

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

WV Department of Environmental Protection

Rule 38 CSR 2 Section 11.3.a.3 Mining Reclamation Surety Bond Requirements

Legislative Auditor: Aaron Allred
Post Audit Division Director: Justin Robinson



GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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Post Audit Report: *WV Department of Environmental Protection - Rule 38 CSR 2 11.3.a.3 Mining Reclamation Surety Bond Requirements*

September 24, 2019

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EXECUTIVE SUMMARY: PAGE 1

ISSUE 1: PAGE 2

The West Virginia Department of Environmental Protection is Not Enforcing the Provision of 38 CSR 2 Section 11.3.a.3 Requiring Mining & Reclamation Surety Companies Obtain a Certificate of Authority from the U.S. Department of the Treasury, Opening the State to Unnecessary Risk.

APPENDIX A: PAGE 19

Report Draft Transmittal Letter

APPENDIX B: PAGE 20

Objective, Scope, & Methodology

APPENDIX C: PAGE 21

Legislative Services Legal Opinion

APPENDIX D: PAGE 23

September 15, 2005 DEP Advisory Council Meeting Minutes

APPENDIX E: PAGE 28

June 16, 2010 DEP Letter to WVOIC

APPENDIX F: PAGE 30

September 17, 2013 WVOIC E-Mail to DEP Mining & Reclamation Director

APPENDIX G: PAGE 31

October 3, 2013 WVOIC Letter to DEP Mining & Reclamation Director

APPENDIX H: PAGE 33

August 14, 2019 DEP Letter to Post Audit Division RE: DEP Rule 38 CSR 2 - 11.3.a.3

APPENDIX I: PAGE 40

DEP Response to Post Audit Report

APPENDIX J: PAGE 42

DEP Draft Rule Change of 38 CSR 2 - 11.3.a.3

APPENDIX K: PAGE 43

Companies with Surety Bonds Issued Through First Surety Corporation

APPENDIX L: PAGE 48

September 20, 2019 Legislative Auditor Letter to DEP Seeking Clarification on Proposed Rule Change in Response to Audit Report

APPENDIX M: PAGE 49

DEP Response to September 20, 2019 Legislative Auditor's Letter

APPENDIX N: PAGE 50

September 23, 2019 Legislative Services Email to DEP Seeking Clarification on DEP Allowing First Surety Corporation to Continue to Issue Bonds

APPENDIX O: PAGE 51

September 23, 2019 DEP Response to Legislative Services Email

Executive Summary

The Legislative Auditor conducted this audit of the West Virginia Department of Environmental Protection's (DEP) mining and reclamation bonds pursuant to W.Va. Code §4-2-5. The objective of this review was to determine the adequacy and legality of all non-quarry reclamation surety bonds held by the Division of Mining and Reclamation, and the companies that are producing the bonds.

Report Highlights

Issue 1: The West Virginia Department of Environmental Protection (DEP) is Not Enforcing the Provision of 38 CSR 2 Section 11.3.a.3 Requiring Mining & Reclamation Surety Companies Obtain a Certificate of Authority from the U.S. Department of the Treasury, Opening the State to Unnecessary Risk.

- DEP is in non-compliance with Legislative Rule 38 CSR 2 Section 11.3.a.3 by accepting mining and reclamation surety bonds from two companies that have not obtained their respective certificates of authority to issue federal bonds from the U.S. Department of the Treasury [T-Listed] within the prescribed time-frame stipulated by the rule.
- Legislative Rule 38 CSR 2 Section 11.3.a.3 currently states in part that “[Companies] not included on the United States Treasury Department’s listing of approved sureties must diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and **within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.**”
- First Surety Corporation has issued reclamation bonds in West Virginia for more than 13 years without obtaining a T-listing as required by 38 CSR 2 Section 11.3.a.3. First Surety is currently responsible for 284 surety bonds with the DEP, totaling approximately \$47.8 million dollars.

Recommendations

1. The Legislative Auditor recommends DEP comply with Section 11.3.a.3 of 38 CSR 2 and require all surety companies to be T-Listed by the U.S. Department of the Treasury within four years of the issuance of each company’s first mining and reclamation surety bond. Further, the Legislative Auditor recommends that the DEP immediately cease acceptance of mining reclamation surety bonds from First Surety Corporation and Quanta Insurance Company.
2. The Legislative Auditor recommends the DEP report back to the Post Audits Subcommittee in six months to provide an update on its compliance with the recommendation.

Issue 1: The West Virginia Department of Environmental Protection (DEP) is Not Enforcing the Provision of 38 CSR 2 Section 11.3.a.3 Requiring Mining & Reclamation Surety Companies Obtain a Certificate of Authority from the U.S. Department of the Treasury, Opening the State to Unnecessary Risk.

Background

In 1977, the U.S. Congress passed the Surface Mining Control and Reclamation Act (SMCRA). This created a federal program to help regulate the mining and reclamation industries. The act gives states the right to create their own oversight programs (primacy), with their own rules and regulations. For a state to run its own regulatory program, it must have statutes that are “no less stringent” than those set forth in the SMCRA. Any W.Va. Code or Rule that is amended or enacted must first be sent to the U.S. Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (OSMRE) for review and approval.

The SMCRA requires reclamation bonds to be provided to insure the reclamation of mined land. W.Va. Code §22-3-11 sets out the mining and reclamation bonding requirements for West Virginia. The statute requires mining operators to furnish a “penal bond” for a mine site prior to the DEP issuing a permit. The penal amount of the bond is not to be less than \$1,000 or more than \$5,000 for each acre or fraction of an acre with the minimum amount of \$10,000 for each mine site. The statute allows for various types of bond instruments, including surety bonds, collateral bonds (generally cash or securities), escrow accounts, and self-bonding, or a combination of these methods.

Self-bonding is a type of bonding instrument that allows larger coal companies to utilize their capital as a collateral bond or a “guarantee” when obtaining mining permits. However, in 2015 Alpha Natural Resources, one of the State’s largest coal companies and the only company with self-bonds on file with the DEP at the time, filed for bankruptcy. Alpha had approximately \$244 million of self-bonding for roughly 500 mining sites but was able to avoid bond forfeiture through a consent order agreement with the DEP. Following the issue with Alpha, DEP no longer allows companies to be self-bonded. Although the language of W.Va. Code §22-3-11 still references self-bonding as an allowable bond type, it provides the DEP with the discretion to select which bond types it will accept. There are no other rules or laws, state or federal, that disallow self-bonding.

As of August 2019, the form of the bonding instruments are as follows:

- 2,993 Surety Bonds with a total value of \$955,395,229
- 460 Collateral (Cash or Securities) Bonds with a total value of \$26,565,936

Surety bonds are by far the most utilized reclamation bonding instrument for West Virginia mining operations. Surety bonds comprise nearly \$956 million (97%) of the \$982 million in currently active mining and reclamation bonds issued to the DEP. A surety bond is a legally binding contract entered into by three parties: the principal (the mining company), the obligee (DEP), and the third-party insurer.

For mining and reclamation surety bonds, DEP requires the mining company to obtain a surety bond as a guarantee the mining company will fulfill their obligation to reclaim the mine site property once mining operations have ceased. To establish a surety bond the mining permittee pays the surety company a premium, and the surety company sets up a bond with the agency that regulates the

permitted mining site. If the mining company fails to fulfill their obligation to reclaim the mine site property, DEP has the legal right to collect the bonded amount from the surety company. The surety company also has the legal right to attempt to collect the bond amount from the permittee if a bond is forfeited—either by violations leading to cessation ordered by the DEP, or by the permittee being unable to finish the task because of bankruptcy or other factors.

DEP Rule 38 CSR 2 11.3.a Governing Mining Reclamation Surety Bonds

Title 38, Series 2 of the Code of State Rules (38 CSR 2) is the Legislative Rule covering mining and reclamation. Section 11.3.a.3 of the rule delineates the eligibility requirements of third-party insurers who desire to issue mining and reclamation surety bonds. Effective October 11, 2005, by use of the Secretary of State's emergency rule provisions,¹ this section was amended. Changes to these rules are also reviewed by the OSMRE.

On October 3, 2005, the DEP submitted the following proposed rule change to OSMRE for review:

11.3.a.3. Surety received after July 1, 2001 must: (i) be recognized by the treasurer of state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds; Or (ii) submit to the Secretary proof that the surety holds a valid license issued by the basis a certificate of good standing or other evidence demonstrating that the surety remains licensed or otherwise in good standing with the West Virginia Insurance Commissioner and the insurance regulator of its domiciliary state and within four (4) years take all steps necessary to obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.

As noted by Federal Register Vol. 70, No. 250, the OSMRE reviewed the proposed rule change:

On October 3, 2005, the WVDEP provided OSM a copy of the proposed rule for informal review. Unlike the State's existing surety bond provisions at CSR 38–2–11.3.a.1 and the Federal surety bond requirements at 30 CFR 800.20(a), the proposed revision at CSR 38–2–11.3.a.3 did not appear to require the surety to be licensed to do business in the State. To resolve this concern and to make additional clarifications without altering the purpose or intent of either the emergency or the legislative rule, on October 14, 2005 (Administrative Record Number WV– 1443), OSM recommended that the language in both rules be revised as follows:

Any company that executes surety bonds in the State after July 1, 2001, must: (i) be recognized by the treasurer of the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds by being included on the Treasury Department's listing of approved sureties

¹ An emergency rule is any legislative rule filed by an agency finding that the rule must be effective before completing the full Legislative cycle and is promulgated in accordance with [W. Va. Code §29A-3-15](#). This is an option when it has been determined that the promulgation is necessary for the immediate preservation of the public peace, health, safety or welfare, to comply with a statute or regulation, or to prevent substantial harm to the public interest. The Secretary of State has 42 days to consider if an emergency truly exists and that the agency has statutory authority to promulgate the rule. At any point during this time, the Secretary can approve or disapprove the rule. If no action is taken, the rule automatically goes into effect on the 42nd day after filing.

*(Department Circular 570); or (ii) submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner, and agree to submit to the Secretary on at least a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state. **Companies not included on the United States Treasury Department’s listing of approved sureties must diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.** (Emphasis Added)*

This is the same language that was subsequently adopted as 38 CSR 2 Section 11.3.a.3 and remains in effect today.

Inclusion on the U.S. Department of Treasury Circular 570 as an acceptable surety for federal bonds is commonly referred to as being “T-Listed.” Currently, there are 38 companies providing sureties for mining reclamation bonds through DEP that have issued 2,993 mining and reclamation bonds totaling \$955.4 million. Since the emergency rule became effective, there are only two surety companies not currently T-Listed functioning as sureties for mining reclamation bonds. These companies are:

1. **First Surety Corporation** - with 284 mining and reclamation surety bonds totaling \$47.8 million; and
2. **Quanta Insurance Company**² - with one mining and reclamation surety bond for the minimum bond amount of \$10,000.

Conversely, all other 36 surety companies comprising the remaining \$928.8 million in sureties for mining reclamation bonds in West Virginia³ are T-Listed.

According to DEP’s records, First Surety Corporation issued their first mining and reclamation surety bond in West Virginia in March 2006. However, as of the date of this audit report, **First Surety Corporation has yet to obtain a T-Listing from the U.S. Department of the Treasury as required by 38 CSR 2 11.3.a.3, more than 13 years after their first mining reclamation surety bond was issued.**

The following question was presented to the Legislative Services Division to determine the legal applicability of the T-Listing requirement of 38 CSR 2, Section 11.3.a.3:

Are surety companies that issued their initial WV mining reclamation surety bonds more than four years ago, and have not obtained certificates of authority from the United States Department of the Treasury as acceptable sureties on federal bonds, ineligible to function as third-party insurers for mining reclamation bonds under section 11.3.a.3 of 38 CSR 2?

In response, the Legislative Services’ legal opinion (Appendix C) states:

² This company was listed in the DEP’s August 2019 *All Bond Report* as Quanta Insurance Company. However, we noted this company was purchased by Ascot Insurance Company.

³ Surety bond data obtained from DEP’s August 2019 *All Bond Report*.

*...there are two conditions for a surety company to be a third-party insurer for mining reclamation bonds. The first, the company is already recognized by the US Department of Treasury and can present such a certificate. The second has several sub-conditions that must all be met in order for a company to be a third-party insurer for mining reclamation bonds....While operating under the second condition, it seems that a surety company is required to obtain a certificate of authority from the US Department of Treasury within four years. However, it is unclear when the four year clock starts to run, whether it is upon first issuing a surety bond in this state, or if it began at the time the rule was promulgated meaning all companies would be currently required to have a certificate of authority. Although, a plain reading would seem to indicate that the four-year clock would start upon first operating under the second condition. This would be the most beneficial to new companies attempting to start business operations in West Virginia and is further evidenced by meeting minutes as the intent for the rule change. Therefore, **the most likely conclusion is that any surety companies operating as third-party insurers for mining and reclamation bonds would need to have a certificate of authority from the US Department of Treasury within four years of the initial surety bond.** (Emphasis Added)*

The Post Audit Division sent a request to the DEP concerning its application of this rule in regard to First Surety Corporation, which is still operating without the required T-Listing 13 years after executing its first bond. In its response, the DEP stated that it disagreed with the Legislative Services legal opinion and that the T-Listing requirement is not applicable to First Surety Corporation or any entity operating under subsection (ii) of 11.3.a.3. The Legislative Auditor did not modify his opinion as a result of the DEP's response, as it appears to ignore the plain language of the rule and the history of the rule as described within this report. **Therefore, it is the opinion of the Legislative Auditor that the DEP is not enforcing the provision of 38 CSR 2 11.3.a.3 by allowing companies to execute sureties without obtaining the required T-Listing.** This application of the rule as described by DEP also seems to conflict with its own past application of the rule since it was first established in 2001 in response to concerns over insolvent insurers.

History of DEP's T-Listing Requirement (Section 11.3.a.3 of 38 CSR 2)

The DEP's T-Listing requirement for surety companies was first implemented and effective in 2001. At that time, Section 11.3.a.3 of 38 CSR 2 required companies have a T-Listing in order to function as a surety for mine reclamation bonds. The original language of Section 11.3.a.3, effective July 1, 2001, stated:

Surety received after July 1, 2001 must be recognized by the treasurer of [the] state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.

The adoption of the rule in 2001 was due to the DEP's concern regarding the solvency of surety companies. In a letter dated June 16, 2010 discussing the 2001 rule change to the West Virginia Office of the Insurance Commissioner (WVOIC), the former Director of DEP's Division of Mining and Reclamation stated that "...the *Frontier Insurance Company* insolvency prompted this rule change..." and "...the requirement that a surety company have a T Listing..." was made to protect DEP "...from potential insolvent insurers."

Additionally, DEP's Internal Auditor further commented on the genesis of Section 11.3.a.3, in a letter dated July 3, 2019:

The intended purpose of amending the rule in 2001...was to check solvency of the surety company providing bonding. Around this time, several surety companies filed for bankruptcy. Management (in place at that time) realized it did not have the expertise or time to determine if a surety company providing a bond would be solvent. DMR⁴ staff learned of the federal listing of approved sureties and determined the listing could be utilized to reduce the risk of the agency accepting a surety bond from a company which may go bankrupt.

When a company applies to be T-Listed, they are required by the U.S. Department of the Treasury to submit dozens of documents detailing their financial condition. These documents⁵ include, but are not limited to:

- A list of the names and post office addresses of holders of more than 5% of the Company's stock and the number of shares held by each. The financial statements of the corporate owners should be provided. If privately held, the ultimate individual owners must be identified. Biographical affidavits of owners should be submitted;
- Report of the most recent examination (within the last three years) of the Company's financial condition and affairs, which was made by the domiciliary Insurance Department;
- The latest IRIS ratio results and an explanation for any ratios outside the normal range;⁶
- A list of states and other areas in which the company is licensed to transact surety business;
- A memorandum setting forth:
 - A comprehensive statement of the Company's method of operation, including underwriting guidelines, claims adjustment procedures, reinsurance philosophy, control over collateral, etc.;
 - The particular classes of business in which it engages;
 - Any special underwriting agreements, management agreements or pooling agreements in force, and copies thereof; and
 - Present plans of the company as to the types of Federal bonds; and the anticipated annual premium volume of Federal bonds; and the geographic areas in which it intends to write Federal bonds.
- A list of all bonds and policies (in all lines of business) in force as of the application date with a penal amount or face amount in excess of 10% limitation. Information is to be furnished as to how the excess amount of each risk has been protected.

The above list is a partial listing of the documents required to be submitted to the Treasury prior to a surety company acquiring a T-Listing. The Treasury analyzes this information, and either approves or denies the request for T-Listing. Approval allows a company to provide surety on federal bonds. Although federal bonds are not the tool used to provide surety for reclamation in West Virginia, the Treasury's thorough analysis in processing T-Listing applicants provides a level of assurance that companies approved for the T-Listing are sufficiently solvent to provide mining and reclamation surety bonds. The adoption of the T-Listing requirement by DEP removed the onus from

⁴ Division of Mining and Reclamation

⁵ <https://fiscal.treasury.gov/surety-bonds/authorized-reinsurer-bonds.html>

⁶ IRIS is an acronym for Insurance Regulatory Information System.

DEP in determining whether companies were sufficiently financially viable to be sureties of reclamation bonds.

During a September 15, 2005 meeting of the Department of Environmental Protection Advisory Council, a proposed emergency rule change to Section 11.3.a.3 of 38 CSR 2 was discussed. According to minutes of the Advisory Council meeting (Appendix D), the proposed rule change was explained by DEP's Emergency Program Manager, as follows:

*...the current rule prevents new surety companies that do not currently issue federal bonds, but are otherwise in good financial condition, from doing business as sureties on mining and reclamation bonds. The agency did not intend this result when it adopted the original language; it only used the federal requirement as a way to have someone with financial expertise outside the agency assess a surety's financial condition. To be T-listed, a surety has to do business for a least 2 years, preventing new companies from meeting the requirement. **The proposed rule change will allow a company to issue mining bonds as long as they meet the federal T-listing requirement within four (4) years....*** (Emphasis Added)

On September 21, 2005, an emergency rule change was filed with the Secretary of State proposing 11.3.a.3 of 38 CSR 2 be amended. According to DEP's *Emergency Briefing Document* filed with the proposed change, an emergency "...exists because there is presently a great demand for reclamation bonds from the coal industry in West Virginia that is not being met by the number of sureties currently offering surety bonds in West Virginia...." The emergency rule was then approved by the Secretary of State on October 11, 2005.

As previously mentioned, this rule was also submitted to the OSMRE for review. The language of Section 11.3.a.3, as submitted by the DEP to OSMRE on October 3, 2005, stated:

*11.3.a.3. Surety received after July 1, 2001 must: (i) be recognized by the treasurer of state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds; Or (ii) submit to the Secretary proof that the surety holds a valid license issued by the basis a certificate of good standing or other evidence demonstrating that the surety remains licensed or otherwise in good standing with the West Virginia Insurance Commissioner and the insurance regulator of its domiciliary state **and within four (4) years take all steps necessary to obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.*** (Emphasis Added)

Due to an issue noted by the OSMRE, unlike the State's existing surety bond provisions at CSR 38-2-11.3.a.1 and the Federal surety bond requirements at 30 CFR 800.20(a), the proposed revision at CSR 38-2-11.3.a.3 did not appear to require the surety to be licensed to do business in the State. To resolve this concern and to make additional clarifications without altering the purpose or intent of either the emergency or the legislative rule, on October 14, 2005 (Administrative Record Number WV- 1443), OSMRE recommended that the language in both rules be revised as follows:

Any company that executes surety bonds in the State after July 1, 2001, must: (i) be recognized by the treasurer to the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds by being included on the Treasury Department's listing of approved sureties

(Department Circular 570); or (ii) submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner, and agree to submit to the Secretary on at least a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state. Companies not included on the United States Treasury Department's listing of approved sureties must diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.

This revision, meant to simply clarify the requirement the surety be licensed to do business in the State “without altering the purpose or intent” of the rule, was formally adopted by the DEP and is the current language of 38 CSR 2 Section 11.3.a.3.

38 CSR 2 Section 11.3.a.3 Requirement to Obtain T-Listing Within Four Years

38 CSR 2 Section 11.3.a.3 states in part that:

...Companies not included on the United States Treasury Department's listing of approved sureties must...within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds [T-Listing].

As addressed in the Legislative Services' Legal Opinion, “...it is unclear when the four year clock starts to run....” However, based on this legal opinion, the Legislative Auditor believes a plain reading of the rule indicates the four-year clock would start when a third-party insurer initially offers their first mining and reclamation surety bond. Further, the original language of 11.3.a.3 required all sureties received after July 1, 2001 to be T-Listed. This requirement, as stated by DEP, was in response to the issue concerning Frontier Insurance Company's insolvency and the DEP's admitted inability to make determinations of the adequacy of a company's financial condition to provide sureties for mining reclamation. The current language of the rule clearly indicates the need for a company to be T-Listed within four years of operating in order to provide assurance that the company is financially stable and capable of meeting its bond obligations.

DEP's Application of the Four-Year Timeframe for the T-Listing Requirement has Diverged Through the Years Since the Rule was Amended in 2005.

September 15, 2005:

According to the September 15, 2005 minutes of the Department of Environmental Protection Advisory Council meeting, in which the proposed rule change was discussed, DEP's Emergency Program Manager stated that “...(t)he proposed rule change will allow a company to issue mining bonds as long as they meet federal T-listing requirement within four years....” This statement in the minutes indicates that the council and the DEP held that the four-year window for obtaining the T-listing would begin when a company issues their first mining and reclamation bond. First Surety remitted to DEP its first mining and reclamation surety bond in March 2006. **Therefore, under this**

understanding of the rule, in March 2010 the four-year window would have expired, and First Surety would have been rendered ineligible to issue mining and reclamation surety bonds.

June 16, 2010:

The former Director of DEP's Division of Mining and Reclamation wrote a letter dated June 16, 2010 (Appendix E) to the WVOIC at the request of the President of First Surety Corporation for the purpose of providing the Office of the Insurance Commissioner with DEP's "...comments on the meaning of 38 CSR §2-11.3.a.3. as it applies to First Surety..." and, more specifically, the four-year window requirement for obtaining a T-Listing. The Director stated in the letter that DEP interprets the section as requiring:

...an insurer to submit its application for T listing at earliest possible time after it is able to satisfy all of the Treasury Department's minimum requirements (at least three years experience, reinsurance and audited financial statements covering both) aggressively seek the T Listing, filing each year, attempt to cure any defects in its application that may impact the issuance of the T Listing by the Treasury Department and obtain the T listing within four years after it has satisfied these minimum requirements....

This same letter goes on to state:

...Should First Surety be unsuccessful in obtaining T listing within four years, the DEP would have to re-evaluate the manner in which its regulations apply at that time. In that event, the DEP would likely cease acceptance of new surety bonds from First Surety. If First Surety continues to meet state solvency requirements, I do not anticipate that the DEP would regard any surety bonds lawfully written by First Surety during this four year period to be immediately invalid. Other, more specific, questions as to how the DEP's regulations apply would have to be addressed under the circumstances that exist at that time....

According to an email dated September 17, 2013 (Appendix F) and a subsequent certified mail letter dated October 3, 2013 (Appendix G) both from the WVOIC to the former Mining and Reclamation Director, First Surety met the minimum requirements for applying for a T-Listing by June 1, 2009, and applied for the T-Listing in August 2010.⁷ According to the WVOIC certified letter to the Mining and Reclamation Director, the "...T-Listing requirement has been noted by the OIC as a prospective risk facing FSC..." and therefore, "...it is essential the OIC determine FSC's ability to maintain their current business plan of offering coal mine reclamation bonds..." In both the email and letter, WVOIC questioned First Surety's eligibility to issue coal mine reclamation surety bonds as the timeframe, as understood from DEP's June 16, 2010 letter, would have expired on June 1, 2013 and First Surety would have been rendered ineligible at that time to issue mining and reclamation surety bonds.

October 29, 2013:

The former Director of the Division of Mining and Reclamation responded by letter dated October 29, 2013 to the WVOIC's October 3, 2013 letter regarding FSC's eligibility to offer mining and reclamation surety bonds. In his letter the Director stated in part:

⁷ As of the date of this report, First Surety Corporation has not obtained a T-Listing from the U.S. Treasury.

...I apologize for the failure of my June 16, 2010 letter to completely clarify the Department's interpretation on this point. The Department interprets the four year time frame of 38 CSR §2-11.3.a.3 to begin when First Surety has satisfied the Treasury Department's minimum requirements in complete application for listing. By a "complete application", we mean an application that satisfactory addresses all of Treasury's requirements and is ripe for decision by Treasury. To the extent that Treasury may have identified deficiencies in First Surety's original application that were required to be addressed in order to demonstrate compliance with Treasury's minimum requirements and make its application complete and ripe for decision, the four year period would begin to run from the time when First Surety, in the diligent pursuit of this application, corrected such deficiencies thereby rendering its application ripe for decision.

DEP's position, as stated in this letter, is that the four-year window for obtaining the T-Listing would not commence until the surety company meets all the U.S Treasury's requirements for obtaining the T-Listing. **Simply put, if the DEP enforces the rule as described, the four-year T-Listing requirement becomes meaningless, as surety companies that fail to meet the minimum requirements would remain eligible to offer mining and reclamation surety bonds indefinitely. This application of the T-Listing requirement in the rule would do little or nothing to alleviate concerns regarding the financial solvency of sureties providing reclamation bonds in West Virginia which, ostensibly, is the reason the rule exists.**

In addition, there are no references in 38 CSR 2 to "minimum requirements" or "complete application" regarding the commencement of a surety company's four-year window for obtaining the T-Listing. Therefore, it would seem there is no legal basis for these stipulations expressed in the former Director's letter.

August 14, 2019:

In a letter dated August 14, 2019, DEP's legal counsel responded to the Post Audit Division's inquiry regarding First Surety Corporation's eligibility for offering mining and reclamation bonds in West Virginia (Appendix H). In this letter, the DEP disagreed with the Legislative Services' legal opinion regarding the T-Listing requirement and the applicability of the four-year timeframe to meet this requirement. In fact, the DEP's current position disagrees with its own past statements regarding the T-Listing requirement and the applicability of the four-year timeframe entirely.

DEP stated in its response, quoted in part below, that the last sentence of Section 11.3.a.3 of 38 CSR 2, requiring surety companies to be T-Listed within four years, only applies to subsection (i) and does not apply to subsection (ii):

*...The DEP maintains that the second clause of the legislative rule is intended only to apply to those surety companies who seek to fulfill the requirements of W. Va. C.S.R. §38-2-11.3.a.3.(i) and **not** companies that seek to fulfill the requirements of W. Va. C.S.R. §38-2-11.3.a.3.(ii). Accordingly, in DEP's view, any company that seeks to provide surety bonds in West Virginia must take one (or both) of the two optional courses.*

*The final sentence applies **only** to companies who seek to provide surety bonds in West Virginia pursuant to W. Va. C.S.R. §38-2-11.3.a.3.(i). Consequently, **companies that are able to “submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner... and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state,” need only do so. Such companies are not bound by the requirements for those companies that seek the United State[s] Treasury listing.** (Emphasis Added)*

If one accepts DEP’s view on the rule as advocated in this letter, then surety companies offering mining and reclamation bonds need never be T-Listed. This would seem to be contrary to the DEP’s earlier positions regarding the T-Listing requirement and the original reasons it imposed this requirement.

The construction of 38 CSR 2 Section 11.3.a.3 and the T-Listing requirement clause indicates it relates specifically to subsection (ii) since it immediately follows subsection (ii). Further, the original language of the 2005 amendment to the rule as submitted by the DEP to OSMRE was clear in its construction when the language stated:

*11.3.a.3. Surety received after July 1, 2001 must: (i) be recognized by the treasurer of state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds; **Or (ii) submit to the Secretary proof that the surety holds a valid license issued by the basis a certificate of good standing or other evidence demonstrating that the surety remains licensed or otherwise in good standing with the West Virginia Insurance Commissioner and the insurance regulator of its domiciliary state and within four (4) years take all steps necessary to obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.** (Emphasis Added)*

It was previously noted that OSMRE changed the language of this proposed rule change and submitted it back to the DEP to resolve the specific concern that the rule change did not appear to require the surety to be licensed to do business in the State. As previously quoted from Federal Register Vol. 70, No. 250, OSMRE stated, “...without altering the purpose or intent of either the emergency or the legislative rule, on October 14, 2005 (Administrative Record Number WV– 1443), OSM recommended that the language in both rules be revised...”, resulting in the current language of the rule today.

This assertion is further supported by the fact that eligibility for issuing mining and reclamation surety bonds in accord with subsection (i) requires the surety company to “...*be recognized by the treasurer to the state as holding a **current** certificate of authority from the United States Department of the Treasury [T-Listed].*” Obviously, a company with a **current** T-Listing would have no need for a four-year window to become T-Listed, making the applicability of the four-year requirement specific to subsection (i) a moot point.

Lastly, the U.S. Treasury requires applicants for the T-Listing to be licensed and in good standing by the applicant’s domiciliary state and, in fact, by all states in which the applicant offers sureties. This means that **to be eligible to be T-Listed, a company must meet the conditions in subsection (ii) of 38 CSR 2 §11.3.a.3. Therefore, assuming continuous eligibility to offer mining**

and reclamation surety bonds only requires companies to be licensed and in good standing with its domiciliary state’s insurance regulator, the path for eligibility for a surety company to offer such bonds under subsection (i) [T-Listed] would be a useless endeavor. As a result, the requirements for the T-Listing in the rule, presumably intended to alleviate concerns regarding the financial solvency of sureties providing reclamation bonds, would be of no benefit.

Financial Solvency and Administrative Issues Noted Concerning First Surety Corporation

Given that the DEP has not prevented companies without a T-Listing from providing sureties in accordance with 38 CSR 2 Section 11.3.a.3, the Legislative Auditor sought to determine if there were any evident financial concerns facing those companies who are not T-Listed. As previously stated on page 4 of this report, there are currently only two companies executing sureties without the required T-Listing: First Surety Corporation and Quanta Insurance Company. Since Quanta Insurance Company only has one surety bond at the minimum amount of \$10,000, the focus of this analysis was conducted on First Surety Corporation.

The WVOIC provides oversight of insurers operating in West Virginia. Although W.Va. Code §33-2-9 only requires the WVOIC examine insurers once every five years, the WVOIC conducted two *Domestic Financial Examinations* of First Surety Corporation within a two-year period. The first examination (dated January 7, 2016) covered the period of January 1, 2010 through December 31, 2014, while the second examination (dated September 18, 2017) covered the period of January 1, 2015 through December 31, 2016. **These two examinations resulted in 14 “significant findings”, whereas examination reports conducted from January 2016 to present on 21 other insurers had a combined total of 14 “significant findings”—indicating that issues concerning First Surety Corporation are more numerous and frequent than other insurers.** This is illustrated further in the following table:

**Table 1 - Comparison of WVOIC Domestic Financial Examination Reports
Significant Findings Issued 2016-2019**

	Company	Year of Report	Number of Significant Findings
1	First Surety Corporation	2016	9
	First Surety Corporation	2017	5
2	Brickstreet Mutual Insurance Company	2019	0
3	CareSource of West Virginia	2018	0
4	Coventry Health Care of WV	2017	0
5	Delta Dental of WV	2017	0
6	Farmers & Mechanics Fire & Casualty Insurance Co.	2018	0
7	Farmers and Mechanics Mutual Insurance Co. of WV	2018	0
8	Health Plan of the Upper Ohio Valley	2017	3
9	Highmark Senior Solutions Company	2018	0
10	Highmark West Virginia, Inc.	2018	0
11	Inland Mutual Insurance Company of WV	2017	1
12	Municipal Mutual Insurance Company of WV	2017	0
13	Mutual Protective Association of WV	2017	0
14	Pan-Handle Farmers Mutual Ins. Company	2017	3
15	Peoples Mutual Fire Insurance Company	2018	0
16	PinnaclePoint Insurance Company	2019	0
17	Safe Insurance Company	2017	0
18	SummitPoint Insurance Company	2019	0
19	THP Insurance Company	2017	4
20	West Virginia Family Health Plan, Inc.	2018	0
21	West Virginia Farmers Mutual Insurance Association	2016	2
22	West Virginia National Auto Insurance Co.	2018	1
Data obtained from the WV Offices of the Insurance Commissioner			

The significant findings from the WVOIC examination reports reported on First Surety include, but are not limited to:

- Examiners noted the company made aggressive dividend payments in 2012, 2013, and 2014. The amount of these dividend payments on two occasions exceeded the ordinary dividend threshold (extraordinary dividends) and the company did not obtain prior approval from the WVOIC as required by W. Va. Code §33-27-5 for extraordinary dividends. The company was subsequently fined for the extraordinary dividends on two occasions. Additionally, in February 2015, the

company prematurely declared and partially paid a dividend to its parent (Jacob's Financial Group), prior to filing its 2014 Annual Statement. The 2015 dividend was paid despite objections raised by the Company President and Treasurer. Several individual board members were subsequently fined for the 2015 payment. According to the WVOIC's examination report for the period ended December 31, 2014, "...*(t)hese decisions again reflected the Company's willingness to aggressively pay dividends and deliberate disregard for adherence to WV law. The aggressive and premature payment of these dividends is arguably detrimental to the mid to long term financial health of the Company.*"

- According to the examination report for the period ending December 31, 2016, First Surety was in noncompliance with the *capital and surplus requirements* stipulated in W. Va. Code §33-3-5b in "...that the Company's capital stock was below a minimally required amount of \$1,000,000...."

Further information concerning First Surety Corporation's financial condition obtained during the course of the audit include:

- IRIS ratios are a set of ratios designed to measure solvency and liquidity. They are calculated from insurers' annual statements that are filed with the National Association of Insurance Commissioners (NAIC), and insurers that fail one or more tests can be placed under the supervision of their domicile regulator. For 2018, First Surety failed the ratio for "*Change in Net Premiums Written*" as the company experienced a large decrease in premiums. Three additional ratios, "*Investment Yield*," "*Gross Change in Policyholders' Surplus*," and "*Change in Adjusted Policyholders' Surplus*" were just slightly above the lower threshold for passing.
- Jacobs Financial Group, Inc (JFGI) is the parent company of First Surety Corporation and it owns 51% of First Surety's equity. JFGI is required to file an annual independent audit report with the U.S. Securities and Exchange Commission (SEC). For each fiscal year from 2006 to 2017, the last available report year available, the SEC EDGAR annual reports for JFGI state, "there is substantial doubt as to the company's ability to continue as a going concern." If Jacobs Financial Group were to become insolvent, the assets of the First Surety could be at risk to creditors.⁸
- Effective September 4, 2019, the SEC temporarily suspended trading in securities for JFGI, First Sureties parent company, due to "...a lack of current and accurate information..." about JFGI because the company has not filed "...certain periodic reports with the Commission...."

The financial issues previously detailed raise questions regarding the financial solvency of First Surety Corporation and its parent, Jacobs Financial Group. Considering that First Surety has mining and reclamation sureties totaling \$47.8 million, the Legislative Auditor has concerns about the capacity of First Surety to pay its surety bond obligations in the event that one or more mining operators fail to fulfill their obligations to reclaim mine sites in which First Surety is the third-party insurer.

As stated earlier, the U.S. Department of the Treasury has rigorous requirements surety companies must meet in order to be a surety on federal bonds [T-Listed]. These requirements provide

⁸ While an insolvent parent can continue in business without necessarily affecting the operations of the subsidiary, creditors can try to force it into involuntary bankruptcy to access the subsidiary's assets. Typically, the mere fact that a business is insolvent is not enough for most courts to approve an involuntary bankruptcy petition, but if the parent is not able to borrow money to stay afloat or renegotiate debt terms and has no revenue prospects that will eventually relieve the insolvency, the risk of a court approving an involuntary bankruptcy petition by one or more creditors grows. *Source: bizfluent.com: "What Happens to a Subsidiary Company if the Parent Company Becomes Insolvent?"*

a high-level of assurance that a surety company is sufficiently solvent to meet its financial obligations. Certainly, this assurance is far superior to simply requiring a surety company to be licensed and in good standing in its domiciliary state.

Conclusion

It is the opinion of the Legislative Auditor that DEP is in noncompliance with Section 11.3.a.3 of 38 CSR 2 by permitting First Surety Corporation to continue to issue mining and reclamation surety bonds without being T-Listed. Based on the opinion of Legislative Services, the Legislative Auditor is unsure if compliance with the rule would require DEP to reissue all bonds issued by First Surety, or if those issued in the first four years subsequent to the issuance of its first bond on March 27, 2006 would remain valid. The Legislative Auditor also notes that allowing companies which do not comply with the T-listing requirement to execute surety bonds puts the 36 companies that do comply with the requirement at a disadvantage. As of the date of this report First Surety Corporation has 284 active bonds with a total value of approximately \$47.8 million. This represents 9.5% of all surety bonds issued and 5% of the value of all bonds. There were 64 bonds issued totaling approximately \$10 million in the first four years First Surety began executing mining reclamation surety bonds in West Virginia. After this four-year period to present, First Surety has issued 220 bonds totaling approximately \$37.8 million. The table below shows the number of bonds issued by First Surety compared to those issued by other insurers who are T-listed for the period of 2010 to present.

Number and Value of Bonds Issued by First Surety Corporation (FSC) vs Other Insurers Calendar Years 2010 to Present			
Calendar Year	FSC/Other Insurers	Number of Bonds Issued	Value of Bonds Issued
2010	FSC	38	\$ 4,162,696
	Other Insurers	30	\$ 9,197,740
2011	FSC	17	\$ 7,981,560
	Other Insurers	20	\$ 6,888,620
2012	FSC	8	\$ 1,947,740
	Other Insurers	132	\$ 20,007,210
2013	FSC	33	\$ 5,543,218
	Other Insurers	78	\$ 30,607,004
2014	FSC	11	\$ 1,108,040
	Other Insurers	141	\$ 20,439,904
2015	FSC	15	\$ 5,026,252
	Other Insurers	224	\$ 41,673,711
2016	FSC	27	\$ 2,500,828
	Other Insurers	422	\$ 123,349,957
2017	FSC	43	\$ 7,090,160
	Other Insurers	732	\$ 339,991,864
2018	FSC	21	\$ 1,756,270
	Other Insurers	666	\$ 252,005,978
2019	FSC	7	\$ 6,486,454
	Other Insurers	103	\$ 18,134,035

Data obtained from DEP All Bond Report

The Legislative Auditor believes the requirements of 38 CSR 2 11.3.a.3, holding a valid license issued by the WVOIC and quarterly submission of a certificate of good standing from the WVOIC, are not sufficient on their own to provide assurance regarding the financial condition of a company. The requirement that surety companies be T-Listed within four years of offering their initial surety bond provides a higher level of assurance of financial solvency than just confirming the companies are licensed and in good standing with the WVOIC.

DEP stated to the WVOIC that the T-Listing requirement was in response to Frontier Insurance Company becoming financially insolvent, and that the T-Listing requirement would protect DEP “from potential insolvent insurers”. Regarding the issue with Frontier Insurance Company, on June 6, 2000 the company lost its T-Listing with the U.S. Treasury and subsequently on July 27, 2000 the WVOIC suspended Frontier from writing surety business in West Virginia. Then on April 9, 2001, WVOIC entered a cease and desist against Frontier, suspending its license from writing any new or renewal insurance business in West Virginia. In 2013, the WVOIC issued an administrative complaint against Frontier seeking to revoke its license in response to an Order of Liquidation against the company citing the company was in continuing unsound financial condition. Frontier was subsequently allowed to surrender its certificate of authority due to the fact that the company had not written any new business in WV since 2001 and did not owe the state any tax monies. The fact that Frontier had lost its T-Listing in 2000 was a key indicator of the financial issues the company was facing that eventually led to its bankruptcy. This also exemplifies how the T-Listing requirement of 11.3.a.3 provides assurance over a company's financial condition. A company that cannot obtain T-Listing or loses its listing likely indicates that the company presents an increased risk over those who do maintain such listing.

Concerning the certificate of good standing issued by the WVOIC that is required to be submitted to the DEP on a quarterly basis, there seems to be some confusion on the method for which this is supplied and the DEP's record of those certificates. The Post Audit Division requested copies of all certificates of good standing from the DEP on May 29, 2019 and, as of the date of this report, the DEP still has not provided copies of all the requested certificates. In a meeting with the Post Audit Division on August 15, 2019, the DEP Deputy Secretary for Operations stated that First Surety Corporation would send their information to the Insurance Commissioner, who would review it, and after issuing the certificate the Insurance Commissioner would forward it to DEP, who reviews it and would then place it in a file. However, the WVOIC informed the Post Audit Division that certificates of good standing are issued at the company's request and are not compulsory. Regarding First Surety Corporation, WVOIC does not issue a certificate of good standing to the DEP directly at DEP's request or on a set schedule. WVOIC issues the certificate of good standing to First Surety Corporation at the request of First Surety Corporation, and at the time it requests it. Further, in an email between the President of First Surety Corporation and the Acting Deputy Director of DEP's Division of Mining and Reclamation on June 26, 2019, the Acting Deputy Director stated:

The legislative auditor is requesting that we provide copes [sic] back to 2006 from First Surety under 38-2-11.3.a.3 in that these are supposed to be provided to the DEP Secretary on a quarterly basis.

Could you please send me all copies of all certificates you have starting in 2006 or the first year you started issuing surety bonds for West Virginia mining permits under WV Code 22-3.

Based on this email, it appears that the DEP does not have all of the required certificates of good standing in their records and it is unclear if they were ever submitted to the DEP Secretary as required.

Moreover, our review of WVOIC's examination reports on First Surety and other First Surety financial documents and reports obtained from the WVOIC and the SEC, disclose areas of concern regarding First Surety's financial solvency and administrative practices. These areas of concern, together with the fact that First Surety Corporation is the surety for \$47.8 million in mining and reclamation bonds, should prompt the DEP to closely monitor First Surety's potential to fulfill their surety obligations in the event of one or more bond forfeitures.

It is acknowledged by the State and DEP that mining and reclamation bonds will not cover the full costs of reclamation in the event of permit forfeiture. Therefore, DEP has established an alternative bonding system that provides additional funding for reclamation costs through a tax imposed on each ton of coal mined. These taxes are deposited into two separate accounts collectively referred to as Special Reclamation Funds. These Special Reclamation Funds were deemed fully solvent by an actuarial report in 2017, but that determination assumed solvency of the surety companies. A large-scale bankruptcy and forfeiture event could drain the reclamation funds, leaving them unable to fulfill federal requirements to perform reclamation tasks.

The Legislative Auditor is unaware of any contingency plans, so it is quite possible additional costs that may arise as the result of surety company insolvency could fall to the taxpayers, either via additional tax or potential job loss caused by increased tax burdens on mining companies. The funds currently hold roughly \$170 million. If a company the size of FSC were to become insolvent due to bond forfeitures, the reclamation funds could lose up to a third of their value. Since the DEP is solely reliant on information provided from a third party for assurance that companies executing sureties are financially sound, seeking the most reliable source of this assurance through the U.S. Department of Treasury T-Listing is the most effective means to ensure the State is financially protected from insolvent insurers executing surety bonds for mining reclamation.

Recommendations

1. The Legislative Auditor recommends DEP comply with Section 11.3.a.3 of 38 CSR 2 and require all surety companies to be T-Listed by the U.S. Department of the Treasury within four years of the issuance of each company's first mining and reclamation surety bond. Further, the Legislative Auditor recommends that the DEP immediately cease acceptance of mining reclamation surety bonds from First Surety Corporation and Quanta Insurance Company.
2. The Legislative Auditor recommends the DEP report back to the Post Audits Subcommittee in six months to provide an update on its compliance with the recommendation.

Appendix A

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

Post Audit Division

1900 Kanawha Blvd. East, Room W-329
Charleston, WV 25305-0610
(304) 347-4880

Justin Robinson
Director



September 11, 2019

Austin Caperton, Cabinet Secretary
WV Department of Environmental Protection
601 57th Street South East
Charleston, WV 25304

Delivered via Electronic Mail

Dear Cabinet Secretary Caperton:

This is to transmit a draft copy of our report concerning WV Surface Mining and Reclamation Rule 38 CSR 2 Section 11.3.a.3. The current draft contains some redundancy of information and may be revised further prior to release for clarity purposes, but the revisions will not materially change the facts contained in the report. This report is scheduled to be presented during the interim meeting of the Post Audits Subcommittee on Tuesday, September 24, 2019 at 1:00 pm in the Senate Finance Committee Room (451-M). We recommend that a representative from your agency be in attendance to respond to the report and answer any questions committee members may have during or after the meeting.

The Legislative Auditor is requesting a meeting to discuss this draft report on Thursday, September 12, 2019 in his office, room E-132. Please contact Stan Lynch, Audit Manager, at 304-347-4880 to schedule a time for this meeting. In addition, we would like to extend the opportunity for you to provide a response to the report. Please provide your written response by the close of business on Thursday, September 19, 2019 so that we may incorporate the response into the final print copy. Thank you for your cooperation.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson
Director

Enclosure

c: Jamie Chambers, Internal Auditor, WVDEP

Appendix B

Objective, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this review as authorized by Chapter 4, Article 2, Section 5 of the *West Virginia Code*, as amended.

Objective

The objective of this review is to determine the adequacy and legality of all non-quarry reclamation surety bonds held by the Division of Mining and Reclamation, and the companies that are producing the bonds.

Scope

The scope of this objective will be limited to all non-quarry reclamation surety bonds currently held by the Division of Mining and Reclamation, and to any company currently producing said sureties. The time period will cover the history of surety bonds and companies currently active, state agency reports from 2012-2019, and West Virginia Code and Rules including amendments, changes, and any other documentation from 2001-2019.

Methodology

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through correspondence with various agencies that oversee, collect, or maintain information. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the respective agency's position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

Audit staff examined the records of the WVDEP Division of Mining and Reclamation bonds in the All Bond Report and compared these records to information on file with the Office of the Secretary of State, the U.S. Department of the Treasury, and the West Virginia Office of the Insurance Commissioner.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix C

INTEROFFICE MEMORANDUM

TO: Stan Lynch, Deputy Director Post Audit

FROM: Jaclyn Schiffour, Counsel

SUBJECT: DEP Surety Bond Requirements

DATE: June 28, 2019

CC: Rich Olsen, Director Legislative Services
Justin Robinson, Director Post Audit

West Virginia Code §22-3-11 requires the Department of Environmental Protection to obtain performance bonds prior to the issuance of various permits. DEP was also granted rulemaking authority to prescribe rules relating to surety and insurance requirements. Currently, Post Audit is reviewing the legal requirements for corporate surety companies to function as third-party insurers for mine reclamation performance bonds. Primarily, Legislative Rule 38 CSR 2 outlines specific eligibility requirements for “Insurance and Bonding” in Section 11.

Question Presented: Are surety companies that issued their initial WV mining reclamation surety bonds more than four years ago, and have not obtained certificates of authority from the United States Department of the Treasury as acceptable sureties on federal bonds, ineligible to function as a third-party insurers for mining reclamation bonds under section 11.3.a.3 of 38 CSR 2?

Short Answer: It is likely that surety companies who have issued their initial bond more than four years ago and do not have a certificate of authority from the US Department of the Treasury **are ineligible** to function as third-party insurers for mining reclamation bonds.

Analysis: Legislative Rule 38 CSR 2 outlines specific eligibility requirements for “Insurance and Bonding” in Section 11. The Legislative Rule 38 CSR 2 (11.3.a.3) states:

“Any company that executes surety bonds in the State after July 1, 2001, must: (i) be recognized by the treasurer to the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds by being included on the Treasury Department’s listing of approved sureties (Department Circular 570); or (ii) submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner, and agree to submit to the Secretary on at least a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state. Companies not included on the United States Treasury Department’s listing of approved sureties must diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.

Based on the above rule, there are two conditions for a surety company to be a third-party insurer for mining reclamation bonds. The first, the company is already recognized by the US Department of Treasury and can present such a certificate. The second has several sub-conditions that must all be met in order for a company to be a third-party insurer for mining reclamation bonds. For a company to validly issue bonds under the second condition, a company must (1) present valid proof of a license by the WV Insurance Commissioner; (2) submit, at least quarterly, a certificate of good standing from the WV Insurance Commissioner or a certificate of good standing from any other state in which in the company is domiciled, and (3) diligently pursue application to and acceptance of recognition by the US Department of Treasury as an acceptable surety for federal bonds within four years. There is no mention or cross citation within Section 11 of any exemption standards that may be applicable to companies seeking a certificate of authority from the US Department of the Treasury, therefore, it is unlikely any time extensions to become compliant with this rule would be granted.

While operating under the second condition, it seems that a surety company is required to obtain a certificate of authority from the US Department of Treasury within four years. However, it is unclear when the four year clock starts to run, whether it is upon first issuing a surety bond in this state, or if it began at the time the rule was promulgated meaning all companies would be currently required to have a certificate of authority. Although, a plain reading would seem to indicate that the four-year clock would start upon first operating under the second condition. This would be the most beneficial to new companies attempting to start business operations in West Virginia and is further evidenced by meeting minutes as the intent for the rule change. Therefore, the most likely conclusion is that any surety companies operating as third-party insurers for mining and reclamation bonds would need to have a certificate of authority from the US Department of Treasury within four years of the initial surety bond.

In conclusion, surety companies that issued their initial WV mining reclamation surety bonds more than four years ago, and have not obtained certificates of authority from the United States Department of the Treasury as acceptable sureties on federal bonds would likely be ineligible to function as a third-party insurers for mining reclamation bonds under section 11.3.a.3 of 38 CSR 2.

Appendix D

West Virginia Department of Environmental Protection
ADVISORY COUNCIL TELECONFERENCE MINUTES

Thursday - September 15, 2005
601 57th Street, SE, Charleston, WV
West Virginia Conference Room – 3rd Floor

ATTENDEES:

Advisory Council Members:

Larry Harris
Rick Roberts
Jason Bostic for Bill Raney

***NOTE:** Lisa Dooley did not participate in the teleconference – she did offer suggestions regarding 47CSR61 by e-mail. (see attached)

DEP:

Stephanie R. Timmermeyer, Cabinet Secretary
Karen G. Watson, Assistant General Counsel
Jessica Greathouse, Chief Communication Officer – WVDEP – Public Information Office
Mike Dorsey – WVDEP - DWWM
Mike Johnson – WVDEP – DWWM
Charlie Sturey - WVDEP – DMR
Pam Nixon – WVDEP - OA

Cabinet Secretary Stephanie R. Timmermeyer began with general information about legislation. She said that the agency is waiting on the Governor's office, and once finalized will send information to the Council for their information. She said the Council could discuss the subject in December or in a special meeting before that if they desire.

- **47CSR61 - Community Infrastructure Investment Program**

This legislative rule establishes requirements governing the Community Infrastructure Investment Program established pursuant to W.Va. Code §22-28-1 et seq. The program will facilitate the construction or expansion of project facilities for the promotion of economic development and the protection of public health and environment in the state.

Mike Johnson summarized the following:

- The 2005 Legislature passed Senate Bill 700 which created within DEP a “Community Infrastructure Investment Program”, dedicated to facilitate the construction of new or expanded water and sewer facilities that promote economic development while protecting public health and the environment.

- The Legislature found that private businesses are in need of these services and are willing to initially pay for the construction of these facilities, then after construction is completed to transfer them to a Publicly Owned Treatment Works (POTW), at no cost to the POTW.
- Any municipality or public service district can enter into an “agreement” with a private business to undertake a project under this statute.
- Both the POTW and the private business entity can jointly submit an application (with the Agreement) to DEP for approval. If DEP approves the arrangement, it will issue a “Certificate of Appropriateness” signifying its approval.
- Under this new law, DEP is the sole agency approving these type projects up front. The Public Service Commission of WV is no longer involved until after the transfer of facilities takes place.
- DEP filed an emergency rule to implement this new law on August 1, 2005, as authorized in the law. On August 10, 2005, DEP also filed a Notice of a Public Hearing setting the hearing for September 27, 2005, at 6pm in Morgantown at WVU’s Natural Resource Center for Coal and Energy.

The emergency rule basically gives the requirements for filing an application with DEP, including the Investment Agreement. This process takes place after a permit has been issued by DEP (and/or the Bureau for Public Health). DEP has 30 days after receipt of a complete application to render its decision. The application fee to accompany the application is \$3,000.

Larry Harris asked could this be any type of business. Mike Johnson replied yes.

Jason Bostic asked if there is any other matter for the PSC to approve. Mike Johnson responded the PSC only reviews the project after construction – after the facility is transferred to the public utility. Then the PSC has oversight.

Larry Harris wanted to know if a mining company could participate in the program. Mike Johnson replied “yes.”

- **38CSR2 - Conditions for Surety Bonds**

Charlie Sturey discussed the following proposed revision involving surety bonds to 38CSR2:

11.3 Bond Instruments.

11.3.a. Surety bonds shall be subject to the following conditions:

...

11.3.a.3. Surety received after July 1, 2001 must: (i) be recognized by the treasurer of the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds, or (ii) submit to the Secretary proof that the surety holds a valid license issued by the West Virginia Insurance Commissioner and agree to submit on at least a quarterly basis a certificate of good standing or other evidence demonstrating that the surety remains licensed or otherwise in good standing with the West Virginia Insurance Commissioner and the insurance regulator of its domiciliary state.

Charlie explained that the current rule prevents new surety companies that do not currently issue federal bonds, but are otherwise in good financial condition, from doing business as sureties on mining and reclamation bonds. The agency did not intend this result when it adopted the original language; it only used the federal requirement as a way to have someone with financial expertise outside the agency assess a surety's financial condition. To be T-Listed, a surety has to do business for at least 2 years, preventing new companies from meeting the requirement.

The proposed rule change will allow a company to issue mining bonds as long as they meet the federal T-Listing requirement within four (4) years. The agency will file the rule as an emergency rule next week and hold a public hearing the end of October.

Jason Bostic asked if the current language is unique to West Virginia, and Charlie responded that a few other states have a similar requirement.

At the conclusion of the discussion on 38CSR2, Secretary Timmermeyer asked the Council if they had any questions for the staff present for the teleconference call.

Larry Harris asked how the studies on unisex fish are coming along. Bill Brannon responded the agency is still working on the issue and is looking at other watersheds. Larry would like a copy of the unisex news release.

Jason Bostic said the Coal Association might have some suggested revisions to the portion of the mining rule involving forestry and the soil overburden issue. The Secretary suggested they submit any suggestions they have in writing to the agency for its consideration.

Karen Watson, Assistant General Counsel, let the Council know that Trish would be e-mailing them with the upcoming date of our next meeting. We are looking at the first week in December.

Karen adjourned the meeting.

DEPARTMENT OF ENVIRONMENTAL PROTECTION
BRIEFING DOCUMENT

Rule Title: West Virginia Surface Mining Rule

A. AUTHORITY: W. Va. Code § 22-3-4

B: SUMMARY OF RULE:

The current rule requires that after July 1, 2001, a surety must be recognized by the Treasurer of the State as holding a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds (otherwise referred to as being "T-Listed"). The proposed amendment to 11.3.a not only addresses the concerns of DEP by providing to DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-Listed to provide surety bonds in West Virginia

C. STATE OF CIRCUMSTANCES THAT REQUIRE RULE:

The current rule requires that after July 1, 2001, a surety must be recognized by the Treasurer of the State as holding a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds (otherwise referred to as being "T-Listed").

This standard was adopted by the Department of Environmental Protection ("DEP") to address concerns about the financial solvency of sureties providing reclamation bonds in West Virginia. The DEP did not have the necessary resources or expertise to regularly and timely monitor the financial condition of sureties doing business in West Virginia. A surety that is T-Listed is required to provide on regular basis financial information to the Department of Treasury, which reviews this information and provides its findings to state regulatory agencies. While this information provided by the Department of Treasury has been helpful, this restriction has prevented sureties that are not T-Listed, that are otherwise in good financial condition, from providing reclamation bonds in West Virginia. This, along with other reasons, has adversely impacted the market for reclamation bonds in West Virginia. Further, since a surety must have at least two years experience providing surety bonds before it can be T-Listed, a new insurance company or an existing insurance company that has not previously issued surety bonds cannot offer surety bonds in West Virginia.

The proposed amendment to 11.3.a not only addresses the concerns of DEP by providing to DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-Listed to provide surety bonds in West Virginia.

The passage of this amendment will allow West Virginia to address West Virginia's problems and promote West Virginia's economy.

D. FEDERAL COUNTERPART REGULATIONS – INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

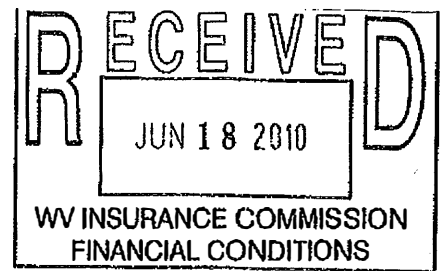
There is no federal counterpart regulation, thus no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3 c, the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitution of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

The agency has presented the proposed rule to the Environment Protection Advisory Council at its meeting on September 15, 2005. Minutes of the Council's meeting are attached.



west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street SE
Charleston, WV 25304
304-926-0490

Joe Manchin III, Governor
Randy Huffman, Cabinet Secretary
dep.wv.gov

June 16, 2010

J. Leah Cooper
West Virginia Division of Insurance
Financial Conditions Section
1124 Smith Street
Charleston, West Virginia 25305

RE: Surety Bonds

Dear Ms. Cooper:

We have been asked by Bob Kenney, President of First Surety, to provide you with the DEP's comments on the meaning of 38 CSR § 2-11.3.a.3 as it applies to First Surety. We have been advised that there is some confusion regarding the interpretation of this regulation regarding when the four year timeframe begins under this section for determining if a surety company is in compliance with its Treasury Listing (T-Listing) requirement.

As you may know, DEP developed the requirement that a surety company have a T Listing in order to protect itself from potential insolvent insurers. The Frontier Insurance Company insolvency prompted this rule change.

We understand that before a surety company may apply for a T Listing, it must have, among other requirements, at least three years experience, reinsurance and audited financial statements covering both. We understand the First Surety acquired reinsurance effective April 1, 2009, has recently obtained audited financials for the minimum period of time necessary to apply for a T listing and, having met the minimum requirements necessary to make an application, will be submitting this application soon.

The DEP interprets 38 CSR § 2-11.3.a.3 to require an insurer to submit its application for T listing at earliest possible time after it is able to satisfy all of the Treasury Department's minimum requirements (at least three years experience, reinsurance and audited financial statements covering both) aggressively seek the T Listing, filing each year, attempt to cure any defects in its application that may impact the issuance of the T Listing by the Treasury Department and obtain the T listing within four years after it has satisfied these minimum requirements.

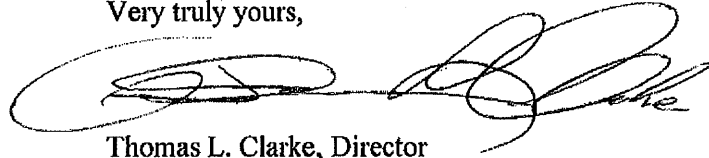
Should First Surety be unsuccessful in obtaining T listing within four years, the DEP would have to re-evaluate the manner in which its regulations apply at that time. In that event, the DEP would likely cease acceptance of new surety bonds from First Surety. If First Surety continues to meet state solvency requirements, I do not anticipate that the DEP would regard any surety bonds lawfully written by First Surety during this four year period to be immediately invalid. Other, more specific, questions as to how the DEP's regulations apply would have to be addressed under the circumstances that exist at that time.

Promoting a healthy environment.

J. Leah Cooper
June 16, 2010
Page Two

With respect to First Surety, the fact that this is an insurer domiciled in West Virginia, with its financial condition being constantly scrutinized by your office, gives us far more comfort than we would have with a foreign insurer.

Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Clarke', written over a horizontal line.

Thomas L. Clarke, Director
Division of Mining and Reclamation

TLC/cm

cc: Robert Kenney

From: Robert Hrezo
Sent: Tuesday, September 17, 2013 11:22 AM
To: Tom Clarke (Thomas.L.Clarke@wv.gov)
Cc: Leah Cooper; Jamie Taylor
Subject: First Surety Corporation T-Listing Status
Attachments: FSC DEP Resp to T-Listing.pdf

Dear Mr. Clarke:

Allow me to introduce myself. My name is Rob Hrezo and I am the Financial Analyst assigned to cover First Surety Corporation for the West Virginia Offices of the Insurance Commissioner. Please find attached a copy of the letter sent to J. Leah Cooper dated June 16, 2010 regarding First Surety Corporation's T-Listing requirement for writing mine reclamation surety bonds. Please make the determination when the four year time period has or will expire(d) for First Surety to have obtained the T-Listing to meet WV DEP regulations. Per paragraph 4 of your letter, it appears that the Company must obtain the T-Listing within four years after it has satisfied the minimum requirements. The minimum requirements listed are three years of experience, reinsurance, and audited financial statements covering both. First Surety began operations January 1, 2006 and met the 3 years of experience requirement on December 31, 2008. The Company obtained reinsurance on April 1, 2009. The audited financial statements for the period ending December 31, 2008 was received by our offices on June 1, 2009.

Paragraph 3 of the letter indicates that the Company obtained the audited financial statements for the minimum period of time necessary to apply for a T-Listing. And having met the minimum requirements necessary to make an application was preparing to do so then. The Company filed its application in August 2010. To date, the Company has not obtained the T-Listing. Has the four year period expired on June 1, 2013 four years following when the third audit report was received? Or will the four year period expire in June 2014 four years after your letter when the Company had satisfied the minimum requirements to make an application? Or will it expire in August 2014 four years after the original application was made? Your assistance in determining when the four year period for obtaining the "T-Listing" by FSC expires or if it has already expired is greatly appreciated.

If you would like to set up a time to discuss the situation and its implications, we would be happy to do so. Let me know when is a good time for you and who you would like to include in the discussions. I can be reached via return e-mail or at the number listed below. Thank you in advance for your time and assistance in this matter.

Sincerely,

Robert J. Hrezo
Financial Analyst
WV Offices of the Insurance Commissioner
Financial Conditions Division
(304) 558-2100 x 1103
Robert.Hrezo@wvinsurance.gov



Offices of the Insurance Commissioner

EARL RAY TOMBLIN

Governor

MICHAEL D. RILEY
Insurance Commissioner

October 3, 2013

Certified Mail: 7012 2210 0000 4976 1361

Thomas L. Clarke, Director
Division of Mining and Reclamation
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25301

Re: First Surety Corporation Treasury Listing Requirement

Dear Mr. Clarke:

The purpose of this letter is to request DEP's interpretation of Regulation 38 CSR § 2-11.3.a.3 regarding First Surety Corporation's ("FSC") timeframe to be compliant with the Federal Treasury Listing ("T-Listing") requirement.

To provide some background as to the WV Offices of the Insurance Commissioner's ("OIC") role in regulation of insurance companies, the primary function of the Financial Analysis Section at the OIC is to provide an in-house desk audit of the annual statement and all other supplemental filings made by an insurer. Financial Analysis monitors the insurer's statutory compliance and solvency on a continuous and ongoing basis. The Financial Analyst evaluates data derived from financial statements and other sources to reach conclusions regarding an insurer's current and future financial stability. As part of the analysis for FSC, the OIC has listed the T-Listing requirement as a prospective risk. A prospective risk is a residual risk that impacts the future operations of an insurer. The business plan on file with the OIC indicates that FSC's primary business will be focused on providing coal reclamation bonds.

Please find attached a copy of the letter sent to me dated June 16, 2010 regarding FSC's T-Listing requirement for writing mine reclamation surety bonds. Per paragraph 4 of your letter, it appears that the Company must obtain the T-Listing within four years after it has satisfied the minimum requirements. The minimum requirements listed are: 1.) three years of experience; 2.) reinsurance; and 3.) audited financial statements covering both. First Surety began operations January 1, 2006 and met requirement #1 – the 3 years of experience requirement on December 31, 2008. The Company



First Surety Corporation
Mr. Clarke
October 3, 2013
Page 2

obtained reinsurance on April 1, 2009, meeting requirement #2. The audited financial statements for the period ending December 31, 2008 were received by our offices on June 1, 2009, meeting requirement #3.

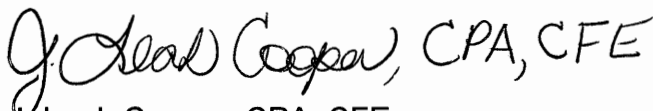
Paragraph 3 of your letter indicates that the Company obtained the audited financial statements for the minimum period of time necessary to apply for a T-Listing. Therefore having met the minimum requirements necessary to make an application, it was reported that FSC was preparing to do so at that time. The Company filed its application for T-Listing in August 2010. To date, the Company has not obtained the T-Listing, however, per the Company; they continue to actively seek T-Listing approval.

As the T-Listing requirement has been noted by the OIC as a prospective risk facing FSC, it is essential that the OIC determine FSC's ability to maintain their current business plan of offering coal mine reclamation bonds in West Virginia should the T-Listing not be obtained in the timeframe DEP has established. Specifically requested is DEP's determination as to the **date** (bolded for emphasis) for which FSC must obtain the T-Listing to meet WV DEP requirements.

OIC has previously requested DEP's interpretation via an email to you dated September 17, 2013. Please see attached.

Until a final decision is determined on the date T-Listing is required by FSC, we ask that DEP keep this correspondence confidential. Due to the critical nature of the issue, we respectively request DEP's determination be provided to the OIC by October 31, 2013. If this timeframe is not feasible, please let us know and if you prefer to set up a time to discuss the situation and its implications, we would be happy to do so. Thank you in advance for your time and assistance in this matter.

Sincerely,



J. Leah Cooper, CPA, CFE
Director/Chief Examiner

Enclosures: DEP Letter dated June 16, 2010
Email Request dated September 17, 2013

cc: Michael D. Riley, Insurance Commissioner

Appendix H



west virginia department of environmental protection

Office of Legal Services
601 57th Street, SE
Charleston, WV 25304
Phone: (304) 926-0460
Fax: (304) 926-0461

Austin Caperton, Cabinet Secretary
dep.wv.gov

Jason Wandling
jason.e.wandling@wv.gov

August 14, 2019

Via email to:
stan.lynch@wvlegislature.gov and
justin.robinson@wvlegislature.gov

Mr. Stanley Lynch
Audit Manager
Legislative Post Audit Division
1900 Kanawha Blvd., E.
Bldg 1, Rm W-329
Charleston, WV 25305-0610

Subject: WVDEP Surety Bonds

Dear Mr. Lynch:

During the Legislative Auditor's review of the DEP Division of Mining and Reclamation's surety bond requirements, counsel for the Post Audit determined that the WVDEP DMR program improperly allows some surety companies, such as First Surety, to provide bonding in West Virginia despite the fact that they "issued their initial bond more than four years and do not have a certificate of authority from the US Department of the Treasury," according to Post Audit's interpretation of West Virginia Code of State Rules §38-2-11.3.a.3, as authorized by West Virginia Code §22-3-11. That rule states:

Any company that executes surety bonds in the State after July 1, 2001, must: (i) be recognized by the treasurer to the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds by being included on the Treasury Department's listing of approved sureties (Department Circular 570); or (ii) submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner, and agree to submit to the Secretary on at least a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state. Companies not included on the United States Treasury Department's listing of approved

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sureties must diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.

Pursuant to Post Audit's interpretation of this rule, surety companies who execute surety bonds in West Virginia must 1. Be recognized by the West Virginia Treasurer as holding a certificate of authority from the United States Department of the Treasury or 2. submit proof to DEP that the surety company holds a valid license from the West Virginia Insurance Commissioner (and agree to submit quarterly certificates of good standing from the West Virginia Insurance Commissioner) and other evidence that shows the surety company is in good standing of whatever state in which the company is domiciled. W. Va. C.S.R. §38-2-11.3.a.3.

Counsel for the Post Audit, however, interpreted the remainder of the rule to require *all* companies not included on the United States Treasury Department's listing of approved sureties "must diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and within four (4) years, obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds." *Id.*

The DEP disagrees with this interpretation. The DEP maintains that the second clause of the legislative rule is intended only to apply to those surety companies who seek to fulfill the requirements of W. Va. C.S.R. §38-2-11.3.a.3(i) and *not* companies that seek to fulfill the requirements of W. Va. C.S.R. §38-2-11.3.a.3(ii). Accordingly, in DEP's view, any company that seeks to provide surety bonds in West Virginia must take one (or both) of the two optional courses. The final sentence applies *only* to companies who seek to provide surety bonds in West Virginia pursuant to W. Va. C.S.R. §38-2-11.3.a.3(i). Consequently, companies that are able to "submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner, and agree to submit to the Secretary on at least a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state," need only do so. Such companies are not bound by the requirements for those companies that seek United State Treasury Department listing.

DEP disagrees with Post Audit counsel's assertion that all surety companies must meet both subsections (i) and (ii). Rather, as shown above, the rule presents two paths to surety licensure in West Virginia and such companies may choose which they prefer.

Critically, DEP relies upon the Briefing Document that accompanied submission of the rule to the Legislature. See, Exhibit One. The revision of the legislative rule was undertaken explicitly to address "the concerns of DEP by providing to DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-Listed to provide surety bonds in West Virginia." *Id.* at 1.

The Briefing Document acknowledged that the then-current rule required all companies be T-Listed. The Briefing Document noted that the change was required because "While this information provided by the Department of the Treasury has been helpful, this restriction has prevented sureties that are not T-Listed, that are otherwise in good financial condition, from providing reclamation bonds in West Virginia. This, along with other reasons, has adversely impacted the market for reclamation bonds in West Virginia." The Briefing Document *explicitly*

noted that the amendment to the rule was to provide “DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-listed to provide surety bonds in West Virginia.”

Accordingly, the DEP respectfully disagrees with the Post Audit counsel’s memorandum and instead points to the clear legislative history of the rule to support the DEP’s acceptance of sureties that are not T-Listed.

Regards,



Jason Wandling

EXHIBIT ONE

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #1

Do Not Mark In This Box

FILED

2005 SEP 21 P 2:00

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE
Ofc. of Mining & Reclamation

AGENCY: West Virginia Department of Environmental Protection TITLE NUMBER: 38

RULE TYPE: Legislative CITE AUTHORITY: W.Va. Code §22-3-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 2

TITLE OF RULE BEING AMENDED: West Virginia Surface Mining Rule

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

DATE OF PUBLIC HEARING: Thursday, October 27, 2005 TIME: 6:00 pm.

LOCATION OF PUBLIC HEARING: West Virginia Department of Environmental Protection

Coopers Rock Room - A

610 57th St.

Charleston, WV 25304

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS:

WVDEP - Division of Mining and Reclamation
Charlie Sturey

610 57th St.

Charleston, WV 25304

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Stephanie F. Timmerman
Authorized Signature

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEFING DOCUMENT

Rule Title: West Virginia Surface Mining Rule

A. AUTHORITY: W. Va. Code § 22-3-4

B. SUMMARY OF RULE:

The current rule requires that after July 1, 2001, a surety must be recognized by the Treasurer of the State as holding a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds (otherwise referred to as being "T-Listed"). The proposed amendment to 11.3.a not only addresses the concerns of DEP by providing to DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-Listed to provide surety bonds in West Virginia

C. STATE OF CIRCUMSTANCES THAT REQUIRE RULE:

The current rule requires that after July 1, 2001, a surety must be recognized by the Treasurer of the State as holding a certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds (otherwise referred to as being "T-Listed").

This standard was adopted by the Department of Environmental Protection ("DEP") to address concerns about the financial solvency of sureties providing reclamation bonds in West Virginia. The DEP did not have the necessary resources or expertise to regularly and timely monitor the financial condition of sureties doing business in West Virginia. A surety that is T-Listed is required to provide on regular basis financial information to the Department of Treasury, which reviews this information and provides its findings to state regulatory agencies. While this information provided by the Department of Treasury has been helpful, this restriction has prevented sureties that are not T-Listed, that are otherwise in good financial condition, from providing reclamation bonds in West Virginia. This, along with other reasons, has adversely impacted the market for reclamation bonds in West Virginia. Further, since a surety must have at least two years experience providing surety bonds before it can be T-Listed, a new insurance company or an existing insurance company that has not previously issued surety bonds cannot offer surety bonds in West Virginia.

The proposed amendment to 11.3.a not only addresses the concerns of DEP by providing to DEP an alternative source of reliable financial information about the surety, but also allows sureties that are in good financial condition but are not T-Listed to provide surety bonds in West Virginia.

The passage of this amendment will allow West Virginia to address West Virginia's problems and promote West Virginia's economy.

D. FEDERAL COUNTERPART REGULATIONS – INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:

There is no federal counterpart regulation, thus no determination of stringency is required.

E. CONSTITUTIONAL TAKINGS DETERMINATION:

In accordance with §22-1A-1 and 3 c, the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitution of West Virginia and the United States of America.

F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:

The agency has presented the proposed rule to the Environment Protection Advisory Council at its meeting on September 15, 2005. Minutes of the Council's meeting are attached.

Appendix I



west virginia department of environmental protection

Executive Office
601 57th Street, SE
Charleston, WV 25304
Phone: (304) 926-0460
Fax: (304) 926-0461

Austin Caperton, Cabinet Secretary
dep.wv.gov

September 20, 2019

Mr. Justin Robinson
Director
West Virginia Legislative Auditor's Office
1900 Kanawha Blvd., E., Rm W329
Charleston, WV 25305-0610

By email to: justin.robinson@wvlegislature.gov

Subject: West Virginia Department of Environmental Protection
Legislative Audit Report Draft Dated September 18, 2019

Dear Mr. Robinson:

Thank you for providing the September 18, 2019 draft of the Post Audit Division's recommendations regarding the West Virginia Department of Environmental Protection's ("DEP") enforcement of West Virginia Code of State Rules § 38-2-11.3.a.3. As a state agency, we take seriously the need for our agency's commitment to the statutes and legislative rules that govern and define our mission. Additionally, my staff and I enjoyed meeting you and your colleagues from the Post Audit Division during your review. I applaud the professionalism and attention to detail you and your staff exhibited during this process.

The DEP has reviewed your September 18, 2019 draft of the Post Audit Division's recommendations and we support your findings and recommendations. The DEP has met with the Insurance Commissioner and his staff and have agreed that the DEP will submit a rule revision to the Legislature that will explicitly require that companies that wish to offer surety bonds for coal mining in West Virginia must be T-listed. The rule will afford companies who do not have a T-listing time to obtain it on or before January 1, 2021.

The agency will have a representative present to attend and respond to questions posed by the Post Audit Subcommittee at the September 24 hearing. If you have additional comments or

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questions beforehand, please feel free to contact me or Jason Wandling, our general counsel. Thank you for the opportunity to respond to the Post Audit Division's recommendations.

Sincerely,



Austin Caperton

Appendix J

11.3. Bond Instruments.

11.3.a. Surety bonds shall be subject to the following conditions:

11.3.a.1. A surety bond shall be executed by the operator and a corporate surety licensed to do business in the State of West Virginia and approved by the Secretary.

11.3.a.2. Surety bonds shall be noncancelable during their term except that surety bond coverage may be adjusted in accordance with the provisions of subsection 12.3 of this rule.

11.3.a.3. Any company that executes surety bonds in the State after ~~July 1, 2001~~ January 1, 2021, must: (i) be recognized by the treasurer to the state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on ~~federal~~ bonds by being included on the Treasury Department's listing of approved sureties (Department Circular 570); ~~or~~ and (ii) submit proof to the Secretary that it holds a valid license issued by the West Virginia Insurance Commissioner; and agree to submit to the Secretary on ~~at least~~ a quarterly basis a certificate of good standing from the West Virginia Insurance Commissioner and such other evidence from the insurance regulator of its domiciliary state, if other than West Virginia, demonstrating that it is also in good standing in that state. Companies not included on the United States Treasury Department's listing of approved sureties must ~~diligently pursue application for listing, submit evidence on a semi-annual basis demonstrating that they are pursuing such listing, and within four (4) years,~~ obtain a certificate of authority from the United States Department of the Treasury as an acceptable surety on ~~federal~~ bonds on or before January 1, 2021. Companies that have not secured a current certificate of authority from the United States Department of the Treasury as an acceptable surety on bonds by being included on the Treasury Department's listing of approved sureties (Department Circular 570) on or before January 1, 2021 may be granted an exemption from this rule if the company is in the process of securing such listing, but such exemption will not be extended for any reason beyond July 1, 2021.

Appendix K

Coal Companies with Active Reclamation Bonds Issued Through First Surety Corporation			
No.	Coal Company	Bond Issue Date	Bond Amount
1	AMERICAN MINING GROUP, LLC	10/23/2018	\$ 19,880
2	AMERICAN MINING GROUP, LLC	10/23/2018	\$ 39,760
3	AMERICAN MINING GROUP, LLC	10/23/2018	\$ 88,040
4	AMERICAN MINING GROUP, LLC	4/9/2019	\$ 164,720
5	AWARD DEVELOPMENT LLC	6/24/2015	\$ 215,000
6	AWARD DEVELOPMENT LLC	5/29/2014	\$ 230,040
7	AWARD DEVELOPMENT LLC	12/16/2014	\$ 25,000
8	BLUESTONE COAL CORPORATION	8/3/2010	\$ 57,000
9	BLUESTONE COAL CORPORATION	8/3/2010	\$ 14,000
10	BLUESTONE COAL CORPORATION	8/3/2010	\$ 31,800
11	BLUESTONE COAL CORPORATION	8/3/2010	\$ 65,000
12	BLUESTONE COAL CORPORATION	11/30/2007	\$ 452,200
13	BLUESTONE COAL CORPORATION	7/23/2008	\$ 346,800
14	BLUESTONE COAL CORPORATION	6/3/2010	\$ 74,800
15	BLUESTONE COAL CORPORATION	6/28/2010	\$ 190,400
16	BLUESTONE COAL CORPORATION	12/23/2010	\$ 163,200
17	BLUESTONE COAL CORPORATION	12/27/2010	\$ 476,000
18	BLUESTONE COAL CORPORATION	12/27/2010	\$ 210,800
19	BLUESTONE COAL CORPORATION	12/27/2010	\$ 40,800
20	BLUESTONE COAL CORPORATION	1/11/2008	\$ 239,400
21	BLUESTONE COAL CORPORATION	7/11/2008	\$ 258,400
22	BLUESTONE COAL CORPORATION	12/22/2009	\$ 231,800
23	BLUESTONE COAL CORPORATION	8/19/2010	\$ 98,800
24	BLUESTONE COAL CORPORATION	10/11/2010	\$ 41,800
25	BLUESTONE COAL CORPORATION	12/27/2010	\$ 2,280,000
26	BLUESTONE COAL CORPORATION	12/27/2010	\$ 14,300
27	BLUESTONE COAL CORPORATION	8/3/2010	\$ 14,840
28	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
29	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
30	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
31	BLUESTONE COAL CORPORATION	11/30/2007	\$ 16,240
32	BLUESTONE COAL CORPORATION	11/30/2007	\$ 18,560
33	BLUESTONE COAL CORPORATION	12/27/2010	\$ 23,200
34	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
35	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
36	BLUESTONE COAL CORPORATION	4/25/2010	\$ 6,360
37	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,600
38	BLUESTONE COAL CORPORATION	8/3/2010	\$ 44,160
39	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
40	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
41	BLUESTONE COAL CORPORATION	8/3/2010	\$ 11,548
42	BLUESTONE COAL CORPORATION	12/27/2010	\$ 10,888
43	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
44	BLUESTONE COAL CORPORATION	8/3/2010	\$ 12,320
45	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
46	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
47	BLUESTONE COAL CORPORATION	8/3/2010	\$ 10,000
48	BRUSHY FORK RESOURCES LLC	12/27/2013	\$ 233,200
49	BRUSHY FORK RESOURCES LLC	10/10/2014	\$ 42,400
50	COVINGTON COAL COMPANY, LLC	8/1/2012	\$ 720,000
51	COVINGTON COAL COMPANY, LLC	8/1/2012	\$ 215,000
52	COVINGTON COAL COMPANY, LLC	8/1/2012	\$ 40,000
53	COVINGTON COAL COMPANY, LLC	8/1/2012	\$ 325,000
54	COVINGTON COAL COMPANY, LLC	8/1/2012	\$ 310,000
55	COVINGTON COAL COMPANY, LLC	10/10/2013	\$ 180,000
56	COVINGTON COAL COMPANY, LLC	10/11/2013	\$ 100,000
57	COVINGTON COAL COMPANY, LLC	10/28/2014	\$ 45,000
58	D. & L. COAL COMPANY, INCORPORATED	12/19/2013	\$ 26,250
59	D. & L. COAL COMPANY, INCORPORATED	12/19/2013	\$ 113,000
60	D. & L. COAL COMPANY, INCORPORATED	12/19/2013	\$ 14,688

61	D. & L. COAL COMPANY, INCORPORATED	12/19/2013	\$ 55,000
62	D. & L. COAL COMPANY, INCORPORATED	12/19/2013	\$ 61,000
63	DFM COAL, LLC	8/3/2011	\$ 1,196,160
64	DP SOUTHBOUND COAL CO. LLC	8/13/2013	\$ 20,800
65	EAGLE MINING, LLC	12/16/2015	\$ 1,128,960
66	EAGLE MINING, LLC	12/16/2015	\$ 576,000
67	EAGLE MINING, LLC	12/16/2015	\$ 729,600
68	EAGLE MINING, LLC	12/16/2015	\$ 353,280
69	EAGLE MINING, LLC	12/16/2015	\$ 533,760
70	EAGLE MINING, LLC	12/16/2015	\$ 552,960
71	EAGLE MINING, LLC	2/17/2016	\$ 15,360
72	EAGLE MINING, LLC	1/11/2019	\$ 2,803,847
73	EAGLE MINING, LLC	12/16/2015	\$ 25,000
74	EAGLE MINING, LLC	12/16/2015	\$ 126,736
75	EAGLE MINING, LLC	12/16/2015	\$ 180,848
76	EAGLE MINING, LLC	12/16/2015	\$ 120,408
77	EAGLE MINING, LLC	12/16/2015	\$ 144,180
78	EAGLE MINING, LLC	12/16/2015	\$ 185,000
79	EAGLE MINING, LLC	12/16/2015	\$ 43,448
80	EAGLE MINING, LLC	12/16/2015	\$ 111,072
81	EAGLE MINING, LLC	6/5/2016	\$ 20,000
82	EAGLE MINING, LLC	1/11/2019	\$ 2,803,847
83	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 34,000
84	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 27,200
85	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 51,000
86	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 40,800
87	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 27,200
88	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 23,800
89	GME MINING & RECLAMATION, INC.	8/30/2018	\$ 20,400
90	GOLD RESOURCES, LLC	10/7/2008	\$ 5,000
91	JAMES C. JUSTICE COMPANIES, INC.	9/28/2009	\$ 20,500
92	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 23,200
93	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 20,880
94	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 10,000
95	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 13,920
96	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 30,160
97	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 37,120
98	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 34,800
99	JUSTICE HIGHWALL MINING, INC	11/30/2007	\$ 34,800
100	JUSTICE HIGHWALL MINING, INC	1/11/2008	\$ 46,400
101	JUSTICE HIGHWALL MINING, INC	1/11/2008	\$ 23,200
102	JUSTICE HIGHWALL MINING, INC	4/10/2008	\$ 34,800
103	JUSTICE HIGHWALL MINING, INC	9/12/2008	\$ 20,880
104	JUSTICE HIGHWALL MINING, INC	9/12/2008	\$ 20,880
105	JUSTICE HIGHWALL MINING, INC	5/25/2010	\$ 16,240
106	JUSTICE HIGHWALL MINING, INC	5/25/2010	\$ 23,200
107	JUSTICE HIGHWALL MINING, INC	5/25/2010	\$ 18,560
108	JUSTICE HIGHWALL MINING, INC	5/25/2010	\$ 64,960
109	JUSTICE HIGHWALL MINING, INC	6/28/2010	\$ 37,120
110	JUSTICE HIGHWALL MINING, INC	3/8/2012	\$ 16,240
111	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 43,560
112	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 63,360
113	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 71,280
114	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 23,760
115	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 99,000
116	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 95,040
117	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 118,800
118	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 79,200
119	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 99,000
120	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 59,400
121	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 79,200
122	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 95,040
123	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 102,960

124	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 91,080
125	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 99,000
126	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 27,720
127	KENTUCKY FUEL CORPORATION	5/15/2009	\$ 99,000
128	KENTUCKY FUEL CORPORATION	6/15/2009	\$ 49,200
129	KENTUCKY FUEL CORPORATION	6/15/2009	\$ 29,520
130	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	1/20/2014	\$ 90,480
131	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	5/7/2014	\$ 170,520
132	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	5/7/2014	\$ 160,080
133	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	7/29/2014	\$ 111,360
134	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	7/29/2014	\$ 128,760
135	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	7/29/2014	\$ 59,160
136	KEYSTONE INDUSTRIES, LLC DBA KEYSTONE DEVELOPMENT, LLC	7/29/2014	\$ 45,240
137	NUFAC MINING COMPANY, INC.	1/25/2011	\$ 1,031,000
138	NUFAC MINING COMPANY, INC.	1/25/2011	\$ 65,000
139	NUFAC MINING COMPANY, INC.	1/25/2011	\$ 10,000
140	NUFAC MINING COMPANY, INC.	1/25/2011	\$ 10,000
141	NUFAC MINING COMPANY, INC.	1/25/2011	\$ 238,080
142	OXFORD MINING COMPANY, LLC	7/24/2007	\$ 100,096
143	OXFORD MINING COMPANY, LLC	7/24/2007	\$ 93,568
144	OXFORD MINING COMPANY, LLC	7/24/2007	\$ 82,688
145	OXFORD MINING COMPANY, LLC	7/24/2007	\$ 23,936
146	OXFORD MINING COMPANY, LLC	7/24/2007	\$ 43,520
147	OXFORD MINING COMPANY, LLC	8/22/2007	\$ 45,696
148	OXFORD MINING COMPANY, LLC	9/2/2008	\$ 10,000
149	POINT LICK ENERGY LLC	2/13/2019	\$ 508,280
150	POINT LICK ENERGY LLC	2/13/2019	\$ 21,240
151	POINT LICK ENERGY LLC	2/13/2019	\$ 181,720
152	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 17,000
153	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 48,720
154	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 226,200
155	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 38,280
156	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 55,680
157	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 76,560
158	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 55,680
159	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 261,000
160	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 45,240
161	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 264,480
162	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 215,760
163	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 153,120
164	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 254,040
165	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 281,880
166	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 97,440
167	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 288,840
168	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 153,120
169	PRITCHARD MINING COMPANY, INC.	4/3/2017	\$ 302,760
170	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 39,432
171	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 13,764
172	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 23,932
173	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 14,632
174	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 184,320
175	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 460,800
176	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 227,840
177	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 215,040
178	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 15,360
179	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 138,840
180	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 123,552
181	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 10,000
182	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 81,744
183	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 22,932
184	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 10,920
185	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 10,000
186	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 10,000

187	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 10,000
188	PRITCHARD MINING COMPANY, INC.	4/20/2016	\$ 40,960
189	RAVEN CREST CONTRACTING, LLC	1/14/2019	\$ 2,800
190	RAVEN CREST CONTRACTING, LLC	8/20/2018	\$ 212,520
191	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 154,000
192	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 59,000
193	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 12,000
194	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 626,480
195	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 372,960
196	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 257,520
197	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 523,920
198	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 194,880
199	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 305,760
200	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 100,800
201	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 157,920
202	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 145,000
203	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 40,320
204	RESERVE RESOURCE PARTNERS, INC.	2/2/2018	\$ 24,000
205	RESERVE RESOURCE PARTNERS, INC.	4/16/2018	\$ 57,960
206	RESERVE RESOURCE PARTNERS, INC.	7/26/2018	\$ 25,200
207	RESERVE RESOURCE PARTNERS, INC.	6/12/2017	\$ 550,800
208	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 71,400
209	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 139,400
210	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 166,600
211	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 10,000
212	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 53,720
213	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 58,320
214	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 21,240
215	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 63,840
216	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 30,360
217	RESERVE RESOURCE PARTNERS, INC.	5/12/2017	\$ 129,000
218	RESOURCES LIMITED, LLC	3/27/2006	\$ 30,160
219	RESOURCES LIMITED, LLC	3/27/2006	\$ 18,560
220	RESOURCES LIMITED, LLC	3/27/2006	\$ 27,840
221	RESOURCES LIMITED, LLC	6/20/2006	\$ 20,880
222	RESOURCES LIMITED, LLC	4/9/2007	\$ 33,600
223	RESOURCES LIMITED, LLC	5/10/2007	\$ 10,000
224	RESOURCES LIMITED, LLC	11/5/2007	\$ 18,200
225	RESOURCES LIMITED, LLC	5/14/2008	\$ 19,600
226	RESOURCES LIMITED, LLC	9/30/2008	\$ 21,000
227	RESOURCES LIMITED, LLC	5/6/2009	\$ 22,400
228	RESOURCES LIMITED, LLC	5/29/2013	\$ 40,600
229	RESOURCES LIMITED, LLC	3/27/2006	\$ 22,272
230	RESOURCES LIMITED, LLC	1/5/2007	\$ 10,000
231	REVELATION ENERGY, LLC	7/14/2011	\$ 620,000
232	REVELATION ENERGY, LLC	7/14/2011	\$ 820,000
233	REVELATION ENERGY, LLC	7/14/2011	\$ 400,000
234	REVELATION ENERGY, LLC	7/14/2011	\$ 10,000
235	REVELATION ENERGY, LLC	2/5/2013	\$ 130,000
236	REVELATION ENERGY, LLC	7/14/2011	\$ 1,878,600
237	REVELATION ENERGY, LLC	7/14/2011	\$ 72,720
238	REVELATION ENERGY, LLC	7/14/2011	\$ 68,680
239	REVELATION ENERGY, LLC	7/14/2011	\$ 371,680
240	REVELATION ENERGY, LLC	7/14/2011	\$ 149,480
241	REVELATION ENERGY, LLC	7/15/2011	\$ 218,160
242	REVELATION ENERGY, LLC	1/8/2013	\$ 512,160
243	REVELATION ENERGY, LLC	1/8/2013	\$ 504,400
244	REVELATION ENERGY, LLC	1/8/2013	\$ 442,320
245	REVELATION ENERGY, LLC	1/8/2013	\$ 323,000
246	REVELATION ENERGY, LLC	1/8/2013	\$ 57,000
247	REVELATION ENERGY, LLC	1/8/2013	\$ 429,400
248	REVELATION ENERGY, LLC	1/8/2013	\$ 49,400
249	REVELATION ENERGY, LLC	1/8/2013	\$ 448,400

250	REVELATION ENERGY, LLC	1/8/2013	\$ 220,400
251	REVELATION ENERGY, LLC	1/8/2013	\$ 258,400
252	REVELATION ENERGY, LLC	1/8/2013	\$ 292,600
253	REVELATION ENERGY, LLC	1/8/2013	\$ 126,480
254	REVELATION ENERGY, LLC	1/8/2013	\$ 297,600
255	REVELATION ENERGY, LLC	7/15/2011	\$ 822,000
256	SEMINOLE WEST VIRGINIA MINING COMPLEX, LLC	6/11/2016	\$ 114,000
257	SHAFER BROTHERS CONSTRUCTION, INC.	5/31/2012	\$ 1,500
258	SNR STONECOAL LLC	6/28/2018	\$ 93,440
259	SNR STONECOAL LLC	6/28/2018	\$ 391,810
260	SNR STONECOAL LLC	6/28/2018	\$ 275,880
261	SNR-LOGAN LLC	6/28/2018	\$ 40,880
262	SOUTH FORK COAL COMPANY, LLC	9/5/2018	\$ 3,500
263	SOUTH FORK COAL COMPANY, LLC	10/9/2018	\$ 247,000
264	SOUTHERN MINERALS, INC.	8/6/2018	\$ 12,000
265	SPRING CREEK ENERGY COMPANY, LLC	4/19/2012	\$ 320,000
266	TRIPLE 7 COMMODITIES INC	10/17/2017	\$ 12,000
267	TRIPLE 7 COMMODITIES INC	10/17/2017	\$ 251,160
268	TRIPLE 7 COMMODITIES INC	10/17/2017	\$ 20,440
269	TYLER MORGAN, L.L.C.	7/15/2016	\$ 113,360
270	TYLER MORGAN, L.L.C.	10/19/2016	\$ 292,120
271	TYLER MORGAN, L.L.C.	4/3/2017	\$ 17,440
272	UNITED COALS, INC.	4/2/2007	\$ 64,000
273	UNITED COALS, INC.	4/2/2007	\$ 25,000
274	UNITED COALS, INC.	4/5/2007	\$ 85,400
275	UNITED INTERNATIONAL, INC	4/2/2007	\$ 12,000
276	WWMV, LLC	12/27/2013	\$ 368,160
277	WWMV, LLC	12/27/2013	\$ 41,040
278	WWMV, LLC	12/4/2013	\$ 26,520
279	WWMV, LLC	12/4/2013	\$ 20,400
280	WWMV, LLC	12/4/2013	\$ 22,440
281	WWMV, LLC	12/4/2013	\$ 20,400
282	WWMV, LLC	12/4/2013	\$ 51,000
283	WWMV, LLC	12/4/2013	\$ 24,400
284	WWMV, LLC	12/4/2013	\$ 32,760

Appendix L

WEST VIRGINIA LEGISLATURE *Joint Committee on Government and Finance*

1900 Kanawha Blvd. East, Room E-132
Charleston, WV 25305-0610
(304) 347-4800
(304) 347-4819 FAX



Aaron Allred
Legislative Manager

September 20, 2019

Austin Caperton
Secretary
Department of Environmental Protection
601 - 57th Street
Charleston, WV 25304

Delivered via Fax

Dear Secretary Caperton:

I read your September 20, 2019, letter to Justin Robinson of my staff. It is my reading of your response that DEP now agrees with my attorneys' legal position that First Surety cannot presently legally issue mine reclamation bonds. Furthermore, if I am reading your response correctly, it is DEP's proposal to change the W.V. Code of State Rules § 38-2-11.3a.3 in order to allow First Surety to continue issuing mine reclamation bonds until January 1, 2021. If I am misunderstanding DEP's positions, please let me know by the close of business today.

Sincerely,

A handwritten signature in blue ink that reads "Aaron Allred".

Aaron Allred
Legislative Auditor

c: Justin Robinson, Director
Post Audit Division
Legislative Auditor's Office

Appendix M

From: [Wandling, Jason E](#)
To: [Justin Robinson](#); [Aaron Allred](#)
Cc: [Caperton, Austin](#); [Chambers, Jamie L](#); [Stanley Lynch](#); [Judith Strawderman](#); [Mandirola, Scott G](#); [Ward, Harold D](#); [Abraham, Brian R](#); [Jaclyn Schiffour](#)
Subject: Re: [External] Letter from the Legislative Auditor Concerning DEP's Response to Post Audit Report
Date: Friday, September 20, 2019 4:42:51 PM
Attachments: [image003.png](#)

Dear Legislative Manager Allred:

I write in response to your letter of this afternoon, asking for clarification of DEP's position with regard to your office's draft report dated yesterday.

While, yes, the DEP agrees with your position, the agency also, as discussed, agreed to revise the rule at issue to require T-listing for all companies - not just First Surety - that wish to issue surety bonds in West Virginia beginning on January 1, 2021. Until then, the DEP will ensure that any company that is not currently T-listed may not write new surety bonds in an amount in excess of those it currently holds and that any company that cannot obtain T-listing by January 1, 2021 (or that is not in the process of getting one on January 1, 2021 and that gets it on or before June 1, 2021) will not be allowed to issue such bonds in West Virginia.

Jason Wandling

On Sep 20, 2019, at 2:30 PM, Justin Robinson <justin.robinson@wvlegislature.gov> wrote:

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and are expecting the content. -- WV Office of Technology

Cabinet Secretary Caperton,

Please see the attached letter from the Legislative Auditor concerning the DEP's response to the Post Audit report. He is seeking some clarification regarding the rule change proposed in response to the report. Should you have any questions, feel free to contact me at 304-347-4880. Thank you.

Sincerely,

Justin Robinson

<image003.png>

<Legislative Auditor letter to DEP Secretary Caperton 9.20.19.pdf>

From: [Doren Burrell](#)
To: jason.e.wandling@wv.gov
Cc: [Aaron Allred](#); [Justin Robinson](#); [Jaclyn Schiffour](#)
Subject: FW: Request for Clarification
Date: Monday, September 23, 2019 11:51:28 AM

Mr. Wandling,

We have received your email message from Friday afternoon, September 20th, regarding your proposal to proceed with bonding companies that have not complied with the T-listing requirement in your agency's legislative rule, 38 W.V.C.S.R. 2, § 38-2-11-3a.3. I ask for further clarification so that we may correctly understand exactly what it is that your agency proposes to do.

You have written, "Until [January 1, 2021,] the DEP will ensure that any company that is not currently T-listed may not write new surety bonds in an amount in excess of those it currently holds . . ." What do you mean by the word "currently"? Could you also explain why you have qualified the phrase "may not write new surety bonds"? Your wording appears to allow a company that is not currently in compliance with state law to write new surety bonds under some circumstances. Is this correct? Is that, in fact, what the DEP proposes?

Doren Burrell
Attorney, Legislative Services
1900 Kanawha Blvd., East
Building 1, Room E-132
Charleston, WV 25305

(304)347-4800

From: [Wandling, Jason E](#)
To: [Doren Burrell](#)
Cc: [Aaron Allred](#); [Justin Robinson](#); [Jaclyn Schiffour](#)
Subject: RE: [External] FW: Request for Clarification
Date: Monday, September 23, 2019 3:58:30 PM
Attachments: [DRAFT REVISIONS to 38CSR2-11.3.docx](#)

It's a little complicated, to be sure.

First, the agency will propose a new version of this rule that will make it clear that, in the future, T-listing will be a requirement for posting surety bonds.

The reason for using the work "currently" is to accommodate a firm that already holds surety bonds for coal companies. Given past legislative and agency interpretations of the rule, the company (First Surety) was deemed qualified to provide bonds. Under the changed agency interpretation, however, they will not be allowed to write any new bonds in excess of the bonds they currently hold. In other words, if First Surety holds \$45MM in bonds now, the agency will not allow it to sell any new bonds unless some of the bonds it already holds have been released.

You can reach me at 304-553-1405 if you'd like to discuss this further. I'll be picking up my son in a few minutes, but I'll be available starting around 4:30 to answer a call.

From: Doren Burrell <doren.burrell@wvlegislature.gov>
Sent: Monday, September 23, 2019 11:51 AM
To: Wandling, Jason E <Jason.E.Wandling@wv.gov>
Cc: Allred, Aaron <aaron.allred@wvlegislature.gov>; Justin Robinson <justin.robinson@wvlegislature.gov>; Jaclyn Schiffour <jaclyn.schiffour@wvlegislature.gov>
Subject: [External] FW: Request for Clarification

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and are expecting the content. -- WV Office of Technology

Mr. Wandling,

We have received your email message from Friday afternoon, September 20th, regarding your proposal to proceed with bonding companies that have not complied with the T-listing requirement in your agency's legislative rule, 38 W.V.C.S.R. 2, § 38-2-11-3a.3. I ask for further clarification so that we may correctly understand exactly what it is that your agency proposes to do.

You have written, "Until [January 1, 2021,] the DEP will ensure that any company that is not currently T-listed may not write new surety bonds in an amount in excess of those it currently holds . . ." What do you mean by the word "currently"? Could you also explain why you have qualified the phrase "may not write new surety bonds"? Your wording appears to allow a company that is not currently in compliance with state law to write new surety bonds under some circumstances. Is this correct? Is that, in fact, what the DEP proposes?

Doren Burrell
Attorney, Legislative Services
1900 Kanawha Blvd., East
Building 1, Room E-132
Charleston, WV 25305

(304)347-4800



POST AUDITS SUBCOMMITTEE
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Roman Prezioso
Greg Boso

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Roger Hanshaw, Speaker
Timothy Miley
Gary Howell



JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR
- POST AUDIT DIVISION -

Room 329 W, Building 1
1900 Kanawha Boulevard East
Charleston, West Virginia 25305
Phone: (304) 347-4880