Notes From States Discussion on August 22

During day two of the workshop, state participants raised several concerns, issues and ideas as a part of roundtable discussion, as follows:

There was discussion on the health of surety companies, and the interaction between surety companies and state regulatory authorities. Some state participants reported that prior to the representative from Zurich's presentation on Surety bonding, they had not considered the health of the surety companies a major issue. There was concern expressed over what tools might be available to monitor the health of these and other financial assurance companies.

The representative from Zurich's presentation suggested that Surety companies engage in regular monitoring of and communication with the operators for whom they provide bond. However, as the representative from Virginia commented, this type of regular engagement is not typical. In Virginia's experience, Surety companies tend not to interact much with operators and do very little to hedge against potential mine failures proactively; rather, surety companies tend to react only once mine failure is imminent.

This point raised discussion of what the states can do in order to involve surety companies to a greater degree in oversight of mines. One suggestion was to require the surety companies to do oversight inspections. Another was to communicate better with surety companies to ensure they are aware of and are utilizing the many indicators of the health of a mine or mining company that the state regulating authorities use frequently.

On the topic of how much coordination should occur between the state regulatory authorities and the surety companies, it was generally agreed that, in theory, this sort of coordination should be sought after. The representatives from Ohio however, brought up the point that a perception of over-engagement with the surety companies can cause political concerns. For instance, if each and every violation is reported to the surety, it will look as though the mine is not fulfilling its SMCRA duties. Therefore, since it is much less contentious to report only substantial violations, some amount of discretion is appropriate.

Much of the discussion focused on concerns related to self-bonding. The general concern was over whether companies who self-bond are really financially healthy enough to justify self-bonding. Especially in multiple states where the acceptance of self-bonding by the state regulatory agency is required by state regulation. These regulations are very difficult to change, because companies have interest in minimizing the amount of capital they must tie up in bonds. Another complicating factor in dealing with self bonded companies is that, when largely self-bonded companies hold a significant portion of responsibility for power production in a state, the state government can not and will not allow these companies to fail. Therefore, if such a company is struggling and the regulatory authority would like to require a new bond instrument, the possibility of that new instrument bankrupting the company precludes its use. Some states reported having success requiring a third party guarantee, but with the key criterion that the guarantee not come from a company within the same corporate family as the bonded company. Another

new option discussed was the use of a sight draft, a bill of exchange that is payable at sight so the money may be immediately collected upon presentment to the drawee named in the instrument.

Another dimension to this issue is how quickly the financial health of these companies can change. Without very careful and regular tracking of a companies' financial health, especially the smaller companies, this volatility makes self-bonding even more dangerous. One possible solution raised was to use fees to finance a third party auditor to track company health. These fees could be charged to the self-bonding company and would be justified because otherwise, a self-bond is paramount to saddling the regulatory authority with these obligations. Getting this kind of fee system implemented would however likely require rule changes. In Nevada, they have found that using a series of checklists and other requirements that can be checked periodically is useful in tracking the health of self-bonded mines.

Bond Pools

There was significant discussion surrounding the use of bond pools. Many states commented on how bond pools can provide a good alternative to self-bonding for those companies that can not afford full cost bonds. Overall, the states seemed to comment that bond pools work best when as many of the small mines as possible participate. Alaska reported having a generally positive experience with their bond pool. It is used entirely by smaller placer mines, and has been very successful with reclamation. The fund builds up over time, because the companies sacrifice 5% when the bond is released. They also reported however, that the bond pool is very poor for long-term water treatment. Ohio also increases their bond pool over time, but through a severance tax. Kentucky and West Virginia described their bond pools as a kind of backstop or safety net covering the difference between estimates and actual costs. Kentucky uses a mandatory bond pool, but with the option to post full cost bond in lieu of participation. West Virginia's Special Reclamation Fund is effectively a bond pool, and has been very successful, but does have a problem with preventing companies from dumping their bonds, since they know the SRF will cover them. Pennsylvania reported that they are eliminating their bond pool, due to an unfavorable court decision requiring that the entire bond pool be liable for each mine, meaning one devastating event could require the whole pool for reclamation, especially where long-term water treatment is concerned.