Testimony before the U.S. House of Representatives
Subcommittee on Energy and Mineral Resources

"EPA vs. American Mining Jobs: The Obama Administration's Regulatory Assault on the Economy"

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Submitted by:

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Department of Natural Resources, State of Alaska

On Behalf of:

The State of Alaska and the Interstate Mining Compact Commission

I. Introduction

Chairman Lamborn, Ranking Member Holt, and members of the House Subcommittee on Energy and Mineral Resources – I am Edmund J. Fogels, Deputy Commissioner of the Alaska Department of Natural Resources (AK DNR). On behalf of Governor Sean Parnell, the State of Alaska thanks the Subcommittee for this opportunity to testify and express our support for your work to ensure that mining in the United States will continue to create wealth and provide for the nation's mineral needs in the future without duplicative and overly burdensome federal regulation. I have also been entrusted by the 26 member and associate-member states of the Interstate Mining Compact Commission (IMCC) to convey their views to the Subcommittee today, and to express their gratitude for your leadership in this area.

In particular, I thank you for the opportunity to bring to your attention some of the challenges that recent overreaching actions by a particular federal agency – the Environmental Protection Agency (EPA) – have created for mining states throughout the country. The institutional attitude of the EPA demonstrated in the examples I will provide today needs to refocus on a more collaborative and respectful relationship with the states. We are hopeful that, through the careful oversight of you and your colleagues, this change will occur and mining in the United States will continue to provide good jobs to our citizens and valuable commodities and raw materials to our industries in a manner that is consistent with the mission of the EPA, and, more importantly, the interests of our states in protecting human health and the environment.

Biographical information

Before getting into substantive matters, I would like to briefly mention my professional background as it pertains to this testimony and provide some information about the IMCC. I have been serving as Deputy Commissioner of AK DNR, a state agency of over 1,100 personnel, since December 2010. I have worked as a natural resource manager for the State of Alaska for over 25 years, including as a mining regulator and state/federal mining permit coordinator. AK DNR is the largest non-federal land manager in the United States. In addition to Alaska's vast mineral resources, we manage one of the largest portfolios of oil, gas, water, timber, and renewable energy resources in the world. Our workforce is staffed by experts on responsible exploration and development that have years of experience with Alaska's unique environment.

The IMCC, of which the State of Alaska became a full member this year, is a multi-state organization that represents the natural resource and related environmental protection interests of its member states. 21 states have ratified their membership in the IMCC through acts of their respective state legislatures, and five others participate as associate members while they pursue enactment of state legislation ratifying their membership. A primary focus of the IMCC is liaising with Congress and the federal government to promote a cooperative effort between state and federal agencies in advancing responsible mining development and environmental protection.

Overview of Today's Testimony

My primary message today is that state governments must be allowed to be an equal partner, and at times to take the lead, in regulating mining in their respective states. A healthy mining industry and environmentally sound natural resource development are important to Alaska and the member states of the IMCC, and are in the best interests of the United States. Responsibly developing our mineral resources benefits our citizens and the country as a whole. To make this happen, we need cooperation rather than frustration from federal agencies such as the EPA. The states have developed effective and robust regulatory programs that should be relied on by federal agencies, not overridden by them.

States have been a central part of bringing about the modern era of mining regulation and environmental protection, and these processes have been very effective at correcting past mistakes. When federal agencies, such as the EPA, seek to expand their mining regulation they are often duplicating existing, well-functioning programs. This duplication is not only inefficient, but it has real costs to the states and their residents who work to responsibly develop and protect natural resources. The states' familiarity with the specifics of their respective local mining industries is irreplaceable, and federal agencies must recognize the states' role in representing their citizens' economic and environmental interests.

The examples of ongoing processes that are negatively affecting the State of Alaska and the IMCC member states that I will describe today illustrate how federal overreach can create uncertainty, increase cost, and cause delay for mining investment. These are also all examples where well-functioning state processes have been duplicated or disregarded. To solve this problem, federal regulators must:

First, respect the primary role and responsibility of the states in managing, administering, and protecting their lands and waters. This role is grounded in the states' position as sovereign entities in the system of federalism recognized in the U.S. Constitution, and has been unequivocally acknowledged many times by Congress. For example, the Clean Water Act – one of the primary federal environmental statutes the EPA is tasked with administering – clearly states: "It is the policy of Congress to recognize, preserve, and protect the *primary* responsibilities and rights of the states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[1]

Second, respect the experience and expertise of state agencies who are often much more familiar than federal regulators with the particular circumstances and needs in their communities. States may be able to craft more practical solutions to challenges if their roles are not displaced by rigid federal processes that do not take into account state experience and expertise. In short, states are more likely to be problem solvers, looking for and finding solutions that work well for their environment and their economy.

Lastly, defer to, and build on, the successful programs that are already in place. New programs do not need to be built from the ground up at the federal level, as this will duplicate many of the well-functioning processes that are established and well-managed by the states. This will ensure that the expertise of both the states and of other federal agencies can be used efficiently. Collaboration with and support for state programs should be the focus of new federal initiatives.

II. Mining, Under Modern Standards and Regulations, is Critical to Our States

I know that the Subcommittee is very familiar with the numerous benefits that are associated with U.S. mining, so I will only quickly outline them to give a foundation to the issues of state primacy that my testimony focuses on. Bottom line - mining is critical to the economic, social, and security interests of our states and the nation as a whole. When companies, including the many small businesses that participate in American mining, invest in mineral exploration and development in the United States it brings high-paying, technical jobs back to our country. Many times, especially in a state like Alaska, these investments and developments occur in rural areas and bring economic opportunities and social benefits to our citizens that are otherwise not widely available. Domestic mining also brings secure domestic supplies of important resources – for example: coal and uranium for energy security, iron for industrial production, and gold and other metals for modern high-tech applications. We are in a global competition for these resources – for secure supplies to meet our demands, and for the investment that drives employment and development in our states.

III. Mining Regulation is Local, and Should Remain Primarily the Responsibility of the States

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1 33 U.S.C § 1251(b) (emphasis added).

The issues we are discussing today are certainly global and national, but they are also local. Environmental protection benefits those who live in the protected environment. Clear and general standards, enforced by objective regulators, have to be applied to specific situations in specific locations. This is why the State of Alaska focuses so intently on maintaining high standards for environmental protection – so many of our citizens, whom our state government has a Constitutional responsibility to represent, regularly utilize Alaska's environment. Many areas of Alaskan life, from traditional subsistence lifestyles to local recreation to our robust tourism industry, are dependent on protecting our fish, wildlife, water, and land from degradation.

This is also why Alaska, and the members of the IMCC, recognize that a well-regulated mining industry brings real, local benefits to our residents. The most frequently cited and clearly illustrative example in Alaska is the Red Dog Mine in the Northwest Arctic Borough. This project brings hundreds of jobs to this remote region, and provides the Borough's only source of tax income. In partnership with the regional Alaska Native Corporation (NANA, Inc.), this mine has generated hundreds of millions of dollars of economic activity in the region and is far and away the region's largest employer. When these kinds of mining projects are delayed or deferred due to federal overreach and permitting delays, it means that local residents do not have access to employment opportunities, and social programs in rural areas have limited funding. As commodity markets are dynamic, delayed projects may miss windows of opportunity. This stretches a one or two year permitting delay into potentially decades before communities see projects move forward. When projects are abandoned altogether, it means economic and social opportunities they could have provided in our states are completely lost.

Local affects, both positive and negative, are central reasons why mining regulation must preserve a strong role for the states. Federal resources and expertise should not be disregarded, but these complex regulatory activities must primarily rest with state regulators who are on the ground and who understand the full range of their respective states' interests. We need to reverse the tendency seen in the last several years to centralize agency decision making in Washington D.C. In this regard, I would like to submit for the record a resolution concerning the states' federalism concerns that was recently adopted by IMCC which further expands on our concerns and recommendations regarding state and federal relations.

IV. Current State Mining Regulations and Programs are Effective and Functioning Well

Mining can have impacts on the environment. Many of the laws that regulate mining today were passed to remedy the negative impacts that prior, unregulated mining had during the 1800s and early 1900s. State regulators can confidently say we have learned many lessons from these earlier projects. The same re-prioritization of environmental protection that motivated the passage of federal laws such as the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the 1970s and 1980s has also occurred in state government. Modern regulations and mining practices, with states functioning as the leading regulator in many areas, now successfully mitigate impacts associated with mining.

This point is critical for our discussion today – there are not lapses or loopholes in today's environmental regulations. There is not a need for federal regulators to displace existing state programs. Recent EPA initiatives to ratchet up their regulations are a solution without a problem. They usurp authority from the states, and, in some cases, from their own partners in other federal regulatory agencies, while resulting in less-effective regulation.

V. EPA Overreach Creates Uncertainty, Increases Costs, and Causes Delay for Projects

There are three concrete examples of EPA overreach that I will share with you today, but this list is certainly not exhaustive. The administrative process within which these dialogues occur can be extremely detailed and technical, and this opacity works against effective oversight and readjustment of agency priorities. It bears repeating that the primary theme of my testimony is that all of these processes would have gone much more smoothly if the states were consulted and respected as these federal actions were developed. We are hopeful that Congress will support the states in the future by reaffirming the call for state primacy supported by the U.S. Constitution and described in federal law in your continued oversight.

The Bristol Bay Watershed Assessment - Uncertainty

Since 2010 the EPA has been developing a "watershed assessment" of an area roughly the size of West Virginia in the Southwest of Alaska.[2] After the short description of this rushed process that I will provide, it will be unquestionably clear that it has really accomplished only one thing – increased uncertainty in the regulatory framework for mining in the Bristol Bay region.

Despite there being no clear basis in statute, regulation, or past practice for this kind of study[3], this new watershed assessment process has developed an unauthorized regulatory document, based on hypothetical mining activity in the region, to potentially support the unprecedented exercise of a preemptive CWA 404(c) veto by EPA. To be clear – the State of Alaska is not concerned that an attempt is being made to gather information in the region related to mining, or to ensure that the numerous valuable ecological resources in the sensitive Bristol Bay region are protected. With the watershed assessment, a federal agency is creating new, ambiguous regulatory steps that exclude the state and duplicate the processes already put in place by existing state and federal law. The state's biggest issue is not Pebble Mine – but the potential effective loss of all beneficial use of this massive area of state land, which was promised to the state as part of the Statehood Act land entitlement to help secure an independent economic existence for Alaska and Alaskans. This is a serious concern, as the area of the watershed assessment represents almost 10% of the State of Alaska's land holdings.

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[2] Almost all of the lands in the assessment area are owned by the State of Alaska. Conversely, almost none of the lands are owned by the federal government.

[3] The watershed assessment has been conducted at a cost of over $2 million dollars. In the context of sequestration and serious federal budget challenges, these are funds that the EPA has expended on a purely discretionary activity while letting mandatory responsibilities (I.e., approving state-proposed water quality standards) slide.

Were a mining permit submitted for a project in the region, a duly authorized federal regulatory document that is consistent with established law and the public participation process would have to be prepared. This would not be a watershed assessment but instead an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The latter process would also allow for the State of Alaska to participate as a cooperating agency, and have a formal role representing its interests in the process. An EIS must still be completed for any future development in the region, but it will likely be pre-determined by the amorphous regulatory action undertaken by the EPA in conducting the watershed assessment outside of the normal NEPA process.

The EPA's multi-year, multi-million dollar assessment is also based entirely on hypothetical mining activity[4]. Under the typical regulatory process, which will still have to occur for any future mining development in the Bristol Bay region regardless of EPA's actions stemming from the watershed assessment, a project proponent would be responsible for submitting a detailed mine plan to state and federal regulators to review. If this mine plan did not comply with state mitigation and environmental protection laws, or did not receive appropriate federal permits under the CWA, it would not be able to go forward. All of these decisions would be made based on specific proposals, rather than speculation and conjecture.

Finally, a watershed assessment is not the manner in which the EPA is statutorily authorized to involve itself in a regulatory approval process under the CWA. While the EPA has not committed to do so, the State of Alaska has repeatedly raised the concern that EPA will use the assessment to claim it has authority to preemptively veto CWA section 404 permits before they are issued or even applied for.[5] The EPA does have the authority to veto CWA section 404 permits – if they are deemed to be insufficient after full review of the mining plan has taken place. The preemptive veto that the EPA has been urged to make would turn this process on its head and replace the statutory process called for under NEPA and the CWA with a process created on an ad-hoc basis by EPA outside of the Administrative Procedure Act (APA).

The state has submitted many detailed comments and criticisms of the watershed assessment to the EPA, and my comments today are only a summary of these concerns. On this point, the take-away is that the EPA has obfuscated and duplicated the EIS/NEPA/CWA section 404 process in conducting its assessment – without involving the specifics of an actual project or the application of the state's processes. Ad-hoc regulatory steps that diminish the state's role are the opposite of how federal agencies should be conducting their work.

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[4] The activity EPA evaluated in the watershed assessment was based in part on a non-technical investor document prepared in 2011 by an entity with a partial interest in the project to comply with Canadian financial disclosure requirements.

[5] Despite the fact that the watershed assessment was begun in response to a petition for a preemptive CWA 404(c) veto by private groups, the EPA has stated it "will not address use of its regulatory authority until the assessment becomes final." However, EPA has acknowledged the watershed assessment will "provide an important base of information" for EPA to respond to the petition.

CERCLA 108(b) Bonding – Costs

The EPA's attempts to displace successful state bonding programs for the hard-rock mining sector pursuant to its authorities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is another major concern to Alaska and the members of the IMCC. Despite the extensive expertise that state agencies have developed in the areas of bonding and reclamation, it is unclear how an EPA-administered hard-rock bonding program would incorporate this expertise or how it could affect these successful state programs.[6] This is an example of the need for federal agencies to respect and proactively consult with states on regulatory issues, rather than making us fight to provide information about the success of the programs we already have in place.

This process could have enormous negative impacts on the mining investment in the United States and our national interests by driving up capital costs. Reclamation bonds are capital commitments that companies must make to ensure cleanup and reclamation of mining activities are completed if the companies themselves go bankrupt or are unable to remediate their sites. Bonds are the financial cornerstone of environmental protection and are a cost that responsible operators must pay to receive mining permits. However, unsophisticated calculations by the EPA, uninformed by the vast experience of the states, would throw the bonding process severely out of balance. Excessive bonds do not make it more likely that a mine will be properly remediated, but they may prevent it from being developed entirely.

The EPA's initiative to develop bonding requirements for hard-rock mines under CERCLA 108(b) dates back to 2009. In response to a suit brought by environmental non-governmental organizations (NGOs), a federal district court in California found that the EPA had not complied with timelines in CERCLA to begin issuing bonding requirements for industrial activities that create a high risk of releasing hazardous materials into the environment, and ordered the EPA to begin doing so. In July 2009 EPA announced in the Federal Register that it would begin with hard-rock mining. This was in some ways a surprising decision, because EPA did not have any institutional expertise in bonding hard-rock mines. Successful state and federal programs were already in place, and modern mitigation measures and reclamation have significantly decreased the risk of hazardous material releases associated with hard-rock mining.

Many states raised questions and concerns about how the rulemaking was proceeding in 2010 and 2011. In this regard, I would like to submit for the record copies of resolutions recently adopted by IMCC and the Western Governors Association that address this matter in greater detail. The State of Alaska understands that this rulemaking has been delayed by EPA's focus on its numerous other expansive regulatory undertakings, but may be reinitiated this year or next. If this rulemaking goes forward, the EPA should commit to deferring to state bonding programs and honoring their primary role of managing mining programs within their respective jurisdictions. Importantly, any rulemaking should be thoroughly

[6] As well as the successful bonding programs conducted by the Bureau of Land Management (BLM) in the Department of the Interior (DOI) and the United States Forrest Service (USFS) in the Department of Agriculture (DOA).

vetted with state experts before its release so that EPA can benefit from their expertise regarding the content and implementation of the rule.

Aquatic Resources of National Importance (ARNIs) – Delay

The final subject I will touch on today is the role the EPA has played in reviewing the work of other federal permitting agencies, and delaying decisions that have been carefully and cooperatively made. Under section 404(q) of the CWA, EPA is directed to enter into a memorandum of agreement with the Army Corps of Engineers (Corps) to implement their shared responsibilities under CWA section 404. This memorandum lays out a process for escalating levels of review at both the EPA and the Corps when EPA believes a permit improperly addresses environmental concerns.[7]

Recently the EPA has been quick to escalate review of projects under the MOU. EPA documents indicate that in the first twenty years of the MOU, less than twenty permit cases were elevated in the entire country.[8] One of these was an oil development project on the North Slope of Alaska in 2005. In the last three years two 404(q) letters have been sent in Alaska alone: in 2010 for a bridge built over the Tanana River by the Alaska Railroad, and just last month for a road being developed for a road near the native village of Nuiqsut on the North Slope.

The process in the MOU was ostensibly created to streamline the joint EPA and Corps review timeline for CWA permits, but in practice EPA ARNI concerns have been raised once details of the project have been extensively debated between the Corps, state regulators, and the project proponent. As there is no definite standard as to what might be an ARNI, it is very difficult for major projects to develop timelines that can predict how EPA's review will affect the project. Project proponents are pressured to accept changes sought by the EPA to preliminary Corps decisions in order to avoid the potential extended delay that a disagreement between the federal agencies could entail.

VI. EPA's Enforcement Approaches Reinforce the Need for State Primacy in Mining Regulation

My fellow Alaskan Sheldon Maier from the 40-mile district in Alaska where the "Chicken Raid," as it is being called, took place is also going to be testifying before you today, so I will only speak briefly about this incident and leave the details to him to describe. However, I will note that it demonstrates the over-zealousness that the EPA and other federal agencies are applying to the enforcement of their environmental regulations. This kind of enforcement raises serious issues for all Alaskans who exercise

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[7] Ironically, this process culminates in a 404(c) veto action – the same veto that the EPA's Bristol Bay watershed assessment is gathering a "base of information" for before any Corps permit application has even been submitted.

[8] EPA 404(q) fact sheet: "EPA has requested higher level of review by the Department of Army on 11 permit cases under the 1992 404(q) MOA as of January 2011… Eight (8) additional permit cases were elevated to EPA Headquarters." *See* <http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf>

their rights to use the state and federally managed lands and waters in Alaska, and especially for many of our miners. It also highlights the importance of having state regulators who know the details of operations as the primary lead on the programs that have such direct impacts on the state's citizens.

VII. Future EPA Overreach Should be Averted by State Consultation on CWA Jurisdiction Today

The EPA has recently released a draft document prepared for its Science Advisory Board (SAB) that has been informally title the "connectivity study."[9] This is a several hundred page report that documents the interconnection of most water in the entire United States, and will serve as the basis for an expansive EPA rulemaking that will likely dramatically increase CWA jurisdiction. The EPA has acknowledged as much, noting on its website that this report "will provide the scientific basis needed to clarify CWA jurisdiction"[10] and listing the areas that the future rulemaking will generously exempt, such as "artificial ornamental waters" and "artificially irrigated areas that would be dry if irrigation stops."

The scope of CWA jurisdiction is absolutely critical to the management of land and water in every state throughout the country. It has been disputed for decades, including in multiple cases before the Supreme Court that have restricted EPA's prior interpretations of its authority. It is therefore absolutely critical that the states be extensively consulted during this rulemaking. Unfortunately, that isn't happening.

While the connectivity study is currently out for public comment and is not yet finalized, the EPA has been developing its rulemaking in tandem with the study, which EPA states "provide[s] the scientific basis needed" to justify its development. Troublingly, a draft proposed rule has already been sent to the Office of Management and Budget (OMB) in the White House for interagency review. While the State of Alaska and many of the IMCC states have pushed for a formal rulemaking to clarify CWA jurisdiction,[11] this undertaking should not be conducted without the detailed involvement of the states. Additionally, it should not be conducted before the states have been able to comment on and review the report providing the underlying scientific basis for the rulemaking.

Unfortunately, the states have been provided the same opportunity to comment on the connectivity study as the average member of the public. This disregards the clear direction of the CWA to consult with, and retain the primary role of, state governments in managing land and water use. For example, the State of Alaska – representing almost 20% of the land mass of the United States – is not even featured in the maps in the connectivity study. There are no sections addressing its unique arctic environment or the complexities of permafrost. These kinds of omissions starkly illustrate the need to

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[9] Formally titled: "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)." *See* 78 Fed. Reg. 58,536 (Sept. 24, 2013).

[10] *See* EPA *Report Information*, available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345>

[11] Rather than the potentially extra-legal attempts EPA initially pursued to make jurisdictional determinations through guidance documents that were not reviewed under the APA.

involve state regulators who know the specifics of their respective regions from the very beginning of these processes.

VIII. The Solution

The problems I have discussed here today are difficult to solve. They will require a change in approach by federal regulators to increase rather than decrease consultation with states when dealing with mining regulation. Unfortunately, expressions of Congressional intent language like that in the CWA are not always enough to stem federal overreach. There must also be continued oversight and leadership from Congress and the Executive Branch to ensure that states are treated as partners in the critical process of environmental protection. The benefits of such a stronger state and federal partnership will accrue to the whole nation. Increased federal efficiency will reduce both government expense and delays that affect projects. State primacy will ensure that all of the state's interests are represented in regulatory decision making. Environmental protection can continue to be strengthened by federal and state experts complimenting rather than duplicating each other's work.

The states are ready to take up this partnership. The membership of 26 states in the IMCC demonstrates this commitment, and provides an excellent venue for the further development of state and federal partnerships in the area of mining regulation. In the future, the country as a whole may want to discuss broader solutions, including review of the CWA, CERCLA, and other environmental laws to ensure that the states' expertise can be more effectively put to work in these areas. For example, the Canadian process of devolving resource management authority to provinces and territories may provide lessons that could be applied to our own system. The IMCC member states are committed to an open dialogue about these ideas.

Additionally, the State of Alaska is going a step further and undertaking a review of assuming primacy for permitting under CWA section 404. Under this program, the state, rather than the Corps, would administer many 404 permitting responsibilities in cooperation with EPA. If we moved forward, this could require significant effort and expense by the state, but it may also make permitting projects, including mining projects, in Alaska more efficient, timely, and certain. We are putting our money where our mouth is. We are also potentially alleviating significant financing and staffing burdens for the federal government at a time of very limited federal budget capacity. This kind of partnership is a win-win scenario. There are many questions that need to be answered regarding development of the state program before we can make a recommendation to the Governor and the State Legislature to continue the process, but we are committed to continuing our thorough evaluation.

IX. Conclusion

I have presented a number of problems caused by overreach by the EPA and other federal agencies, and I know my fellow panelists will be raising others. I am also presenting a solution – respect for states' rights and state primacy. States need to remain in the driver's seat on mining regulation so we can protect our environment while also attracting the mining investment that protects our citizens' economic security. I respectfully ask that you continue your careful oversight of federal regulatory agencies to ensure they acknowledge this need. Thank you again for the opportunity to testify before

you today, and for your leadership supporting American mining. I would be happy to answer any questions you may have.

Resolution

Interstate Mining Compact Commission
Re: Federalism and Funding

BE IT KNOWN THAT:

WHEREAS, pursuant to the cooperative federalism approach embodied in many national environmental and natural resource protection laws, state governments serve as primary regulators, while also functioning as partners with various federal agencies that share similar authorities and responsibilities for the development and implementation of national environmental and natural resource protection laws; and

WHEREAS, Congress has expressed its intent under these national laws to recognize, preserve and protect the primary responsibilities and rights of the states to plan, develop and implement laws and regulations that insure the restoration, preservation and enhancement of land and water resources and therefore has delegated, authorized or provided exclusive jurisdiction (primacy) for certain federal program responsibilities to states which, among other things, enables states to establish programs that go beyond minimum federal program requirements; and

WHEREAS, various state and federal courts throughout the country have validated the primary regulatory role of the states under this regulatory approach; and

WHEREAS, states that have received delegation or "primacy" have demonstrated that they have the independent authority, technical ability and fiscal wherewithal to adopt and implement laws, regulations and policies at least as stringent as federal counterparts; and

WHEREAS, the delegation of new federal environmental and natural resource protection rules and policies to the states by federal agencies continues at a steady pace; and

WHEREAS, federal financial support in the way of grants to the states to implement these programs has steadily declined; and

WHEREAS, cuts in federal support adversely affects the states' ability to implement federal programs in a timely manner and to adequately protect human health and the environment and appropriately develop our Nation's natural resources; and

WHEREAS, from the states' point of view, funds that support operation of delegated primacy programs are essential to provide the necessary resources to meet statutory requirements related to public health and the environment and natural resource development; and

WHEREAS, states currently perform the vast majority of environmental and natural resource protection tasks in America, including significant percentages of permitting, enforcement and compliance actions, including the collection of environmental quality data to support those decisions; and

WHEREAS, as a direct result of the experience and expertise of the states in implementing these regulatory programs, the federal government has realized significant savings based on what it would otherwise cost federal agencies to implement equivalent programs; and

WHEREAS, these accomplishments represent the success of a cooperative working relationship between the states and federal government agencies as originally envisioned by Congress; and

WHEREAS, federal government agencies provide meaningful value in achieving the protection of human health and the environment and developing our Nation's natural resources by fulfilling numerous complementary functions such as establishing minimum national standards, ensuring state-to-state consistency in the implementation of those standards, supporting research, and providing training and technical support; and

WHEREAS, with respect to the implementation of state-delegated (or "primacy") programs, the role of federal government agencies becomes one of appropriate oversight and funding support, rather than state-level implementation or second-guessing of state programs; and

WHEREAS, it is vital that the federal government encourage flexibility for states to develop regulatory programs that address local conditions and to incorporate new procedures and techniques that accomplish agreed-upon environmental and natural resource program requirements, thereby assuring an effective and efficient expenditure of taxpayers' money

NOW THEREFORE BE IT RESOLVED THAT THE INTERSTATE MINING COMPACT COMMISSION:

Affirms its continuing support for the protection of human health and the environment and the appropriate development of our Nation's natural resources by providing for clean air, clean water, the proper handling of waste materials, and the restoration of mine lands; and

Recognizes the continuing need for states as primary regulators to jointly work together with the federal government for the most efficient and effective use of limited resources for the greatest environmental benefit; and

Affirms the need for adequate funding for environmental and natural resource programs at both the state and federal level given the vitally important role of both levels of government; and

Affirms that assumption of environmental and natural resource protection authority by the states is supported, while opposing preemption of state authority, including preemption that limits the states' ability to establish environmental or natural resource protection programs more stringent than federal programs; and

Supports the authorization or delegation of programs to the states and believes that when a program has been authorized or delegated, the appropriate federal focus should be on program oversight/review as opposed to intervention in program implementation; and

Supports early, meaningful and substantial state involvement in the development and implementation of environmental and natural resource statutes, policies, rules, programs, reviews, budgets and strategic planning and calls upon Congress and appropriate federal agencies to provided expanded opportunities for such involvement; and

Believes that such integrated consultation will increase mutual understanding, improve state-federal relations, remove barriers, reduce costs and more quickly improve the Nation's environmental quality and natural resource development; and

Affirms its support for the concept of flexibility, with states viewed as laboratories of invention, whereby the function of the federal government, working with the states, is largely to set goals for environmental protection and natural resource development that, to the maximum extent possible, leave the accomplishment of those goals primarily to the states, especially as relates to the use of different methods to implement core programs and to develop new programs.

Issued this 16th day of November, 2012

ATTEST:

Executive Director

Resolution

Interstate Mining Compact Commission
Re Financial Responsibility (Bonding) for Mine Reclamation

BE IT KNOWN THAT:

WHEREAS, the development of our Nation's minerals necessarily involves the surface disturbance of the land and often results in impacts to air and water resources; and

WHEREAS, state and national laws provide for the reclamation of land disturbed by mining and for the protection of human health and the environment related to those disturbances; and

WHEREAS, with regard to hardrock and noncoal mineral development, state governments have largely taken the lead in fashioning regulatory programs that address environmental protection and reclamation requirements; and

WHEREAS, an important component of state regulatory programs 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 fails to do so in accordance with the state program. These types of financial assurances, often referred to 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; and

WHEREAS, all states have developed regulatory bonding programs to evaluate and approve the financial assurances required of mining companies. States have also developed the staff and expertise necessary to calculate the appropriate amount of bonds, based on the unique circumstances of each mining operation, and to make informed predictions of how the real value of current financial assurance may change over the life of the mine, including post-closure; and

WHEREAS, Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Sec. 9608(b), requires that the U.S. Environmental Protection Agency (EPA) promulgate financial responsibility requirements for industrial facilities that take into account the risks associated with their use and disposal of hazardous substances; and

WHEREAS, pursuant to a federal district court decision in California (*Sierra Club v. Johnson*, 2009 WL 2413094 (N.D. Cal. 2009)) which ordered EPA to move forward with the rulemaking, EPA announced in July 2009 that is has selected hardrock mining as the first industry sector for which it would develop financial responsibility requirements under CERCLA Section 108(b) (74 Fed. Reg. 37213, July 28, 2009); and

WHEREAS, in preparation for its rulemaking, EPA has recently undertaken an analysis of reclamation bonding requirements in approximately 20 state regulatory programs throughout the U.S.; and

WHEREAS, since the initiation of EPA's rulemaking initiative, a number of IMCC member states have expressed concern that any bonding requirements that EPA may develop for the hardrock and noncoal

mining industry could be duplicative of state requirements, and could even preempt them entirely under EPA's reading of Section 114(d) of CERCLA. The states have also questioned whether EPA has the resources to implement reclamation bonding for hardrock and noncoal mines, since bond calculations usually reflect site-specific reclamation needs and costs; and

WHEREAS, the states are concerned that EPA may be attempting to fill alleged "gaps" in state reclamation bonding programs that either may not exist or that are unrelated to the purposes of a reclamation bonding program;

NOW THEREFORE BE IT RESOLVED:

That the Interstate Mining Compact Commission recognizes the states' lead and primary role in regulating the environmental impacts associated with hardrock and noncoal mining operations within their borders, including financial assurance requirements for reclamation; and

Affirms that the states have a proven track record in regulating mine reclamation, having developed appropriate statutory and regulatory controls and dedicated resources and staff to insure full and effective implementation of their regulatory programs; and

Believes that the states currently have financial responsibility programs in place that are working well and as such should stand in lieu of federal requirements under Section 108(b) of CERCLA; and

Recommends that an independent, impartial body (such as the National Academy of Sciences) conduct a study to review financial responsibility requirements under state regulatory programs to determine their sufficiency, to identify any serious gaps, and to recommend whether a federal rulemaking on the matter is needed; and

Urges the U.S. Environmental Protection Agency to seriously reconsider the need for and direction of the anticipated financial responsibility rulemaking under Section 108(b) of CERCLA given its potential impacts on existing state regulatory programs, particularly with regard to preemption effects and the duplication of resources resulting from an unnecessary federal regulatory program.

Issued this 12th day of October, 2012

ATTEST:

Executive Director

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. <u>GOVERNORS' POLICY STATEMENT</u>

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

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1 *See* <u>Sierra Club v. Johnson,</u> 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.