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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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February 10, 2017

Ms. Catherine McCabe
Acting Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: Need for 120-Day Extension of Comment Period on the Proposed Rule Entitled:
“Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of
Facilities in the Hardrock Mining Industry,” 82 Fed. Reg. 3388 (Jan. 11, 2017).

Dear Acting Administrator McCabe:

I am writing to ask EPA to extend the comment period for the above-referenced proposed rule for an additional 120 days, until July 10, 2017. This rule will affect not only the mining industry, but could also establish a precedent for the electric utility, petroleum and coal products, and chemical manufacturing industries.

This proposal fills 124 pages of the Federal Register that reference an additional 2,329 technical supporting documents totaling nearly 233,000 pages, some of which were added to the docket only this week, halfway into the 60-day comment period. A meaningful opportunity for comment requires time to adequately review these documents and the complex statistical model that EPA made available to the public only recently.

A 60-day comment period is inadequate for this proposed rule. For example, EPA estimates that if the rule is finalized 221 facilities would need to obtain an estimated \$7.1 billion in financial responsibility coverage. This estimate does not appear to be fact-based and needs close scrutiny. EPA also estimates that absent the rule, the agency would incur \$527 million in costs over 34 years to clean up hardrock mines. It is unclear why \$7.1 billion in coverage would be needed to cover \$527 million in costs, even if EPA’s estimate of cleanup costs is accurate. EPA also estimates that the proposed rule would cost the mining industry between \$111 and \$171 million a year, depending on what types of financial assurance are allowed by a final rule. Based on EPA’s numbers, these annual costs are as much as 11 times greater than the benefit to EPA of \$527 million over 34 years – an average of \$15.5 million a year.

These numbers must be evaluated carefully because under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) any level of financial responsibility coverage must be “consistent with the degree and duration of risk associated with the production,

transportation, treatment, storage, or disposal of hazardous substances.” Further, the level of financial responsibility must “protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction.” EPA’s record must demonstrate that these statutory requirements are met. Evaluation of this threshold matter will require a review of the over 233,000 documents EPA has placed into the record.

States also will need time to evaluate the proposed rule’s impact on state financial assurance programs. I understand that among the documents that EPA added to the docket this week are documents on EPA’s review of state programs. Any financial assurance requirements under CERCLA will preempt state financial assurance requirements related to releases of hazardous substances. Given the breadth of the definition of the term “hazardous substance,” EPA’s rule is likely to supersede almost any state requirements. States need the opportunity to correct any assumptions that EPA has made about state laws. These comments from states will be critical to avoid preemption of state law. This information also could allow EPA to restructure the rule to complement, rather than displace, state requirements.

Finally, under CERCLA, EPA must, to the maximum extent practicable “cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements.” EPA admits that it is unclear whether the commercial insurance industry will provide the financial responsibility instruments that would be required under the proposed rule. Clearly, further consultation with the industry is needed.

I am aware that EPA has agreed to an order on consent under which EPA must issue a final rule regarding this matter by December 1, 2017. However, if EPA feels it needs more time to consider comments received by a new comment deadline of July 10, the agency should request that the court extend the deadline for final agency action.

Additional information received under an extended comment period will allow EPA to ensure it meets the requirements of CERCLA and will improve any final rule. EPA should extend its comment deadline by an additional 120 days.

Sincerely,



John Barrasso, M.D.
Chairman
Committee on Environment and Public Works
United States Senate