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United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510–6150

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March 8, 2011

The Honorable Ken Salazar
Secretary
U.S. Department of Interior
1849 C Street, N.W.
Washington, DC 20240

The Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Dear Secretaries Salazar and Vilsack:

I write to seek your perspectives on actions being taken by the Environmental Protection Agency (EPA) related to financial assurance requirements, including bonds, for hardrock mines in the United States. On federal lands, your agencies have statutory responsibility for the development and administration of such requirements under authorities that include the Federal Land Policy and Management Act (FLPMA) for the Bureau of Land Management (BLM) and the Organic Act for the U.S. Forest Service (USFS).[1] In addition to BLM and USFS financial assurance requirements, states have generally promulgated analogous standards for hardrock mines on non-federal lands.

Environmental organizations sued EPA in March 2008 to compel the agency to promulgate and implement certain financial assurance requirements under Sec.108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] In February 2009, the U.S. Federal District Court for the Northern District of California ordered EPA to identify and publish notice of those classes of facilities that may be subject to future financial assurance requirements under CERCLA Sec.108(b). In July 2009, EPA identified the hardrock mining industry as the first class of facilities for which it would impose such requirements.[3]

Despite the maturity and effectiveness of existing financial assurance programs implemented by your agencies and the states, EPA is considering new regulations that may unnecessarily duplicate or preempt them. I believe EPA erred when it identified classes of hardrock mining facilities without considering these existing programs and hastily concluded that new regulations were warranted without studying the facts. EPA officials have claimed that their involvement will "help ensure that owners and operators of the facilities, not taxpayers, foot the bill for environmental cleanup."[4] However, as Ranking Member of the Energy and Natural Resources Committee – which has jurisdiction over the BLM and USFS – it is clear to me that this task has been, and continues to be, the responsibility of the BLM, USFS, and the states for hardrock mines.

The BLM and USFS have required financial assurances for hardrock mines on federal lands since 1981 and 1974, respectively. Both agencies annually re-assess the sufficiency of existing financial assurances, presumably ensuring that the most modern regime is in place for hardrock mines on federal

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[1] Implementing regulations at 43 C.F.R. Part 3809 and 36 C.F.R. Part 228A, respectively.
[2] *Sierra Club v. Johnson*, No. C 08-01409 WHA (March 12, 2008).
[3] 74 Fed. Reg. 37, 213 (July 28, 2009).
[4] December 6, 2010 EPA press release: http://yosemite.epa.gov/opa/admpress.nsf/0/BAD9A932029FD368852577F10058E761.

land. Those same operations benefit from the BLM and USFS' capacity to account for regional and project-specific differences. This capacity is particularly important since, for example, a hardrock mine in the Nevada desert is very different from one in the Alaska Arctic.

Moreover, even within a particular region, there can be substantial differences in the environmental conditions and reclamation requirements from mine to mine. Accounting for these differences is essential to developing an effective reclamation plan and appropriately calculating any financial assurance requirements associated with it. This point was underscored by a Congressionally-initiated report from the National Research Council (NRC) in 1999, which found that, "[s]imple 'one-size-fits-all' solutions are impractical because mining confronts too great an assortment of site-specific technical, environmental, and social conditions."[5]

Importantly, the NRC report also found that "the overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated but *generally effective*" and that "improvements in implementation of *existing* regulations present the greatest opportunity for improving environmental protection."[6] Subsequent to publication of this report, the BLM and USFS undertook a comprehensive update of their hardrock mining regulations, including those related to financial assurance requirements, in 2001 and 2004, respectively.

In light of the statutory authorities and years of experience that the BLM and USFS already hold, I am seeking your perspectives on whether EPA's actions to require financial assurances under CERCLA Sec.108(b) for hardrock mines are warranted. Thus, I respectfully request detailed answers to the following questions:

1. Has your agency received any information from EPA indicating that it intends to pursue a 'one-size-fits-all' approach under CERCLA Sec.108(b) for hardrock mining? If so, what information has been provided and has your agency expressed any concerns with this approach?

2. Has your agency received any information from EPA regarding how legacy (pre-1990) hardrock mining (or processing) sites listed on the CERCLA National Priorities List (NPL) impacted their identification of the industry as posing a high risk under CERCLA Sec.108(b)? If so, what information has been provided and has your agency expressed any concerns with this approach?

3. Has your agency received any information from EPA indicating that it intends to link the cost of remediating legacy (pre-1990) hardrock mining (or processing) sites to the calculation of future financial assurance requirements that may be imposed under CERCLA Sec.108(b)? If so, what information has been provided and has your agency expressed any concerns with this approach?

4. Please provide a description of how your agency currently calculates financial assurance requirements applicable to hardrock mines on federal lands.

5. Can your agency approve a plan of operations that poses a high risk of unnecessary or undue degradation of public lands? How would your agency typically respond to a plan of operations that it believed posed a high risk of unnecessary or undue degradation of public lands?

6. Does your agency have the authority to impose financial assurance requirements for post-mining, long-term monitoring, maintenance and treatment operations?

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[5] *Hardrock Mining on Federal Lands*, National Research Council, National Academy Press, 1999 at p. 90.
[6] *Id.* at p. 90-91 (emphasis added).

7. How many hardrock mining and beneficiation[7] plans of operation has your agency approved since 1990?

    a. How many of those sites are, or have been, placed on the CERCLA NPL?

    b. How many of those sites placed on the CERCLA NPL involve(d) a responsible party that pays (paid) for the cost of short-term removals or long-term remediation, either in part or in whole? What is the aggregate dollar amount spent by these responsible parties? What is the aggregate dollar amount spent by the federal (or state) government?

8. Does your agency coordinate – or has it coordinated in the past – with states to develop financial assurance requirements for hardrock mines on non-federal lands? If so, please describe this coordination.

9. Please provide all documents, records, papers, reports, agreements, notes, correspondence, presentations, analyses, comments, and any other materials generated by your agency as part of an inter- or intra-agency process associated with the EPA's CERCLA Sec.108(b) rulemaking.[8]

I believe that EPA plays a critical role in protecting the environment, but it is important to ensure that such protection is achieved by competent administration of sufficient authorities and not by burying projects in duplicative and expensive regulatory programs that restrict their ability to come to fruition. I believe that EPA's intrusion into financial assurance requirements for hardrock mines, where your agencies have implemented robust programs, is unnecessary and will result only in duplication, inordinate costs and potential closures.

As you are well aware, the governance of mining operations must balance robust environmental protections with the need for job-creating projects that increase our resource security, bolster our economic well-being, and utilize modern techniques that minimize impacts. The burdens imposed on these projects must also reflect the fact that mining is a globally competitive industry with major U.S. strategic interests at stake.

I thank you for your attention to this matter and look forward to your prompt reply.

Sincerely,

Lisa A. Murkowski

cc: EPA Administrator Lisa Jackson

[7] As defined at 40 C.F.R. 261.4(b)(7).

[8] 74 Fed. Reg. 37, 213.