



Policy Resolution 2020-04

Financial Assurance Regulation

A. BACKGROUND

1. Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9608(b), requires EPA to promulgate financial responsibility requirements for industrial facilities that take into account the risks associated with their use and disposal of hazardous substances.
2. CERCLA 108(b) is meant to protect the public, and state and local government from financing reclamation if industry goes out of business or fails to meet its reclamation obligations.
3. In 2009, EPA selected hardrock mining as the first industry sector for its analysis of whether federal financial assurance requirements under CERCLA108(b) were needed. In response, Western Governors expressed their concerns to EPA that any such financial assurance requirements could be duplicative of state requirements and could even preempt them entirely. The Governors also questioned whether EPA had the resources to implement and evaluate financial assurance for hardrock mines, since assurance calculations usually reflect very site-specific and ecological reclamation needs, tasks, and costs.
4. All western states have developed regulatory financial assurance programs to evaluate and approve the financial assurances required of mining companies. The states have developed the staff and expertise necessary to independently calculate the appropriate amount of the financial assurance, based on the unique circumstances of each mining operation and environmental and ecological requirements of each state.
5. Western states have a proven track record in regulating mine reclamation in the modern era – including for hardrock mines – having developed appropriate statutory and regulatory controls and are dedicating resources and staff to ensure responsible industry oversight.
6. In 2018, EPA determined that the agency would not issue financial assurance requirements under CERCLA 108(b) for the hardrock mining sector. The U.S. Court of Appeals for the D.C. Circuit upheld EPA's decision.
7. In 2017, EPA had also announced that it would examine the following sectors to see if they warrant financial assurance requirements under CERCLA 108(b): electric power generation, transmission, and distribution industry; petroleum and coal products manufacturing industry; and chemical manufacturing industry (collectively, "other sectors").

B. GOVERNORS' POLICY STATEMENT

1. Because mine reclamation is needed primarily 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 financial assurance.
2. Western Governors believe that states currently have effective financial responsibility programs for hardrock mining that should not be duplicated or preempted by EPA pursuant to CERCLA 108(b).
3. Prior to determining whether to pursue CERCLA section 108(b) financial assurance regulations for any of the other sectors, EPA should engage in substantive pre-publication consultation with Western Governors and state regulators regarding existing state regulations to prevent duplication or preemption of existing state law.
 - a. This should include substantive pre-publication consultation with states during development of rules or decisions and a review by states of any proposal before a formal rulemaking is launched.
 - b. EPA should also take into account state data and expertise in development and analysis of underlying science that serves as the legal basis for federal regulatory action.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct WGA staff to work with Congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult westgov.org/resolutions for the most current copy of a resolution and a list of all current WGA policy resolutions.