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July 15, 2016

Administrator McCarthy
Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy,

Re: CERCLA 108(b) financial assurance regulations

We write today on behalf of the organizations listed below, and the millions of people we represent, to urge the Environmental Protection Agency (EPA), as it moves forward with the development of the financial assurance regulations required under CERCLA 108(b), to ensure that these regulations will rigorously protect taxpayers from the clean-up costs associated with metal mines and compel timely remediation to protect communities from the hazardous materials associated with these facilities.

These regulations are long overdue. According to the Toxic Release Inventory, metal mining is the nation's leading source of toxic releases, generating nearly 2 billion pounds a year of hazardous materials such as arsenic, mercury, lead and cadmium. The EPA estimates the backlog of clean-up costs for hardrock mines across the country at \$20-\$54 billion -- vastly more than the annual Superfund budget.¹

To compound the problem, new sites are being added to the CERCLA program every year. Across the nation, communities are faced with polluted drinking water, contaminated soils, and long-standing public health risks.

- In Colorado, the Gold King disaster released 3 million gallons of mine waste water into the Animas River, with far-reaching effects to the communities downstream.
- In Nevada, the Yerington Mine has polluted drinking water wells with radioactive pollutants, with unfunded clean-up costs of \$30 million.
- In South Dakota, the public is on the hook for \$90 million to address severe acid mine drainage at the Gilt Edge Mine.
- In Oregon, the Formosa Mine has devastated prime salmon habitat with toxic metals, leaving the public to pay an estimated \$12 million for remediation.
- In Montana, the Zortman Landusky Mine has cost taxpayers over \$20 million and water pollution from acid mine drainage is expected to continue for hundreds of years.

Too often, the cost of clean-up is shouldered by the American taxpayer, rather than the mining companies responsible for the pollution. The EPA needs the authority to collect financial assurance, up front, to ensure timely and appropriate clean-up.

As the EPA develops the draft regulations, due December 1, 2016, our organizations highlight the following five priority issues:

1) Corporate guarantees. We urge the EPA to preclude the use of corporate guarantees, or self-bonding, as a financial assurance instrument in the draft regulations. Taxpayers may get stuck with billions in clean-up costs to reclaim coal mines because the Surface Mining Control and Reclamation Act (SMCRA) allows coal companies to use corporate guarantees, rather than an independent and secure form of financial assurance that doesn't depend on the financial condition of the company.² For this reason, OSMRE is currently reviewing their SMCRA self-bonding rules and the Senate and House have each introduced legislation clarifying they need not consider self-bonding instruments.

When OSMRE finalized its self-bonding regulations for surface coal mining in 1983, it made clear that "[t]he purpose of establishing a self-bond program is to recognize that there are companies that are financially sound enough that the probability of bankruptcy is small." 48 Fed. Reg. 36,418 at 36,421 (August 10, 1983). Unfortunately, recent experience has conclusively established that government regulators are not capable of accurately determining, in advance,

¹ <https://www.regulations.gov/document?D=EPA-HQ-SFUND-2009-0265-0001>

² Washington Post, "Can Coal Companies Afford to Cleanup Coal Country," April 2, 2016;

http://www.nytimes.com/2016/06/07/business/dealbook/regulators-fear-1-billion-coal-cleanup-bill.html?_r=0

which companies are financially sound enough to be allowed to self-bond. Of the total of \$3.86 billion in existing SMCRA self-bonds, over \$2.4 billion are held by companies currently in bankruptcy. 81 Fed. Reg. 31,880 (May 20, 2016). EPA must learn from OSMRE's mistakes and recognize that self-bonding is far too risky.

Corporate guarantees are not backed by hard assets, cash or cash equivalents. Many mining companies that rely on resource extraction lack diversified lines of business that can dilute the risk of market downturns. Furthermore, the metal market is too volatile to provide sufficient time for corrective action. Once market conditions decline, self-bonding creates a perverse incentive by discouraging shifts to stronger forms of financial assurance, because the shift would occur at the weakest financial moment for the company.

2) Public Participation. For the financial assurance system to be credible and fully informed it is important for the public to be provided opportunities for meaningful participation in all financial assurance actions, including calculating and issuance, renewal, review, and partial or full release of a financial assurance. This is appropriate because, among other things, it is the public that typically pays the cost of cleanup if the financial assurance is insufficient.

3) Financial assurance reductions. In its May 2016 webinar³, the EPA described its plan to allow deductions to the bond amount if the mine facility employs certain types of engineering controls. While this approach may reduce the risk of impacts, it does not necessarily reduce the cost of cleanup. We strongly support the use of engineering controls at mine facilities, and encourage policies that incentivize best practices. However, it is essential that the regulations ensure that proposed deductions don't conflict with the central purpose of the statute – to ensure that the full cost of clean-up is covered by the financial assurance.

4) Perpetual Pollution. An increasing number of mine sites throughout the U.S. will require costly water treatment for hundreds to thousands of years, or “in perpetuity,” to address long-term water pollution often caused by acid mine drainage. A recent review of government documents reveal that just forty mines will generate an estimated 17 to 27 billion gallons of polluted water in perpetuity.⁴ The cost of water treatment will extend far beyond the expected life of the mining company. It is extremely difficult to predict what water treatment and power costs will be 50-100 years in the future, or if economic conditions will generate a return on investment, or even if the institution that holds the bond will be in existence. The regulations need to prioritize these types of facilities, and address the exceptional financial liability associated with these hazardous materials.

5) Radioactive waste. Radioactive materials are generated in significant quantities at uranium mine operations and are often present as byproducts in waste streams at non-uranium mines, including those that extract phosphorous, potash, oil shale, copper, gypsum, rare earths and other minerals. Hundreds of thousands of tons of overburden, waste rock, gangue and uneconomic ore may be permanently disposed at a single mine site and can contain significant amounts of uranium, thorium, radium and other radioactive byproducts. Over time, radioactive materials are released through multiple pathways of exposure from waste piles into the environment and have

³ <https://clu-in.org/conf/tio/108b/slides/CERCLA-108b-webinar.pdf>

⁴ <https://www.earthworksaction.org/files/publications/PollutingTheFuture-FINAL.pdf>

long-term potential to degrade ground and surface water supplies. Already, EPA estimates the number of inactive mines with unfettered radioactive waste dumps to number in the thousands and the practice of dumping radioactive mine waste at operating mines continues without special management practices or reclamation standards in place to mitigate radioactive releases.⁵ Future bonding requirements should consider the particular long-term risks posed by current disposal practices for the extraction of uranium and other radioactive minerals.

Once again, we express our support for the development of rigorous regulations under CERCLA 108(b) to ensure that funding is available for clean-up of hazardous materials at mine facilities.

We look forward to working with the EPA on this important issue as the regulatory process proceeds.

Sincerely,

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⁵ U.S. EPA, Evaluation of EPA's Guidance on Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) Report to Congress, June 2000 (EPA 402-R-00-01), p. 5.

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