

DRAFT - 9/10/10
**Financial Assurance for Unmitigated Adverse Impacts Associated with
Large Groundwater Withdrawals**

The Policy of Environmental Damage Cost Internalization

A widely applied principle in US environmental law is that the creator of environmental pollution or other damage should bear the costs of remediation and reclamationⁱ. Cost internalization by responsible parties results in the most equitable means of compensation for environmental damage by avoiding compensation using public funds and promoting deterrence, risk reduction and innovation to prevent environmental harm.

However the objective of polluter cost internalization is not always achieved in practice. Environmental damage liabilities may variously be avoided through bankruptcy, corporate dissolution, divestiture of assets, or forms of corporate organization designed to externalize liabilities. As a consequence, regulatory authorities have looked to forms of financial assurance to address the risk of non-compensation for or public assumption of environmental damage costs.

Financial assurance requires the potential creators of environmental damage to demonstrate up front the financial capacity to remediate and/or compensate for such damage. Requiring such demonstration of financial responsibility assures that potential environmental costs are considered in the accounting and business decisions of companies whose operations may create environmental harm. Certain forms of financial assurance also can (1) enhance the possibility of more timely access to compensation, possibly mitigating further damage caused by delay; (2) minimize public transaction cost of collecting compensation; and (3) utilize the expertise and scrutiny of third-party financial providers such as sureties, insurers and banks.

Choosing a Financial Assurance Mechanism

The concept of implementing financial assurance rules raises many collateral issues such as the level of assurance to be required, the type of assurance mechanism to be employed, the conditions under which funds are to be released and obligations to be considered discharged, and the interaction of such rules and mechanisms with other laws, especially, bankruptcy law.

Among the array of mechanisms available, the primary ones used and considered are insurance, letters of credit, cash accounts or certificates of deposit (held in the name of the government or regulatory agency), pledged collateral (e.g. real estate), trust funds, forms of self-guarantees or self-demonstration (financial tests, corporate guarantees, financial reserves), pool guarantee funds, designated public funds, and financial or performance bonds issued by a third-party (herein referred to generally as surety bonds.)ⁱⁱ

The greatest difficulty in choosing a financial assurance mechanism may inhere in the fact that the perspectives of regulators and industry may differ on many of the attributes of financial insurance mechanisms. Generally, regulators are primarily interested in an efficient and effective guarantee, while industry is primarily interested in reducing the economic impact of the financial assurance mechanism.

However, while priorities differ there is not necessarily conflict on all attributes. A study of industry versus regulatory perspectives on the various attributes of financial assurance instruments and the development of a decision model was completed by Ferreira et. al.ⁱⁱⁱ in the upstream petroleum sector. They weighted preferences by regulators and industry members on fourteen different attributes: seven attributes chosen from the regulator perspective (level of liquidity, risk of performance of the instrument, delay/difficulty in collecting funds, impact on the industry, level of monitoring required to insure continued integrity of the instrument, incentives for contractual compliance offered by the instrument, and effectiveness in targeting risky parties) and seven chosen from an industry perspective (level of liquidity constraints and opportunity costs, flexibility, fiscal advantages/disadvantages, ease of exit from obligations, level of money value protection for allocated funds, impact on credit and loan capacity and level of difficulty in instrument acquisition (underwriting).

The study demonstrated that in the regulatory context of this oil sector, the industry showed preference for insurance policies, self-guarantees and surety bonds, while regulators preferred surety bonds and cash collateral accounts. The instrument class having the highest agreeable feedback from both stakeholders was surety bonds, followed by insurance and then letters of credit. Insurance was not favored by some regulators who consider this instrument as transferring liability to third parties without generating reasonable incentives for compliance. Some regulators also found letters of credit to present undue financial risk.^{iv}

Bankruptcy Considerations

This section will give a brief overview of the very complex and extensive intersection and interplay of the Bankruptcy Code^v and environmental protection law, primarily to illustrate the relevant aspects pertaining to the choice of financial assurance mechanisms.

Environmental protection law and bankruptcy law generally seek conflicting objectives: environmental regulation seeks to impose or recover remediation or mitigation costs and bankruptcy law is designed to give the debtor a fresh start by discharging existing claims against the debtor. The intersections and potential conflicts between the Bankruptcy Code and the enforcement of environmental regulation are many and varied. Attempts by regulators to achieve remediation or mitigation may be stymied by bankruptcy provisions such as those that govern application of the automatic stay (which prevents creditors from taking any action against the debtor to collect claims or enforce judgments), whether a right against the debtor constitutes a dischargeable claim, whether expended remediation costs can be given administrative expense priority over certain other claims, and whether

certain assets, rights or claims of the debtor are deemed to be property of the debtor's estate. The application of one or more of these provisions in combination with components of the factual context such as the time of occurrence of the environmental damage, the timing and nature of regulatory enforcement action, the type of financial assurance mechanism, if any, chosen, whether the debtor is liquidating or reorganizing and the benefit to the debtor's estate of remediation or mitigation effort have in their various combinations produced an array of results for environmental regulators.

To begin the discussion, we assume that a firm with environmental obligations has filed bankruptcy to reorganize. Once the bankruptcy is filed there can be a number of questions that must be analyzed to determine the success of the regulator in enforcing environmental obligations of the debtor. First, do the environmental obligations constitute "claims" under Section 101(4) of the Bankruptcy Code which, if so, are then dischargeable in bankruptcy? When is the claim deemed to have arisen? Only claims that arise prior to the confirmation of the plan of reorganization are subject to discharge under Code Section 1141(d)(1). What priority relative to other claims is to be accorded the environmental claim (and can such a claim be given administrative priority over other general unsecured claims? If administrative priority is not applicable, environmental claims are not given special priority over other claims of creditors, and thus receive whatever distributions are made for general unsecured claims and are discharged upon confirmation. Can the regulator enforce certain obligations under an exception to the automatic stay that allows "commencement or continuation of an action or proceeding by a government unit to enforce such government unit's police or regulatory power" (11 U.S.C. Sec 362 (b) (4))? Finally, where environmental law has mandated the firm to provide financial assurance, there arises the issue of whether the instrument or its proceeds are deemed property of the debtor's estate (11 USC Sec 541 et seq.) and therefore unavailable to the regulator.

Courts have generally found that actions brought by environmental agencies to reimburse costs incurred to mitigate or remediate, or to impose civil penalties against corporate debtors constitute dischargeable "claims".^{vi} However environmental agencies often enforce obligations by issuing compliance orders and seeking mandatory or prohibitive injunctions, arguing that an injunction is not a "claim" under Code Sec 101(4)(B) because it does not also give rise to a right to payment.^{vii}

Prohibitory injunctions that require the debtor to cease and desist from environmental degradation generally are not deemed to be "claims", fall within the police power exceptions to the stay, and are enforceable against the debtor. The more complicated question has arisen with respect to actions for mandatory injunctions directing the debtor to mitigate or remediate environmental damage. The U.S. Supreme Court in *Ohio v. Kovacs*^{viii} held that a state injunction ordering the appointed receiver to clean up hazardous waste was a dischargeable claim where the receiver would be forced to spend money to comply. The Sixth Circuit in *United States v. Whizco, Inc.* applied the *Kovacs* "expenditure test" to hold that an injunction directing a mine operator to reclaim surface

mines required the purchase of equipment to comply and therefore was a dischargeable claim.

However the Second Circuit in *In re Chateaugay Corp.*, held that neither a prohibitory nor a mandatory injunction directing the debtor to remediate existing contamination is a claim and therefore the debtor's obligation to comply would not be discharged. The *Chateaugay* court found that an injunction is a "claim" only if it "does no more than impose an obligation entirely as an alternative to a payment right" and a "non-claim" injunction is "any order that to any extent ends or ameliorates current pollution"^{ix}. The *Chateaugay* court distinguished the facts before it from those in *Kovacs* where the debtor was not in possession of its own property and had to pay someone else to perform the clean-up. The Third Circuit in *In re Torwico Electronics, Inc.* followed the *Chateaugay* reasoning, holding that an order from a state environmental agency requiring the debtor to clean up releases of hazardous waste from a formerly operational manufacturing facility did not constitute a "claim" and ordered the debtor to comply. In summary the application of the *Kovacs* "expenditure test" and the limits of the police and regulatory power exception have not yet been clearly and reliably defined.^x

Another potential scenario distinguishable from those above, is when environmental damage occurs on the debtor's property during the pendency of the bankruptcy case and the regulatory agency has incurred remediation costs. Such claims for reimbursement are generally allowed administrative expense priority. However the extent of the priority claim may be limited to those expenses that enhance the value of the estate or that are necessary to remedy imminent harm to public health.^{xi} Also there may be considerable delay in liquidating such claims

The thorny issues affecting the regulator's ability to minimize public costs expended to remediate or mitigate environmental harm caused by or incident to the operations of an insolvent firm have focused more attention on the advantages and utility of financial assurance mechanisms. However, even where a financial assurance mechanism is employed prior to bankruptcy, the bankruptcy filing may pose obstacles to reaching assets represented by such instruments. The regulator is first faced with the question of whether a motion for relief from the automatic stay is required to reach the assets. Although many regulatory agencies will file such a motion as a matter of course in an exercise of caution, the question of whether the bankruptcy court has jurisdiction over the assets and whether the regulator can reach and liquidate such assets devolves primarily on the question of whether such assets constitute property of the debtor's estate under Bankruptcy Code Section 541.

The determination of whether assets are property of the debtor's estate is based upon the debtor's rights in such assets under applicable state law.^{xii} In the case of escrowed funds, courts look first to determine whether the arrangement in fact is a true escrow under applicable state law. Once a valid escrow arrangement has been found, courts have generally ruled that assets held in such escrow are not property of the debtor's estate, with the exception that any contingent rights the debtor may have to be refunded some or

all of the funds under the terms of the escrow agreement remain property of the estate.^{xiii} Similarly where an express trust, valid under or created by applicable state law, is found, the trust corpus is generally not held to be property of the estate.^{xiv} Funds that are left under the control of the debtor, or commingled with the debtor's assets, even though designated as available for remediation costs, will generally require the regulator to meet the much higher thresholds of proving constructive or resulting trusts in order to access the assets.

Under analogous principles pertaining to the relationship between a letter of credit issuer and its beneficiary which is independent of the debtor, courts have generally held that letters of credit and its proceeds are not property of the debtor's estate.^{xv} However the beneficiary generally has the duty to return drawn proceeds in excess of those needed to satisfy the debtor's obligations^{xvi}.

A recent case in the District of New Hampshire, *In re Hinsdale Greyhound Racing Assn.*^{xvii} involved the State's motion for relief from the automatic stay to set-off certain State claims from funds that were supplied by the debtor pre-petition and segregated pursuant to the requirements of a State statute in order to reimburse the State for certain potential types of costs and expenditures as specifically enumerated in the statute. Although the segregated fund was substituted for the "bond" required under the statute the court found the segregated fund could be substituted for the bond under another State statute and that the fund was equivalent to a bond. The court allowed the State to recover from the fund, but only for those expenses for which reimbursement was expressly provided for in the statute.

Insurance policies and surety bonds issued by third-party issuers essentially transfer liability to the issuer and the proceeds of such are generally available to the beneficiary free of any claim of the debtor's estate. The risk of such financial assurance mechanisms for regulators generally arise from the financial status of the issuer and the contractual terms of the instruments, for example, the issuer's right to cancel or non-renew.

In summary, those financial mechanisms instituted prior to bankruptcy which (1) transfer liability for environmental obligations to, or require upon default or other conditions the payment of monies by, a financially sound third-party issuer, such as insurance, surety bonds or letters of credit; or (2) place funds supplied by the regulated firm in the control of third parties pursuant to valid escrow or trust arrangements, have the greatest potential for minimizing the public risk for remediation of environmental damage.

Adverse Impacts Associated with Large Groundwater Withdrawals

The State of New Hampshire has established statutes and regulations to protect the public and water resources from being adversely impacted by new groundwater withdrawals that exceed 57,600 gallons over any 24-hour period. The implementation of the statutory requirements and associated regulations has established liability and a regulatory

response mechanism for unmitigated adverse impacts. However the current statutory and regulatory regime does nothing to assure that the permittee will be financially able to mitigate adverse impacts once they begin to occur. The consequence is the potential that adverse impact costs will be shifted to the public or the delay in enforcing remediation by the permittee will prevent timely mitigation, perhaps worsening the adverse impact. Externalization of remediation costs is both inequitable and detrimental to environmental risk avoidance. As in the vast majority of environmental regulatory contexts, it is prudent to consider the imposition of financial assurance requirements in the context of large groundwater withdrawals

Financial responsibility requirements for new large groundwater withdrawals in tandem with the existing statutory requirements for developing a large groundwater withdrawal further reduce the risk of unmitigated impacts from occurring by establishing accessible financial resources to address the following scenarios:

- Scenario 1) A permittee does not mitigate adverse impacts (such as dewatering a private well) associated with a large groundwater withdrawal and refuses to comply with groundwater withdrawal cessation orders. Certain types of financial responsibility requirements could be used by NHDES to mitigate adverse impacts while NHDES coordinates with the Department of Justice and State Police to enforce its orders;
- Scenario 2) A permittee does not comply with environmental monitoring requirements associated with its permit and does not comply with groundwater withdrawal cessation orders. Certain types of financial responsibility requirements could be used to complete the environmental monitoring required by the permit until NHDES coordinates with the Department of Justice and State Police to enforce its orders; and
- Scenario 3) A permittee alters the flow of contaminated groundwater and causes contamination to flow into private wells and either refuses to, or is financially unable to mitigate this impact as required under RSA 485-C:21.(It should be noted that in addition to liability under RSA 485 C-21, the entity that released the contamination to the environment is also financially responsible under waste remediation statutes and regulations to clean-up contamination and to pay the costs associated with contaminating drinking water resources).

The nature of financial assurance required to address the impacts described above vary significantly. For instance, NHDES would need to be able to readily access funds on the order of \$10,000-30,000 to mitigate the impacts or to maintain monitoring requirements being disputed or neglected by a permittee in order to respond to the issues described in Scenario 1 or 2. A financial assurance mechanism, such as a trust fund, that readily puts funds in the direct control of NHDES would be advisable.

The costs of addressing impacts associated with Scenario 3 could exceed several hundred thousand dollars, which is significantly higher than the costs associated with mitigating issues described in Scenario 1 or 2. A financial assurance requirement of several hundred thousand dollars could be in the form of a trust fund, but this substantial up front cost may be prohibitive for a small business. Alternatively, financial assurance in the form of a letter of credit, surety bond, or insurance could be used to provide protection for more costly impacts that do not require immediate access to funds. Letters of credit, surety bonds or insurance would still add to the costs of operating a large groundwater withdrawal, but would provide for a lower amount of upfront expenditures. Other financial assurance mechanisms such as corporate guarantees or corporate financial tests are less costly to the permittee, but from a regulatory standpoint are not desirable because the reliability of these mechanisms can change quickly and such assurance mechanisms require substantial oversight and enforcement.

Costs of Financial Assurance Mechanisms

Surety Bond – A surety bond is a guarantee by a surety company that it will meet the obligations of the owner or operator, either by performing the necessary activities (such as performing corrective action) or by making payments. The use of a surety bond is similar to the use of a letter of credit. The major differences are that surety bonds are 1) issued by a licensed surety, rather than by a bank; 2) More often issued to cover a lack of performance (e.g., failure to perform a clean-up) rather than default on financial obligation. Surety bonds are issued by surety companies, many of which are insurance companies. Each July, the U.S. Department of the Treasury issues an annual publication, Circular 570, that lists eligible surety companies. The typical cost is about 2 percent of the surety amount. The issuer of the surety bond may require collateral up to full value of the surety.

Trust Fund – A fully funded trust fund holds money for corrective action and third-party liability and are administered by an impartial third party. Trust funds are administered by trust departments, typically of banks. Banks acting as a trustee of funds typically impose annual administrative and maintenance charges of between 0.1 and 1 percent of the principal amount. The largest cost of a fully funded trust is associated with the opportunity cost of allocation the full amount of money in the trust. That is, the cost of raising funds to place in the trust usually exceeds the investment income of the trust.

Irrevocable Letter of Credit - An irrevocable letter of credit is a contract between three parties (the issuer (normally a bank), the owner demonstrating financial responsibility, and the implementing agency). By issuing a letter of credit, the issuer promises to pay a certain amount to the third party in the event that the principal fails to meet an obligation. Banks typically issue letters of credit. Frequently, a bank will issue a letter of credit as one element of an on-going relationship with a client. Costs range from about 1 to 15 percent of the face amount, with a typical charge of about 3 percent. Also, the owner demonstrating financial assurance may need to provide collateral up to the full amount of

the letter of credit. For good customers, banks may not require collateral and may charge lower fees.

Insurance – Insurance collect and insurance premiums from entities with liability insurance policies. The premiums are pooled and losses or claims paid from the pool. Premiums for insurance can vary widely and are based on the magnitude and likelihood of damage that may occur as determined by underwriters on a case by case basis. Another factor affecting cost is the deductible.

For projects located in remote and undeveloped areas, the likelihood of costly damages associated with a large withdrawal are minimal and insurance should be very inexpensive. A large groundwater withdrawal located in a highly developed area with nearby industrial land uses would be relatively more likely to unknowingly cause environmental damage such as altering the flow of contaminated groundwater. But in these instances costs may be reduced because of the state large groundwater withdrawal permitting process that proactively minimizes the potential for the occurrence of these types of impacts. While it is not possible to estimate the cost of insurance to address liabilities associated with a large withdrawal without having an underwriter study a specific project, the risk of a large withdrawal permitted in accordance with state law causing a costly adverse impact would be less than a catastrophic event happening to home which pays an insurance premium of approximately \$1,000 per year for a \$300,000 home. By analogy, liability insurance associated with landfill post-closure requirements costs \$10,000-\$15,000 per year for \$1,000,000 of liability. Using these parameters, it is estimated that insurance should cost between \$1,000-\$10,000 per year.

Proposed Financial Assurance Regulation

Based on the foregoing discussion and review of (1) the resources listed in the Resources section of this paper; (2) the interplay of bankruptcy laws with various financial assurance mechanisms (3) the risks and probable costs associated with various potential adverse impacts of large groundwater withdrawals in NH; and (3) the experience of NH state agencies with current NH statutory financial assurance mechanisms, particularly under waste remediation statutes and regulations, the following draft statutory provision and accompanying administrative rules for financial assurance in the context of large groundwater withdrawals is proposed and recommended:

RSA 485-C Financial Assurance Plan.

I. Upon approval of an adverse impact monitoring and mitigation plan under RSA 485 C-21 and prior to the issuance of a permit, the applicant shall file with the [NHDES] Commissioner proof of adequate financial assurances, as determined and required by the Commissioner, payable to the state of New Hampshire with sureties or other security satisfactory to the commissioner to adequately secure compliance with this chapter upon default by the applicant. The Commissioner shall include, as part of such financial

assurance requirement, such financial assurance mechanisms appropriate to provide immediately available and sufficient funds (1) to mitigate and remedy potential adverse impacts that would require immediate mitigation and remediation or (2) to provide continuing monitoring or testing activity required under RSA 485 C-21 in the event of default by the applicant of such obligations. The Commissioner shall have the authority to adjust after the issuance of the permit the financial assurances required commensurate with any change in information or circumstances, including but not limited to the size and impact of the permitted groundwater withdrawal operation or a modification of the adverse impact mitigation plan. All financial assurance mechanisms required under this Section and shall be selected and issued in accordance with rules to be promulgated by the Commissioner.

II. All proceeds of forfeited financial assurance or other security shall be expended by the Commissioner for any and all mitigation, monitoring, or other obligations of the applicant under 485 C-21. Upon issuance of a certification in writing, signed by the Commissioner, that all such obligations satisfactorily fulfilled, the remainder of any financial assurance shall revert to the applicant or other party as designated in the financial assurance plan.

III. The Commissioner shall establish a schedule or otherwise provide for, if and as is appropriate, for the partial release of the financial assurances as obligations of the applicant under the Chapter are satisfied. All financial assurances provided, or portions thereof as detailed in any schedule thereof, shall be released when all obligations of the applicant under this Chapter have been completed by the applicant to the satisfaction of the Commissioner.

IV. Community water systems, as defined in RSA 485:1-a, I, are exempt from the provisions of paragraphs I-III above.

Proposed Rules for Financial Assurance Regulation

(a) Financial assurance required shall be provided by the entity possessing a large groundwater withdrawal permit. The financial assurance shall be used by the department to meet the requirements of RSA 485-C:21 if an applicant does not comply with RSA 485-C and conditions of a large groundwater withdrawal permit.

(b) In order to remediate or mitigate adverse impacts which require immediate remediation or mitigation (e.g. adverse impacts to private wells or to implement the conditions of a large groundwater withdrawal), financial assurance [in the minimum amount of at least \$_____] shall be in the form of:

(1) A surety bond issued by a surety company listed as an acceptable surety on federal bonds in Circular 570 of the U.S. Department of the Treasury; or

(2) A trust fund established in accordance with the laws of the state of New Hampshire;

(c) In order to mitigate impacts to water users or resources in accordance with RSA 485-C:21 that exceed the costs of the impacts described in paragraph (b) above, or require an extended period of time to design and implement the mitigation measure because of the nature of the adverse impact, the financial assurance [in the minimum amount of \$ _____] shall be in the form of:

(1) An irrevocable letter of credit issued for a period of at least one year from an institution whose operations are regulated and examined by a federal or New Hampshire state agency;

(2) An insurance policy, except that insurance issued by an affiliated captive insurance company shall not be acceptable;

(3) A surety bond issued by a surety company listed as an acceptable surety on federal bonds in Circular 570 of the U.S. Department of the Treasury;

(4) A trust fund established in accordance with the laws of the state of New Hampshire; or

(5) An alternate mechanism agreed to by the responsible party and the department that will ensure that the funds necessary to meet the remediation costs are available when they are needed.

(e) Each financial assurance instrument specified in (b) and (c), above, shall specifically identify the state of New Hampshire as the beneficiary.

(f) Funds held in trust accounts may be invested, but shall provide for the preservation of principal.

(g) Letters of credit shall include a provision to automatically extend the expiration date by at least one year unless the issuing institution notifies the responsible party and the department by certified mail, return receipt requested, of a decision to not extend the expiration date at least 120 days before the current expiration date.

(h) Insurance policies and surety bonds shall include a provision to prohibit any cancellation without prior notice of cancellation being sent to the responsible party and the department by certified mail, return receipt requested, at least 120 days before the effective date of cancellation.

Resources

In addition to reviewing the language of Senate Bill 166-2010 which established financial assurance requirements and certain types of mines, and NHDES Financial Assurance Program for the NHDES Waste Division (see <http://des.nh.gov/organization/divisions/waste/swmb/fos/index.htm>) the following resources were found to be useful in for understanding financial assurance concepts and mechanisms:

Berz, David R., Stanley M. Spraker and Adam P. Stochak. Environmental Law
In Real Estate and Business Transactions, LexisNexis:Matthew Bender &

Company, Inc., 2003.

Boyd, J. Financial Responsibility for Environmental Obligations: Are Bonding And Assurance Rules Fulfilling Their Promise? Resources for the Future, Washington, D.C., August, 2001.

Environmental Liabilities: EPA Should Do More to Ensure That Liable Parties Meet Their Cleanup Obligations, GAO-05-658, Washington, D.C., August, 2005..

Ferreira, D., S. Suslick, J. Farley, R. Costanza and S. Krivov. A Decision Model For Financial Assurance Instruments in the Upstream Petroleum Sector. Energy Policy 32: 1173-1184, Elsevier Science Ltd., 2003.

Kuipers, James R., and Cathy Carlson. Hardrock Reclamation Bonding Practices In the Western United States – Summary Report. National Wildlife Federation, Boulder CO, 2000.

Richardson, Benjamin J. Mandating Environmental Liability Insurance, Duke Environmental Law & Policy Center, Vol. 12: 293-329, Spring, 2002.

ⁱ See James Boyd, Financial Responsibility for Environmental Obligations: Are Bonding and Assurance Rules Fulfilling Their Promise? Resources for the Future, August 2001 at 1.

ⁱⁱ Bonding instruments may be classified in various ways or include differing provisions although being referred to identically. For further discussion on classification, see Ferreira, Suslick, Farley, Costanza and Krivov, A Decision Model for Financial Assurance Instruments in the Upstream Petroleum Sector, Energy Policy 32: 1173-1184, (2003).

ⁱⁱⁱ Ibid.

^{iv} The reader is also referred to Boyd, supra note 1, for analysis of the advantages and disadvantages of various assurance mechanisms from each of the regulatory and industry perspectives.

^v All references to “Code Sec ____.” or to “Bankruptcy Code Sec ____” are to Title 11 of the United States Code, as amended, generally known as the Bankruptcy Code

^{vi} See, e.g. *In re Chateaugay Corp.* 944 F. 2d 997 (2d Cir 1991) (federal government’s right to recover hazardous waste clean-up costs under CERCLA was a claim within the meaning of Bankruptcy Code Sec 101(4).

^{vii} It is important to note that the regulator’s argument for a “non-claim” compliance injunction would backfire in a Chapter 7 proceeding where the Trustee would then be absolved from allocating liquidation proceeds to an otherwise valid environmental claim.

^{viii} 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985).

^{ix} *In re Chateaugay Corp.*, 944 F. 2d 997, 1008 (2d Cir. 1991).

^x See also *Safety-Kleen, Inc. (Pinewood) v. Wyche* 274 F. 3d 846 (4th Cir. 2001) (State environmental agency's order to Chapter 11 debtor to obtain substitute financial assurance bonds was to deter environmental misconduct and promote safe operation of hazardous waste facility rather than merely to protect state's status as creditor and therefore regulatory exception to the automatic stay applies to issuance and enforcement of order.), *Bickford v. Lodestar Energy, Inc.* 310 B.R. 70 (E.D. KY, 2004) (State environmental agency action to require debtor to replace reclamation bonds was not to protect government's pecuniary interests in recovering reclamation costs but rather to protect citizens against dangers of unreclaimed land. State action was therefore within the regulatory exception to the automatic stay.)

^{xi} See, e.g. *In re Smith-Douglas, Inc.* 856 F. 2d 12 (4th Cir. 1988), *In re Mahoney-Troast Constr. Co.* 189 B.R. 57 (D.N.J. 1995).

^{xii} Collier on Bankruptcy, Section 541.09, Sixteenth Edition, Vol. 5, (eds. Alan N Resnick and Henry J. Sommer), LexisNexis, 2010.

^{xiii} See *Davis v. Cox*, 356 F. 3rd 76, 933-94 (1st Cir. 2004). See, also *In re Carousel International Corp.* 89 F. 3d 359, 361-62 (It is not settled whether a creditor must seek relief from the automatic stay to determine the validity of an escrow).

^{xiv} See *Mairs-Winn Co, v. Geberson Electric, Inc.*, 103 F. 3d 584, 591 (7th Cir. 1996) , *Drewes v. Schonteich*, 31 F. 3d 674, 677 (8th Cir. 1994).

^{xv} *In re S-Tran Holdings, Inc.* 414 B.R. 28 (Bankr. D, Del. 2009), *Int'l Finance Corp. v. Kaiser Group Int'l, Inc. (In re Kaiser Group Int'l)* 399 F. 3d 558 (3rd Cir. 2005).

^{xvi} *Two Trees v. Builder's Transport, Inc. (In re Builder's Transport, Inc)* 471 F. 3d 1178 (11th Cir. 2006).

^{xvii} 417 B.R. 162, (Bankr. D. N.H. 2009).