

The U.S. Interest in a Strong British Columbia Financial Assurances Regime for Its Mining Sector

Summary

A rigorous financial assurances regime is necessary to force companies to prove up front that they are fully capable of meeting their environmental impact obligations for reclamation and unintended environmental harm events. Unfortunately, British Columbia's financial assurances requirements for its mining sector are woefully inadequate leaving downstream jurisdictions like Washington state at risk. While US decision-makers have called on BC to improve its financial assurances system, shortcomings in their regime continue to put US downstream interests at risk.

Mining: The Critical Need for Financial Assurances

The underlying principle for financial assurance in environmental law is that the polluter pays for their environmental costsⁱ rather than mine owners and operators shifting the burden of cleanup and remediation to other parties, including taxpayers. A rigorous financial assurances regime forces companies to prove up front that they are fully capable of meeting their environmental impact obligations for reclamation and unintended environmental harm events. If a mine owner is unable to pay, a strong regime will provide regulators with access to funds to undertake reclamation and remediation activities themselves. Some of the important benefits:

- Operators are incentivized to adopt best available practices and technologies;
- Less hazardous waste is released over the mine's life;
- Fewer accidents occur and the consequence of those that do happen are reduced;
- Fewer bankruptcies occur; and
- Reclamation, cleanup, remediation and compensation is provided in a more timely and fulsome manner, reducing ultimate harm and cost.

“Financial assurance in B.C. is stronger in theory than in practice.”

– *Responsible Risk: How putting a price on environmental risk makes disasters less likely* **report**,
Canada Ecofiscal Commission

Weak in Practice: British Columbia Financial Assurances Regime

Unfortunately, British Columbia's financial assurances requirements are woefully inadequate. This is of great concern to the four U.S. jurisdictions who are downstream from British Columbia's river systems.ⁱⁱThe BC Auditor General (AG)ⁱⁱⁱ and other well-respected experts^{iv} report that mine reclamation liabilities in BC are underestimated. In addition:

- Many BC mine reclamation plans do not include water treatment as part of the remediation estimation;
- BC pursues a practice of allowing many mine operators to provide only partial security for their already underestimated liabilities^v;
- BC provides an actual incentive to a mining operator to seek bankruptcy protection as a means of avoiding reclamation obligations^{vi};

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- BC has not taken any steps toward ensuring that mining operators have adequate access to financial resources in the event of a major or catastrophic event^{vii}.

The financial risks, loss, and cost for US Interests

In the case of mines located at the headwaters of shared transboundary rivers, the burden of risk, loss and cost falls disproportionately on those living and working downstream. Documented shortcomings of the BC financial assurances regime have consequences for US downstream interests.

In the event of a catastrophic, and likely inevitable Mt. Polley type event^{viii} on a transboundary river, commercial fishers, agricultural interests and overall economic and important human health protections downstream will be affected and have no means of seeking relief.

Transboundary impacts from BC are already at play. For example:

- For 60 years the Tulsequah Chief mine on the transboundary Taku River, has leached acid mine drainage into Alaskan waters;^{ix} the province has yet to stem that pollution.
- Highly toxic selenium pollution from polluting Canadian coalmines in the Montana-BC Elk-Kootenai watershed has poisoned a transboundary fishery posing environmental and potential human health risks to populations on the US side of the boundary^x.

International Enforceable Protections and Financial Assurances Are Feasible

A robust financial assurances regime that addressed concerns by US interests is possible drawing on other precedents. There are several precedents for financial provision for large-scale accidents that would impact environmental and economic resources^{xi}. Two examples include:

- The Civil Liability Convention (CLC) – International Oil Pollution Compensation (IOPC) Fund regime, which provides compensation for loss or damage arising from oil pollution incidents.
- The U.S. Bonneville Power Administration (BPA) who assesses a fee for all hydropower produced, and deposits these fees in mitigation fund to offset impacts of its dams.

It is time British Columbia Reform Its Financial Assurance Regime for Everyone

Unfortunately, calls for enforceable protections and financial assurances that protect US interests have not been heeded. Neither BC nor the Government of Canada have adopted a robust financial assurances regime needed to protect downstream US interests.^{xii}

One recent window of opportunity is that British Columbia has committed to an update of its financial assurances regime in the wake of the Mt. Polley catastrophe. This review is focused on its reclamation security policy.

It is possible for BC adopt a stronger financial assurance regime. There are precedents and models available for them to do so. What remains to be seen is whether BC and the Canadian federal government are willing to engage with the United States to develop a regime protective of both Canadian and US transboundary watersheds. It is a question of political will, not one of feasibility.

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Endnotes:

ⁱ Boris Mamyuk, *Analyzing the Polluter Pays Principle Through Law and Economics*, 18 SE. ENVTL. L.J. 40, 41-42 (2009).

ⁱⁱ Alaska, Washington, Idaho, and Montana are all ‘downstream’ jurisdictions receiving waters flowing from British Columbia into their respective states. These shared water are considered transboundary watersheds.

ⁱⁱⁱ Auditor General is an independent Officer of the British Columbia Legislature, appointed by the elected members of the BC Legislative Assembly. <https://www.bcauditor.com/pubs/2016/audit-compliance-and-enforcement-mining-sector>

^{iv} The Need for Financial Assurances. Robyn Allen. Presentation to the Alaskan State Legislature, March 16, 2017. See also Canada’s Ecofiscal Commission, *Responsible Risk*, July 2018, <https://ecofiscal.ca/reports/responsible-risk-putting-price-environmental-risk-makes-disasters-less-likely/>.

^v As a result of inadequate financial assurances for operations at the BC Mt. Polley mine, BC taxpayers are to date on the hook for \$40 million in cleanup costs, an amount that will likely increase substantially.

^{vi} The Britannia Mine is an example of what can happen when BC taxpayers are left to pay remediation costs that include water treatment. In this case, BC taxpayers are estimated to have paid \$46 million in order for the site to be remediated, including installing a water treatment plant that has an operating cost of over \$3 million/year.

^{vii} An Independent Expert Engineer’s investigation determined that unless half of BC’s 123 tailings facilities are decommissioned, two such tailings breaches are likely to occur each decade. BC has not taken any steps toward designing a recommended decommission plan, and continues to approve mine projects that rely on wet tailings storage, thus adding to the risk of future storage facility failures.

^{viii} On August 4, 2015, there was a breach of the Imperial Metals-owned Mount Polley copper and gold mine tailings pond, in the Cariboo Region of British Columbia. The spill is one of the biggest environmental disasters in modern Canadian history, and one of the largest in the world. An estimated 25 million cubic meters of wastewater and tailings were released. Records filed with Environment Canada in 2013 stated “...326 tons of nickel, over 400 tons of arsenic, 177 tons of lead and 18,400 tons of copper and its compounds placed in the tailings pond” escaped into the surrounding environment.

^{ix} Many argue this is a violation of the Boundary Waters Treaty, which includes the binding provision that “...waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”

^x Many, including the BC Auditor General, argue this could be a violation of the Boundary Waters Treaty between the US and Canada, which includes the binding provision that “...waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”

^{xi} Research Memorandum by David Chambers, Center for Science in Public Participation, [Financial Guarantee for a Major Mine Accident in BC Transboundary Watersheds](http://www.csp2.org), January 28, 2016. www.csp2.org

^{xii} BC would argue that US downstream interests are accommodated through a series of MOUs with the four bordering US states, and an Environmental Cooperation Agreement with Washington. However, binding protections and financial assurances at international scale can only be done through federal government involvement, as state-provincial MOUs do not provide for or require compensatory mitigation, needed when impacts at existing mines in U.S.-B.C. transboundary watersheds exceed financial and/or technical capacity and cannot be mitigated, and do not have the force of law. A good example of the difference between Alaska and BC financial assurance requirements is that of Teck Resources. Teck is the largest mining company in B.C. with 13 operating and closed mines. Teck also operates the Red Dog Mine in Alaska. Alaska requires Teck to fully fund its US \$558 million reclamation liability obligation at Red Dog, whereas B.C. estimates Teck’s reclamation liability for its 13 mines at \$1.4 billion (Canadian), but requires only \$510 million (Canadian) in bonding. The \$1.4 billion (Canadian) reclamation estimate excludes significant requirements for ongoing water treatment such as those at Teck’s coal mining sites in the Elk Valley. Teck’s in-perpetuity liabilities in BC are likely underestimated by hundreds of millions of dollars.

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