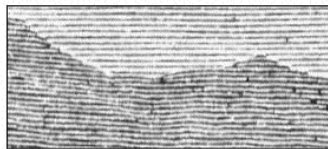


MPC Analysis: The New 3809 Regulations

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MINERAL
POLICY

C E N T E R

INTRODUCTION

History

On November 21st, 2000, the Bureau of Land Management published updated surface mining regulations that govern hardrock mining, and its environmental impacts, on the publicly owned lands managed by BLM. At 12 AM on January 20th, 2001, hours before George W. Bush was inaugurated, the rule went into effect. Efforts by the Bush administration to obstruct “last minute” regulations did not block the mining rule.

The new rule, known as the “3809” regulations because they are located at Title 43, Subpart 3809 in the Code of Federal Regulations, is a much needed update to its predecessor. The old rule was written in 1980 to carry out the Federal Land Policy and Management Act of 1976 (FLPMA) command to the Secretary of the Interior “to prevent unnecessary or undue degradation” of the public lands. While the 1980 rule was much needed (there were no federal regulations specifically governing hardrock mining on public lands before that point – 108 years of regulatory vacuum following the passage of the 1872 Mining Law), it was quickly outstripped by a rapidly modernizing mining industry.

1980 also brought us gold at \$800 per ounce (21 years later, gold trades at ~\$265/oz). The consequent rush to explore and invest in gold extraction played a key role in transforming the hardrock mining industry into a multibillion dollar behemoth whose standard practices transform mountains into craters. The 1980 rule could not contain the new industry it was charged with governing. The result is a now familiar litany of environmental destruction and taxpayer burden. In 2000, the U.S. Environmental Protection Agency estimated that mining pollutes the headwaters of 40% of all western U.S. watersheds.¹ In 1999, the National Wildlife Federation estimated the potential taxpayer liability for environmental cleanup costs at operating hardrock mines in excess of \$1 billion.²

After mining reform failed to materialize in Congress in 1993-94, Secretary of Interior Bruce Babbitt began the rulemaking process in January of 1997. Four years later, and after the defeat of five separate industry-sponsored legislative shenanigans intended to kill it, we have a new final rule.³

The New Rule

In a nutshell, the new rule is a considerable improvement over the old rule... but it still may not adequately “prevent unnecessary or undue degradation” of our public lands. The old rule was riddled with weakness and loopholes. For example, even though the old rule was written to

¹ *Liquid Assets 2000*, U.S Environmental Protection Agency, p10

² *Hardrock Reclamation Bonding Practices in the Western United States*, James Kuipers for the National Wildlife Federation, 02/2000

³ The final rule was published in 3 parts in the November 21st, 2000 Federal Register. It is accessible via the web (text version) at

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=page+69997-70046

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=page+70047-70096

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=page+70097-70132.

The much easier to read PDF version is also available in 3 parts:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=page+69997-70046.pdf

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=page+70047-70096.pdf

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=page+70097-70132.pdf.

protect the environment, it didn't contain meaningful environmental protection standards. Instead, it directed mining operators to pollute no more than what a "prudent operator" would find necessary. The old rule also didn't contain anything approaching adequate bonding provisions, or acknowledge BLM's power to deny mines.

The improvements of the new rule are many. Among other things it

- establishes environmental performance standards;
- creates meaningful bonding requirements;
- acknowledges the BLM's authority to deny mine proposals;
- increases opportunity for public participation;
- strengthens enforcement provisions;
- widens the scope of liability;
- eliminates most notice mines.

However, in many cases, these improvements may not go far enough. Environmental performance standards are established, but they are qualified with exceptions such as "economic feasibility." Meaningful bonding requirements are created, but they may be circumvented with blanket bonds. BLM's authority to deny mine proposals is acknowledged, but not to the extent that it can weigh a mine proposal's comparative value against other potential land uses. Etc.

The balance of this paper examines these issues in greater detail. In particular, it is comprised of the following sections:

- **Discretion to Deny Mine Proposals**
- **Environmental Performance Standards**
- **Notice Mines**
- **Bonding**
- **Public Participation**
- **Enforcement**

One issue this analysis does not cover is how the new rule affects mining on unclaimed or invalidly claimed lands. That may be appended in an update. Or it may be published in a separate paper. We know and appreciate that there is interest.

Readers should understand that this analysis is a first take, a prediction. BLM has not yet published its guidance manual for the new rule. Although officially in effect, the rule has yet to be implemented. Despite what we believe the rule to say, it might be interpreted more weakly (or strongly) by the new administration. These caveats are not attempts to avoid responsibility for what is written here. Rather, they are an invitation. If you, the reader, discover instances where this analysis is wanting – either now or in the future, please let us know. Although we will be, as always, watchdogging the implementation and enforcement of the rules that govern hardrock mining, your perspectives, the people for whom this paper was written, is encouraged.⁴ We will be updating our analysis of the rule as more information becomes available.

⁴ Please send comments to Alan Septoff: aseptoff@mineralpolicy.org.

DISCRETION TO DENY MINE PROPOSALS

One of the major advances under the new 3809 rule is the clear acknowledgement of BLM’s ability to deny the most irresponsible of mine proposals. BLM has actually had the power since the Federal Land Policy and Management Act was passed in 1976. FLPMA authorized the 3809 regulations by granting the Secretary of the Interior the power “by regulation or otherwise, [to] take any action necessary to prevent unnecessary or undue degradation of the public lands.”⁵ As described by BLM in the preamble to the new rule:

“The ‘any action necessary’ language of this provision shows that Congress granted the Secretary broad latitude in the preventive actions that he could take. Congress did not define the term ‘unnecessary or undue degradation,’ but it is clear from the use of the conjunction ‘or’ that the Secretary has the authority to prevent ‘degradation’ that is necessary to mining but undue or excessive. *This includes the authority to disapprove plans of operations that would cause undue or excessive harm to the public lands.*”⁶ [italics added]

What this actually means in practice constitutes the balance of this section. This section will answer the following questions:

- *when can BLM deny a mine proposal under the new rule?*
- *what are the limits to BLM’s authority to deny mine proposals under the new rule?*
- *what must BLM do to deny a mine proposal?*

When can BLM deny a mine proposal under the new rule?

BLM can deny a mine proposal when it would cause unnecessary or undue degradation (UUD). BLM defines UUD to mean “conditions, activities or practices that:

- (1) Fail to comply with one or more of the following: The performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of culture resources;
- (2) Are not ‘reasonably incident’ to prospecting, mining, or processing operations as defined in § 3715.0-5 of this title;
- (3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas; or
- (4) Occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.”⁷**

In a sentence, the first three sections of the UUD definition say merely that a mine proposal causes UUD (and can therefore be denied) if it doesn’t comply with the environmental

⁵ 43 U.S.C. 1732(b)

⁶ *Federal Register*, 11/21/2000, p69999

⁷ § 3809.5

performance standards of the new regulations, or the other applicable laws of the United States, or it pollutes in a way that is unnecessary for mining operations. These first three sections are not a significant change from the old regulations.

Section four, on the other hand is quite new. It is the teeth of BLM’s newly acknowledged ability to deny mine proposals.

What are the limits to BLM’s ability to deny mine proposals under the new rule?

Under the old rule, for all intents and purposes mine proposals BLM did not deny mines. Relative to the old rule, BLM’s newly acknowledged authority to deny ill-advised mine proposals is a quantum leap forward. In practical terms, however, its authority under the new rule is limited. To demonstrate these limits, we have parsed out section 4, the section that allows denial of mines for *undue* degradation of public lands. Bear in mind that none of the following parsed conditions, if met, are sufficient in and of themselves to allow BLM to deny a mine proposal. All must be met.

- Mine proposals can be denied only on “mining claims or millsites located after October 21, 1976.” This may not be much of a limitation. All claims located by 10/21/76 (date of the passage of FLPMA) could have been, and probably have been patented – i.e. they are no longer public lands and therefore not subject to these regulations.
- Mine proposals can be denied only if they impact “*significant* scientific, cultural, or environmental resource values.” [italics added] “Significant” is not defined in the rule, nor is it in the preamble, although BLM pretends it does by referencing an equally vague passage in FLPMA.⁸ So if the land manager in question doesn’t agree that a resource value is significant, they can permit a mine proposal even if it will cause substantial irreparable harm that cannot be effectively mitigated. In that case, they are bound only by the first three sections of the UUD definition. However, the preamble does limit the scope of what is significant to that which is important to a particular location,⁹ as opposed to a global or national significance, which may make the significance threshold easier to meet. For example, it is easier to demonstrate that a particular aquifer is significant to an adjoining community than it is to demonstrate that the same aquifer is significant to Americans nationwide.
- Mine proposals can only be denied if they cause “*substantial* irreparable harm.” [italics added] Some irreparable harm is allowable. “Substantial” is not defined in the rule or the preamble – the land manager, or perhaps a BLM guidance manual, must decide.
- Mine proposals can only be denied if they cause “substantial irreparable harm *that cannot be effectively mitigated.*” [italics added] The key words here are “effectively” and “mitigated.” There are five types of mitigation defined in the rule, only one of which applies here: mitigation can be “compensating for the impact by replacing, or providing substitute,

⁸ *Federal Register*, 11/21/2000, p70017, where “significant resource values” are defined as those meeting the definition of 43 U.S.C. 1701(a)(8), which states “the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use”

⁹ *Federal Register*, 11/21/2000, p70017

resources or environments”.¹⁰ The clear meaning here is that even if substantial irreparable harm is done by a mine, if that harm can somehow be ‘made up’ *offsite*, that substantial irreparable harm is not undue degradation and is allowable. How well the harm is ‘made up’ rests on the definition of “effectively,” which is not defined in the rule or preamble.

Perhaps because of the “effective mitigation” phrase, BLM predicts in the Final Environmental Impact Statement that the new UUD standard will rarely be used to protect environmental resources. On the other hand, BLM predicts that the UUD standard may be used “extensively” when considering cultural resources (i.e. Native American sacred sites).¹¹

Grandfathering is another reason the new UUD standard will be infrequently used. Existing operations aren’t subject to the new standard, as one might expect. However, proposals submitted by January 20th, but not yet approved, are also grandfathered.¹²

What must BLM do to deny a mine proposal?

If BLM denies a mine proposal, it must document the reasons for denial. Specifically, it must show that the proposal would cause irreparable harm, that the irreparable harm is substantial in extent or duration, that the substantially irreparably harmed resources are significant, and how mitigation would not effectively reduce the level of harm below the (undefined) substantial or irreparable threshold.¹³

BLM explicitly mentions in the preamble that such denials are reviewable upon appeal.

A final caution on discretion...

BLM still cannot manage the public lands for multiple use when considering mine proposals on valid claims. Despite these newly acknowledged discretionary powers, it is important to note that the new rule doesn’t truly address the fundamental problem underlying hardrock mining regulation: mining is still regarded as the highest and best use of public lands on valid claims under the 1872 Mining Law. Even with the new rule, land managers are still forbidden from managing public lands for multiple use when hardrock mining is involved. A land manager is still forbidden from weighing a potential mine against all other potential uses of the land when deciding when to permit a mine proposal. They can only answer a yes or no question: will the mine cause substantial irreparable harm to significant resources that cannot be effectively mitigated? If the answer is no, the mine must be permitted. Even if the land is better used for another purpose.

¹⁰ § 3809.5

¹¹ “[W]e assume that BLM would rarely deny a Plan of Operations or reject a Notice on the basis of this substantial irreparable harm provision for most resources.” *Final Environmental Impact Statement, Surface Management Regulations for Locatable Mineral Operations*, BLM, October 20, 2000, p3-5.

¹² § 3809.400(b)

¹³ § 3809.411(d)(3)

2000 discretion regulations	1980 discretion regulations
<p>§ 3809.5 How does BLM define certain terms used in this subpart? As used in this subpart, the term: <i>Unnecessary or undue degradation</i> means conditions, activities, or practices that:</p> <p>(1) Fail to comply with one or more of the following: The performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and State laws related to environmental protection and protection of cultural resources;</p> <p>(2) Are not “reasonably incident” to prospecting, mining, or processing operations as defined in § 3715.0–5 of this title;</p> <p>(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas; or</p> <p>(4) Occur on mining claims or millsites located after October 21, 1976 (or on unclaimed lands) and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.</p>	<p>§ 3809.0–5 Definitions. As used in this subpart, the term: (k) <i>Unnecessary or undue degradation</i> means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met.</p>
<p>§ 3809.411 What action will BLM take when it receives my plan of operations? [...] (d) Upon completion of the review of your plan of operations, including analysis under NEPA and public comment, BLM will notify you that— [...] (3) BLM disapproves, or is withholding approval of your plan of operations because the plan:</p> <p>(i) Does not meet the applicable content requirements of § 3809.401;</p> <p>(ii) Proposes operations that are in an area segregated or withdrawn from the operation of the mining laws, unless the requirements of § 3809.100 are met; or</p> <p>(iii) Proposes operations that would result in unnecessary or undue degradation of public lands. If BLM disapproves your plan of operations based on paragraph (4) of the definition of “unnecessary or undue degradation” in § 3809.5, BLM must include written findings supported by a record clearly demonstrating each element of paragraph (4), including—</p> <p>(A) That approval of the plan of operations would create irreparable harm;</p> <p>(B) How the irreparable harm is substantial in extent or duration;</p> <p>(C) That the resources substantially irreparably harmed constitute significant scientific, cultural, or environmental resources; and</p> <p>(D) How mitigation would not be effective in reducing the level of harm below the substantial or irreparable threshold.</p>	<p>§ 3809.1–6 Plan approval. (a) A proposed plan of operations shall be submitted to the authorized officer, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall, within 30 days of such receipt, analyze the proposal in the context of the requirement to prevent unnecessary or undue degradation and provide for reasonable reclamation, and shall notify the operator:</p> <p>(1) That the plan is approved; or</p> <p>(2) Of any changes in or additions to the plan necessary to meet the requirements of these regulations; or</p> <p>(3) That the plan is being reviewed, but that a specified amount of time, not to exceed an additional 60 days, is necessary to complete the review, setting forth the circumstances which justify additional time for review. However, days during which the area of operations is inaccessible for inspection shall not be counted when computing the 60 day period; or</p> <p>(4) That the plan cannot be approved until 30 days after a final environmental statement has been prepared and filed with the Environmental Protection Agency; or</p> <p>(5) That the plan cannot be approved until the authorized officer has complied with section 106 of the National Historic Preservation Act or section 7 of the Endangered Species Act.</p>

2000 discretion regulations	1980 discretion regulations
<p>§ 3809.415 How do I prevent unnecessary or undue degradation while conducting operations on public lands? You prevent unnecessary or undue degradation while conducting operations on public lands by—</p> <p>(a) Complying with § 3809.420, as applicable; the terms and conditions of your notice or approved plan of operations; and other Federal and State laws related to environmental protection and protection of cultural resources;</p> <p>(b) Assuring that your operations are “reasonably incident” to prospecting, mining, or processing operations and uses as defined in § 3715.0–5 of this title; and</p> <p>(c) Attaining the stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.</p> <p>(d) Avoiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.</p>	<p>§ 3809.2 Prevention of unnecessary or undue degradation. § 3809.2–1 Environmental assessment.</p> <p>(a) When an operator files a plan of operations or a significant modification which encompasses land not previously covered by an approved plan, the authorized officer shall make an environmental assessment or a supplement thereto to identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required.</p> <p>(b) In conjunction with the operator, the authorized officer shall use the environmental assessment to determine the adequacy of mitigating measures and reclamation procedures included in the plan to insure the prevention of unnecessary or undue degradation of the land. If an operator advises the authorized officer that he/she is unable to prepare mitigating measures, the authorized officer, in conjunction with the operator, shall use the environmental assessment as a basis for assisting the operator in developing such measures.</p> <p>(c) If, as a result of the environmental assessment, the authorized officer determines that there is <i>substantial public interest</i> in the plan, the authorized officer shall notify the operator, in writing, that an additional period of time, not to exceed the additional 60 days provided for approval of a plan in § 3809.1–6 of this title, is required to consider public comments on the environmental assessment.</p> <p>[45 FR 78909, Nov. 26, 1980; 45 FR 82934, Dec. 17, 1980, as amended at 48 FR 8816, Mar. 2, 1983]</p>

ENVIRONMENTAL PERFORMANCE STANDARDS

To flesh out the concept of what it takes to prevent unnecessary and undue degradation, BLM adopted a new set of environmental performance standards that will govern all future mining on the public lands.

This section answers the following questions:

- *how are environmental performance standards different under the new regulations?*
- *what are the new environmental performance standards?*
- *what are operational performance standards and how are they different from the general performance standards?*
- *what operations have to comply with the new environmental performance standards?*
- *how do the environmental performance standards relate to a determination of “substantial irreparable harm” to significant resources?*
- *how do the new performance standards relate to environmental protection standards adopted by a state?*

How are environmental performance standards different under the new regulations?

The old regulations generally allow the company to develop reclamation plans based on reclamation practices that were “usual and customary” within the mining industry, regardless of the efficacy of the plan in achieving a specific outcome. Surface disturbances that were a “customary” part of the mining operation were allowed, along with reclamation obligations that had a marginal impact on the lands and water damaged by mining.

The new environmental performance standards in 3809.420 change the way BLM thinks about environmental compliance. These new standards are “outcome based,” and essentially indicate what the resources affected by mining need to look like once mining and reclamation are complete. They are no prescriptions for how to achieve the standard, just the goalpost for the industry during operations and at the end of their operation.

The new regulations also are more specific in defining generally and specifically what needs to be included in the reclamation of a mine site on public lands. Under the new regulations, reclamation includes:

- (1) Isolation, control, or removal of acid-forming, toxic, or deleterious substances;
- (2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;
- (3) Rehabilitation of fisheries or wildlife habitat;
- (4) Placement of growth medium and establishment of self-sustaining revegetation;
- (5) Removal or stabilization of buildings, structures, or other support facilities;
- (6) Plugging of drill holes and closure of underground workings; and
- (7) Providing for post-mining monitoring, maintenance, or treatment.

The new regulations recognize that FLPMA did not intend all uses to take place anywhere on the public lands. Instead, BLM has the mandate to prevent unnecessary and undue degradation by preventing “substantial irreparable harm to significant scientific, cultural or environmental resource values of the public lands that cannot be effectively mitigated.”

What are the new environmental performance standards?

The following chart compares the new environmental performance standards to the standards adopted by the BLM in 1980, under the old regulations. The new standards differ substantially from the old standards in several important ways. First, BLM recognizes that standards are needed for each step in mining reclamation, from the initial dirt moving to meeting the post-mining land use. New standards have been adopted for how soils should be handled, what revegetation is required, and how fish and wildlife habitat should be established and maintained.

BLM generally adopted the language currently in Nevada’s state law with regard to water quality and water quantity protection. Operators are encouraged to minimize the production of polluted water as part of the operation, as opposed to relying on water treatment, to meet water quality standards. Similarly, operators are encouraged to minimize the loss of water quantity during mining, as opposed to pumping and re-injecting the water resources. Specific direction is given to minimize the creation of acid-mine generating materials as part of the mining operation.

The most significant flaw in the new performance standards is the misplaced reliance on mitigation of the damage done to public lands resources as a way to prevent unnecessary and undue degradation. BLM’s new standards would allow for the destruction of riparian habitats, for example, if the damage to the riparian area can be mitigated by creating another riparian area in another location. Riparian areas are one of the most ecologically significant habitats on the public lands, supporting a rich diversity of native plant and animal species as well as significant recreational and livestock uses. The prevention of “undue degradation” cannot provide for the destruction of these vital biological systems.

2000 environmental standards	1980 environmental standards
<p>General performance standards. Sec. 3809.420 (1) Technology and practices. You must use equipment, devices, and practices that will meet the performance standards of this subpart.</p> <p>(2) Sequence of operations. You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.</p> <p>(3) Land-use plans. Consistent with the mining laws, your operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, as appropriate.</p> <p>(4) Mitigation. You must take mitigation measures specified by BLM to protect public lands.</p> <p>(5) Concurrent reclamation. You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.</p>	<p>General Environmental Performance. Sec. 3809.2-2 All operations, including casual use and operations under either a notice (Sec. 3809.1-3) or a plan of operations (Sec. 3809.1-4 of this title), shall be conducted to prevent unnecessary or undue degradation of the Federal lands and shall comply with all pertinent Federal and State laws, including but not limited to the following:</p>
<p>(1) Air quality. Your operations must comply with applicable Federal, Tribal, State, and, where delegated by the State, local Government laws and requirements.</p>	<p>(a) Air quality. All operators shall comply with applicable Federal and State air quality standards, including the Clean Air Act (42 U.S.C. 1857 et seq.).</p>

2000 environmental standards	1980 environmental standards
<p>(2) Water. You must conduct operations to minimize water pollution (source control) in preference to water treatment. You must conduct operations to minimize changes in water quantity in preference to water supply replacement. Your operations must comply with State water law with respect to water use and water quality.</p> <p>(i) Surface water. (A) Releases to surface waters must comply with applicable Federal, Tribal, State, interstate, and, where delegated by the State, local government laws and requirements.</p> <p>(B) You must conduct operations to prevent or control the discharge of pollutants into surface waters.</p> <p>(ii) Ground water. (A) You must comply with State standards and other applicable requirements if your operations affect ground water.</p> <p>(B) You must conduct operations to minimize the discharge of pollutants into ground water.</p> <p>(C) You must conduct operations affecting ground water, such as dewatering, pumping, and injecting, to minimize impacts on surface and other natural resources, such as wetlands, riparian areas, aquatic habitat, and other features that are dependent on ground water.</p>	<p>(b) Water quality. All operators shall comply with applicable Federal and State water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.).</p>
<p>(3) Wetlands and riparian areas. (i) You must avoid locating operations in wetlands and riparian areas where possible, minimize impacts on wetlands and riparian areas that your operations cannot avoid, and mitigate damage to wetlands and riparian areas that your operations impact.</p> <p>(ii) Where economically and technically feasible, you must return disturbed wetlands and riparian areas to a properly functioning condition. Wetlands and riparian areas are functioning properly when adequate vegetation, land form, or large woody debris is present to dissipate stream energy associated with high water flows, thereby reducing erosion and improving water quality; filter sediment, capture bedload, and aid floodplain development; improve floodwater retention and ground-water recharge; develop root masses that stabilize streambanks against cutting action; develop diverse ponding and channel characteristics to provide the habitat and water depth, duration, and temperature necessary for fish production, waterfowl breeding, and other uses, and support greater biodiversity.</p> <p>(iii) You must mitigate impacts to wetlands under the jurisdiction of the U.S. Army Corps of Engineers (COE) and other waters of the United States in accord with COE requirements.</p> <p>(iv) You must take appropriate mitigation measures, such as restoration or replacement, if your operations cause the loss of nonjurisdictional wetland or riparian areas or the diminishment of their proper functioning condition.</p>	
<p>(8) Solid waste. (i) You must comply with applicable Federal, State, and where delegated by the State, local government standards for the disposal and treatment of solid waste, including regulations issued Under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.).</p> <p>(ii) You must remove from the project area, dispose of, or treat all non-mine garbage, refuse, or waste to minimize their impact.</p>	<p>(c) Solid wastes. All operators shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes, including regulations issued pursuant to the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.). All garbage, refuse or waste shall either be removed from the affected lands or disposed of or treated to minimize, so far as is practicable, its impact on the lands.</p>

2000 environmental standards	1980 environmental standards
<p>(6) Fish, wildlife, and plants. (i) You must minimize disturbances and adverse impacts on fish, wildlife, and related environmental values.</p> <p>(ii) You must take any necessary measures to protect Federally proposed or listed threatened or endangered species, both plants and animals or their proposed or designated critical habitat as required by the Endangered Species Act.</p> <p>(iii) You must take any necessary action to minimize the adverse effects of your operations, including access, on BLM-defined special status species.</p> <p>(iv) You must rehabilitate fisheries and wildlife habitat affected by your operations.</p>	<p>(d) Fisheries, wildlife and plant habitat. The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations.</p>
<p>(7) Cultural, paleontologic, and cave resources. (i) You must not knowingly disturb, alter, injure, or destroy any scientifically important paleontologic remains or any historic, archaeological, or cave-related site, structure, building, resource, or object unless--</p> <p>(A) You identify the resource in your notice or plan of operations;</p> <p>(B) You propose action to protect, remove or preserve the resource; and</p> <p>(C) BLM specifically authorizes such action in your plan of operations, or does not prohibit such action under your notice.</p> <p>(ii) You must immediately bring to BLM's attention any previously unidentified historic, archaeological, cave-related, or scientifically important paleontologic resources that might be altered or destroyed by your operations. You must leave the discovery intact until BLM authorizes you to proceed. BLM will evaluate the discovery and take action to protect, remove, or preserve the resource within 30 calendar days after you notify BLM of the discovery, unless otherwise agreed to by the operator and BLM, or unless otherwise provided by law.</p> <p>(iii) BLM has the responsibility for determining who bears the cost of the investigation, recovery, and preservation of discovered historic, archaeological, cave-related, and paleontologic resources, or of any human remains and associated funerary objects. If BLM incurs costs associated with investigation and recovery, BLM will recover the costs from the operator on a case-by-case basis, after an evaluation of the factors set forth in section 304(b) of FLPMA.</p>	<p>(e) Cultural and paleontological resources. (1) Operators shall not knowingly disturb, alter, injure, or destroy any scientifically important paleontological remains or any historical or archaeological site, structure, building or object on Federal lands.</p> <p>(2) Operators shall immediately bring to the attention of the authorized officer any cultural and/or paleontological resources that might be altered or destroyed on Federal lands by his/her operations, and shall leave such discovery intact until told to proceed by the authorized officer. The authorized officer shall evaluate the discoveries brought to his/her attention, take action to protect or remove the resource, and allow operations to proceed within 10 working days after notification to the authorized officer of such discovery.</p> <p>(3) The Federal Government shall have the responsibility and bear the cost of investigations and salvage of cultural and paleontology values discovered after a plan of operations has been approved, or where a plan is not involved.</p>
<p>(11) Protection of survey monuments. (i) To the extent economically and technically feasible, you must protect all survey monuments, witness corners, reference monuments, bearing trees, and line trees against damage or destruction.</p> <p>(ii) If you damage or destroy a monument, corner, or accessory, you must immediately report the matter to BLM. BLM will tell you in writing how to restore or re-establish a damaged or destroyed monument, corner, or accessory.</p>	<p>(f) Protection of survey monuments. To the extent practicable, all operators shall protect all survey monuments, witness corners, reference monuments, bearing trees and line trees against unnecessary or undue destruction, obliteration or damage. If, in the course of operations, any monuments, corners, or accessories are destroyed, obliterated or damaged by such operations, the operator shall immediately report the matter to the authorized officer. The authorized officer shall prescribe, in writing, the requirements for the restoration or reestablishment of monuments, corners, bearing and line trees. [45 FR 78909, Nov. 26, 1980; 45 FR 82934, Dec. 17, 1980, as amended at 48 FR 8816, Mar. 2, 1983]</p>

2000 environmental standards	1980 environmental standards
<p>(4) Soil and growth material. (I) You must remove, segregate, and preserve topsoil or other suitable growth material to minimize erosion and sustain revegetation when reclamation begins.</p> <p>(ii) To preserve soil viability and promote concurrent reclamation, you must directly transport topsoil from its original location to the point of reclamation without intermediate stockpiling, where economically and technically feasible.</p>	
<p>(5) Revegetation. You must--</p> <p>(i) Revegetate disturbed lands by establishing a stable and long-lasting vegetative cover that is self-sustaining and, considering successional stages, will result in cover that is--</p> <p>(A) Comparable in both diversity and density to pre-existing natural vegetation of the surrounding area; or</p> <p>(B) Compatible with the approved BLM land-use plan or activity plan;</p> <p>(ii) Take all reasonable steps to minimize the introduction of noxious weeds and to limit any existing infestations;</p> <p>(iii) Use native species, when available, to the extent technically feasible. If you use non-native species, they must not inhibit re-establishment of native species;</p> <p>(iv) Achieve success over the time frame approved by BLM; and</p> <p>(v) Where you demonstrate revegetation is not achievable under this paragraph, you must use other techniques to minimize erosion and stabilize the project area, subject to BLM approval.</p>	

What are operational performance standards and how are they different from the general performance standards?

In addition to the performance standards for mining set forth in 3809.420(b), BLM recognized that certain activities taking place during the mining operation have a significant impact on the environment, and should be regulated. These include the construction and maintenance of haul roads, soil and earth moving activities, construction and maintenance of impoundment and leaching pads, and other activities. Specific standards are to be applied to mining activities during the operation of the mine, as well as after the operation phase of mining is complete. Here is a list of the “operational performance standards” that are not included in the table above.

Sec. 3809.420(c). Operational performance standards.

- (1) Roads and structures. (i) You must design, construct, and maintain roads and structures to minimize erosion, siltation, air pollution and impacts to resources.
 - (ii) Where it is economically and technically feasible, you must use existing access and follow the natural contour of the land to minimize surface disturbance, including cut and fill, and to maintain safe design.
 - (iii) When commercial hauling on an existing BLM road is involved, BLM may require you to make appropriate arrangements for use, maintenance, and safety.
 - (iv) You must remove and reclaim roads and structures according to BLM land-use plans and activity plans, unless retention is approved by BLM.

- (2) Drill holes. (i) You must not allow drilling fluids and cuttings to flow off the drill site.
 - (ii) You must plug all exploration drill holes to prevent mixing of waters from aquifers, impacts to beneficial uses, downward water loss, or upward water loss from artesian conditions.
 - (iii) You must conduct surface plugging to prevent direct inflow of surface water into the drill hole and to eliminate the open hole as a hazard.

(3) Acid-forming, toxic, or other deleterious materials. You must incorporate identification, handling, and placement of potentially acid-forming, toxic or other deleterious materials into your operations, facility design, reclamation, and environmental monitoring programs to minimize the formation and impacts of acidic, alkaline, metal-bearing, or other deleterious leachate, including the following:

- (i) You must handle, place, or treat potentially acid-forming, toxic, or other deleterious materials in a manner that minimizes the likelihood of acid formation and toxic and other deleterious leachate generation (source control);
- (ii) If you cannot prevent the formation of acid, toxic, or other deleterious drainage, you must minimize uncontrolled migration of leachate; and
- (iii) You must capture and treat acid drainage, or other undesirable effluent, to the applicable standard if source controls and migration controls do not prove effective. You are responsible for any costs associated with water treatment or facility maintenance after project closure. Long-term, or post-mining, effluent capture and treatment are not acceptable substitutes for source and migration control, and you may rely on them only after all reasonable source and migration control methods have been employed.

(4) Leaching Operations and Impoundments. (i) You must design, construct, and operate all leach pads, tailings impoundments, ponds, and solution-holding facilities according to standard engineering practices to achieve and maintain stability and facilitate reclamation.

(ii) You must construct a low-permeability liner or containment system that will minimize the release of leaching solutions to the environment. You must monitor to detect potential releases of contaminants from heaps, process ponds, tailings impoundments, and other structures and remediate environmental impacts if leakage occurs.

(iii) You must design, construct, and operate cyanide or other leaching facilities and impoundments to contain precipitation from the local 100-year, 24-hour storm event in addition to the maximum process solution inventory. Your design must also include allowances for snowmelt events and draindown from heaps during power outages in the design.

(iv) You must construct a secondary containment system around vats, tanks, or recovery circuits adequate to prevent the release of toxic solutions to the environment in the event of primary containment failure.

(v) You must exclude access by the public, wildlife, or livestock to solution containment and transfer structures that contain lethal levels of cyanide or other solutions.

(vi) During closure and at final reclamation, you must detoxify leaching solutions and heaps and manage tailings or other process waste to minimize impacts to the environment from contact with toxic materials or leachate. Acceptable practices to detoxify solutions and materials include natural degradation, rinsing, chemical treatment, or equally successful alternative methods. Upon completion of reclamation, all materials and discharges must meet applicable standards.

(vii) In cases of temporary or seasonal closure, you must provide adequate maintenance, monitoring, security, and financial guarantee, and BLM may require you to detoxify process solutions.

(5) Waste rock, tailings, and leach pads. You must locate, design, construct, operate, and reclaim waste rock, tailings, and leach pads to minimize infiltration and contamination of surface water and ground water; achieve stability; and, to the extent economically and technically feasible, blend with pre-mining, natural topography.

(6) Stability, grading and erosion control. (i) You must grade or otherwise engineer all disturbed areas to a stable condition to minimize erosion and facilitate revegetation.

(ii) You must recontour all areas to blend with pre-mining, natural topography to the extent economically and technically feasible. You may temporarily retain a highwall or other mine workings in a stable condition to preserve evidence of mineralization.

(iii) You must minimize erosion during all phases of operations.

(7) Pit reclamation. (i) Based on the site-specific review required in Sec. [3809.401](#) and the environmental analysis of the plan of operations, BLM will determine the amount of pit backfilling required, if any, taking into consideration economic, environmental, and safety factors.

(ii) You must apply mitigation measures to minimize the impacts created by any pits or disturbances that are not completely backfilled.

(iii) Water quality in pits and other water impoundments must comply with applicable Federal, State, and where appropriate, local government water quality standards. Where no standards exist, you must take measures to protect wildlife, domestic livestock, and public water supplies and users.

(9) Fire prevention and control. You must comply with all applicable Federal and State fire laws and regulations, and take all reasonable measures to prevent and suppress fires in the project area.

(10) Maintenance and public safety. During all operations and after mining--

- (i) You must maintain structures, equipment, and other facilities in a safe and orderly manner;
- (ii) You must mark by signs or fences, or otherwise identify hazardous sites or conditions resulting from your operations to alert the public in accord with applicable Federal and State laws and regulations; and
- (iii) You must restrict unaccompanied public access to portions of your operations that present a hazard to the public, consistent with Secs. [3809.600](#) and 3712.1 of this title.

What operations have to comply with the new environmental performance standards?

The new performance standards apply to all new notice level operations, and plans of operations. For the first time, BLM staff have a complete set of performance standards from which to evaluate whether mining should occur on public lands.

However, these new standards do not apply to existing operations, or to operations that have a completed application as of January 20, 2001. The new performance standards also do not apply to notice-level operations that were approved prior to January 20, 2001

How do the environmental performance standards relate to a determination of “substantial irreparable harm” to significant resources?

BLM defined “unnecessary or undue degradation” to include conditions, activities, or practices that result in “substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.” BLM did not define “substantial irreparable harm ... that cannot be effectively mitigated.” However, a review of the environmental performance standards could be read in conjunction with this phrase, to shed light on the kinds of activities that should be considered “substantial irreparable harm.”

For example, BLM assumes that damage/destruction to wetland and riparian habitats can take place if the impacts can be mitigated through the restoration or replacement of these habitats. If, however, the damage cannot be mitigated, this could be read to be “substantial irreparable harm” and would serve as the basis for denying a mining operation.

How do the new performance standards relate to environmental protection standards adopted by a state?

BLM set out a comprehensive list of environmental performance standards to create a floor (or minimum) for environmental protection on public lands. If a state standard is more stringent in protecting the environment than the federal standard, the state standard is considered to be consistent with the federal standard and will be adopted by the BLM Sec. 3809.202(b)(3) . The states can enter into Memorandum of Understanding with the BLM to implement some or all of the federal regulatory program, including the determination of whether the federal performance standards will be met at a mine within that state. BLM will have the final authority to determine if the environmental performance standards will be met before approving a plan of operation.

BONDING

The bonding aspects of the new regulations (§ 3809.500) are probably the best part of the new rule. Where the old rule didn't actually require bonding at all, the new rule most emphatically does. Furthermore, loopholes are relatively limited. Corporate guarantees (or self-bonding) has been forbidden for new operations, and the BLM has the authority to forbade inadequate state-sanctioned bonding mechanisms. Bonding pools are allowed. And, relatively, grandfathering for pre-existing operations is limited.

The balance of this section will answer the following questions:

- *who must bond?*
- *who estimates the bond?*
- *what must a bond cover?*
- *what financial instruments are acceptable for a bond?*
- *how often is the bond reviewed for adequacy?*
- *when is a bond released?*
- *when is a bond forfeit?*
- *how does the public participate in the bonding process?*

Who must bond?

It is easier to say who doesn't have to bond: casual use mines, and notice level mines with notices filed by January 20th, 2001.¹⁴

All new notice operations must bond, as well as pre-existing notice mines that file for a modification, or a notice extension beyond two years.¹⁵

All plan level mines must possess bonds that meet the new regulatory standards. Pre-existing plan mines must upgrade their bonds to the new regulatory standard by July 19th (180 days after the effective date).¹⁶ However, there apparently is no requirement that BLM review these pre-existing bonds for compliance -- so unless a company volunteers, or perhaps public scrutiny shames BLM into a quicker review, pre-existing inadequate bonds will probably not be updated until after (perhaps 180 days after) BLM carries out one of its "periodic" bond reviews mentioned in § 3809.552(b))

For all mine proposals where a bond is required, operations may not begin until a BLM-approved bond is secured.¹⁷

¹⁴ § 3809.500

¹⁵ § 3809.503

¹⁶ § 3809.505, *Federal Register*, 11/21/2000, p70004

¹⁷ § 3809.412

All this is in marked contrast to the old rule, which did require a bond for every operation, but did not require that the bond actually cover the costs of reclamation.

Who estimates a bond?

The mining operator estimates the bond as if a third party contractor were to perform the reclamation. The BLM can reject a bond estimate as too low.¹⁸

What must a bond cover?

In general...

As stated in § 3809.552(a), a bond must cover

"...the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards. The financial guarantee must also cover any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third-party contracts are developed and executed."

BLM, at its discretion, may also require a funding mechanism to cover long-term, post-mining treatment costs --- for environmental compliance and other reasons. BLM can require the establishment of such a mechanism even after a plan has been approved.¹⁹ Environmentalists should be aware of the regulatory structural deficiency at this point: the operator provides the reclamation plan and estimates the bond amount, but the *BLM* is responsible for requiring a perpetual treatment fund. Implicit in this structure is the BLM's acknowledgement the miniscule likelihood that a mining company will voluntarily acknowledge that its mine proposal will require perpetual treatment. But BLM doesn't write the reclamation plan. The environmental community will ultimately be responsible for ensuring that BLM considers when and where to require a perpetual treatment fund.

Note that the perpetual treatment fund is NOT the same as a contingency fund/insurance policy to account for Summitville-like disasters. BLM considered and discarded this option.²⁰

Also, at least at the outset, the bond estimate cannot cover any sort of environmental violations. BLM requires that the bond cover expected reclamation costs. If environmental violations are expected, then the mine proposal would have to be denied because it would meet the regulatory definition for causing unnecessary or undue damage. One assumes that if water quality violations occur as BLM 'periodically' reviews bonds, BLM will increase the required bond amount.

Incremental bonding...

The new rule also explicitly allows for incremental bonding.²¹ BLM will permit operations to begin with only enough bond to cover the portion of operations the operator says that they will conduct.

¹⁸ § 3809.554

¹⁹ § 3809.552(c), *Federal Register*, 11/21/2000, p70046

²⁰ *Federal Register*, 11/21/2000, p70069

²¹ § 3809.553

Because the public isn't allowed to separately comment on bond proposals anyway, public participation is not impaired. It might allow smaller operators to mine where they ordinarily would not because of insufficient funds to cover a bond. On the other hand, it provides these same small (and large) operators with incentive to reclaim concurrently – so that they may use the same financial reserves backing a bond for operations in one increment of operations to be used in the next.

The potential problem associated with incremental bonding is incremental release. To illustrate, suppose an operator bonds for the first 40 acres of a 100 acre operation, and then upon completion of activity on those 40 acres BLM releases the bond. At some point after the bond release, a spill somewhere on the 60 remaining acres impacts that portion of the operation that is no longer bonded. Will the bond for the 60 remaining acres cover the original 40? Probably not. Fortunately, the public is allowed to comment on all bond releases, incremental or otherwise.

Blanket bonding...

Blanket financial guarantees are acceptable under the new rule.²² An operator becomes eligible for a blanket guarantee if it has more than one operation in the United States.

Blanket guarantees are a potential loophole. All descriptions in the rule of what a bond must cover, what constitutes an acceptable financial instrument, etc., refer specifically to individual financial guarantees – bonds for individual operations. The blanket guarantee, on the other hand, isn't defined at all beyond the fact that it covers multiple operations. Furthermore, it is acceptable “[if] its terms and conditions are sufficient to comply with the regulations of this subpart.”²³ One might assume that means complying with the requirements established for individual guarantees. We can hope. However, in the preamble BLM acknowledged that some commenters were concerned with this ambiguity²⁴ yet did nothing to clarify the ambiguity. This may be the kind of loophole that a willful administration might direct the BLM to exploit.

Blanket bonds (and bond pools, mentioned later in this section) have proven grossly inadequate in the past. Too often, they have been woefully underfunded and failed provide anything approaching a responsible portion of total reclamation costs.

What financial instruments are acceptable to guarantee a bond?

For BLM administered individual financial guarantees...

1. Surety bonds that meet Treasury Department standards
2. Cash
3. Irrevocable letters of credit from financial institutions authorized to transact business in the United States
4. Certificates of deposit or savings accounts not in excess of the maximum insurable amount by FDIC.
5. Investment grade securities
6. U.S, state and municipal bonds
7. Insurance²⁵

²² § 3809.560

²³ *ibid.*

²⁴ *Federal Register*, 11/21/2000, p70072

²⁵ § 3809.555

Corporate guarantees...

Corporate guarantees, or self bonds, are no longer acceptable for new operations, but they have been grandfathered for pre-existing operations. However, grandfathered corporate guarantees are not transferable to new operators. Also, if a state changes its corporate guarantee policy, BLM may review the guarantee for adequacy, and can revoke it if BLM finds it in the public interest.²⁶ Modifications to grandfathered plans may not be included in the grandfathered corporate guarantee. Industry attorneys have suggested that substantial modifications to grandfathered plans will be used by BLM as an excuse to revoke grandfathered corporate guarantees.

State guarantees (aka bond pools)...

State approved bonds are acceptable on two conditions: either they are one of the financial instruments listed above, or they are a BLM-sanctioned state bond pool.²⁷ Apparently state approved blanket guarantees are not acceptable.

A state bond pool can be BLM-sanctioned under the following conditions:

- the state will release money from the pool at BLM's request
- BLM determines that the bond pool will remain solvent in time of need.²⁸

There is no regulatory procedure BLM must follow for determining the present and future solvency of a state bond pool.

How often is a bond reviewed for adequacy?

BLM didn't hold itself very accountable here. "BLM will *periodically* review the estimated cost of reclamation and the adequacy of any [long term funding mechanism]."²⁹ What a constitutes a "period" is left to the imagination in the rule text and the preamble. There are two exceptions: (1) if the bond backed by market securities, the operator must report on the value of those securities annually,³⁰ (2) if the operator chooses to bond incrementally, BLM will review bond at least annually.³¹

When is a bond released?

BLM will release 60% of a bond for a particular project or project area (in the case of incremental bonding, and excluding any long term treatment fund) when all earth-moving components of reclamation for that area are complete. BLM will release the remainder of the bond after all other reclamation is complete. Completed reclamation specifically includes revegetation, and compliance with all applicable effluent water quality standards for one year (presumably post-closure).³² As noted in the preamble, revegetation can take years.³³

When is a bond forfeit?

A bond *may* be forfeit if the operator or mining claimant does not conduct reclamation measures as defined in the approved notice or plan, or otherwise doesn't meet the terms of the notice or plan.³⁴ BLM does not have to forfeit the bond, however.

²⁶ § 3809.574

²⁷ § 3809.571

²⁸ *ibid.*

²⁹ § 3809.552(b)

³⁰ § 3809.556

³¹ § 3809.553(b)

³² § 3809.591

³³ *Federal Register*, 11/21/2000, p70076

³⁴ § 3809.595

Assuming BLM decides to initiate forfeiture, BLM will write the operator/claimant describing why BLM is doing so and describe how the operator/claimant may prevent the process from reaching completion.³⁵ Both the process for avoiding forfeiture, and the amount of time the operator has to comply with the forfeiture initiation letter are not clearly defined.

Once BLM determines that the operator/claimant is not complying, it may immediately collect the bond.³⁶

How does the public participate in the bonding process?

There are two points in a mine operation's life cycle where the public can participate in the bonding process: during NEPA review, and when the bond (or portion of a bond) is going to be released.

BLM makes it very clear in the preamble that the public's role in setting of the bond is during the NEPA process, when the entire plan is being reviewed.³⁷ During NEPA review, BLM permits the public to comment on the types of reclamation necessary for a given proposal, and the amount of money necessary to reclaim it. Very gracious of the BLM, the public had this ability already.

This is not very helpful. It is not helpful at least in part because BLM admits that the plan proposal may not even include the operator's bond estimate.³⁸ So the public can hazard its own guess as to how much reclamation might cost, but may not be able to critique the operator's estimate.

On the other hand, the public comment is permitted whenever a bond (or bond portion) is to be released.³⁹ BLM must post the proposed bond release in the appropriate field office or a local newspaper of general circulation and accept public comments for 30 days. Except notice operations, the public does not review their bond release.

³⁵ § 3809.596

³⁶ § 3809.597

³⁷ *Federal Register*, 11/21/2000, p70045

³⁸ "Comments could also be provided at this time [during NEPA review of the proposed plan] on the financial guarantee amounts, *to the extent cost estimates are available during the comment period.*" [italics added], *ibid.*

³⁹ § 3809.590(c)

2000 bonding regulations	1980 bonding regulations
<p>Financial Guarantee Requirements— General § 3809.500 In general, what are BLM’s financial guarantee requirements? If— Then— (a) If your operations constitute casual use, then you do not have to provide any financial guarantee. (b) If you conduct operations under a notice or a plan of operations, then you must provide BLM or the State a financial guarantee that meets the requirements of this subpart before starting operations. For more information, see §§ 3809.551 through under a 3809.573.</p> <p>§ 3809.503 When must I provide a financial guarantee for my notice-level operations? If— Then— (a) If your notice was on file with BLM on January 20, 2001, then you do not need to provide a financial guarantee unless you modify the notice or extend the notice under § 3809.333. (b) If your notice was on file with BLM before January 20, 2001 and you choose to modify your notice as required by this subpart on or after that date, then you must provide a financial guarantee before you can begin operations under the modified notice. If you modify your notice, you must post a financial guarantee for the entire notice. (c) If you file a new notice on or after January 20, 2001, then you must provide a financial guarantee before you can begin operations under the notice.</p> <p>§ 3809.505 How do the financial guarantee requirements of this subpart apply to my existing plan of operations? For each plan of operations approved before January 20, 2001, you must post a financial guarantee according to the requirements of this subpart no later than July 19, 2001 at the local BLM office with jurisdiction over the lands involved. You do not need to post a new financial guarantee if your existing financial guarantee satisfies this subpart.</p> <p>§ 3809.551 What are my choices for providing BLM with a financial guarantee? You must provide BLM with a financial guarantee using any of the 3 options following : If— Then— (a) If you have only one notice or plan of operations, or wish to provide a financial guarantee for a single notice or plan of operations, then you may provide an individual financial guarantee that covers only the cost of reclaiming areas disturbed under the single notice or plan of operations. See §§ 3809.552 through 3809.556 for more information. (b) If you are currently operating under more than one notice or plan of operations, then you may provide a blanket financial guarantee covering statewide or nationwide operations. See § 3809.560 for more information. (c) If you do not choose one of the options in paragraphs (a) and (b) of this section, then you may provide evidence of an existing financial guarantee under State law or regulations. See §§ 3809.570 through 3809.573 for more information.</p>	<p>§ 3809.1–9 Financial guarantees. (a) No operator or claimant shall— (1) Initiate operations under a notice without providing the authorized officer certification of the existence of the appropriate financial guarantee as required by paragraph (c) through (f) of this section; or (2) Conduct operations under a plan of operations without providing the authorized officer with the appropriate financial guarantee as required by paragraphs (g) through (j) of this section.</p> <p>(b) No financial guarantee is required for operations that constitute casual use under § 3809.1–2.</p> <p>(c) No operations conducted under a notice in accordance with § 3809.1–3 shall be initiated until the operator or mining claimant provides to the authorized officer a certification that a financial guarantee exists to ensure performance of reclamation in accordance with the requirements of § 3809.1–3(d). Each certification must be accompanied by a calculation of reclamation costs of the proposed activities covered by the notice, as if third party contractors were performing the reclamation after the site is vacated by the operator. This calculation must be certified at the operator’s or mining claimant’s expense by a third party professional engineer registered to practice within the State in which the activities are proposed. However, when the requirement for a financial guarantee is met by providing evidence of an instrument held by a State agency as provided in this paragraph, the certification of costs by a third party professional engineer is not required. The financial guarantee must be sufficient to cover 100 percent of the estimate of the costs of reclamation, as calculated above, required by State and Federal laws and regulations, and may be in any of the forms described in paragraphs (k) and (l) of this section. In calculating the amount of the financial guarantee, each acre of disturbance or fraction thereof shall require not less than \$1,000. The financial guarantee may also be met by providing evidence of an appropriate instrument held or approved by a State agency pursuant to State law or regulations so long as the instrument is equivalent to that required by this section, is redeemable by the Secretary, acting by and through BLM, and covers the same area covered by the notice. The certification must accompany the notice submitted to the proper BLM office having jurisdiction over the land in which the claim or project area is located. Failure to submit a complete certification will render the notice incomplete and it will be returned by the authorized officer. The financial guarantee covered by the certification must be available, until replaced by another adequate financial guarantee with the concurrence of the authorized officer or until released by the authorized officer, for the performance of such reclamation as required by § 3809.1–3. Such reclamation shall also include all reasonable measures identified as the result of the consultation required by the authorized officer under § 3809.1–3(c). If there is a material change in any financial guarantee on which the operator or mining claimant’s certification is based, the operator or mining claimant must submit an amended certification to the authorized officer within 45 days after the material change occurs.</p> <p>(d) The certification submitted by the operator, mining claimant, or its authorized agent, for any operations conducted under a notice, shall include:</p>

2000 bonding regulations	1980 bonding regulations
<p>Individual Financial Guarantee § 3809.552 What must my individual financial guarantee cover? (a) If you conduct operations under a notice or a plan of operations and you provide an individual financial guarantee, it must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards. The financial guarantee must also cover any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third-party contracts are developed and executed. (b) BLM will periodically review the estimated cost of reclamation and the adequacy of any funding mechanism established under paragraph (c) of this section and require increased coverage, if necessary. (c) When BLM identifies a need for it, you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long term, post-mining maintenance requirements. The funding must be adequate to provide for construction, long-term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM may identify the need for a trust fund or other funding mechanism during plan review or later.</p> <p>§ 3809.553 May I post a financial guarantee for a part of my operations? (a) Yes, BLM may authorize you to provide a financial guarantee covering a part of your operations if— (1) Your operations do not go beyond what is specifically covered by the partial financial guarantee; and (2) The partial financial guarantee covers all reclamation costs within the incremental area of operations. (b) BLM will review the amount and terms of the financial guarantee for each increment of your operations at least annually.</p> <p>§ 3809.554 How do I estimate the cost to reclaim my operations? (a) You must estimate the cost to reclaim your operations as if BLM were hiring a third-party contractor to perform reclamation of your operations after you have vacated the project area. Your estimate must include BLM’s cost to administer the reclamation contract. Contact BLM to obtain this administrative cost information. (b) Your estimate of the cost to reclaim your operations must be acceptable to BLM.</p> <p>§ 3809.555 What forms of individual financial guarantee are acceptable to BLM? You may use any of the following instruments for an individual financial guarantee, provided that the BLM State Director has determined that it is an acceptable financial instrument within the State where the operations are proposed: (a) Surety bonds that meet the requirements of Treasury Department Circular 570, including surety bonds arranged or paid for by third parties;</p>	<p>(1) The name, home address, office and home telephone numbers, and social security number or employer identification number of the operator, mining claimant, or authorized agent; (2) A statement that the mining claimant or operator for whom the individual is submitting the certification will be responsible for the required reclamation; (3) A statement that the authorized officer will be notified at the completion of reclamation operations to arrange for a final inspection; (4) A statement that the financial guarantee in the amount of the estimated reclamation costs, as calculated under § 3809.1–9(c), or \$1,000 per acre or fraction thereof of disturbance as described in the attached notice, whichever is greater, exists, followed by a complete description of the financial guarantee and its location; (5) A statement that the financial guarantee in the amount of the estimated reclamation costs, as calculated under § 3809.1–9(c), or \$1,000 per acre or fraction thereof of disturbance, whichever is greater, will be delivered to the authorized officer within 45 days of a demand for its surrender, following failure to complete reclamation, unless an additional period of time not to exceed 45 days is granted in writing by the authorized officer; (6) A statement acknowledging that surrender of the financial guarantee will not release the operator, mining claimant, or authorized agent from responsibility to ensure completion of the reclamation should the amount of the guarantee be insufficient to complete all required reclamation; (7) A statement acknowledging that release of the requirement to maintain the financial guarantee does not release or waive any claim the Bureau of Land Management may have against any person under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 <i>et seq.</i>, or any other applicable statutes or any applicable regulations; and (8) A statement acknowledging that nonexistence of the financial guarantee or the failure to provide the guarantee upon demand for its surrender by the authorized officer may result in prosecution under 18 U.S.C. 1001, 43 U.S.C. 1733, or other appropriate authorities.</p> <p>(e) Each statement required by paragraph (d) of this section to be included with the certification must be initialed and dated by the individual submitting the certification. Failure to initial all statements will result in the certification and the notice being returned as incomplete by the authorized officer.</p> <p>(f) At any time, the authorized officer may require the notice level operator or mining claimant to demonstrate the existence of the guarantee set out in the certification described in paragraph (c) of this section.</p> <p>(g) Each operator or mining claimant who conducts operations under an approved plan of operations shall furnish to the authorized officer a financial guarantee in an amount specified by the authorized officer. In determining the amount of the guarantee, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed, including the cost to the BLM of conducting the reclamation, using either contract or government personnel.</p>

2000 bonding regulations	1980 bonding regulations
<p>(b) Cash in an amount equal to the required dollar amount of the financial guarantee, to be deposited and maintained in a Federal depository account of the U.S. Treasury by BLM;</p> <p>(c) Irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States;</p> <p>(d) Certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation; and</p> <p>(e) Either of the following instruments having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through BLM:</p> <p>(1) Negotiable United States Government, State and Municipal securities or bonds; or</p> <p>(2) Investment-grade rated securities having a Standard and Poor's rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service.</p> <p>(f) Insurance, if its form and function is such that the funding or enforceable pledges of funding are used to guarantee performance of regulatory obligations in the event of default on such obligations by the operator. Insurance must have an A.M. Best rating of "superior" or an equivalent rating from a nationally recognized insurance rating service.</p> <p>§ 3809.556 What special requirements apply to financial guarantees described in § 3809.555(e)?</p> <p>(a) If you choose to use the instruments permitted under § 3809.555(e) in satisfaction of financial guarantee requirements, you must provide BLM, before you begin operations and by the end of each calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.</p> <p>(b) You must review the market value of the account instruments by December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, you must, within 10 calendar days after its annual review or at any time upon the written request of BLM, provide additional instruments, as defined in § 3809.555(e), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. You must send a certified statement to BLM within 45 calendar days thereafter describing your actions to raise the market value of its account instruments to the required dollar amount of the financial guarantee. You must include copies of any statements or reports furnished by the brokerage firm to you documenting such an increase.</p> <p>(c) If your review under paragraph (b) of this section demonstrates that the total market value of trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, you may ask BLM to authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee. BLM will approve your request only if you are in compliance with the terms and conditions of your notice or approved plan of operations.</p>	<p>(h) For activities conducted under a plan of operations, the financial guarantee must be sufficient to cover 100 percent of the costs of reclamation required by State and Federal statutes and regulations and calculated as if third party contractors were performing the reclamation after the site is vacated by the operator. This calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed, but when the requirement for a financial guarantee is met by providing evidence of an instrument held or approved by a State agency, the certification of costs by a third party professional engineer will not be required. This calculation must be agreed to by the authorized officer. In no case shall the financial guarantee be less than \$2,000 per acre or fraction thereof.</p> <p>(i) In lieu of requiring the financial guarantee as provided in paragraph (g) of this section, the authorized officer may accept evidence of an existing financial guarantee under State law or regulations, if it is redeemable by the Secretary, acting by and through the authorized officer, and held or approved by a State agency for the same area covered by the plan of operations, upon determining that the instrument held or approved by the State provides the same guarantee as that required by this section, regardless of the type of financial instruments chosen by the State. The operator or mining claimant proposing a plan of operations may offer for the approval of the authorized officer any of the financial instruments listed in paragraphs (k) and (l) of this section. The authorized officer may reject any of the submitted financial instruments, but will do so by decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering. If the State makes a demand against the financial guarantee, thereby reducing the available balance, the operator or mining claimant must replace the amount of reduced financial guarantee with another financial guarantee instrument acceptable under this subpart.</p> <p>(j) In the event that an approved plan is modified in accordance with 3809.1-7, the authorized officer will review the initial financial guarantee for adequacy and, if necessary, require the operator or mining claimant to adjust the amount of the financial guarantee to cover the estimated cost of reasonable stabilization and reclamation of areas disturbed under the plan as modified. Operators or mining claimants with an approved financial guarantee may request the authorized officer to accept a replacement financial instrument at any time after the approval of an initial instrument. The authorized officer shall review the offered instrument for adequacy and may reject any offered instrument, but will do so by a decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering.</p> <p>(k) Provided that the State Director has determined that it is a legal financial instrument within the State where the operations are proposed, the financial guarantee may take the form of any of the following:</p> <p>(1) Surety bonds, including surety bonds arranged or paid for by third parties.</p> <p>(2) Cash in an amount equal to the required dollar amount of the financial guarantee, to be deposited and maintained in a Federal depository account of the United States Treasury by the authorized officer.</p>

2000 bonding regulations	1980 bonding regulations
<p>Blanket Financial Guarantee § 3809.560 Under what circumstances may I provide a blanket financial guarantee? (a) If you have more than one notice-or plan-level operation underway, you may provide a blanket financial guarantee covering statewide or nationwide operations instead of individual financial guarantees for each operation. (b) BLM will accept a blanket financial guarantee if we determine that its terms and conditions are sufficient to comply with the regulations of this subpart.</p> <p>State-Approved Financial Guarantee § 3809.570 Under what circumstances may I provide a State-approved financial guarantee? When you provide evidence of an existing financial guarantee under State law or regulations that covers your operations, you are not required to provide a separate financial guarantee under this subpart if— (a) The existing financial guarantee is redeemable by the Secretary, acting by and through BLM; (b) It is held or approved by a State agency for the same operations covered by your notice(s) or plan(s) of operations; (c) It provides at least the same amount of financial guarantee as required by this subpart.</p> <p>§ 3809.571 What forms of State-approved financial guarantee are acceptable to BLM? You may provide a State-approved financial guarantee in any of the following forms, subject to the conditions in §§ 3809.570 and 3809.574: (a) The kinds of individual financial guarantees specified under § 3809.555; (b) Participation in a State bond pool, if— (1) The State agrees that, upon BLM’s request, the State will use part of the pool to meet reclamation obligations on public lands; and (2) The BLM State Director determines that the State bond pool provides the equivalent level of protection as that required by this subpart; or (c) A corporate guarantee that existed on January 20, 2001, subject to the restrictions on corporate guarantees in § 3809.574.</p> <p>§ 3809.572 What happens if BLM rejects a financial instrument in my State-approved financial guarantee? If BLM rejects a submitted financial instrument in an existing State-approved financial guarantee, BLM will notify you and the State in writing, with a complete explanation of the reasons for the rejection within 30 calendar days of BLM’s receipt of the evidence of State-approved financial guarantee. You must provide BLM with a financial guarantee acceptable under this subpart at least equal to the amount of the rejected financial instrument.</p> <p>§ 3809.573 What happens if the State makes a demand against my financial guarantee? When the State makes a demand against your financial guarantee, thereby reducing the available balance, you must do both of the following: (a) Notify BLM within 15 calendar days; and (b) Replace or augment the financial guarantee within 30 calendar days if the available balance is insufficient to cover the remaining reclamation cost.</p>	<p>(3) Irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States. (4) Certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation. (5)(i) Any instrument listed in paragraph (k)(5)(i)(A) or (B) of this section having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through the authorized officer. (A) Negotiable United States Government, State and Municipal securities or bonds. (B) Investment grade rated securities having a Standard and Poor’s rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service. (ii) Notwithstanding the provision in paragraph (c) of this section that an operator or mining claimant conducting operations under a notice need only provide the authorized officer with a certification of the existence of the required financial guarantee, and notwithstanding the provision in paragraph (g) of this section that an operator or mining claimant conducting operations under an approved plan of operations must furnish the required financial guarantee to the authorized officer, any operator or mining claimant who chooses to use the instruments permitted under this paragraph (k)(5) in satisfaction of such provisions, must provide the authorized officer, prior to the initiation of such operations and by the end of each quarter of the calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account. (iii) The operator or mining claimant must review the market value of the account instruments by no later than December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, the operator or mining claimant must, within 10 days after its annual review or at any time upon the written request of the authorized officer, provide additional instruments, as defined in paragraphs (k)(5)(i)(A) and (B), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. The operator or mining claimant must send a certified statement to the authorized officer within 45 days thereafter describing the actions taken by the operator or mining claimant to raise the market value of its account instruments to the required dollar amount of the financial guarantee. The operator or mining claimant must include copies of any statements or reports furnished by the brokerage firm to the operator or mining claimant documenting such an increase.</p>

2000 bonding regulations	1980 bonding regulations
<p>§ 3809.574 What happens if I have an existing corporate guarantee? (a) If you have an existing corporate guarantee on January 20, 2001 that applies to public lands under an approved BLM and State agreement, your corporate guarantee will continue in effect. BLM will not accept any new corporate guarantees or increases to existing corporate guarantees. You may not transfer your existing corporate guarantee to another operator. (b) If the State revises existing corporate guarantee criteria or requirements that apply to a corporate guarantee existing on January 20, 2001, the BLM State Director will review the revisions to ensure that adequate financial coverage continues. If the BLM State Director determines it is in the public interest to do so, the State Director may terminate a revised corporate guarantee and require an acceptable replacement financial guarantee after due notice and a reasonable time to obtain a replacement.</p> <p>Modification or Replacement of a Financial Guarantee § 3809.580 What happens if I modify my notice or approved plan of operations? (a) If you modify a notice or an approved plan of operations under § 3809.331 or § 3809.431 respectively, and your estimated reclamation cost increases, you must increase the amount of the financial guarantee to cover any estimated additional cost of reclamation and long-term treatment in compliance with § 3809.552. (b) If you modify a notice or an approved plan of operations under § 3809.331 or § 3809.431 respectively, and your estimated reclamation cost decreases, you may request BLM decrease the amount of the financial guarantee for your operations.</p> <p>§ 3809.581 Will BLM accept a replacement financial instrument? (a) Yes, if you or a new operator have an approved financial guarantee, you may request BLM to accept a replacement financial instrument at any time after the approval of an initial instrument. BLM will review the offered instrument for adequacy and may reject any offered instrument, but will do so by a decision in writing, with a complete explanation of the reasons for the rejection, within 30 calendar days of the offering. (b) A surety is not released from an obligation that accrued while the surety bond was in effect unless the replacement financial guarantee covers such obligations to BLM’s satisfaction.</p> <p>§ 3809.582 How long must I maintain my financial guarantee? You must maintain your financial guarantee until you or a new operator replace it with another adequate financial guarantee, subject to BLM’s written concurrence, or until BLM releases the requirement to maintain your financial guarantee after you have completed reclamation of your operation according to the requirements of § 3809.320 (for notices), including any measures identified as the result of consultation with BLM under § 3809.313, or § 3809.420 (for plans of operations).</p>	<p>(iv) Whenever, on the basis of a review conducted under paragraph (k)(5)(iii) of this section, the operator or mining claimant ascertains that the total market value of its trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, the operator or mining claimant may request and the authorized officer will authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee, if the operator or mining claimant is in compliance with the terms and conditions of its notice or approved plan of operations.</p> <p>(l) In place of the individual financial guarantee on each separate operation, a blanket financial guarantee covering statewide or nationwide operations may be furnished at the option of the operator or mining claimant, if the terms and conditions are determined by the authorized officer to be sufficient to comply with the regulations in this subpart.</p> <p>(m) When all or any portion of the reclamation has been completed in accordance with a notice submitted pursuant to § 3809.1–3 or an approved plan of operations, the operator or mining claimant may notify the authorized officer that such reclamation has occurred and may request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both. Upon any such notification, the authorized officer will promptly inspect the reclaimed area with the operator. The authorized officer will notify the operator, in writing, whether the financial guarantee can be reduced, the reclamation is acceptable, or both. The authorized officer may reduce the financial guarantee by an appropriate amount, not to exceed 60 percent of the total estimated costs of reclamation as calculated in accordance with paragraph (c) or (h) of this section, if the authorized officer determines that a portion of the reclamation has been completed in accordance with applicable requirements, including, but not limited to, requirements for backfilling, regrading, establishment of drainage control, and stabilization and neutralization of leach pads, heaps, leachbearing tailings, and similar facilities. The authorized officer will not release that portion of the financial guarantee equal to 40 percent of the total estimated costs of reclamation until the area disturbed by operations has been revegetated to establish a diverse, effective, and permanent vegetative cover, and until any effluent discharged from the area has met, without violations and without the necessity for additional treatment, applicable effluent limitations and water quality standards for not less than 1 full year. Any such release of the financial guarantee does not release or waive any claim BLM may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 <i>et seq.</i>, or under any other applicable statutes or any applicable regulations.</p> <p>(n) If an operator or mining claimant refuses or is unable to conduct reclamation as provided in the reclamation measures incorporated into its notice or approved plan of operations or the regulations in this subpart, if the terms of the notice or decision approving a plan of operation are not met, or if the operator or mining claimant defaults on the conditions under which the financial guarantee rests, the authorized officer shall take the following action to require the forfeiture of all or part of a financial guarantee for any area or portion of an area covered by the financial guarantee:</p>

2000 bonding regulations	1980 bonding regulations
<p>Release of Financial Guarantee § 3809.590 When will BLM release or reduce the financial guarantee for my notice or plan of operations? (a) When you (the mining claimant or operator) have completed all or any portion of the reclamation of your operations in accordance with your notice or approved plan of operations, you may notify BLM that the reclamation has occurred and request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both. (b) BLM will then promptly inspect the reclaimed area. We encourage you to accompany the BLM inspector. (c) For your plan of operations, BLM will either post in the local BLM office or publish notice of final financial guarantee release in a local newspaper of general circulation and accept comments for 30 calendar days. Subsequently, BLM will notify you, in writing, whether you may reduce the financial guarantee under § 3809.591, or the reclamation is acceptable, or both.</p> <p>§ 3809.591 What are the limitations on the amount by which BLM may reduce my financial guarantee? (a) This section applies to your financial guarantee, but not to any funding mechanism established under § 3809.552(c) to pay for long-term treatment of effluent or site maintenance. Calculation of bond percentages in paragraphs (b) and (c) of this section does not include any funds held in that kind of funding mechanism. (b) BLM may release up to 60 percent of your financial guarantee for a portion of your project area when BLM determines that you have successfully completed backfilling; regrading; establishment of drainage control; and stabilization and detoxification of leaching solutions, heaps, tailings, and similar facilities on that portion of the project area. (c) BLM may release the remainder of your financial guarantee for the same portion of the project area when— (1) BLM determines that you have successfully completed reclamation, including revegetating the area disturbed by operations; and (2) Any effluent discharged from the area has met applicable effluent limitations and water quality standards for one year without needing additional treatment, or you have established a funding mechanism under § 3809.552(c) to pay for long-term treatment, and any effluent discharged from the area has met applicable effluent limitations and water quality standards water for one year with or without treatment.</p> <p>§ 3809.592 Does release of my financial guarantee relieve me of all responsibility for my project area? (a) Release of your financial guarantee under this subpart does not release you (the mining claimant or operator) from responsibility for reclamation of your operations should reclamation fail to meet the standards of this subpart. (b) Any release of your financial guarantee under this subpart does not release or waive any claim BLM or other persons may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 <i>et seq.</i>, or under any other applicable statutes or regulations.</p>	<p>(1) Send written notification by certified mail, return receipt requested, to the operator or mining claimant that provided the financial guarantee, and the surety on the financial guarantee, if any, and the State agency holding the financial guarantee, if any, informing them of the decision to require the forfeiture of all or part of the financial guarantee. The notification must include the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements for the area or portion of the area affected, including the administrative costs of the Bureau of Land Management.</p> <p>(2) In the written notification, advise the operator or mining claimant and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to— (i) Written agreement by the operator, mining claimant, or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the notice or decision approving a plan of operations and the reclamation plan, and a demonstration that such party has the ability to satisfy the conditions; or (ii) Written permission from the authorized officer to a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in a notice or approved plan of operations.</p> <p>(o) In the event the operator or mining claimant fails to meet the requirements of the written notification provided under paragraph (n) of this section, the authorized officer will— (1) Proceed immediately to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if an appeal has not been filed under § 3809.4, or if such appeal is filed and the decision appealed is confirmed. (2) Use funds collected from financial guarantee forfeiture to implement the reclamation plan, or portion thereof, on the area or portion of the area to which bond coverage applies.</p> <p>(p)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator or mining claimant is liable for the remaining costs. The authorized officer may complete or authorize completion of reclamation of the bonded area and may recover from the operator or mining claimant all costs of reclamation in excess of the amount forfeited. (2) In the event the amount of financial guarantee forfeited was more than the amount necessary to complete reclamation, the unused funds shall be returned, within a reasonable amount of time, by the authorized officer to the party from whom they were collected.</p>

2000 bonding regulations	1980 bonding regulations
<p>§ 3809.593 What happens to my financial guarantee if I transfer my operations? You remain responsible for obligations or conditions created while you conducted operations unless a transferee accepts responsibility under § 3809.116, and BLM accepts an adequate replacement financial guarantee. Therefore, your financial guarantee must remain in effect until BLM determines that you are no longer responsible for all or part of the operation. BLM can release your financial guarantee on an incremental basis. The new operator must provide a financial guarantee before BLM will allow the new operator to conduct operations.</p> <p>§ 3809.594 What happens to my financial guarantee when my mining claim or millsite is patented? (a) When your mining claim or millsite is patented, BLM will release the portion of the financial guarantee that applies to operations within the boundaries of the patented land. This paragraph does not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area. (b) BLM will release the remainder of the financial guarantee, including the portion covering approved access outside the boundaries of the mining claim, when you have completed reclamation to the standards of this subpart.</p> <p>Forfeiture of Financial Guarantee § 3809.595 When may BLM initiate forfeiture of my financial guarantee? BLM may initiate forfeiture of all or part of your financial guarantee for any project area or portion of a project area if— (a) You (the operator or mining claimant) refuse or are unable to conduct reclamation as provided in the reclamation measures incorporated into your notice or approved plan of operations or the regulations in this subpart; (b) You fail to meet the terms of your notice or your approved plan of operations; or (c) You default on any of the conditions under which you obtained the financial guarantee.</p> <p>§ 3809.596 How does BLM initiate forfeiture of my financial guarantee? When BLM decides to require the forfeiture of all or part of your financial guarantee, BLM will notify you (the operator or mining claimant) by certified mail, return receipt requested; the surety on the financial guarantee, if any; and the State agency holding the financial guarantee, if any, informing you and them of the following: (a) BLM’s decision to require the forfeiture of all or part of the financial guarantee; (b) The reasons for the forfeiture; (c) The amount that you will forfeit based on the estimated total cost of achieving the reclamation plan requirements for the project area or portion of the project area affected, including BLM’s administrative costs; and (d) How you may avoid forfeiture, including— (1) Providing a written agreement under which you or another person will perform reclamation operations in accordance with a compliance schedule which meets the conditions of your notice or your approved plan of operations and the reclamation plan, and a demonstration that such other person has the ability to satisfy the conditions; and</p>	<p>(q) When a mining claim is patented, the authorized officer will release the operator or mining claimant from the portion of the financial guarantee that applies to operations within the boundaries of the patented land. The authorized officer shall release the operator or mining claimant from the remainder of the financial guarantee, including the portion covering approved means of access outside the boundaries of the mining claim, when the operator or mining claimant has completed acceptable reclamation. However, existing access to patented mining claims, if across Federal lands, shall continue to be regulated under the approved plan and shall include a financial guarantee. The provisions of this paragraph do not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area (see § 3809.6). [62 FR 9100, Feb. 28, 1997]</p>

2000 bonding regulations	1980 bonding regulations
<p>(2) Obtaining written permission from BLM for a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in your notice or approved plan of operations.</p> <p>§ 3809.597 What if I do not comply with BLM’s forfeiture decision? If you fail to meet the requirements of BLM’s forfeiture decision provided under § 3809.596, and you fail to appeal the forfeiture decision under §§ 3809.800 to 3809.807, or the Interior Board of Land Appeals does not grant a stay under 43 CFR 4.321, or the decision appealed is affirmed, BLM will— (a) Immediately collect the forfeited amount as provided by applicable laws for the collection of defaulted financial guarantees, other debts, or State bond pools; and (b) Use funds collected from financial guarantee forfeiture to implement the reclamation plan, or portion thereof, on the area or portion of the area to which financial guarantee coverage applies.</p> <p>§ 3809.598 What if the amount forfeited will not cover the cost of reclamation? If the amount forfeited is insufficient to pay for the full cost of reclamation, the operators and mining claimants are jointly and severally liable for the remaining costs. BLM may complete or authorize completion of reclamation of the area covered by the financial guarantee and may recover from responsible persons all costs of reclamation in excess of the amount forfeited.</p> <p>§ 3809.599 What if the amount forfeited exceeds the cost of reclamation? If the amount of financial guarantee forfeited is more than the amount necessary to complete reclamation, BLM will return the unused funds within a reasonable amount of time to the party from whom they were collected.</p>	

NOTICE MINES

Under the 1980 rule, notice operations were permitted for mining that was more than “casual” use but disturbed less than 5 acres. Under the new rule, new notice mining operations for extraction are effectively eliminated. Notices will still be permitted for exploration.

The elimination of new notice mines constitutes an regulatory improvement of unknown significance. The BLM, never a particularly transparent organization, does not allow public participation in notice mining permitting or oversight. We don’t know how many exist, how damaging they are, etc.

This section answers the following questions:

- *why was new notice mining eliminated?*
- *when must a notice be filed?*
- *when must a plan be filed even when proposed operations would disturb less than 5 acres?*
- *what happens to pre-existing notices?*

“for notice-level, an operation must submit a notice to BLM before beginning operations, except for certain suction-dredging operations covered by final 3809.31(b).” p70018

Why was new notice mining eliminated?

The notice mine for mining (as opposed to exploration) was eliminated in the new rule because the NRC report explicitly recommended that they be eliminated: “plans of operation should be required for mining and milling operations ,[...] even if the area disturbed is less than 5 acres.”⁴⁰

When must a notice be filed?

A notice must be filed “15 calendar days before you commence *exploration* causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed.”⁴¹ [italics added] For all other operations greater than casual use, a plan must be filed.⁴²

The rule specifically forbids segmenting operations so that they are less than 5 acres and thus not subject to a plan. However, the preamble explains that the phrase “on which reclamation has not been completed” means that if an operator explores under a notice, then reclaim the land covered under that notice, the operator may explore/disturb an adjacent 5 acres without filing a plan. When exploring, only if an operator disturbs more than 5 acres simultaneously must they file a plan.⁴³

There is also a sizable loophole to the no new mining under a notice rule: suction dredges. New notices can cover mining with a suction dredge, if BLM and the State in question have an agreement in place.⁴⁴

⁴⁰ *Hardrock Mining on Federal Lands*, National Research Council, 1999, p.95

⁴¹ § 3809.21(a)

⁴² § 3809.11(a)

⁴³ *Federal Register*, 11/21/2000, p70022-23

⁴⁴ § 3809.31(b)

When must a plan be filed even when proposed operations would disturb less than 5 acres?

In some particularly sensitive unwithdrawn lands, notices are forbidden even where they disturb less than 5 acres. In particular,

- (1) “controlled” or “limited” lands in the California Desert Conservation Area ;
- (2) areas in the National Wild and Scenic Rivers System, and areas designated for potential addition to the system;
- (3) Designated Areas of Critical Environmental Concern;
- (4) areas designated as part of the National Wilderness Preservation System and administered by BLM;
- (5) areas designated as “closed” to off-road vehicle use, as defined in § 8340.0–5 of this title;
- (6) lands in the King Range Conservation Area.

The above areas were included in the old rule, the new rule adds the following exceptions:

- (1) National Monuments and any other National Conservation Areas administered by BLM;
- (2) any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat; and
- (3) bulk sampling over 1,000 tons. A proposed exception not adopted would have been for activities in all areas segregated in anticipation of a mineral withdrawal and all withdrawn areas.⁴⁵

What happens to pre-existing notices?

Notices filed by January 20th, 2001 are grandfathered. They are grandfathered in several senses:

- (1) in that mining notices continue to exist at all; (2) that notices are subject to the old environmental performance standards; (3) that notices are subject to the old bonding requirements (that is, none).⁴⁶

Two years after January 20th, the notice may be extended for another two years. Notices may be extended repeatedly. Extended notices must be bonded, but old environmental performance standards still apply.⁴⁷ Modifications to notices on file on January 20th are not grandfathered in any sense.

⁴⁵ § 3809.11, and *Federal Register*, 11/21/2000, p70018

⁴⁶ § 3809.300

⁴⁷ § 3809.333

PUBLIC PARTICIPATION

This section answers the following questions:

- *at what points can the public participate in the mining review and reclamation process?*
- *can the public participate in mine inspections?*

At what points can the public participate in the mining review and reclamation process?

Under the old regulations, public participation in hardrock mining activities on public lands was fairly limited, and was not specifically included in the regulations beyond the public participation requirements adopted under the National Environmental Policy Act (NEPA).

Under NEPA, the public is provided notice and the opportunity to comment on the environmental analysis prepared when the federal government is considering a mining permit. Since 1992, most major mining operations have received some scrutiny through the development of an Environmental Impact Statement, and the public can comment on the Impact Statement.

In contrast, the new 3809 regulations clearly identify the role of the public in decisions about mining activities on public lands. Under the new 3809 regulations, the public can participate in notice level operations to the extent that the National Environmental Policy Act applies to these operations. For plans of operations, public participation in the review of proposed plans of operations, and for significant modifications to those plans of operations, are expressly provided for.

The new regulations indicate that the public can participate in the following actions:

- Review and approval of Memorandum of Understanding between the BLM and the State regulatory authority, prior to approval by the State Director.⁴⁸
- When the State Director designates a specific area on the public lands where the cumulative effects of the mining activities considered there are likely to result in more than a negligible disturbance. The public receives notification in the Federal Register of the boundaries of the specific area.⁴⁹
- When a complete application for a plan of operations is submitted to the BLM, and before the plan is approved, the public is notified through a notice in a newspaper of general circulation for 30 days.⁵⁰ This same notice is also given for significant modifications to the permit.
- When an operator proposes to release a portion of the financial guarantee covering some or all of a mining operation. BLM will either post a notice OR publish a notice in a newspaper of general circulation for 30 days.⁵¹

⁴⁸ § 3809.202(b)

⁴⁹ § 3809.31 (a)

⁵⁰ § 3809.411(c)

⁵¹ § 3809.590

Can the public participate in mine inspections?

Under the new regulations, BLM specifically authorizes individuals to participate in at least one on-site inspection per year at a mine on public lands. This action is discretionary. If BLM receives a request, they may sponsor and schedule a public visit.⁵² If BLM schedules a public visit, operators must allow the visit and cannot exclude people that are authorized by the BLM to participate in the inspection. An operator's representative must accompany the group on the visit.⁵³

The purpose of this section is to restore some of the rights of the public to visit the public lands affected by mining. Over the past decade, members of the public have routinely been denied access to public lands where mining is taking place. Unfortunately, the access provided under this section is solely under the discretion of the field manager of the BLM or the State Director.

⁵² § 3809.900(a)

⁵³ § 3809.900(b)

ENFORCEMENT

One of the most significant changes to the surface management program is the creation of a comprehensive new approach to inspecting and enforcing hardrock mining activities on public lands.

The old regulations were limited in how FLPMA’s enforcement authority could be exercised for hardrock mining. Generally, BLM took the position that only criminal enforcement actions could be taken against environmental violations. This created the untenable situation where BLM staff had to vie for time from the U.S. Attorney, and compete with violent criminals and other activities in the criminal justice system.

The new regulations recognize the need for administrative enforcement actions to be taken to resolve environmental and other violations at mine sites, along with the assessment and collection of civil penalties for failure to comply with enforcement orders.

This balance of this section answers the following questions:

- *how often will the BLM check for environmental compliance?*
- *how does the enforcement system work under the new regulations?*
- *what mandatory enforcement actions are required?*
- *what information is needed to trigger an enforcement action?*
- *what is joint and several liability, and how does it relate to enforcement?*
- *who can appeal decisions?*

How often will the BLM check for environmental compliance?

At any time, BLM may come onto a mine site and inspect the site. For operations that are using leachate or have the potential to produce acid mine drainage, BLM will inspect those sites at least four times a year.⁵⁴ As mentioned previously, the public can participate in an inspection of the mine site once a year.⁵⁵

How does the enforcement system work under the new regulations?

BLM has the discretion to issue a notice of non-compliance to operators that are not meeting the terms of the plan of operation or otherwise are not in compliance with the environmental performance standards.⁵⁶

If the operator fails to comply or take action to correct the noncompliance order, BLM has the discretion to issue a suspension order, requiring some or all of the operation to cease operations until the violation is corrected.⁵⁷ BLM must notify the operator of its intent to issue a suspension

⁵⁴ § 3809.600

⁵⁵ § 3809.900

⁵⁶ § 3809.601(a)

⁵⁷ § 3809.601(b)

order, and provide an opportunity for an informal hearing before the State Director if the operator objects to the suspension order.

If the operator does nothing to correct the violation, BLM can cause the mining operations to cease under a suspension order. BLM can also revoke a mining plan of operations or an approved notice if the operator fails to comply with a notice of noncompliance or a suspension order, or has a pattern of violations.⁵⁸

BLM also has the authority to request the U.S. Attorney to institute a civil action for an injunction or order from federal court to force compliance with an administrative order, and to collect damages resulting from unlawful acts.⁵⁹

If an operator knowingly and willfully violates any section of the new regulations, he/she is subject to conviction and a fine of not more than \$100,000. Companies are subject to a fine of not more than \$200,000. These are known as criminal penalties, and apply only to operators or individuals who are convicted of a violation in federal court.⁶⁰

BLM also can assess civil penalties. When an operator fails to comply with a noncompliance order, BLM can assess a civil penalty of up to \$5000 each day for each violation when an operator (1) fails to follow the plan of operation or notice, or (2) violate any provision of this part of the regulations.⁶¹ These civil penalties can be negotiated to a lesser settlement between the BLM and the operator.⁶²

What mandatory enforcement actions are required?

There are NO mandatory enforcement provisions. Regardless of the degree of environmental damage taking place on the ground, the decision whether to take enforcement action is left up to the BLM authorized official.

What information is needed to trigger an enforcement action?

The regulations do not specifically address what kind of information is necessary to trigger an enforcement action. Sec. 3809.601(b) does shed some light on what “threshold” will be applied to deciding when and whether to take enforcement action. Under this section, BLM may issue a suspension order if a significant violation is occurring. A significant violation is considered to be one that causes or may result in “environmental or other harm or danger or that substantially deviates from the complete notice or approved plan of operations.

What is joint and several liability, and how does it relate to enforcement?

BLM has addressed the question of who is ultimately responsible for the actions at a mine site, and the potential violations, by including a new section in the regulation:

Sec. 3809.116(a)(1) Mining claimants and operators (if other than the mining claimant) are jointly and severally liable for obligations under this subpart that accrue while they hold their interests. Joint and several liability, in this context, means that the mining claimants and operators are responsible together and

⁵⁸ § 3809.602

⁵⁹ § 3809.604

⁶⁰ § 3809.700

⁶¹ § 3809.702

⁶² § 3809.703

individually for obligations, such as reclamation, resulting from activities or conditions in the areas in which the mining claimants hold mining claims or mill sites or the operators have operational responsibilities.

Mining claim holders, operators, contract miners that work the site, and parent companies of any of these entities will be held accountable for the violations that might occur at the mine site, including any enforcement action taken on the site. The final regulations specifically provide examples of what "joint and several liability" means in this context.

Who can appeal decisions?

The new regulations do not change the law on who can appeal decisions. That decision is governed by the appeals regulations at 43 CFR 4.21. Instead, BLM restates the general language of who can appeal decisions in this section – “a party adversely affected by a decision under this subpart.”⁶³ Anyone who appeals a decision has the opportunity to ask the State Director for review of the decision, or appeal directly to the Interior Board of Land Appeals.

⁶³ § 3809.800