



Western Governors' Association Policy Resolution 11-4

Bonding for Mine Reclamation

A. BACKGROUND

1. Mining has a long history in the West. The western states are rich in hardrock minerals like gold, silver and copper.
2. Because mining necessarily involves surface disturbance, reclamation of mining operations is always required to avoid environmental consequences. Typically the primary environmental concerns are potential effects that active and closed mines could have on adjacent surface water and groundwater.
3. While older mines in western states have sometimes had harmful impacts on adjacent waters, the mining industry has improved its operation and reclamation track record in recent decades, to avoid or minimize such impacts.
4. Recent decades have also brought heightened attention to the importance of mine reclamation from state regulators across the west. All western states that host hard-rock mining industries now have staff dedicated to ensuring that on-going mine operations develop and follow appropriate reclamation plans.
5. An important component of the state's oversight of mine reclamation is the requirement that mining companies provide financial assurances in a form and amount sufficient to fund required reclamation if, for some reason, the company itself fails to do so. These types of financial assurances, often referred to generically as "bonding," protect the public from having to finance reclamation and closure if the company goes out of business, or fails to meet its reclamation obligation.
6. All western states have developed regulatory bonding programs to evaluate and approve the financial assurances required of the mining companies. The states have developed the staff and expertise necessary to calculate the appropriate amount of the bonds, based on the unique circumstances of each mining operation, as well as to make informed predictions of how the real value of current financial assurance may change over the life of the mine, and even post-closure.
7. For many mines, the required bonding will include funds to support the state's long-term oversight, through inspection and sampling, even after the mine closes, to help make sure no long-term environmental impacts develop.

8. Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9608(b), requires that EPA promulgate financial responsibility requirements for industrial facilities that take into account the risks associated with their use and disposal of hazardous substances. After the Sierra Club sued EPA for failing to timely comply with this section of CERCLA, a federal District Court in California ordered EPA to do so.¹
9. In response to the Court's ruling, EPA announced in July, 2009 that it had selected hard-rock mining as the first industry sector for which it would develop bonding requirements under CERCLA Sec. 108.²
10. Since EPA's 2009 announcement, various western states have expressed concern that any bonding requirements that EPA may develop for the hard-rock mining industry may be duplicative of state requirements, and could even pre-empt them entirely, under another section of CERCLA. See 42 U.S.C. §9614(d). The states have also questioned whether EPA has the resources to implement reclamation bonding for hard-rock mines, since bond calculations usually reflect very site-specific reclamations needs, tasks and costs.

B. GOVERNORS' POLICY STATEMENT

1. Because mine reclamation is needed primarily in order to protect adjacent waters, it is both appropriate and consistent with Congressional intent to recognize the states' lead and primary role in regulating water related impacts of mine reclamation, including the associated bonding. See Clean Water Act, Sec. 101(b), 33 U.S.C. § 1251(b).
2. The member states have a proven track record in regulating mine reclamation in the modern era, having developed appropriate statutory and regulatory controls, and are dedicating resources and staff to ensure responsible industry oversight.
3. In contrast, EPA currently has no staff dedicated to oversight of mine reclamation, or to the approval of bonding associated with mine reclamation. As a consequence, if EPA proceeds to promulgate bonding requirements for hard-rock mining industry under CERCLA Sec. 108, it will then have to create a new federal regulatory program. This represents an unnecessary investment of federal funds, at a time when the federal government is trying to get its fiscal house in order.
4. Because of the potential preemption of state authority under CERCLA Sec. 114(d), a new federal bonding program could not only duplicate, but in fact

1 See Sierra Club v. Johnson, 2009 WL 2413094 (N.D. Cal. 2009)

2 See 74 Fed. Reg. 37213 (July 28, 2009).

supplant the states' existing and proven regulatory programs. At the very least, adding a parallel federal program would lead to confusion for the industry and state regulators alike, as well as litigation to define the scope of the federal rules' preemptive effect. The states have developed deep experience in mine permitting, regulation, and bonding, and federal preemption of their bonding programs will threaten these effective state programs.

5. Western Governors believe that the states currently have financial responsibility programs in place that are working well, and that functional programs should not be duplicated or pre-empted by any program developed by EPA pursuant to Section 108(b) of CERCLA. Authorized or approved State programs should automatically stand in lieu of the federal requirements. If necessary EPA should pursue changes to CERCLA to allow states to administer their own bonding programs.

C. GOVERNORS' MANAGEMENT DIRECTIVES

1. WGA staff shall transmit this resolution to leadership and members of Congress, the Administrator of EPA, the Director of the Office of Management and Budget, and to other agencies and persons as warranted.
2. WGA staff will advance the policy positions stated above in appropriate venues as warranted and shall periodically report to the Governors and Staff Council regarding its efforts to that end.