acceptance.
Virginia –
- Have your attorneys prepare any forms the regulatory authority might use to accept this type of bond.
- Should be subject to the Uniform Customs and Practice for Documentary Credits and make sure the most current revision is documented.
- Should be governed by the Uniform Commercial Code of your state.
- Require that any disputes are resolved in the regulatory authority's court jurisdiction.
Colorado – The Financial Assurance Specialist performs annual audit of select bond types to confirm validity with issuing company.
Wyoming –
- Use your own template for the irrevocable LOC agreement, rather than using one from the bank, so it is irrevocable, automatically renewable, and cannot expire without the bank providing 90 days' notice and approval from the Department of Environmental Quality Director.
- The LOC should not be in excess of 10 percent of the bank's capital surplus account as shown on a balance sheet certified by a CPA.
- Check with the bank first to make sure you understand exactly what they need prior to requesting the funds for forfeiture.

Best Practices (Noncoal Bonding):
Mississippi – LOC is required to be written on the bank letterhead using specific wording provided by the state's legal staff.
North Carolina – This LOC form has worked well. If resources allow, we should check with banks annually to be sure the account is still open, and check the stability of the bank annually.
Alaska – Two-year "holding period" costs included in financial assurance costs.
New York –
- Close review of required elements on LOC prior to accepting as financial assurance.
- Automated SPAM email if cancellation is coming due.
South Carolina – Contemplating full revision of current bonding forms.
Ohio, Virginia Colorado, and Wyoming – (see coal).

Experience/Lessons Learned (Coal Bonding):
Ohio – At a minimum, Account Verification Requests must be done annually at expiration.
Virginia – Check with the bank first to make sure you understand exactly what they need prior to requesting the funds for forfeiture.
Colorado – Letter of Credit problem in early 2000's due to bank failures where acquiring bank through FDIC did not honor the LOC. Currently we monitor through the FDIC website any bank failures or forced acquisitions to obtain assumption of the LOC by the new bank.
Wyoming – Use own template for LOC so it is irrevocable, automatically renewable, and cannot expire without bank providing 90 days' notice and approval from the WY Department of Environmental Quality Director. Do not accept amendments unless you have your own template for the language, as language in amendment can change the irrevocable language in the LOC.

Experience/Lessons Learned (Noncoal Bonding):
North Carolina – This has been a reliable bonding instrument.
New York –
- Auto renewal included on Letter of Credit template. Increased notification period to regulatory authority to allow for proper timeframe to make a demand on the LOC if cancelled.
- Resistance of bank to pay sum if permittee is in bankruptcy.

Colorado, Ohio, Virginia, Wyoming – (see coal).

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(4) Type of instrument: Surety Bond

Description: Corporate surety bond executed by a corporate surety approved and authorized to do business in the state; remains in effect until the reclamation of all land covered by the bond is completed to the standards set in statute and regulation; release approved by state.

Regulatory Pros and Cons

Pros	Cons
Third party assurance	Must maintain to ensure instrument integrity
Acceptable bonds for federal lands	Not FDIC insured
Widely available	No guarantee it does not get frozen in a bankruptcy filing
Coverage for disturbance during policy active dates continues until released, regardless of whether policy is still active	Difficult to monitor surety financial status, subsidiary vs parent -- also some parents are foreign owned
Reliable to secure the face value of the bond from the surety company when forfeited	Responsibility on the state to police underwriting limitations and require reinsurance to ensure face value
Simple to administer	Market is very difficult to track
In event of forfeiture, some sureties will fund the reclamation to prevent need to payout on funds	Bond is only as good as the surety company – must conduct detailed review of the surety
Held in house	If surety fails, regulatory authority must get replacement bond from the permittee, or file a claim with liquidator (can take years)
Surety cannot be cancelled in some states, even for non-payment by permittee	In some states surety companies regularly send bond cancellation notices when the permittee does not pay its

	annual premium on time, the surety company decides they want out of the liability, or the permittee moves to other type of bonds, causing burden on the regulatory agency to inspect for outstanding reclamation and possible need to block the cancellation until bond is reinstated or replaced
	There is no limit on the overall total amount of surety bonds issued by a surety to a company, and if a surety issues a large number of bonds to facilities in one corporation, the surety bond risk might not be adequately diversified
	The regulatory authority has no knowledge if surety is collateralized or reinsured
	No requirement that a surety company's parent company be located in the U.S.
	Not guaranteed by assets
Liquidity: Medium	

Regulated Community Pros and Cons

Pros	Cons
Premiums historically less than paying cash, buying a CD, or letter of credit	Can be hard to get, especially for small, under-capitalized companies
Surety bond is non-cancellable even for non-payment of premium or bankruptcy of the principal	Must qualify to use and may require collateral
Does not tie up capital (other than premiums)	Can be costly (fees/premiums)
East of acquiring for companies that are financially stable with large amounts of capital	May have to sign indemnity agreement to pay back surety in the event of forfeiture
May be unsecured and, in bankruptcy proceeding, would have less priority of payment	Instrument non-cancelable by the surety
	Limited number of companies available to offer surety bonds

States where available/used (Coal Bonding): PA, ND, AK, MS, OH, AL, TX, VA, CO, WY.

States where available/used (Noncoal Bonding): PA, NC, CO, AK, MS, OH, NY, VA, SC, WY.

Best Practices (Coal Bonding):
North Dakota – Surety must be licensed in ND and must be listed on the Department of the Treasury's Circular 570.
Ohio – Released before LOCs, CDs, and cash.
Texas – Surety bonds must be executed by the operator and a corporate surety licensed to do business in Texas and be non-cancellable during their term. These documents are reviewed by staff attorneys for sufficiency prior to acceptance.
Virginia –
- Have your attorneys prepare any forms the regulatory authority might use to accept this type of bond.
- Prepare checklists to match your surety form.

Colorado –
- The Financial Assurance Specialist verifies bond issuing companies for rating standards compliance.

Wyoming –
- Treasury circular – a bond over underwriting limit has additional risk. The additional risk should either not be accepted by the state or only accepted with reinsurance or coinsurance.
- Submitted on a form prescribed by the state; release approved by the state.
- Surety cannot be cancelled even for nonpayment.
- Verify outstanding bond against capital and surplus figures annually, require proof of reinsurance when outstanding liability exceeds percentage of capital and surplus figures.

Best Practices (Noncoal Bonding):
North Carolina – This surety bond form has worked well, but we do receive a large number of bond cancellations per year that require the agency to quickly respond to secure the bond/block the cancellation (we have internal bond forfeiture procedures that step through a list of actions with time frames taken by the agency and Attorney General's Office to be in a strong legal position before the intended cancellation date). We should begin checking the rating of the bond company and ensure the bond is still in effect annually (use AM Best Key Rating and/or US Treasury Circular 570, as done in other states).
New York –
- Close review of required elements on surety bond prior to accepting as financial assurance.
- Automated SPAM email if cancellation is coming due.
South Carolina – Contemplating full revision of current bonding forms.
Colorado, Ohio, Virginia, Wyoming – (see coal).

Experience/Lessons Learned (Coal Bonding):
Ohio – Monitor sureties closely, verify outstanding bond against capital and surplus figure annually, require proof of reinsurance when outstanding liability exceeds percentage of capital and surplus figures (Ohio regulations).
Virginia –
- Have not collected a surety.
- Make sure you have checklists to go by when reviewing a surety bond, or any type of bond for that matter. This will prevent mistakes that could cause you difficulty in the future.
- Require each bonding instrument to be scanned or faxed to you for review prior to submission. This allows corrections to be made prior to receiving the original document.
Colorado – Sureties have opted to do the reclamation themselves instead of our state mining department hiring contractors to do the work.
Wyoming –
- Solvency requirements for sureties may need to be in place.
- Recommend regulation for reclamation bonds to limit the overall total amount of surety bonds issued by a surety to a company.

Experiences/Lessons Learned (Noncoal Bonding):
North Carolina – This has been a reliable bonding instrument. When the agency has moved to forfeit and collect the face value of the bond, the surety bond form terms have worked well and the surety companies have paid.
New York –
- Increased cancellation notification period to regulatory authority to allow for proper timeframe to call surety bond if cancelled and not replaced.
- Good experience with surety companies when calling financial surety so far – always received funds.
Colorado, Ohio, Virginia – (see coal).

(5) Type of instrument: Self-bonding

Description: Operator, parent (one above operator) or nonparent guarantor providing an indemnity agreement with the state to pay for reclamation cost. Only available if the entity meet financial criteria.

Regulatory Pros and Cons

Pros	Cons
Based on tangible assets	Uncertainty of self-bonding in future, negative portrayal by NGO public
Inexpensive bond for those companies that qualify	May require review several times throughout the year (quarterly and/or after annual reports issued in addition to permit bond renewal date)
Financial test criteria	Lack of expertise in employees required to review bonds in some states
	Financial requirements are the same for a parent of a conglomerate or a subsidiary
	Risk of company failure/default
	Question of availability when the funds would be needed in case of a forfeiture.
	Unsecured debt maybe considered lower priority in bankruptcy proceeding
	If criteria are not met to qualify for self-bond, the company will probably be unable to substitute bond
	Guarantor's financial health may not be representative of the mine(s) financial health.
Liquidity: Low	

Regulated Community Pros and Cons

Pros	Cons
Inexpensive - no premiums	Must qualify to use and may require collateral.
Does not hinder borrowing power	Must expose all company financial information in an audited financial statement yearly (becomes public information)
Can self-bond up to 25% of guarantor's tangible net worth (coal) or 50% of guarantor's tangible net worth (WY)	Expense incurred for additional CPA verification
Does not show on balance sheet at subsidiary level	

States where available/used (Coal Bonding): PA, MS, ND, AK, AL, TX, VA - No new self-bonds**, CO, WY.

***Virginia – One company still self-bonding that was in place prior to regulation change in the state. No new self-bonds are allowed for.*

Coal self-bonding is not used by PA, OH, AL, or VA, however, the regulations to remove self-bonding in these states have not been approved by OSM. Coal self-bonding is allowed in MS regulations, but it

has never been attempted and the state's Environmental Quality Permit Board is unlikely to approve a permit with self-bonding.

States where available/used (Noncoal Bonding): PA*, CO.
**Pennsylvania – Allowed, but no company has ever requested self-bonding.*

Best Practices (Coal Bonding):
North Dakota – A copy of the permittee's and third party guarantor's most recent balance sheet must be provided with the self-bond and updated balance sheets must be submitted annually to the commission within ninety days after the close of the fiscal year. ND reviews annually, during permit renewal/revisions, and at the time of any change to the bond to ensure financial criteria is met. The indemnity agreement for a collateral bond or self-bond must be executed according to the following:
a. If a corporation or rural electric cooperative: (1) By two officers authorized to sign the agreement by a resolution of the board of directors, a copy of which must be provided; and (2) To the extent the history or assets of a parent organization are relied upon to make the required showings for a collateral bond or self-bond, by every parent organization at any tier.
b. If a partnership, each general partner and each parent organization or principal investor. "Principal investor" or "parent organization" means anyone with a ten percent or more beneficial ownership interest, directly or indirectly, in the applicant.
c. If married, the permit applicant's spouse, if directly involved as part of the business on a regular basis or as an officer of the organization.
The name of each person who signs the indemnity agreement must be typed or printed beneath the signature. The agreement is binding jointly and severally on all who execute it.
Texas – Self-bonds and self-bonds with third-party guarantee are accepted. Self-bonds are only accepted if the applicant, or third-party guarantor (if applicable) meet the required financial tests (tangible assets in the U.S., asset to liability ratios, total net worth, bond ratings, etc.). Audited financial information for the permittee and third-party guarantor (if applicable) must be submitted annually within 90 days of the end of the fiscal year to demonstrate continued compliance with self-bonding rules. The bond instruments and supporting information and annual financial reports are reviewed by staff attorneys and financial staff for compliance with all requirements.
Virginia – If used, have stringent rules as to minimum net worth requirements and how this number is calculated.
Wyoming –
- A guarantor that is a subsidiary should have additional criteria for self-bonding than the criteria of corporate parent guarantor.
- Liabilities for any guarantor should also include the legally binding obligations not present on the financial statements. In addition, the liabilities should consider the entire obligation that may or may not be currently drawn upon.
- For the mine and the guarantor, ask for corporate structure of corporate conglomerate, percent of revenues from guarantor to corporate parent; payments, terms, debt obligations secured with guarantor's assets and all debt obligations drawn and outstanding of the parent.
- Allow self-bonding up to 90% even in the best circumstances.

Best Practices (Noncoal Bonding): N/A

Experience/Lessons Learned (Coal Bonding):
Pennsylvania – Not ever used in PA.
Ohio – Ohio no longer allows for self-bonding effective January 2016.
Virginia – If used, have stringent rules as to minimum net worth requirements and how this number is calculated.
Wyoming – Subsidiaries should have different criteria for self-bonding. In a corporate conglomerate, there are too many legally binding debt obligations secured by assets of a subsidiary that benefit the parent that do not show on the subsidiary balance sheet to make the current financial requirements representative of the true financial situation of a subsidiary guarantor.

Experience/Lessons Learned (Noncoal Bonding):
Wyoming – (see coal).

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(6) Type of instrument: Assigned Trust

Description: The permittee transfers assets to the trust that a trustee holds & administers for the benefit of the Regulatory Authority. The trust is a long term trust fund that builds in value overtime.

Regulatory Pros and Cons

Pros	Cons
Value can grow	Market Risk
Guaranteed cash at end of mine life	Takes a long time to build value
State managed trust and the funds are always available	Fees are associated with the trust and the regulatory authority would need to ensure that administrative fees do not erode the value of the trust
The regulatory authority is the irrevocable beneficiary of the trust	
Liquidity: Medium - High	

Regulated Community Pros and Cons

Pros	Cons
Value can grow	Must qualify to use and may require significant collateral
Low Cost	Ties up capital
Large amount of money available at the end of mine life once reclamation is completed, as long as there is no required treatment or maintenance on the site)	Market risk
Incremental deposits can be made as the permittee advances into adjacent areas of a permit	Fees associated with the trust

States where available/used (Coal Bonding): PA, OH.

States where available/used (Noncoal Bonding): PA, AK*.
**Alaska – Allowed for, but regulations for the management of the fund are not yet established. Ohio law/regulations do not allow the use of an assigned trust for noncoal mineral permits.*

Best Practices (Coal Bonding):
Pennsylvania – Periodic review of performance.
Ohio – The Division is the irrevocable beneficiary of the trust. The trust is established using Division forms containing the terms and conditions established by the Division. The trustee is empowered to invest the funds and investment income accrues to the trust. If written as an absolute guaranty, the guarantor promises to pay for or perform the reclamation. Regulated by the Comptroller of the Currency, Trust Division.

Best Practices (Noncoal Bonding):
Pennsylvania – Periodic review of performance.
North Carolina – No experience with this instrument or the legal processes involved with accessing the account. If used, should check on validity of the account and the institution as noted for banks and surety companies (LOCs).

Experience/Lessons Learned (Noncoal Bonding): N/A

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(7) Type of instrument: US Treasury Note or Bond (AKA Negotiable Securities)

Description: A treasury note is a marketable U.S. government debt security with a fixed interest rate and a maturity between 1 and 10 years. Treasury notes are available from the government with either a competitive or noncompetitive bid. Interest payments on the notes are made every six months until maturity and pays the face value to the holder at maturity. The only difference between a Treasury note and bond is the length of maturity. A Treasury bond's maturity can last from 10 to 30 years. A note or bond must be federally insured to be acceptable.

Regulatory Pros and Cons

Pros	Cons
Liquid	Must maintain to ensure instrument integrity
Insured by FDIC if set up properly	Value is somewhat variable
Acceptable bond for federal lands	No requirement to be automatically renewable and no notice requirements for expiration or transfer of ownership
	Must be tracked to avoid exceeding FDIC insurance
	CD's must be deposited in the State Treasurer's Office (off-site) in some states
	Bonding instrument may be retained by court in bankruptcy situation
	Some states are not allowed to keep interest earned
Liquidity: Medium - High	

Regulated Community Pros and Cons

Pros	Cons
Interest bearing account with interest retained by permittee	Ties up capital
Simple method with no qualifying process	May require several instruments at several locations to satisfy requirement and remain FDIC insured.

States where available/used (Coal Bonding): PA, WY, CO*.
**Colorado – Available, but not used.*

States where available/used (Noncoal Bonding): PA, WY.

Best Practices (Coal Bonding):
Pennsylvania – Periodic review of value.

Wyoming – Banking institutions must be tracked. Wyoming has experienced difficulty collecting these instruments in a couple scenarios. Specifically, the state was not provided notice prior to banks releasing the instrument. The state was also not provided notice when a bank sold.

Best Practices (Noncoal Bonding):
Pennsylvania – Periodic review of value.
Wyoming – (see coal).

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(8) Type of instrument: Cash Escrow Account

Description: Escrow is a legal concept in which a financial instrument or an asset is held by a third party on behalf of two other parties that are in the process of completing a transaction. The funds or assets are held by the escrow agent until it receives the appropriate instructions or until predetermined contractual obligations have been fulfilled. Money, securities, funds and other assets can all be held in escrow.

Regulatory Pros and Cons

Pros	Cons
Guaranteed funds administered by third party	Third party is involved to liquidate financial instrument
Liquidity: High	

Regulated Community Pros and Cons

Pros	Cons
Pays interest	Must have cash or investment to provide for the bond
	Ties up working capital

States where available/used (Coal Bonding): CO*.
**Colorado – Available, but not used.*

States where available/used (Noncoal Bonding): CO.

Best Practices (Coal Bonding):
Wyoming – State should have its own form for the escrow agreement rather than using one from the escrow.

Best Practices (Noncoal Bonding):
Colorado – State receives monthly statement of account.

Experiences/Lessons Learned (Noncoal Bonding):
Colorado – Rarely used.

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(9) Type of instrument: Collateral Bond (Secured self-bond)

Description: A secured self-bond in which the State holds the deed and/or title to the property with a first lien.

Regulatory Pros and Cons

Pros	Cons
Based on tangible assets	Must maintain to ensure instrument integrity
Higher priority creditor in bankruptcy proceeding	Must file liens on property
Alternative to self-bond when company cannot qualify for self-bonding	Would require legal actions to liquidate
	Would have to liquidate asset(s) to initiate reclamation.
	Requires expertise in filing title, liens, and mortgages
	Requires annual reviews and appraisals to ensure value
Liquidity: Medium - High	

Regulated Community Pros and Cons

Pros	Cons
Pays interest	Must have cash or investment to provide for the bond
	Ties up working capital

States where available/used (Coal Bonding): WY.

States where available/used (Noncoal Bonding): WY.

Best Practices (Coal and Noncoal Bonding):
Wyoming –
- State should have form for the mortgage or security agreement rather than using one from the guarantor.
- Require a showing to assure the property is free from encumbrance before a mortgage or security agreement can be put in place.
- Require appraisal of property by a third party selected by the State.
- Require appraisal to include a High, Medium, and Low range and only accept the medium or low value.

ALTERNATIVE BONDING

(10) Type of instrument: State Financial Guarantees

Description: State bonding program where permittee pays a premium and state held funds underwrite the liability.

Regulatory Pros and Cons

Pros	Cons
Simple transfer of state funds between accounts	Requires state to perform as surety
	There is a risk that too many forfeitures would use all of the reserved money
Liquidity: High	

Regulated Community Pros and Cons

Pros	Cons
Does not tie up capital	

States where available/used (Coal Bonding): PA, WY.

States where available/used (Noncoal Bonding): PA.

Best Practices (Coal Bonding):
Pennsylvania – Has a program approved by the Office of Surface Mining as an alternate bonding system. PA has two state bonding programs where permittees pay a premium and state held funds underwrite the liability.

Best Practices (Noncoal Bonding):
Pennsylvania – Requires state to perform as a surety.

(11) Type of instrument: Bonding Pool

Description: Allows a reduced bonding rate due to collection of taxes. The taxed funds collected then would cover any overages above the actual posted bond amount in the event of a forfeiture.

Regulatory Pros and Cons

Pros	Cons
Easy to calculate	Principle of the pool may be depleted by a large mine forfeiture
Provides another bonding option where risk is spread across all active mining operations	Risk is the total cost to reclaim all disturbance at any given time
Based on accrual method – not pay as you go	If forfeiture and administrative costs exceed the income and reserves of the pool, the pool becomes insolvent
If solvent, adequate reserves are available	If coal production is down, income to the coal bond pool is down
The regulatory authority is the (or one of the) managing authority(ies)	Business failure of permittee with the most liability can bankrupt the pool
	Allowable uses of (noncoal) fund include other operational activities, thereby potentially reducing the available funds for forfeiture (OH)
	Use of fund for noncoal mineral forfeitures is limited to deposits associated with noncoal mineral operations, requiring some additional tracking by the state regulatory authority (OH)
Requirements for eligibility	If noncoal mineral production is down, deposits to noncoal bond pool are also reduced
Liquidity: Medium - High	

Regulated Community Pros and Cons

Pros	Cons
Less expensive cost bond instrument than securing individual bonds	If several major withdrawals to the pool are made depleting the funds, the permittees participating in the pool could lose their investment and have to post individual bonds to cover their liability
No premium or membership associated with contributing	The severance tax from certain noncoal minerals is not deposited to this fund, so not all permittees are contributing
	Other permittees' forfeitures as well as other authorized uses of the fund deplete reserves
	Long term viability of pool is uncertain
	Members pay tonnage taxes into the fund

States where available/used (Coal Bonding): ND, AK*, VA. OH*.
*****Alaska – Available, but not used in the state. Not enough operators to support a viable bonding pool. Ohio – Used as an alternative to full cost bonding, not as a bonding instrument per se. Full cost bonding is also an option in Ohio.*

States where available/used (Noncoal Bonding): AK, VA, OH*.
**Ohio – Similar to bond pool on some levels.*

Implementing this option would require statutory change for PA, AL, CO, and WY.

Best Practices (Coal and Noncoal Bonding):
Virginia –
- Never discontinue collecting tonnage tax to build up the fund.
- Do good research on companies applying to participate in the pool.

Experience/Lessons Learned (Coal Bonding):
Ohio – Actuarial analysis conducted every other year on Ohio's bond pool; Reclamation Forfeiture Fund Advisory Board serves in advisory capacity and required by statute to report to the Governor of Ohio biennially on the status of the adequacy of the bond pool to accomplish its purpose.

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(12) Type of instrument: Insurance Policy

Description: This can be used in two forms. Regulations allow for subsidence insurance in lieu of a subsidence bond. Also, a whole life insurance policy may be posted as a form of collateral. (PA)

Regulatory Pros and Cons

Pros	Cons
Third party assurance	Coverage may be cancelled without notice to the regulatory authority
Allowed bond for subsidence only (IL)	Permittee has to provide its net worth to the insurance company in order to secure this type policy and has to make annual payments to maintain the policy
Must be part of the policy before occurrence (IL)	
Does not tie up capital	
Liquidity: High	

States where available/used (Coal Bonding): WY.

States where available/used (Noncoal Bonding): PA, CO*.
**Colorado – Corp Surety.*

Best Practices (Coal Bonding):
North Carolina – No experience with this instrument or the legal processes involved with accessing the policy. If used, should check on validity of the account and the institution as noted above for banks and surety companies (LOCs).

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(13) Type of instrument: Note Secured by Deed of Trust

Description: Promissory note secured by a recorded Deed of Trust (CO).

Regulatory Pros and Cons

Pros	Cons
	Extra compliance with outside services, appraisal, escrow, recording
	Annual re-evaluation
Liquidity: High	

Regulated Community Pros and Cons

Pros	Cons
Use of idle asset allows cash or credit for other uses	Extra expenses to initiate, and ongoing annual update required

States where available/used (Noncoal Bonding): CO.

Experience/Lessons Learned (Noncoal Bonding):
Colorado – Not used due to expense.

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(14) Type of instrument: Additional Types

Coal Bonding:
Colorado -- Additional types of bond available but not used in the state also include: US Treasury Note; Reclamation Fund; cash escrow account; note secured by Deed of Trust.

Ohio – Standby Trust is available and still used in Ohio, but at this time, the state has no experience with liquidation of and/or risks associated with the one Standby Trust for long-term water treatment. Ohio has modeled this bonding mechanism after Pennsylvania's model.
- Pros for the regulatory authority (RA) include: The Division is the irrevocable beneficiary of the trust; the trust is established using Division forms containing the terms and conditions established by the Division; in the event the permittee defaults on its legal obligations to treat the discharge, funds from the trust will be used to treat the mine discharge or provide and maintain an alternative water supply, as applicable; the trustee will make disbursements at the direction of the Division; the trust is enforceable under applicable state law.
- Cons for the RA include: Due to the nature of using a Standby Trust to treat water long term, the amount required to fund a trust fund is calculated as potential costs to the RA to treat the discharge in perpetuity; costs are calculated using a 75 year period and require significant monitoring by the RA while the permittee is actively conducting treatment in the event the RA may become responsible due to forfeiture.
- Pros for the regulated community include: Permittee has options as to how to fund the Standby Trust; the permittee can be reimbursed from the trust for the yearly cost of treatment once the trust is in place and fully funded; Standby Trusts in Ohio can be funded over a 5 year period by those permittees reliant on Ohio's bond pool.

- Cons for the regulated community include: Costs are calculated using a 75 year period resulting in significant financial burden on the permittee; surety companies may not be receptive to writing a surety bond for a Standby Trust due to the long-term commitment and the annual cost variations and adjustments.
- Ease of liquidation: At this time, Ohio has no experience with liquidation of and/or risks associated with the one Standby Trust for long-term water treatment in the state.

Pennsylvania – Annuities are available in the state, but not currently use by any permittee.

Noncoal Bonding:
New York – Negotiable bonds of the United States Government; US Treasury Notes; US Treasury Certificates of Indebtedness; US Treasury Bills; bond or notes of the state of New York; bonds of any political subdivision in the state of New York; bond of the New York State Housing Finance Agency or of other New York state agencies or authorities; bonds of public corporations of the state of New York; or other forms of financial security acceptable to the department. (Rarely, if ever, used.)

Alaska – Gold Deposit.

Colorado – Available, but not used due to expense: note secured by Deed of Trust. Available, but rarely used: Cash Escrow Account – as Best Practice the state received monthly statement of account. Available, but not used: US Treasury Note; Reclamation Fund.

SMCRA Regulatory Authority
Permittee Bankruptcy Scorecard

Prior to or Upon Filing

Prior to or upon filing for bankruptcy, the following information will inform and educate your AGO attorney about the permittee(s) seeking bankruptcy relief and their respective mining operations:					
Permit Information					
Permit number(s)					
Name of permittee					
Initial date of permit(s) issuance					
Subsequent date(s) of permit(s) renewal(s)					
Name of mine					
County(ies) in which the mine is located					
Acres of surface permit facilities					
Type of mine operation (surface, underground, carbon recovery)					
If underground room and pillar, acres of shadow area for purposes of determining unplanned subsidence liability					
Status (active extraction, temporary cessation, reclamation only, closed)					
Pending Permit Decisions					
Identify pending permit applications for new permits, significant permit revisions, insignificant permit revisions, incidental boundary revisions, and permit transfers.					
Performance Bond Information					
Total bonded acres					
Total affected acres					
Type of bond (surety, letter of credit, cash bond, CD, self-bond)					
Surety Bond					
Bond number/ID					

Applicable permit number					
Current bond amount					
Calculated Liability					
Under/over bonded???					
Bond issuance date					
Name of surety					
Bond issuer address/phone number					
Location of bond instruments (original copies)					
Pending bond releases/forfeitures					
Anticipated bond releases/forfeitures (if known)					
Letter of Credit (LC)					
Bond number/ID					
Applicable permit number					
Original amount issued					
LC issuance date					
Name of bank issuing LC					
Address/phone number of bank					
Location of LC instrument & amendments, if any (original copy)					
Whether the LC has been drawn upon					
Current LC balance					
Calculated Liability					
Under/over bonded???					
Pending bond releases/forfeitures					
Anticipated bond releases/forfeitures (if known)					
Cash Bond					
Bond number/ID					
Applicable permit number					
Current cash bond balance					
Calculated Liability					
Under/over bonded???					
Pending bond releases/forfeitures					
Anticipated bond releases/forfeitures (if known)					
Certificate of Deposit (CD)					

Bond number/ID					
Applicable permit number					
Current CD amount					
Calculated Liability					
Under/over bonded???					
Name of bank issuing CD					
Location of CD's (original copies)					
Pending bond releases/forfeitures					
Anticipated bond releases/forfeitures (if known)					
Self-Bond					
Bond number/ID					
Applicable permit number					
Total amount of self-bond					
Calculated Liability					
Under/over bonded???					
Date self-bond approved					
Name of parent or non-parent corporate guarantor (if any)					
Address/phone number of corporate guarantor					
Location of self-bond documents (including indemnity agreement, quarterly financials, yearly financials, RA evaluations of financials)					
Pending bond releases/forfeitures					
Anticipated bond releases/forfeitures (if known)					
Permit Compliance Status					
Is the permittee compliant with the operations and reclamation plan, permit conditions?					
Describe any reclamation/compliance issues					
Length/height of open highwall					
Are there pending enforcement actions (notices of violations, show cause orders, cessation orders)?					
Date of issuance					

Abatement status					
Status of administrative appeal					
Status of Circuit Court case (if applicable)					
Are there outstanding civil penalties owed to the RA?					
How much?					
Date of penalty assessment					
Associated NOV/CO/other enforcement action					
Environmental Concerns					
Identify compliance commitment agreements, consent orders, agreed orders, etc. regarding mitigation of environmental SMCRA violations (e.g. water quality).					
Identify landowner issues (e.g. repair of material damage to land, structures or facilities due to unplanned subsidence).					
Identify pending Clean Water Act (CWA) issues/enforcement actions and provide contact information for the agencies involved, e.g. USACE, USEPA, or the state EPA (if the State RA does not administer CWA laws/regs).					
Ownership and Control					
Who are the surface and mineral owners for the mine area?					
Are surface and/or mineral leases current? (in order to successfully transfer a permit it is much easier for the purchaser to accept assignment of a lease rather than having to obtain a new lease)					