Interstate Mining Compact Commission

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The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on Proposed Rule on Financial Responsibility Requirements under CERCLA 108(b) for Classes of Facilities in the Hardrock Mining Industry at 82 Fed. Reg. 3388 (January 11, 2017), Docket No. EPA-HQ-SFUND-2016-0781

Dear Administrator Pruitt:

This letter constitutes the comments of the Interstate Mining Compact Commission (IMCC) concerning the U.S. Environmental Protection Agency's (EPA) proposed regulations titled, "Financial Responsibility Requirements Under CERCLA 108(b) for Classes of Facilities in the Hardrock Mining Industry" ("Proposed Rule").

IMCC is a multi-state governmental organization representing the natural resource and environmental protection interests of its 26 member states, several of which implement comprehensive and robust regulatory programs for hardrock mining within their borders, particularly in the West. We appreciate the opportunity to present these comments on behalf of our member states. IMCC has also been closely collaborating with the Western Governors' Association (WGA) and several non-member states. In this regard, IMCC endorses the comments being submitted by WGA and the individual states, particularly Alaska, Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, South Dakota, and Wyoming. While some of IMCC's member states are not submitting individual comments, the implications of this proposed rule for their regulatory programs are as significant and potentially debilitating as the states whose comments we are endorsing. IMCC also endorses the comments submitted by the U.S. Forest Service (USFS), and the U.S. Small Business Administration Office of Advocacy.

IMCC strongly recommends that EPA withdraw this fatally flawed proposal and make a "no action needed" determination regarding a CERCLA Section 108(b) rule for the hardrock mining industry. After thorough review, we conclude that EPA's Proposed Rule is duplicative and potentially preemptive of existing comprehensive state programs and federal requirements currently in place. EPA has failed to identify gaps in coverage by these programs that present a *degree and duration of risk* that warrants the rule. EPA has also failed to acknowledge the significant changes that have occurred since the enactment of CERCLA 108(b), and the risk reduction afforded by state program requirements that make a CERCLA event at modern regulated hardrock mine sites highly unlikely.

I. EPA Failed to Demonstrate the "Degree and Duration of Risk"

EPA is proposing these regulations to require "...classes of facilities establish and maintain evidence of financial responsibility *consistent with the degree and duration of risk* associated with the production, transportation, treatment, storage, or disposal of hazardous substances" (42 U.S.C. 9608, Section 108(b)(1)). (Emphasis added) However, EPA is not under any statutory obligation to promulgate CERCLA 108(b) regulations for any specific class of facilities, including hardrock mining. The statute gives EPA the discretion to develop financial responsibility requirements *if* it determines such requirements are appropriate for a particular class of facilities after taking into account the relevant statutory factors. The DC Circuit Court of Appeals empowered EPA to retain the discretion of whether to promulgate a final rule for hardrock mining in its Mandamus Order in "*In re: Idaho Conservation League, et al.,* No. 14-1149 (DC Cir. January 29, 2016) at 17:

> *But the proposed joint order "does not require EPA to promulgate a new, stricter rule" but, at most, it "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule – the content of which is not in any way dictated by the [proposed order on consent]* – using a specific timeline." The timeline in the joint motion requires that EPA commence a rulemaking with respect to hardrock mining by December, 2016, and provide *"notice of its final action" by December 1, 2017.* Joint Mot. 3. Although more is required with respect to hardrock mining than the other identified industries, where EPA retains discretion not to conduct a rulemaking at all, *EPA retains "discretion to promulgate a rule or decline to do so" even for the hardrock mining industry.* (Emphasis added)

In the preamble to the Proposed Rule, EPA states that, "By assuring that owners and operators *establish financial responsibility consistent with the risks associated* with the production, transportation, treatment, storage, and disposal of hazardous substances at their facilities, this proposed rule would increase the likelihood that owners and

operators will provide funds necessary to address the CERCLA liabilities at their facilities, *thus preventing the burden from shifting to the taxpayer or to other parties.* In addition, this proposed rule *would provide an incentive for implementation of sound practices at hardrock mining facilities that would decrease the need for future CERCLA actions"* (Section I.A, Page 3389). (Emphasis added) The states agree that taxpayers should not bear the burden for mine cleanups left behind by mine operators, including those related to hazardous releases. For this reason, the states have developed their own comprehensive regulatory programs to address these concerns and to require financial assurance[1] at hardrock mines. These programs also provide incentives for operators to implement sound practices at hardrock mining facilities that substantially decrease the need for future CERCLA actions. The incentives are in the form of broad enforceable requirements imposed on the industry that will result in issuance and enforcement of compliance orders, violations, civil penalties, potential withdrawal of the mining permit and termination of operations if they do not meet those requirements. Without adequate financial assurance instruments in place to cover the costs of those requirements being fulfilled, should the company default, a permit will not be issued and operations will not commence.

The risk reduction provided by current state regulatory program requirements adequately address CERCLA concerns making a CERCLA 108(b) rule duplicative and unnecessary. This is particularly true when taken together with federal requirements for hardrock mining on public lands under the authority of the U.S. Bureau of Land Management (BLM) and U.S. Forest Service (USFS) ("Federal Land Management Agencies" or "FLMAs" collectively), including requirements for financial assurance. At the time CERCLA 108(b) was enacted by Congress in 1980, there were few, if any, environmental regulations or bonding requirements in place for hardrock mining. In 1980, some form of a CERCLA 108(b) rule may have made sense. Since that time however, in the absence of federal 108(b) financial assurance requirements, states have developed their own mining regulatory programs.

Mandatory state program mine plan, reclamation, and closure requirements are intricate and include appropriate engineering and environmental controls based on site-specific conditions to reach the desired outcomes. They substantially reduce, if not eliminate, the risk of a release of hazardous substances occurring at a permitted mine site that might otherwise result in a National Priorities List (NPL) listing. Properly executed reclamation alone provides risk reduction.

In a report reviewing hardrock mining regulatory programs on federal lands, the National Research Council (NRC) found, "Reclamation minimizes the potential for future environmental damage and prepares the mining and processing site for beneficial use after mining. Common reclamation practices include reducing the slopes on the

[1] "Financial assurance," "financial responsibility," "bond," and "bonding" are used interchangeably throughout these comments.

edges of waste rock dumps and heaps to minimize erosion; capping these piles and tailings piles with soil; planting grasses or other plants that will benefit wildlife or grazing stock and help prevent erosion; directing water flow with French drains and other means to minimize the contact of meteoric water with potentially acid-generating sulfides in the dumps, heaps, and tailings piles; removing buildings; and eliminating roads to minimize unnecessary future entry by vehicles. A mine is not closed until reclamation is complete, but as discussed in this report, in some circumstances reclamation may never be accomplished fully, and long-term monitoring will be necessary." ("Hardrock Mining on Federal Lands", National Research Council, National Academy of Sciences (1999), at 27.)

An important component of state regulatory programs is the requirement that companies provide financial assurances that are sufficient to fund all required reclamation, post-closure monitoring and water treatment (including long-term water treatment and monitoring, and remediation of water resources), and the handling and disposal of hazardous and acid-forming substances resulting from mining processes, should the company for some reason fail to do so in accordance with the state program requirements. The *degree and duration of risk* has been significantly reduced, if not eliminated, by these state and federal programs. Therefore, an EPA rule for hardrock mining is not necessary, and is potentially problematic for these sophisticated state programs. Considering the effectiveness of these comprehensive programs, the associated reduction of risk, the existing financial assurance requirements (and resulting unlikely occurrence of hazardous releases that will require CERCLA cleanups at regulated modern mining facilities), we are perplexed as to why EPA chose hardrock mining as a class of facilities for the development of CERCLA 108(b) financial responsibility requirements, let alone as its first priority.

In its examination of costs for cleanups at NPL sites, EPA estimated that past and projected future remediation expenditures at 243 historical hardrock mining and processing facilities total $12.9 billion. Of that, EPA calculates that it has spent $4 billion through the Superfund (CERCLA) program for cleanup costs at these facilities to date. EPA states, "*Such significant cleanup costs may be considered as an indication of the relative risks present at these sites, and the potential magnitude of environmental liabilities associated with this industry overall.*" (Emphasis added) (E7(3)(e), Page 3479) Use of the $4 billion figure in this context is misleading. Activities that occur at hardrock mining sites such as smelters and downstream processing facilities, for example, are not included in the mining activities covered by the Proposed Rule. However, the $4 billion figure used by EPA to prove that the "level of risk" continues to exist at modern mines includes expenditures for such activities. Also, the environmental problems exhibited at historical sites resulted from practices that predate the existence of comprehensive state regulatory programs and do not accurately represent the current level of risk posed by regulated modern operating hardrock mining facilities that are covered by the Proposed Rule.

The states agree that legacy and, particularly abandoned, mine sites continue to pose risk due to past, largely unregulated mining practices that occurred prior to the existence of state regulatory programs. The prevention of future environmental problems occurring within their borders, like those caused by irresponsible mining practices conducted by some in the past, was the very impetus for states to develop their own robust regulatory programs, inclusive of financial responsibility requirements. Only six of the ten sites added to the NPL in the past ten years began operations since 1990, and cleanup costs at four of those sites were funded by a private entity. None of the cleanup burden at those sites fell on taxpayers. For further examples of erroneous analyses used by EPA in justifying the need for the rule, we also refer you to comments submitted by the state of Wyoming at the section titled, "Use of Best Technology." Two historical CERCLA 1950's uranium mining and milling sites that existed pre-law and prior to promulgation of regulations are discussed therein. EPA inappropriately characterized these historical sites as representative of examples where environmental degradation can occur at a modern hardrock mining facility subject to existing regulations. We further refer you to Wyoming's comments for a comprehensive discussion as to why it would be duplicative, inappropriate, and ill-advised for EPA to include uranium in-situ recovery and conventional milling operations in any CERCLA 108(b) rule.

In the preamble to the rule, the following statements occur: "EPA recognizes, however that past operating procedures, before the advent of environmental laws, were likely in many cases to give rise to environmental problems that current regulations and modern operating practices can prevent or minimize."…. "EPA would look at components of response actions taken by Superfund in the past – that is, distinct activities Superfund paid for – at facilities within the to-be regulated class, and determine the cost of those activities today." (Section V.E.4(a), page 3461) Here and elsewhere EPA contradicts itself by continually looking to historical Superfund mine sites as predictors of likely future required response actions and activities, while simultaneously acknowledging that current regulations and modern mining practices are effective at minimizing risk. EPA relies on historical data to justify the Proposed Rule and its methodology, while also attesting to the fact that state and FLMA regulatory programs are effective at preventing or minimizing environmental effects of mining, thereby precluding the probability of a future CERCLA response action.

EPA should allow state regulators, who have the necessary technical expertise and experience in regulating and bonding hardrock mining operations through their mature and robust programs, to take the lead in covering any CERCLA 108(b) financial assurance needs. The comprehensive and robust state programs are constantly evolving and have undergone refinements and improvements informed by experience over the past thirty years. The states have the authority to adjust financial assurance and technical requirements as needed. As a result, these already effective programs have

become more stringent in their requirements and more efficient over time. Given the states' expertise and the nature of their programs, the overall goal of reducing the degree and duration of risk has been achieved.

II. Preemption of State Regulatory Programs

Under federal law, preemption occurs in any of the following three ways: express preemption, field preemption, or conflict preemption.[2] CERCLA expressly preempts state or local laws from establishing or maintaining financial responsibility "in connection with liability for the release of a hazardous substance from [a]...facility."[3] EPA asserts that existing state financial assurance requirements and proposed CERCLA financial assurance allegedly serve two totally different purposes: state financial assurance is similar to a performance bond to guarantee the reclamation of a mine; EPA financial assurance is similar to an insurance policy to cover the risk of a mine being included on the National Priorities List.

The problem is that CERCLA 114 does not recognize this distinction. CERCLA 114 requires preemption if the state financial assurance is "in connection with liability for the release of a hazardous substance." EPA concludes there is no CERCLA 114 preemption because state financial assurance requirements are not "in connection with liability for the release of a hazardous substance." However, states do cover release of a hazardous substance as part of their reclamation or closure bonds.

Given the large financial assurance amounts used in the examples EPA presented in its webinar about the Proposed Rule's formula, and the failure to account for state reclamation plans and related financial assurance, there is potential that if the Proposed Rule is finalized, the states will be sued under CERCLA 114. EPA's failure to meaningfully engage with the states and fully understand their financial assurance requirements ultimately led to the agency discounting the preemption reality posed by the Proposed Rule.

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[2] See *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (http://caselaw.findlaw.com/us-supreme-court/480/572.html) (The Supremacy Clause of the United States invalidates state laws that interfere with or are contrary to the laws of Congress in any of three ways: (1) where the federal statute expressly states that it is preempting state law; (2) where the federal regulatory scheme is so pervasive the Congress must have intended to "occupy the field" and disallow any state regulation on the same subject; and (3) where Congress has chosen not to occupy a field, but federal and state law conflict.)

[3] 42 USC § 9614(d) ("Except as provided in this title, no owner or operator of a vessel of facility who establishes and maintains evidence of financial responsibility in accordance with this title shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility. Evidence of compliance with the financial responsibility of this title shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel of facility.")

EPA acknowledges that "[M]any states already have financial responsibility requirements applicable to some of the hardrock mining facilities that would be subject to this proposed rule. Thus, in developing this proposal, EPA had to carefully consider the effects of its CERCLA Section 108(b) rules on other programs to avoid any unanticipated consequences." (Section III.A, Page 3397) However, EPA fails to reconcile this statement with CERCLA's direct preemption provision that "[e]vidence of compliance with the financial responsibility requirements of this title *shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance* from such vessel or facility." (42 U.S.C. 9614(d), "CERCLA 114(d)") (Emphasis added) EPA later states it does not intend the Proposed Rule to "result in widespread displacement of those [State] programs" (Section V, Page 3403). The application of this CERCLA provision in the context of the Proposed Rule would potentially preempt all state financial responsibility requirements for the covered response activities, natural resource damages, and health assessments. The result could be a chaotic tangle of preemption legal challenges to avoid duplicative financial assurance burdens.

The preamble (Section V, Page 3403) states, "EPA does not believe that CERCLA Section 114(d) gives a broad preemptive effect to EPA's CERCLA Section 108(b) financial responsibility regulations, over state reclamation bonding requirements generally.... First, both CERCLA Sections 108(b) and 114 are expressly focused on hazardous substances, the risks they present, and financial responsibility associated with liability stemming from their release or threatened release.....As the state commenters have made clear, many state reclamation bonding regimes are not similarly limited to CERCLA hazardous substances or their release."

While it is true state programs are not *limited* to CERCLA hazardous substances or their release, what EPA fails to acknowledge is that many of these programs cover CERCLA hazardous substances or their release *in addition to* other elements of reclamation and closure. That does not necessarily result in a *deficit* of coverage, as appears to be implied in EPA's statement, but rather indicates the states' programs are *more comprehensive than* the Proposed Rule, in that their financial assurance requirements cover reclamation and closure, *in addition to* hazardous releases.

Though EPA "does not intend its CERCLA 108(b) regulations to result in widespread displacement of [states'] programs" (Section V, Page 3403) and "does not believe that CERCLA Section 114(d) gives a broad preemptive effect to EPA's CERCLA Section 108(b) financial responsibility regulations, over state reclamation bonding requirements generally", we believe EPA's understanding of states' programs is incomplete. This is largely attributable to the flawed federalism process and lack of meaningful engagement with the states early on in the rulemaking process. EPA admits it is providing its general views on the preemption issue, and it is the courts that would make any final determination. This is little consolation to the states, and could result in

other liabilities falling on taxpayers for reclamation and closure work not related to hazardous releases, should crucial bonding elements of a state's program be preempted.

As demonstrated in the examples from South Dakota below, hazardous release coverage is often included within the reclamation and mine closure bonds a state requires. Such coverage is part and parcel of those bonds, rather than requiring stand-alone separate instruments. EPA has not recognized the fact that, though state regulations identify bonding requirements as "reclamation bonds", "mine closure bonds," or "post-closure bonds," calculation of financial assurance to cover hazardous releases and associated mitigation are often included within those instruments. EPA's insistence that what the Proposed Rule does is "different" than what state reclamation and mine closure programs require appears to be merely an issue of semantics.

III. Federalism Process Failures and Impacts

We disagree with EPA that the Proposed Rule does not have federalism implications as defined by Executive Order (EO) 13132, nor do we agree that EPA satisfactorily "engaged its intergovernmental partners *in the same pre-proposal activities expected* under the EO". EPA states, despite determining there are no federalism implications, that "...consistent with the EPA's policy to promote intergovernmental communication and cooperation, and in response to the considerable interest shown by the states prior to and during the development of this action, EPA *engaged in extensive pre-proposal consultation*....to ensure that our state and local partners *would have the opportunity to provide meaningful and timely input into its development.*" (Section VII.E, Page 3484) (Emphasis added)

To the contrary, EPA failed to meaningfully engage the states as regulatory partners during the rulemaking process. Federalism outreaches were brief and perfunctory and lacking in essential details required for states to provide "meaningful and timely" substantive comment on the Proposed Rule, or any significant input into its development. EPA's federalism outreach consisted of a single in-person meeting with state associations at EPA headquarters in Washington, DC (May 18, 2016) and two one-hour phone calls (July 7 and 19, 2016) with the states prior to publication of the Proposed Rule. More purposeful meetings early on in the rulemaking process would have afforded states the opportunity to provide EPA with essential information about their financial assurance requirements and regulatory programs and provided EPA a deeper understanding of those programs. However, requests to meet were declined, citing the tight court-ordered December 1, 2016 deadline for EPA to issue a Proposed Rule.

Information provided in the federalism briefing and calls consisted of general concepts under consideration by EPA, but no specific detail on the rule or the formula being developed for calculating financial responsibility. EPA was often unable to

answer specific questions raised by the states as to the impact the rule would have on crucial elements of their existing financial assurance requirements, while nonetheless insisting the rule would not preempt those programs. The states were hardly engaged as "regulatory partners." The limited opportunities for engagement did not amount to "extensive pre-proposal consultation", nor did they afford opportunity for the states to provide substantive input. Considering the potential for duplication and preemption of state programs by a complicated CERCLA 108(b) rule, and the far-reaching consequences and devastating effects it could have for the state programs, we consider EPA's federalism process flawed and inadequate.

We refer you to our federalism comments that were filed with EPA on August 16, 2016 for more discussion about how we believe this Proposed Rule will potentially preempt our state regulatory programs, and how EPA failed to fulfill the expectations of EO 13132 in its federalism outreach (copy attached). A resolution adopted by IMCC and submitted to EPA Administrator Gina McCarthy on May 3, 2016 is also included as an attachment to those comments. The concerns expressed therein still stand and we incorporate them by reference into these comments. While we appreciated the opportunity to submit pre-proposal comments, due to the lack of any actual details of the rule or the model formula being provided during the consultations, the states' ability to substantively comment at that time was severely limited. Owing to EPA's lack of transparency, it was difficult for the states to fully understand and respond to the potential conflicts with state requirements found in the Proposed Rule. After having analyzed the details of the rule and EPA's approach since publication, we are even more concerned that this rule will potentially preempt state programs. EPA missed an opportunity to draw on the states' extensive experience and technical expertise in regulating hardrock mining and calculating financial assurance requirements and to gain a more sophisticated level of understanding of those programs. The result is a fatally flawed Proposed Rule that is duplicative and unnecessary. This failure can be attributed in large part to the settlement-driven time frames that drove EPA to rush to issue a Proposed Rule, and a future notice of final action.

In the preamble it states, "EPA compiled summaries of all 50 states' mine bonding requirements to get a general understanding of the types of requirements applicable under other programs.... EPA's general understanding of state mining programs indicates that those programs vary, and that states use mine permitting authorities to enforce compliance with state mining regulations. Some states may address different risks, or address risks in a different manner from those for which EPA's proposed Financial Responsibility Formula is designed to account." (Section V, Page 3403)

It is true that state regulatory programs use different approaches to achieve the same goals of reducing risk and providing financial assurance on many fronts, including to cover hazardous releases. The states' program requirements are designed to be site-

specific. They are not designed around a one-size-fits-all formula, such as EPA's Proposed Rule. These programs "address different risks, or address risks in a different manner" sometimes by necessity. They are designed to require the most appropriate site-specific controls and related financial assurance that result in the desired conditions at each operation located within their borders. Site-specific state programs take into account the unique variations at individual hardrock mine sites, including mine size, commodity mined, ore processing methods, water treatment methods, topography, geologic and climatic differences, and other crucial factors.

The Proposed Rule's nationwide one-size-fits-all formulaic approach is flawed in that it does not account for these site-specific factors. Instead, it focuses on overly prescriptive controls that are applied indiscriminately, rather than focusing on the desired conditions and how they are best achieved at a given site. For example, EPA's formula for mine facilities to qualify for reductions in financial assurance requires engineering controls be in place that may not always be the best choice for reducing risk at a given site, depending on site-specific conditions at the facility. The states have learned from their 30-plus years of regulatory experience that a site-specific approach, rather than a one-size-fits-all formulaic approach, is the most accurate method for setting standards and calculating bond amounts. In a March 8, 2011 letter, Senator Lisa Murkowski, Chairman of the Senate Committee on Energy and Natural Resources expressed these very concerns, citing a National Research Council report from 1999 that found "simple 'one-size-fits-all' solutions are impractical because mining confronts too great an assortment of site-specific, technical, environmental, and social conditions."

EPA's process of evaluating existing state program bonding requirements was flawed and resulted in an inaccurate analysis of those requirements. This could have been avoided had the states been given the opportunity to work with EPA in developing the final state summaries it compiled, or at least been given the opportunity to review them for accuracy before EPA conducted its analysis. While the states were given an opportunity to review and comment on earlier versions of state summaries prepared by an EPA contractor in the 2010 - 2012 time period, the eventual state summaries prepared for and relied upon by EPA in developing the proposed rule were never vetted with the states. EPA failed to do its due diligence in this regard by meaningfully consulting with the states.

In the case of South Dakota, for example, the state regulators have identified several inaccuracies that left EPA with huge gaps in their understanding of the states' requirements that directly relate to financial assurance that covers hazardous releases. EPA's South Dakota summary concluded that bonding for long-term water treatment was not covered by financial assurance calculations under the state's statutes or regulations, which is incorrect. South Dakota has comprehensive water treatment bonding requirements. Reclamation plans are required to include rehabilitation of water

resources. The only way to rehabilitate water is to treat it. The costs for all elements of the reclamation plan, including water treatment, are required to be included in reclamation and post-closure bond calculations in the state (SDCL 45-6B-3(14) and SDCL 45-6B-7(7)). Mine operators are also required to include mill sites constructed in conjunction with a mining operation in the reclamation plan (ARSD 74:29:05). Bonds are required in amounts sufficient to cover the costs to reclaim and treat water generated from process ponds and tailing impoundments, including leach pads, and dumps containing treated spent ore from leach pads. This includes addressing any necessary water treatment associated with these facilities. The water treatment costs are calculated into the reclamation and post-closure bonds. Operators are also required by statute to address the treatment of tailings to ensure continued neutralization or immobilization of any parameters of concern in a post-closure plan, which implies long-term water treatment must be addressed in the plan (SDCL 45-6B-91(1)). Operators are also required by statute to address long-term operation and maintenance in a post-closure plan. The state's post-closure bonds include financial assurance requirements for long-term water treatment, operation, and maintenance. For example, South Dakota currently holds a 100-year post-closure bond in the amount of $19.9 million, another 100-year bond in the amount of $42 million, and a 50-year bond in the amount of $26.8 million, all which include coverage for long-term water treatment. We refer you to the state of South Dakota's comments for more details and additional inaccuracies the state identified in the summary.

It is troubling that EPA did not consult with the states in the development or review of these summaries in order to assure they were making presumptions based on accurate information. Who would know the full extent and intricacies of state programs and their financial assurance requirements better than the regulators who operate and enforce them?

IV. Response Component Criteria / Formulaic vs. Site-Specific Approach

In the preamble discussion of industry compliance costs in the Proposed Rule, it states, "For the response component, EPA estimated the financial responsibility amounts for each facility for twelve categories of response activities that EPA has undertaken at hardrock mining sites." (Section I.C(3)(a), Page 3391) On May 16, 2017, EPA met with IMCC, WGA, and several Western states in Denver, Colorado for the purpose of discussing the states' concerns regarding the Proposed Rule. We appreciated the opportunity to meet with EPA. However, such meetings should have taken place early on in the rulemaking process, prior to publication of any proposed rule, as part of a meaningful federalism consultation.

Had that occurred, EPA would have learned, as they did during the Denver meeting, how the state programs already adequately address the twelve response components in the Proposed Rule. Arizona, New Mexico, South Dakota, and Utah

presented scenarios demonstrating how their state program requirements align with the response activities at currently permitted mine sites within their states. Copies of the states' handouts are attached. Also attached are charts compiled by Arizona, South Dakota, and Utah which list the current laws and regulations in their respective states that address each of the twelve response activities. We also refer you to a similar expanded support document submitted with the state of Nevada's comments that charts the applicable state laws and regulations, and describes each component in detail.

EPA's formulaic approach utilizing these twelve response activities as the basis for the Proposed Rule is duplicative of the risk reduction requirements and financial assurance already covered by the states through their reclamation and closure programs. FLMAs have similar requirements for hardrock mining operations on federal lands. Several states and FLMAs have Memoranda of Understanding (MOUs) in place that enable them to coordinate program requirements. Many components of the formula and the reduction criteria rely heavily on information EPA collected from how the state and FLMA programs regulate hardrock mines, demonstrating that on some level, EPA acknowledges the programs to be effective. EPA's approach in the formula for calculating financial responsibility amounts also appears to assume that all twelve response categories are going to fail. This is not a reasonable assumption based on experiences with modern regulated mining operations.

EPA's Proposed Rule is different from state programs in that it, "[W]ould not establish any regime regulating the conduct of hardrock mining and mineral processing activities. Instead, EPA intends for CERCLA Section 108(b) requirements to apply alongside other programs that directly regulate the operation of hardrock mines." (Section IV.A, Page 3400) It does not make sense to have a rule requiring financial assurance that is not tied to regulatory requirements, particularly when such a rule threatens to preempt critical elements of those existing programs that both regulate the mining operations and require adequate financial assurance, thereby reducing the risks both preventively and responsively, if necessary. This further demonstrates EPA's failure to fully comprehend the significant changes that have occurred in the 35 years since CERCLA was enacted, and to understand the comprehensiveness of the state and FLMA regulatory programs prior to issuing a decision to classify hardrock mining for a CERCLA 108(b) rulemaking. EPA has clearly underestimated the role that state and FLMA regulatory programs have had in substantially reducing the risk at these sites, making the rule unnecessary.

EPA's generic formulaic approach to determining financial assurance under CERCLA 108(b) that applies general engineering controls for operators to qualify for reductions without the benefit of understanding or considering site-specific data and conditions is fundamentally flawed. Through the years of lessons learned in running their programs, states moved away from formulaic approaches and instead prefer using site-specific calculations of the bond, realizing it is the most precise and effective

method. State bonds are calculated based on site-specific data to predict and cover all reasonably likely costs for reclamation, closure, and the handling and containment of hazardous substances. Bond calculations also account for potential unpredicted complications and mitigation costs, including for hazardous releases. State programs place the emphasis on achieving the desired results at each individual site, rather than applying a general engineering control that may, or may not be the best choice based on site-specific circumstances. The bond is then calculated based on cost estimates for implementing the best technical and engineering controls identified for each individual site.

The 1999 NRC report found, "The overall structure of the federal and state laws and regulations that provide mining-related environmental protection is *complicated* but *generally effective*. The *structure reflects regulatory responses to geographical differences* in mineral distribution among the states, *as well as the diversity of site-specific environmental conditions.* It also reflects the unique and overlapping federal and states responsibilities. Conclusion: Federal land management agencies' regulatory standards for mining *should continue to focus on the clear statement of management goals rather than on defining inflexible, technically prescriptive standards. Simple "one-size-fits-all" solutions are impractical because mining confronts too great an assortment of site-specific technical, environmental, and social conditions. Each proposed mining operation should be examined on its own merits.* For example, if backfilling of mines is to be considered, it *should be determined on a case-by-case basis*, as was concluded by the Committee on Surface Mining and Reclamation (COSMAR) report (NRC, 1979)." ("Hardrock Mining on Federal Lands", National Research Council, National Academy of Sciences (1999), at 5.) (Emphasis added). We agree with NRC's conclusion. Mining is too complicated and varied from one site to another to be practically addressed by a one-size-fits-all formula.

EPA considered an alternate "closure plan" approach in the Proposed Rule that would require more site-specific information be considered, and that would complement permit-based regulatory programs, but cited difficulties in adopting such an approach. "CERCLA Section 108(b) requirements in contrast [to other regulatory programs, such as a permit program], are freestanding in that they are not directly associated with regulatory program requirements with which an owner and operator must comply, or with a remedy that has been selected that an owner and operator must implement....[a "closure plan" approach] would in concept, fill in any gaps EPA identified under other programs. By contrast, *a permit program has the advantage of identifying the appropriate engineering controls for closure before they become necessary, through a permit process.*" (Section IV.E, Page 3401) (Emphasis added)

The states agree that a permit program has distinct advantages, and thus states require engineering controls to be identified and included in the mine reclamation and closure plans in advance of mining before the controls become necessary, and before a

permit will be issued allowing operations to commence. The appropriate financial assurance to cover the cost of implementing the site-specific permit conditions is also required to be in place before the permit will be issued, thereby assuring funds are available to properly reclaim the site and mitigate any problems should the operator declare bankruptcy or be otherwise unable or unwilling to meet its liabilities. The reclamation and closure plan engineering controls are designed to reduce the likelihood of a hazardous release ever occurring. The associated financial assurance requirements already accomplish the intended goal of a CERCLA 108(b) rule by also reducing the risk of taxpayers being burdened by clean-up costs in the unlikely event of a hazardous release. The states have enforcement authority to inspect and ensure that operators abide by the permit conditions and maintain the required amounts of financial assurance. They also have the authority to periodically review and adjust required bond amounts when warranted by changing conditions at a mine site.

In considering difficulties with a "closure plan" approach, "EPA was unable to identify a basis to specify a site-specific set of engineering controls for a site-specific cost estimate, without going through a process similar to applying the [National Oil and Hazardous Substances Pollution Contingency Plan (NCP)] at each facility. *Such an approach would present a significant regulatory burden on the Agency.* First it *would necessitate a case-by-case evaluation of each facility to determine the appropriate engineering controls* that CERCLA might require, and *then the Agency would need to compare that set of controls to any applicable regulatory requirements, such as state or Federal reclamation requirements.* Second, it would be difficult for EPA to create a CERCLA Section 108(b) financial responsibility instrument *that would be written to cover only the particular "gaps"* the Agency sought to cover for each engineering requirement at a facility *without having the instrument overlap with other requirements given that some closure programs conduct activities that reduce CERCLA risks*....EPA has *policy concerns about overseeing other Federal and state programs' financial responsibility requirements for adequacy, given other authorities' expertise with mining regulation.* Based on these considerations, EPA is proposing the formula approach in this rule." (Section IV.E, Page 3401)

EPA clearly recognizes that there will be overlap with coverage and CERCLA risk-reduction provided by existing state and FLMA programs. The Agency points to the difficulties of reconciling these areas of overlap as one justification for not pursuing a more site-specific "closure plan" approach, and instead has opted for a one-size-fits-all formula approach that avoids the complicated process of making site-specific determinations. The formula approach also rids EPA of the "burden" of having to conduct analyses to identify and avoid overlapping requirements already in place under state and FLMA programs on a site-specific basis.

The overlapping requirements however will still exist. By necessity, EPA's chosen approach will place the burden onto the states to do the site-specific analyses to

determine how any final CERCLA 108(b) financial assurance requirements overlap with their long-standing state financial assurance requirements. States will need to adapt their requirements to the new rule, not to strengthen their programs, but to unravel integrated proven existing financial assurance elements in order to avoid being potentially preempted by the courts. This poses serious challenges for state programs.

Often financial assurance requirements integrate the calculations for bond amounts adequate to cover the risk-reducing technical and engineering control elements of the reclamation and closure plans at a mine site with the necessary amounts to cover unforeseen potential remediation responses. The calculations could include long-term water maintenance and/or treatment and monitoring where needed, and other reasonably considered unforeseen circumstances that may occur, such as hazardous releases. The various components of these state requirements work together in reducing risk. If preempted, state financial assurance to cover the reclamation and closure work at a permitted cite will be put at risk in addition to the bond portion related to and duplicated by CERCLA 108(b). EPA contradicts its own argument that the Proposed Rule has no Federalism implications and will not preempt state programs.

We also share EPA's policy concerns regarding its ability to oversee states' sophisticated and mature programs, since the Agency itself acknowledges the states have expertise with mining regulations that EPA lacks. EPA recognizes this expertise not only in the section quoted above but elsewhere within the preamble. It is also implied in the Proposed Rule's methods for determining response cost actions and reduction criteria. In establishing the financial assurance reduction criteria for hardrock facilities, for example, EPA's formula relies heavily on data derived from controls and technical requirements included in reclamation plans, and cost estimates already in place under other programs, but without the benefit of crucial site-specific information. The end result is a CERCLA 108(b) financial assurance rule that closely mirrors the requirements in state and FLMA reclamation and closure bonds. This assuredly will lead to state programs being subject to potential preemption challenges in the courts.

EPA has yet to identify any "gaps" in the state programs, despite past requests by the states and others that EPA perform a gap analysis, both prior to pursuing a CERCLA 108(b) rule for hardrock mining, and during the rulemaking process. Should any gaps in CERCLA liability be identified through a thorough analysis of existing programs, EPA should rely on the noted expertise of the existing program authorities to close those gaps. Deferring to states and FLMAs to cover any perceived gaps, rather than implementing an expansive and duplicative new national rule, would also allow for the preferred site-specific approach for financial assurance calculations without posing "significant regulatory burdens" on EPA, since states and FLMAs already have the necessary expertise and years of experience in calculating bonds in this manner. EPA should have worked with the states and FLMAs to conduct a complete and collaborative review of their programs to address any identified gaps within the existing frameworks,

rather than add an unnecessary extra layer of duplicative and costly regulations that will likely end in litigation. The states have been willing to work with EPA toward this goal, and we believe the industry would also support such an effort. This approach would have fulfilled the expectations of Executive Order 13132, Section 3, which up until now EPA has failed to do:

> Executive Order 13132, Section 3, "Federal Policymaking Criteria":
> "(d) When undertaking to formulate and implement policies that have federalism implications, agencies shall:
> (1) encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;
> (2) where possible, defer to the States to establish standards;
> (3) in determining whether to establish uniform national standards, consult with appropriate State and local officials in developing those standards."

V. Reduction Criteria

The formula for calculating financial assurance in the Proposed Rule includes criteria operators can meet to qualify for reductions in the amount of financial responsibility required. In discussing the purposes of the rule in the preamble, EPA characterizes these reductions as follows: "[T]he rule would provide an incentive for implementation of sound practices at hardrock mining facilities that would decrease the need for future CERCLA actions." (Section VII.C.2, Page 3481) As stated previously, the state programs already fulfill this purpose by requiring appropriate "sound practices" through their enforceable state program laws and regulations. Those practices are identified on a site-specific basis and are included in mandatory mine reclamation and closure plans. Due to advances in engineering and technology, those "sound practices" unfold over time. FLMA and state programs continually adapt to incorporate advances where risk reduction would be realized by doing so.

EPA's proposed formula for operators to qualify for reductions in financial responsibility under the Proposed Rule is too prescriptive. Several states believe that very few, if any, of the hardrock mine facilities in their states would qualify for reductions under EPA's prescriptive formula, though we believe these facilities often implement "sound practices" that reduce the need for future CERCLA actions. Specific practices are determined and managed through state programs on a site-specific basis and are determined by desired outcomes, rather than adoption of specific engineering methods or designs applied in a one-size-fits-all manner.

In the preamble discussion of a possible program deferral approach, EPA states, "It should be noted, however, that in taking this approach EPA would not expect to review Federal and state closure and reclamation programs for adequacy, or to judge the quality or efficacy of those programs. EPA's concern would be whether requirements

meeting the reduction criteria, designed for purposes of CERCLA Section 108(b), are imposed and enforced at facilities, and secured with financial assurance adequate to assure their implementation." (Section VI.4(E), Page 3469) However, by requiring EPA-prescribed practices to qualify for reductions, rather than recognizing those risk-reducing practices set forth in state permit requirements, EPA would in essence be judging the quality and efficacy of those program requirements and overstepping the expertise of the states.

As previously noted, EPA expressed "policy concerns about overseeing other federal and state programs' financial responsibility requirements for adequacy, given other authorities' expertise with mining regulation." By proposing specific engineering controls or numeric requirements for reductions, such as planning for a 200-year storm event, and reducing net precipitation by 95 percent, EPA is second-guessing these very federal and state agencies' expert site-specific determinations. The overly prescriptive engineering controls applied for reductions in the formula do not account for the site-specific conditions and sometimes do not represent the best "sound practice" or are unnecessary under the circumstances at a given site. In some cases, EPA's reduction criteria could have the effect of causing an operator to opt for an alternative, less desirable practice rather than employing a best management practice because the latter does not meet EPA's reduction requirements.

We agree with the following statement included in comments submitted to EPA on the Proposed Rule by the U.S. Forest Service on April, 2017 (pages 10-11):

> "In the Technical Support Document (TSD), "Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry Proposed Rule: Financial Responsibility Reductions" (December 1, 2016)...
> "...EPA acknowledges that 'Today BMPs have been developed that can mitigate potential impacts from mining to meet EPA's goal '...that the engineering requirements will result in a minimum degree and duration of risk associated with the production, transportation, treatment, storage, or disposal, as applicable, of all hazardous substances present at that site feature.'"
> EPA continues to cite the requirements for many of these mitigations in Federal and State regulations as the basis for developing the reduction requirements. Yet the fact that EPA refers to existing regulations as a rationalization for building the requirements of a particular reduction serves to underline that these existing regulations serve the purpose that EPA hopes is served by the proposed rule: to reduce the risk of a release of a hazardous or toxic substance. Therefore, the specific requirements in the reductions are unnecessary, because other programs with more site-specific presence than EPA has are already requiring these actions, using site-specific conditions as

criteria for design of the mitigations in question. Thus, the outcome is that EPA is attempting to regulate that which is already regulated."

Further supporting the position above, is EPA's allowance, in support of calculations of financial responsibility at a facility, for owners and operators to submit information "found in existing documents such as the owners or operator's plan of operations, reclamation and/or closure plans, and permits." (VI.5, Page 3470) This defies EPA's statements that CERCLA 108(b) rules are inherently different from state program requirements.

VI. Financial Assurance Market Capacity Study

EPA failed to adequately fulfill the intent of the "Conference Committee Report for the Consolidated Appropriations Act" (2016), in which Congress directed the Agency to conduct a study of market capacity as it relates to the necessary bonding instruments for meeting financial responsibility requirements under a new CERCLA 108(b) rule for hardrock mining. EPA concluded the research suggests there "likely" would be sufficient capacity to meet the rule's requirements, but cautioned that the capacity would be highly dependent on the overall account of required financial responsibility, depending on the parameters of the final rule, and on the types of financial assurance it will allow. EPA also states, "Given the *number of unknown factors*, the *ultimate availability* of CERCLA's Section 108(b) financial responsibility instruments *cannot be predicted with certainty until the final rule has been promulgated. At that time*, the available instruments will be determined, and *the market will have an opportunity to respond.*" (Section III.E, Page 3399) (Emphasis added) Clearly Congress' intent in directing EPA to conduct this study was for the purpose of providing a reasonable determination of the feasibility for operators to meet the requirements under a new proposed CERCLA 108(b) rule for hardrock mining. EPA failed to do so. Considering how little information was made available to stakeholders about the draft rule prior to publication, the time and data constraints EPA was under in developing the proposal, and the number of assumptions and questions that remain within the published Proposed Rule, it is not surprising that "given the number of unknown factors" there could be no certainty in predicting the availability of financial responsibility instruments.

EPA conducted its outreach to the financial assurance industry well before its formula for calculating financial responsibility was developed, thus missing a critical component for consideration in any serious market capacity study. EPA's interaction with the surety and banking industry appear to have been superficial, and their input was summarily dismissed and disregarded, resulting in EPA's conclusion that "there 'likely' would be sufficient capacity." Once a final rule is promulgated, a market response will be irrelevant. Should CERCLA 108(b) requirements put a strain on market capacity, it could have serious consequences not only for operators subject to the

CERCLA 108(b) rule, but also for other coal and noncoal mining sectors outside the scope of the rule.

VII. Conclusion

Existing state programs effectively and comprehensibly regulate hardrock mining to achieve the same goal sought by EPA, which is to reduce the "degree and duration of risk" associated with the release of hazardous substances. The state programs impose regulations that prevent, mitigate, and remediate such risks, and include adequate financial assurance requirements to prevent costs associated with unforeseen CERCLA liabilities from being shifted to taxpayers if a responsible party cannot or will not meet those liabilities. Within the Proposed Rule, EPA has implicitly and expressly acknowledged the expertise of the state regulatory authorities in regulating hardrock mines, as well as the effectiveness of state programs in preventing and mitigating CERCLA risks. At the same time EPA fails to identify any gaps in these existing programs. Therefore, EPA has failed to demonstrate the need for a national CERCLA 108(b) rule for hardrock mining.

EPA's lack of meaningful engagement with the states prior to its initial decision to classify hardrock mining for rulemaking, and now throughout the rulemaking process, resulted in a Proposed Rule that overlaps existing requirements contained in state programs. Citing the significant burden it would pose to the Agency and the overlap with other state and federal program requirements, EPA declined to pursue a site-specific approach in favor of an unwieldly and awkward, one-size-fits-all formula for calculating financial responsibility that will not work. EPA based its rulemaking decisions on historical mine data that do not reflect the low level of risk posed by modern hardrock mining given current technological advances and regulatory circumstances. EPA simultaneously extracted data from existing state and FLMA programs in designing the Proposed Rule, further demonstrating their effectiveness.

Should the courts mandate that EPA take some action for the hardrock mining industry under CERCLA 108(b), it should not be this fatally flawed Proposed Rule that has potentially devastating consequences for existing state and FLMA programs. Pursuing such a rule would put mature state and FLMA programs at risk of preemption without any benefit to the environment or taxpayers. If EPA must proceed, it should withdraw the Proposed Rule and initiate a process in close collaboration with the states and FLMAs to explore a fundamentally different and less expansive approach that would allow the states and FLMAs to make any necessary enhancements under their respective current regulatory frameworks. One concept discussed with EPA at the May 16, 2017 meeting with the states that deserves further deliberation is a full and complete exemption for states and FLMA programs. Such an exemption is necessary in order to ensure the integrity of these programs. This cannot be accomplished by a litigation-

driven December 1, 2017 deadline, and would require EPA to pursue an extension of that deadline with the courts.

We believe current state and FLMA programs have already reduced the degree and duration of risk to a level that does not warrant a new national rule. We therefore strongly recommend EPA withdraw the Proposed Rule and make a "no action necessary" determination for hardrock mining facilities.

Sincerely,

Beth A. Botsis
Deputy Executive Director

Attachments