Congress of the United States

Washington, DC 20515

August 9, 2016

The Honorable Gina A. McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

Under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) the Environmental Protection Agency (EPA or the Agency) is considering creating a regulatory regime for the hard rock mining industry regarding aspects of risk management and financial assurance. Financial assurance is a critical component of any operation to ensure that cleanup, closure, and post-closure activities are carried out once productivity ceases. We understand that the EPA's current regulatory considerations under section 108(b) are the result of a lawsuit brought by non-governmental organizations in the U.S. Court of Appeals for the District of Columbia Circuit and that the Court has ordered EPA to complete a proposed rule by December 2016.

The Committee on Natural Resources has jurisdiction over laws that impact the hard rock mining industry and the Committee on Energy and Commerce has jurisdiction over CERCLA. Both Committees have a direct interest in EPA's consideration of regulations that may impact beneficial access to the natural resources of the United States, and protection of the environment.

Mining is a critical component of our national economy and mining operations can have a significant impact on the environment. That is why, since the enactment of CERCLA, Congress and the states have crafted rigorous laws to ensure that mining operations protect the environment and the interests of taxpayers. Federal and state regulations have evolved to respond to past deficiencies and ensure that the highest level of environmental protection is achieved.

We understand that EPA has taken the position that the financial assurance regulatory program the Agency is developing under CERCLA is distinct from the comprehensive regulations by states and other federal agencies and that the 108(b) regulations will operate differently from other financial responsibility programs. We also understand that the Bureau of Land Management, the U.S. Forest Service, and the majority of western states continue to raise concerns regarding duplication and preemption. Consequently, while we recognize the importance of financial assurance, we are concerned about whether EPA has adequately analyzed existing federal and state financial assurance requirements to evaluate properly the need

for additional regulation. We are particularly troubled with the issue of preemption and whether the 108(b) rule is duplicative of existing federal and state programs, and if additional regulation is needed, to be sure the new requirements are consistent with other financial assurance programs.

In addition, we are focused on whether EPA, in developing the rule, is considering the views of federal agencies with more direct experience regulating the hard-rock mining industry such as the U.S. Forest Service and Bureau of Land Management, as well as views of state regulators, and the mining industry.

In recent Congressional briefings, EPA officials indicated that a simple model was being developed to determine the scope and amount of financial assurance requirements. It is unclear what mines were used to develop the formula/model and whether the formula is based on costs from legacy sites with existing issues. It is also unclear whether the model includes reductions in the CERCLA financial assurance amount to account for regulatory controls or financial assurance required under state and federal programs. Therefore, we are concerned that the model will not appropriately give credit for the existing financial assurance that regulated entities have committed to state and federal programs that are functionally equivalent and achieve the same goals as the CERCLA financial assurance.

If the Agency fails to reduce the amount of the CERCLA financial assurance obligation to account for these programs, it will result in the unnecessary and duplicative imposition of many billions of dollars of financial assurance requirements on the mining industry. We are also concerned about what input EPA has sought from mining experts in other federal agencies or external experts in the development of the model and whether the model has or will receive appropriate peer review.

Please provide to the Committees the following documents by August 22, 2016:

1. A working electronic version of EPA's current model for hard rock mining financial assurance, and all supporting information utilized to develop model inputs, unit valuations, and best practice credit reduction types and factors.

2. Copies of all documents and correspondence regarding the development of the financial assurance model (between the EPA and other federal and state agencies).

3. Copies of all documents and correspondence regarding the development of the financial assurance model (between EPA and financial experts, regulated financial institutions, and financial entities) that potentially could offer services required by any financial assurance regulation created by EPA's proposed draft rule.

4. The draft market capacity study.

Additionally, please provide to the Committees responses to the following questions by August 22, 2016:

1. What peer review activities have been undertaken to date? What peer review activities is EPA planning? Please indicate who will undertake the reviews, when these will occur, and how the results will be used and shared.

2. Will EPA's rule allow an operator subject to the rule to undertake a site-specific risk assessment and financial assurance determination, especially given the extensive site-specific information that mining companies must provide as part of state and federal permitting?

3. What U.S. mines were visited as part of EPA's planning for the 108(b) regulation? When were these mines visited? How many members of the rulemaking team participated in these visits? Please explain what relevant information was used from each of the sites in developing the model/formula. Also, please provide information about the site features of each of the mines as well as a breakdown of the cleanup, closure, and post-closure costs for each site (differentiate between what a potentially responsible party paid versus what the government paid).

4. How is EPA setting risk thresholds to identify site features subject to financial assurance? When will EPA provide an updated hard rock mining industry risk assessment incorporating what has been learned from consultation with other agencies?

5. In developing the model/formula and selecting appropriate data, did EPA use a filtering technique to ensure that legacy issues are not included within the calculation? If so, please describe in detail the filtering technique, including whether the agency omitted sites that were designed and operated prior to 1990.

6. How is the Agency going to factor in reductions for compliance with existing state and federal laws requiring financial assurance? Will this be a dollar-for-dollar commensurate reduction? If not, what criteria, formula, statistical analysis, or other method is EPA using to determine these reductions?

7. What is the percentage fixed amount the Agency is currently considering for natural resource damages? What is the fixed cost the Agency is currently considering for health assessment costs?

8. What is the duration of the financial assurance obligation or the specific criteria that the Agency will use to release a company from the obligation (either partially or in full)?

9. What information has EPA provided to financial entities that potentially could offer services required by any financial assurance regulation created by in order for them to do a capacity determination?

To arrange delivery of the requested information and documents, and if you have any questions, you may contact Mike Freeman, staff for the Resources Committee at (202) 225-2761 or Tina Richards, staff for the Energy and Commerce Committee at (202) 225-2927. Thank you for prompt response to this request.

Sincerely,

Rob Bishop
Chairman
Committee on Natural Resources

Fred Upton
Chairman
Committee on Energy and Commerce

Attachment

cc: The Honorable Bill Shuster, Chairman
Committee on Transportation and Infrastructure