

July 10, 2017

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:

Staff members from the Montana Department of Environmental Quality (DEQ) have reviewed the 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. DEQ regulates Hard Rock Mining activities under Montana's Metal Mine Reclamation Act codified at Sections 82-4-301, et seq., Montana Code Annotated (MCA). DEQ is, therefore, impacted by the proposed rule. Thank you for the opportunity to provide comments on the proposed rule.

We acknowledge that Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) directs the Environmental Protection Agency (EPA) to develop requirements that 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. On January 29, 2016, the United States Court of Appeals for the District of Columbia Circuit in *Re: Idaho Conservation League, Et Al., Petitioners, On Petition for Writ of Mandamus to the United States Environmental Protection Agency, No. 14-1149*, issued an order establishing a schedule for EPA to follow in establishing rules for the Hard Rock Mining industry. The order requires EPA to sign an order of proposed rulemaking by December 1, 2016, and to take final action by December 1, 2017. Beginning January 1, 2017, EPA requested comments on the proposed rule for the Hard Rock Mining sector. The comment deadline was established as July 11, 2017.

Montana DEQ is concerned that this rule duplicates and preempts Montana's reclamation and post-closure financial assurance programs currently in place.

- Section 82-4-338, MCA, requires Hard Rock operators to submit to DEQ a bond in an amount no less than the estimated cost to the state to ensure compliance with Montana's Air Quality Act, Montana's Water Quality Act, the Metal Mine Reclamation Act, and the permit issued by DEQ under the Metal Mine Reclamation Act.
- In addition, and at a minimum, Montana DEQ is required to perform a comprehensive bond review every five years for each Hard Rock operation to ensure that the bonding level is appropriate.

Through this rule process, EPA has failed to identify any gap in coverage in Montana's programs that presents a degree and duration of risk that warrants federal preemption. The duplication and confusion created by this rule has no environmental or monetary benefit and if implemented would degrade the quality of environmental protection already in place in Montana.

- Montana's state program already mandates mine plans, reclamation plans, and closure requirements that are intricate and include appropriate engineering and environmental controls based on site-specific conditions, aimed at reaching desired outcomes. Such state requirements substantially reduce the risk of hazardous substances release.
- Montana programs also provide incentives for operators to implement sound practices at Hard Rock mining facilities. Examples of incentives include broad enforceable requirements imposed on the industry that may result in issuance and enforcement of compliance orders, imposition of administrative and/or civil penalties, suspension of the mining permit, revocation of the mining permit, and loss of eligibility to conduct mining operations in Montana if those requirements are not met.

EPA's nationwide, one-size-fits-all formulaic approach does not account for site-specific factors.

- From years of experience, Montana DEQ has found that the site-specific calculations of the bond is the most precise and effective method. State bonds are calculated based on site-specific data to predict and cover all reasonable and likely costs for reclamation, closure, and the handling and containment of hazardous substances.

Furthermore, when considering that similar Federal requirements also exist on public lands under the authority of the U.S. Bureau of Land Management (BLM) and U.S. Forest Service (USFS) in Montana, including requirements for financial assurance, the necessity for the new CERCLA rules is nullified.

DEQ believes the proposed rule is fatally flawed and cannot be easily fixed.

- Therefore, Montana DEQ strongly urges EPA to withdraw the proposed rule and take a "no action needed" approach. This discretion is provided for in the court order to

the EPA and DEQ believes a “no rule option” is justified for Montana based on the robust financial assurance program that already reduces CERCLA liabilities and risks.

- If the circuit court mandates that EPA promulgate a rule, DEQ proposes that the draft rule be replaced with a new rule which exempts states like Montana that have robust financial assurance programs. This would necessitate a revision of the final rule deadline to allow time for the development of this new rule and exemption.

In summary, Montana DEQ believes the EPA’s Proposed Rule is duplicative and preemptive of Montana’s existing comprehensive state program. No known gap in Montana practice and protection has been identified or would be corrected with creation of this rule. Montana also opposes the creation and imposition of a one-size-fits-all approach that fails to improve upon existing protections enacted by the state.

Thank you again for the opportunity to provide comments on the proposed rule. DEQ appreciates your thoughtful consideration of its comments and recommendations, and consideration of the negative impacts of the draft rule on Montana and its regulatory program.

If you have any questions, please contact Christopher Dorrington at (406) 444-0496 or email at cdorrington2@mt.gov.

Sincerely,



July 10, 2017

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