



June 1, 2019

Idaho Department of Lands
Attn: Eric Wilson - Rulemaking
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Boise, ID 83702
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Re: Rulemaking Information for IDAPA 2003.02 Docket 20-0302-1901

These comments are submitted on behalf of Earthworks, a national non-profit conservation organization dedicated to protecting communities and the environment against the adverse impacts of mining.

As an overarching comment, we want to emphasize that financial assurance should be in a form that is secure, independently guaranteed, and readily accessible. Corporate guarantees - or self-bonding - are none of these. Corporate guarantees are simply a pledge made by a mining company and/or its parent company. There are no hard assets, cash or cash equivalents to back the “guarantee.” In essence, corporate guarantees provide no guarantee at all.

Although some states allow for corporate guarantees based on certain financial tests, this approach has also proven inadequate because securing a replacement financial assurance instrument when the company is suffering financial problems is highly uncertain – thus defeating the purpose of financial assurance. The corporate financial test rests on the assumption that a company’s recent financial performance is a reasonable predictor of its financial future. However, the financial test cannot anticipate sudden changes in market conditions or other factors that can dramatically change a company’s financial picture – and a company’s ability to meet its obligations. Once a company’s financial condition declines to the point that the company can no longer pass the financial test, it can be very difficult for the company to meet the requirements, or pay the costs, of obtaining an alternative form of financial assurance from a third-party provider.

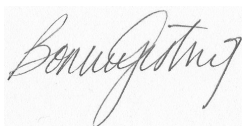
The State of Idaho should not have to track the financial health of a mining company, particularly given the volatility of metals prices and the numerous external forces that affect the viability of mining companies. In 2000, the DOI BLM identified similar concerns when it decided to prohibit new corporate guarantees for future reclamation work to restore lands when mining operations cease. In making the decision, BLM cited both the agency’s lack of expertise

to perform the periodic reviews of company's assets, liabilities and net worth that would be necessary to oversee guarantees and the fact that even with annual reviews by skilled staff, a default risk would remain.¹ This is why federal land management agencies do not allow for corporate guarantees, and many mining states have taken steps to preclude or phase out corporate guarantees.

- The State of Colorado passed legislation in 2019 that prohibits self-bonding or corporate guarantees.²
- The State of Maine passed legislation in 2017 that excludes corporate guarantees.³
- The Montana Metal Mine Reclamation Act states that bonding must be in a form with "surety satisfactory to the department."⁴ According to Dan Walsh, Montana Hardrock Mining Bureau Chief, the MMRA does not identify corporate guarantees as an acceptable form of bond, and the Department has never accepted a corporate guarantee for bonding to his knowledge.⁵
- Similarly, the State of Alaska has never accepted a corporate guarantee in its hardrock mining program.⁶ According to the Associate Director of the Alaska Department of Natural Resources, although state statute allows for corporate guarantees, the implementing regulations to identify the appropriate financial tests were never promulgated, so the state considers there to be some legal uncertainty over their use.
- The State of Nevada has largely phased out corporate guarantees in response to the U.S. Bureau of Land Management's decision to preclude corporate guarantees.

Corporate guarantees or self-bonding are an unnecessary financial risk as demonstrated by the numerous mining states that operate effectively without them. We strongly oppose the use of corporate guarantees as a form of financial assurance. If corporate guarantees are approved, we urge the department to restrict their use to the most limited circumstances, and for the department to retain the flexibility and discretion to deny a corporate guarantee on a case by case basis. Please see the following more detailed comments on the sections below.

Sincerely,



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¹ See discussion in 2005 GAO report: <https://www.gao.gov/assets/250/246828.pdf>

² https://leg.colorado.gov/sites/default/files/2019a_1113_signed.pdf

³ <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0265&item=3&snum=128>

⁴ Montana Metal Mine Reclamation Act, Sections 82-4-223, MCA and 82-4-338, MCA.

⁵ E-mail, Dan Walsh, Montana Hardrock Mining Bureau Chief, February 28, 2019

⁶ Personal Communication, Kyle Moselle, Associate Director, Alaska Department of Natural Resources, May 30, 2019. State statute AS 27.19.040(e) and AS 46.03.100 authorize Alaska DNR and DEC to use corporate guarantees, subject to implementing regulations, but the regulations fail to provide a financial test.

Section 070: APPLICATION PROCEDURE AND REQUIREMENTS FOR OTHER MINING OPERATIONS INCLUDING HARDROCK, UNDERGROUND AND PHOSPHATE MINING.

04 (a) This section should be expanded to include reclamation and post closure plans for tailings, waste rock, heaps, processing ponds, sediment ponds, and open pits.

04 (f) This section should include a requirement to provide post-closure plans for tailings impoundment management and monitoring to ensure long-term stability.

Section 120: FINANCIAL ASSURANCE REQUIREMENTS FOR MINING

03 The items in the table below should be included as indirect costs in the financial assurance calculations.

<u>INDIRECT COST GUIDELINES</u>				
Recommended Percentage of Reclamation Costs				
	CSP2¹	USFS²	BLM³	SCRE⁴
Contractor Profit	10%	15% - 30%	10%	10%
Scope/Bid Contingency	10%	14% - 50%	4% - 10%	4% - 10%
Mobilization/Demobilization	0% - 10%	0% - 10%	---	Direct Cost
Engineering & Construction Plans	8%	2% - 10%	4% - 8%	4% - 8%
Performance Bond Cost	5%	3%	3%	3%
Liability Insurance			1.5% of Labor	1.5% of Labor
State Sales Tax on Direct Costs	---	0% - 5%	---	---
Agency Administration	10%	4% - 14%	6% - 10% + 1.26% - 2.1%	6% - 10% + 1.26% - 2.1%
Annual Inflation	3%	1% - 6%	---	---
	=====	=====	=====	=====
Total Indirect Costs	46% - 56%	39% - 128%	29% - 44%	29% - 44%
References:				
¹ Hardrock Reclamation Bonding Practices in the Western United States, James R. Kuipers, PE, Center for Science in Public Participation, February 2000.				

² Training Guide for Reclamation Bond Estimation and Administration, for Mineral Plans of Operation Authorized and Administered Under 36 CFR 228A, USDA Forest Service, Minerals and Geology Management, April 2004.

³ BLM Handbook H-3809-1, Surface Management Handbook, Department of Interior, Bureau of Land Management, September 17, 2012.

⁴ Nevada Standardized Reclamation Cost Estimator (SRCE), 2015, <http://www.nvbond.org/>

Complete List:

Contingency; Mobilization/Demobilization; Engineering Redesign; Engineering Procurement & Construction Management; Contractor Profit; Agency Administration; Annual Inflation

Contingency costs are meant to address the errors that exist in every estimate resulting from the use of assumptions and conceptual information rather than actual measurement of work to be performed.

Contract Administration refers to all costs of the preparation and administration of oversight, design, construction or other contracts needed to accomplish closure and other operating plan requirements.

Agency Administration is all work performed by agency personnel and associated overhead costs of administrative work in support of agency closure of a mine (above and beyond that normally budgeted through appropriation).

Section 122: FORM OF FINANCIAL ASSURANCE

06 (a) The amount of the financial assurance in the form of corporate guarantees should be as minimal as possible. Nevada provides that no more than 25% can be in a corporate guarantee. Other states, such as Alaska and Montana, which have no record of corporate guarantees for hardrock mines, demonstrate that the industry can successfully function without corporate guarantees. The majority of the financial assurance should be in a form that is secure, independently guaranteed and readily accessible.

We agree that the proposed rules should preclude corporate guarantees for post-closure costs because this is the time in which the risk of default is the most significant. The mine is no longer generating revenue, yet water management and treatment costs could potentially continue in perpetuity. The chance that any company, let alone a mining company, could file for bankruptcy during the additional 30 years after closure is significant. State agencies have little leverage over companies during closure because maintaining an operating permit is no longer essential to the company. Furthermore, it's substantially more difficult to secure a replacement for a corporate guarantee after the mine closes and it's no longer generating revenue.

06 (c) The mining company should be required to provide audited financial statements. According to a review of the OSMRE financial assurance regulations, OSMRE found that "the financial relationships between parent and subsidiary companies have become increasingly complex, making it difficult to ascertain an operator's financial health on the basis of

information reported in company financial and accounting documents, according to officials.” According to OSMRE officials, financial expertise is now often needed to evaluate the current complex financial structures of large coal companies, which was not envisioned when the regulations were developed.”⁷ OSMRE also pointed out that the regulatory authority in a given state may not be aware that an operator had self-bonded in other states. Operators are only allowed to self-bond for up to 25 percent of their net worth in the United States, according to regulations. Regulatory authority decisions on accepting self-bonds generally focus on assessing activities occurring in a specific state, not nationwide, according to the Interstate Mining Compact Commission. As a result, the state regulatory authority or OSMRE may know whether an operator has applied for self-bonds in other states that if approved would exceed 25 percent of its net worth in total.

06 (c) This section of the regulations should also require the operator to meet at least two criteria. A single criteria, such as having a bond rating of A, is insufficient to demonstrate financial health.

The GAO reviewed federal financial assurance requirements for coal mining, hardrock mining, onshore oil and gas extraction and wind and solar development, and found that of these mining and energy development activities only coal mining allowed self-bonding. The OSMRE regulations implementing SMRCA require “operators to have one of the following: have an “A” or higher bond rating, maintain a net worth of at least \$10 million, or possess fixed assets in the United States of at least \$20 million. In addition, the total amount of self-bonds any single operator can provide shall not exceed 25 percent of its tangible net worth in the United States. Yet, following the bankruptcies of the three largest coal companies, a 2018 GAO report has recommended that Congress eliminate self-bonding for coal altogether, stating that:

“Obtaining additional financial assurances from operators for unanticipated reclamation costs, such as long-term treatment for water pollution, can be difficult. Determining the financial stability of surety companies has been challenging in certain instances. Self-bonding presents a risk to the government because it is difficult to (1) ascertain the financial health of an operator, (2) determine whether the operator qualifies for self-bonding, and (3) obtain a replacement for existing self-bonds when an operator no longer qualifies. In addition, some stakeholders said that the risk from self-bonding is greater now than when the practice was first authorized under the Surface Mining Control and Reclamation Act (SMCRA).”⁸

The State of Nevada requires at least two ratios to be met in its financial tests, in addition to the requirements in c, d and e below.⁹

(b) The audited financial statements of the corporation must indicate that the corporation has two of the following three ratios:

(1) A ratio of total liabilities to stockholder’s equity less than 2 to 1.

⁷ U.S. Government Accountability Office, “Coal Mine Reclamation: State and Federal Agencies Face Challenges in Managing Billions in Financial Assurances,” March 2018.

⁸ Id.

⁹ <https://www.leg.state.nv.us/NAC/NAC-519A.html#NAC519ASec350>

(2) A ratio of the sum of net income plus depreciation, depletion and amortization to total liabilities greater than 0.1 to 1.

(3) A ratio of current assets to current liabilities greater than 1.5 to 1.

(c) The net working capital and tangible net worth each must equal or exceed the amount established for reclamation pursuant to [NAC 519A.360](#).

(d) The tangible net worth must be at least \$10,000,000.

(e) Ninety percent of the assets of the corporation must be:

(1) Located in the United States; or

(2) At least six times the amount established pursuant to [NAC 519A.360](#).

(c)(ii) –The rules should require total net worth to exceed total liabilities to ensure that the company’s net worth is greater than its liabilities. The ratio of assets to liabilities should be 1.5 or greater.

(c)(iii) – The rules should require a bond rating of A or above. If a company’s bond rating is already BBB, there is no room to maneuver if the rating drops further.

122.06(d) - Parent vs. Operator/subsidiary

Corporate guarantees must be posted by the parent company as well as the subsidiary. The ASARCO bankruptcy that occurred after Grupo Mexico acquired the company provides a powerful example for why the parent company must be held accountable for financial assurance, how quickly a company’s financial circumstances can change, and how difficult it can be to go after a foreign-based company.

122.06(e) - Foreign company

We urge the department to adopt the Nevada language that says the company must have 90% of its assets in the USA or the assets of the corporation must exceed 6X the total reclamation costs.¹⁰

122.06(g) - Timing for submission of updates

Submissions should be mandatory and occur April 1 of each year.

122.06(h) - Requirement for replacement bonding

The operator must immediately notify IDL if they fall below financial fitness, and it should be mandatory for the department to require replacement bonding if the operator no longer qualifies.

122.06(i) - Director discretion re: approval and continued use

Approval and continued use of a corporate guarantee should be subject to review and approval by IDL even if all other thresholds are met, as required by the State of Montana and others. At the end of the day, the state agency is responsible for ensuring that reclamation occurs, and it should have the discretion to deny a corporate guarantee if the agency deems it appropriate.

¹⁰ <https://www.leg.state.nv.us/NAC/NAC-519A.html#NAC519ASec350>