Interstate Mining Compact Commission

445-A Carlisle Drive, Herndon, VA 20170
Phone: 703/709-8654 Fax: 703/709-8655
Web Address: www.imcc.isa.us E-Mail: gconrad@imcc.isa.us or bbotsis@imcc.isa.us

COMMISSIONERS

GOV. TERRY MCAULIFFE
Virginia, Chairman

GOV. BILL WALKER
Alaska, Vice Chairman

GOV. GARY R. HERBERT
Utah, Treasurer

GOV. ROBERT BENTLEY
Alabama

GOV. ASA HUTCHINSON
Arkansas

GOV. BRUCE RAUNER
Illinois

GOV. MIKE PENCE
Indiana

GOV. MATTHEW G. BEVIN
Kentucky

GOV. JOHN BEL EDWARDS
Louisiana

GOV. LAWRENCE J. HOGAN, JR.
Maryland

GOV. PHIL BRYANT
Mississippi

GOV. JAY NIXON
Missouri

GOV. ANDREW CUOMO
New York

GOV. PAT MCCRORY
North Carolina

GOV. JACK DALRYMPLE
North Dakota

GOV. JOHN R. KASICH
Ohio

GOV. MARY FALLIN
Oklahoma

GOV. TOM WOLF
Pennsylvania

GOV. NIKKI HALEY
South Carolina

GOV. BILL HASLAM
Tennessee

GOV. GREG ABBOTT
Texas,

GOV. EARL RAY TOMBLIN
West Virginia

GOV. MATT MEAD
Wyoming

ASSOCIATE MEMBERS

GOV. JOHN HICKENLOOPER
Colorado

GOV. SUSANA MARTINEZ
New Mexico

EXECUTIVE DIRECTOR
GREGORY E. CONRAD

August 16, 2016

Ms. Sonya Sasseville
Office of Land and Emergency Management
U.S. Environmental Protection Agency Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 5303P
Washington, DC 20460

Ms. Anna Krueger
Economist
U.S. Environmental Protection Agency Headquarters
Mail Code 5303P
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted via Email to: McCarthy.Gina@epa.gov, Kreuger.Anna@epa.gov, Sasseville.Sonya@epa.gov, Barr.Linda@epa.gov, Barbery.Andrea@epa.gov, Hanson.Andrew@epa.gov

Dear Ms. Sasseville and Ms. Kreuger:

This letter constitutes the comments of the Interstate Mining Compact Commission (IMCC) concerning the Environmental Protection Agency's (EPA) anticipated rulemaking to require financial assurance for hardrock mining under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The comments are being submitted as part of EPA's consultation with the states pursuant to the terms of the "Federalism" Executive Order (EO 13132), which directs federal agencies to consult with elected state and local government officials, or their representative national organizations, when developing regulations and policies that may impose substantial compliance costs on state and local governments or may preempt current or future state or local laws and regulations. We appreciate the opportunity to provide these comments on behalf of our member states. IMCC has also been collaborating with several state government organizations and non-member states. In this regard, IMCC also endorses the individual comments being submitted by the states of

Nevada, South Dakota, and Utah, and the comments of the Western Governors' Association and The Environmental Council of the States.

The IMCC is a multi-state governmental organization representing the natural resource and environmental protection interests of its 25 member states, several of which implement comprehensive and robust regulatory programs for hardrock mining within their borders, particularly in the West. An important component of state regulatory programs is the requirement that companies provide financial assurances that are sufficient to fund required reclamation, post-closure monitoring and water treatment, and the handling and disposal of hazardous and acid-forming substances resulting from mining processes, should the company for some reason fail to do so in accordance with the state reclamation program requirements.

As noted in IMCC's resolution on "Financial Assurance for Hardrock Mine Reclamation" dated April 20, 2016, the states have acquired extensive expertise on and understanding of the various mining methods and technologies used by their hardrock industries, and have years of experience in evaluating mining operations, calculating bond amounts based on the unique circumstances of each mining operation, assuring that completion of reclamation and proper mine closure takes place, addressing public health risks and environmental risks, regulating hazardous substances utilized in mining, and preventing and remediating hazardous releases. The states have also developed the staff and expertise necessary to make informed predictions of how the real value of financial assurance may change over the life of the mine, including post-closure, and they have the authority to make adjustments to financial assurance requirements over time when necessary. In the West, hardrock mining operations on public lands are also subject to comprehensive regulation and financial assurance requirements under the authority of the U.S. Bureau of Land Management (BLM), and the U.S. Forest Service (USFS), in many cases in cooperation with the states through memoranda of understanding (MOUs).

Under CERCLA 108(b), EPA intends to address financial assurance requirements for hardrock mining operations and processing facilities in the event of a hazardous release, should a company declare bankruptcy or be otherwise unable to conduct necessary response activities. EPA intends to take into account the "degree and duration of risks" associated with the use and management of hazardous substances at these sites. EPA has repeatedly stated that what CERCLA 108(b) would regulate is different from what the states are doing, emphasizing that states' programs are "preventive" in nature and only address mine reclamation and closure requirements, as opposed to addressing releases of hazardous substances. The fact is, state reclamation programs are designed to prevent such releases from ever occurring and to thereby eliminate the risk. Several state programs include financial assurance coverage not only for the handling and treatment of hazardous substances, but also for remediation of hazardous releases, should it become necessary.

Despite EPA's stated good intentions to avoid preemption of state laws and regulations, we remain concerned that, as structured, EPA's anticipated rule appears to duplicate state financial assurance requirements, and that preemption of existing state

programs is a certainty based on the limited information EPA has shared with us to date. This is in direct contradiction to EO 13132, Section 2, *Fundamental Federalism Principles,* which states "(i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States." Preemption would be devastating for the states' ability to effectively regulate the hardrock mining industry within their borders. As explained in a letter sent to EPA in 2011 by the New Mexico State Attorney General, preemption would create huge gaps in the state's regulatory system. For instance, in situations where a mine operator fails to implement reclamation requirements without resulting in a significant release of hazardous substances, the state might be prompted to call in the financial assurance to correct the violation, whereas EPA would not (under CERCLA 108(b)). If the state law is preempted, the state will no longer have that ability. The same could be true where a state regulates mine contaminants that are not hazardous substances. These scenarios would leave the state with no effective remedy to ensure reclamation.

Based on our analysis, the effect of state programs is to substantially reduce, if not eliminate, the risk that a mine will have a release of hazardous substances that might otherwise result in a National Priorities List (NPL) listing. Therefore, there is no reason to require CERCLA 108(b) financial assurance at mines that have state approved reclamation plans and financial assurance in place. To the extent that EPA perceives that there are gaps in state financial assurance requirements, the agency has failed to clearly identify them, despite repeated requests in past years by the states and Congress to do so. Without more to establish otherwise, the states continue to maintain that their programs for financial assurance are sufficient for purposes of CERCLA 108(b).

Any gap analysis by EPA should follow a thorough understanding of existing state and federal programs. If it is determined that regulatory enhancements are needed in some states or under certain circumstances to address hazardous releases, a much narrower rule should be developed, rather than a nationwide one-size-fits-all rule for which no need has been demonstrated. EPA should also specifically exempt operations from CERCLA 108(b) financial assurance in states where the state program's financial assurance requirements are determined to be sufficient.

The approach above would be consistent with EO 13132, Section 2 (f), which states "The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems."

EO 13132, Section 3, *Federal Policymaking Criteria*, also supports this approach:

"(d) When undertaking to formulate and implement policies that have federalism implications, agencies shall:

(1) encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States;

(2) where possible, defer to the States to establish standards;

(3) in determining whether to establish uniform national standards, consult with appropriate State and local officials in developing those standards.

EO 13132, Section 6 (c) states that "no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, *prior to the formal promulgation of the regulation, (1) consulted with State and local officials early in the process of developing the proposed regulation*" (Emphasis added). Should EPA continue to move forward, the states request that as part of the "early consultation," EPA provide the states with a draft of the rule to enable the states to better understand and respond to the potential conflicts with state requirements, as well as preemption impacts. The states also request access to the model and formula being developed to calculate required amounts of financial assurance under CERCLA 108(b). This would include the specific measures and engineering controls being considered for reducing the amounts of financial assurance, the percentages associated with those reductions, and the basis for calculating those percentages. To date, the agency has only shared vague conceptual information and sample scenarios that do not necessarily reflect conditions and characteristics of actual mining operations within the various states. Without having detailed information about the draft rule and model, we can only comment on what we "think" EPA intends to include, and it is impossible to understand and comment on the relationship between the draft rule and existing state programs. As regulators, the states should be given an opportunity to comment substantively on specific provisions of the draft rule and model prior to publication of the rule and the public comment period. This is necessary for a true and meaningful federalism consultation to take place. It is also consistent with EO 13132, Section 4, *Special Requirements for Preemption*, (d) "When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict."

During a July 19 conference call between EPA and the states, EPA stated the agency will not be looking at state programs that are in place, or legal requirements such as the presence of a required reclamation plan or permit, when calculating reductions in the financial assurance required under the CERCLA 108(b) rule. Instead, EPA will only consider physical controls on the ground, such as individual measures and engineering controls in place at a mining operation. We are concerned that EPA will "miss the forest for the trees" with this approach by not fully understanding, and taking into account, the programs as a whole and how they work together in their entirety to eliminate and reduce risk. Depending on the operation and circumstances on the ground, a particular engineering control may or may not be appropriate and/or result in the same reduction of risk in every case. The states have the expertise and knowledge to determine the appropriateness and likely effectiveness of these controls on a site-specific basis. Mining

and reclamation plans required for state permits are effective ways to reduce risk, along with the associated financial assurance. In addition, many existing state and federal programs go beyond these measures and directly address hazardous substances and hazardous releases. It is essential for EPA to fully understand these programs in order to avoid duplication and preemption. Due to their effectiveness, state programs in their entirety should be taken into account in the formula for reducing, and in many cases eliminating, the amounts of financial assurance that will be required under the model EPA is developing for calculating bond amounts as part of the CERCLA 108(b) rulemaking.

The results of existing state, BLM and USFS programs in eliminating or reducing the risk of hazardous releases are testimony to their effectiveness. These comprehensive programs make Superfund sites like those that occurred in the past extremely unlikely. If the key component of the draft rule is risk, reduction of risk pursuant to state and federal program requirements together with the bond already in place should be taken into account. For example, according to a March 8, 2011 letter sent by Senator Murkowski to Secretaries Salazar and Vilsack, there have been no modern mine sites permitted by BLM or USFS since 1990 added to the CERCLA NPL (e.g. zero out of 659 BLM permitted mine sites, and zero out of 2,685 USFS permitted mine sites have been added to the NPL).

Following are descriptions of some existing state program and financial assurance requirements that demonstrate why we believe these programs are adequate, and how they eliminate or greatly reduce the risk and need for CERCLA 108(b) financial assurance protection. [Note: Italicized sections relate directly to hazardous substances/hazardous releases, though we believe all of the requirements contribute to the reduction of risk.]

Nevada

Nevada reclamation bonding requirements that are designed to be consistent with federal regulations are in place for exploration projects and mining operations with proposed disturbance greater than 5 acres or removing in excess of 36,500 tons of material (ore plus overburden) from the earth per year. The bonds ensure productive post-mining land use and protect waters in the state by ensuring adequate funding is set aside to complete reclamation on privately owned and federal land in the event operators are unable or unwilling to meet their reclamation obligations. Bonds are required for projects on private or public lands. On public lands, bonding is a joint process between the state and federal land managers (BLM and USFS) under a formal MOU, most recently updated in 2014. The bulk of financial assurance is held in surety bonds, but other instruments authorized for use include trust funds, corporate guarantees, letters of credit, insurance, cash, and a State Bond Poll (no CD's). Both the state and federal land managers review and approve the cost estimates when setting bond amounts. Bond release is also coordinated between the agencies. The financial assurance must be in place prior to initiation of any land disturbance activities. Currently over $2.66 billion of financial assurance is posted in Nevada. The bonds may be held by BLM, USFS, or the

state, and the bonds are updated at least once every three years and more often, if needed. The bond amount is calculated to include:

- *Regrading to stable slopes and installing covers to reduce infiltration for: waste rock piles, heap leach pads, and tailings storage facilities.*
- Recontouring and backfilling to establish original topography, including: roads, borrow areas, ponds and yard areas; demolition of buildings; pits must be safe and stable; and revegetation of disturbed areas.
- Closure and reclamation of portals, adits, shafts, and vent raises.
- Plugging of water wells.
- *Disposal of hazardous and mercury-bearing waste products – all hazardous substances, along with ongoing monitoring as needed.*
- *Construction of cover systems for waste rock piles and tailings storage facilities.*
- *Monitoring, sampling, and site maintenance during the mine closure period.*
- *Management of mine impacted waters, including releases, are covered by the bond. Mine impacted waters are defined as any contaminated water resulting from a mining operation requiring stabilization, management, control or treatment to prevent or mitigate degradation of waters of the state. Included are stabilization, management, control, or treatment of mine impacted waters from waste rock piles, open pits, and underground mines. Both short-term impacts during operations and long-term (perpetual) impacts during post-closure are covered.*

Nevada also maintains an Interim Fluid Management (IFM) Fund to fund responses to potential releases at heap leach pad facilities, tailings impoundments, or other fluids management facilities. In the event the mine owner abandons the mine or stops managing fluids at the mine, the state can access the IFM fund to manage fluids while the surety bond forfeiture process proceeds and plans are completed to place the site in permanent closure. Nevada maintains a standby contractor capable of performing interim fluids management. Alternatively, the bond issuer can perform interim fluids management. The cost of interim fluids management is factored into and reimbursed by the bond.

Nevada regulations at NAC 519A.360 (amount of surety required) require the operator to consider the following in determining the cost of executing the plan for reclamation:

- *Process fluid stabilization.*
- *Stabilization, management, control, and treatment of mine-impacted waters.*
- Equipment mobilization and demobilization.
- Removal and disposal or salvage of buildings, structures, equipment, piping, scrap and regents.
- *Activities required to ensure the continuation of post-reclamation stabilization, management, control, and treatment of mine-impacted waters.*

Calculation of the bond is based on what it would cost regulators to reclaim the site. Several tools have been developed that help in the bond calculation process, including:

- The Standardized Reclamation Cost Estimator (SRCE) – a spreadsheet model with an annually updated Cost Data File for earthwork volumetric estimations and surface area calculations.
- *The Heap Leach Draindown Estimator (HLDE), which models the draindown curve and long-term flow. It is used for cost estimating and closure plan development.*
- *The Process Fluid Cost Estimator (PFCE) for estimating process fluid stabilization costs via a multi-phase process from active recirculation to passive fluid management.*

Utah

The Utah minerals regulatory program consists of operations and reclamation standards, and includes requirements for financial assurances and the handling and disposal of deleterious materials (heap leach, tailings, etc.) utilized or created as the result of mining operations. Surface mining and the surface effects of underground and in situ mining are regulated, as are on-site transportation, concentrating, milling, evaporation, and other primary processing. Off-site processing, smelting or refining are not covered under the program's regulations.

The Utah program broadly defines deleterious materials as earth, waste or introduced materials exposed by mining operations to air, water, weather or microbiological processes, which would likely produce detrimental chemicals or physical conditions in soils or water. Substances introduced during any part of the mining process are regulated. Utah's definition of deleterious materials encompasses all hazardous substances under CERCLA. Mining operations are required to have a reclamation plan in place that includes a narrative description identifying any deleterious or acid-forming materials generated and left on site as a result of mining or mineral processing. The plan must include a description of the treatment, location and disposition of the materials, and a map showing the location of the materials upon the completion of reclamation. In addition to plans for reclamation during and after mining to shape, stabilize, revegetate, or otherwise treat the land affected in order to achieve a safe and ecologically usable condition and use consistent with the local environmental conditions and land management practices, *the plans must include any clean-ups of deleterious materials that may become necessary. The Utah operation standards state that all deleterious or potentially deleterious material shall be safely removed from the site or kept in an isolated condition such that adverse environmental effects are eliminated or controlled.*

Financial assurance is required and calculated based on site-specific technical details of the mining and reclamation plans for all mining operations using third-party costs. *The financial assurance cost estimate includes all aspects of the reclamation plan,*

including traditional items such as demolition, grading, and revegetation, but also includes cleanup, disposal, and/or treatment of deleterious materials during and after completion of mining operations.

For small mines (<10 acres), average costs per acre usually apply, and additional costs are added for facilities like portals, processing, and other features. The financial assurance can be in the forms of a letter of credit, surety bond, cash, certificate of deposit, other collateral, or corporate guarantee through a contract with the Utah Board of Oil, Gas and Mining, which oversees the Division of Oil, Gas and Mining.

New Mexico

In New Mexico, two statutes govern hardrock mines: the New Mexico Mining Act (Section 69-36-1 NMSA 1978) implemented by the New Mexico Energy, Minerals & Natural Resources Department; and the New Mexico Water Quality Act (Section 74-6-1 NMSA 1978) implemented by the New Mexico Environment Department. The Acts are designed to eliminate any environmental damage from mining.

Under the New Mexico Mining Act, permit types include: exploration, minimal impact, existing and new mines. Each permit must include a closeout plan to reclaim the permit area and to reestablish a "self-sustaining ecosystem", and must also include financial assurance based on a detailed engineering cost estimate of what it would cost the state, or the state's contractor, to complete the reclamation plan. The bond calculation must include costs for: contract administration, mobilization, demobilization, engineering redesign, profit and overhead, procurement costs, reclamation or closeout plan management, and contingencies. The state allows net present value calculations for long term closures. Types of financial assurance allowed include: cash; trust funds; surety bonds; letters of credit; collateral bonds; and third party guarantees, which are limited to a maximum of 75% of total financial assurance.

Currently, New Mexico holds $692 million in financial assurance at 82 facilities and there have been no significant forfeitures, and only one forfeiture since inception of the New Mexico Mining Act. The state has released over $100 million in financial assurance due to completed reclamation.

Under the New Mexico Water Quality Act a permit is required for the discharge of any water contaminant. Permits must be in place specifying measures to prevent water pollution and financial responsibility may be required for corrective action. Specific rules are required for the copper industry, including requirements for a discharge permit that governs construction and operation of the mine along with a closure plan that includes regrading, cover system, and water management and treatment. Financial assurance is also required in accordance with the closure plan. Financial assurance mechanisms under the Water Quality Act are the same as for the Mining Act.

New Mexico's law requires that financial assurance must not duplicate nor be less comprehensive than federal financial requirements. At mines where both Mining Act and Water Quality Act permits are required, the implementing agencies establish joint financial assurance which avoids duplication and use joint power agreements to administer the requirements. The agencies have MOUs in place with BLM and USFS to avoid duplication where federal land is involved.

Existing New Mexico financial assurance is similar to a performance bond and serves to guarantee the reclamation of the mine. *The draft CERCLA 108(b) rule EPA is developing will serve more as an insurance policy to cover the risk of the mine ending up on the National Priorities List (NPL) under CERCLA. However, CERCLA 114, which requires preemption if the state financial assurance is "in connection with liability for the release of a hazardous substance" does not recognize the distinction between the completely different purposes of the state's bond and the EPA bond. EPA asserts that there is no CERCLA 114 preemption because state financial assurance requirements are not "in connection with liability for the release of a hazardous substance." However, New Mexico has observed that, given the large amounts of financial assurance that would be required in the sample mine scenario examples provided by EPA in a recent webinar, and the lack of credits for state reclamation plans and financial assurance already in place (through which the state is dealing with the prevention of, and in some cases the actual release of, hazardous materials), it is almost certain that when the EPA financial assurance rule is promulgated, New Mexico and other states with similar requirements will be sued under CERCLA 114.*

South Dakota

The South Dakota Department of Environment and Natural Resources (DENR) and the Board of Minerals and Environment (BME), under the South Dakota Codified Law (SDCL) 45-6B, regulate mining operations in the state and require financial assurance. *A Large Scale Mine Permit (SDCL 45-6B) is required for mines that affect more than 10 acres and mine more than 25,000 tons annually or use chemical or biological leaching agents. These mines are complex and difficult to reclaim, and may have long-term water treatment or other costs associated with them.*

There are potentially three different types of bonds required for large scale mining operations in South Dakota. They include a reclamation bond, additional financial assurance for mining operations that employ chemical or biological leaching ("spill bond"), and post-closure financial assurance. By statute, the reclamation bond is required to cover the actual cost of reclamation, which would accrue to the state if a third party contractor had to be hired to reclaim the site. There is no set limit on the bond amount, and it must be submitted prior to the issuance of the mine permit.

The South Dakota DENR has copyrighted a spreadsheet program, called "BondCalc," that was developed in the 1980's to calculate mine permit bonds. The program has been refined and improved over the years. South Dakota also uses Nevada's SRCE bond estimation program. These programs are used to do an engineering cost

estimate based on having a third party contractor do the reclamation work. The cost estimate includes a conservative equipment section based on local rates and equipment availability, actual operating costs and information from other states, and mine site acreages and volumes. Several references are used to identify costs, including the "Caterpillar Performance Handbook" and "Means Cost Data Book" among others. Certain assumptions are made in the calculation, such as a five-year reclamation timeframe. Overhead and indirect costs are also considered, and credit is given for reclamation work already completed.

Large Scale Mine Permit cost calculations include:

- Earthmoving costs, such as reducing waste rock facility slopes, backfilling pits, grading, and topsoil replacement;
- Revegetation including seeding, mulching, and fertilizing;
- Erosion control;
- *Disposal of pond solutions and neutralizing heap leach pads;*
- *In-situ ground water restoration;*
- *Site maintenance during the closure period;*
- *Monitoring and sampling;*
- *Water treatment;*
- *Waste depository caps;*
- *Well plugging;*
- *Building demolition; and*
- *Indirect costs, such as mobilization, performance bond, contractor overhead, contractor profit, state excise tax, inspection and administration, engineering and consulting, scope and bid, and contingencies.*

In addition to the reclamation bond, financial assurance, referred to as a "Spill Bond," is required for mining operations that employ chemical or biological leaching. The Spill Bond covers the cost of responding to and remediating accidental releases of chemical or biological leaching agents. The maximum amount that may be required for a Spill Bond is $1 million. Spill Bond calculations are based on a site-specific engineering cost estimate which assumes a hypothetical spill or leak event, and a third party contractor doing the remediation work.

Mine operators are also required to submit post-closure financial assurance as part of a post-closure plan. Generally, a 30-year post-closure period applies, but the length of the post-closure period can be lengthened or shortened by the state, depending on site conditions. Post-closure bonds are required at the time of reclamation bond release and prior to the start of the post-closure period. These bonds are also calculated based on an engineering cost estimate for a third party contractor to do the work. The calculation includes costs for monitoring and sampling, inspection and maintenance activities, long term water treatment such as for acid rock drainage (ARD), cap maintenance, and overhead and indirect costs. Considering a post-closure bond may be necessary for 30 or more years, a present worth analysis is used to calculate the long-

term bond. A lump sum amount is determined that, if deposited today, will cover costs over the post-closure period.

South Dakota mining statutes and permit conditions allow the state to periodically adjust bond amounts as site conditions change, permits are amended, technical revisions are made, or for other reasons requiring an adjustment. Bond amounts are also adjusted for inflation based on the construction cost index. Bonds are reviewed and adjusted on an annual basis.

South Dakota DENR calculates the proposed bond amount after operators submit cost estimates for mine reclamation and post-closure care in a mine permit application. It also recommends the amount and type of bonding mechanism to the BME which sets the final amount and type of bond. The bond must be submitted before a permit is issued. Bonds may be in the form of cash (certificates of deposit), irrevocable letter of credit, corporate surety, or government securities. Company net worth guarantees are not accepted by the BME.

South Dakota also operates under an MOU with the USFS for operations located on public lands. The state holds the bond, with USFS holding any additional bond it determines is necessary, and both agencies work together on reclaiming lands where bond forfeiture occurs. At this time, the state does not have MOU's in place with any other federal agencies. However, by statute, the BME can consider any surety or cash bond required by an agency of the federal government in determining the amount and duration of reclamation surety required.

Final Comments and Conclusions

During the July 19 conference call between EPA and the states as part of EPA's federalism outreach, an example of two operations in South Dakota that are currently in post-closure was presented. The state is holding 100 year post-closure bonds for two mines for long-term water treatment – one in the amount of $20 million and the second for $42 million. EPA was asked whether mines that are no longer producing, but are in a reclamation or post-closure phase, would be covered under the CERCLA 108(b) rule, and how potential preemption of South Dakota's post-closure regulations would be addressed. EPA was also asked whether the state's "Spill Bond" program would be able to continue without being preempted. EPA responded that the facility would have to submit information to EPA and the agency would review it and determine *at that time* whether financial assurance under CERCLA 108(b) is needed at an adjusted amount. EPA once again stated, based on what the agency has learned about state programs, that states' requirements for closure are different from what the CERCLA 108(b) rule would cover (hazardous releases), and EPA would have to make a determination based on what financial assurance is already in place. However, South Dakota's post-closure bonds and spill bonds address releases of hazardous substances. Therefore, what EPA plans to cover under the CERCLA 108(b) rule may not actually be different from what existing state programs already cover. EPA has clearly adopted a faulty "preemption argument" in concluding state programs are not addressing hazardous releases. In many instances,

as demonstrated above, that simply is not accurate. EPA continued to suggest on the July 19 call that, if there is something within the state programs showing that risk is reduced, EPA would reduce the amount of required financial assurance and the courts would likely take that into consideration regarding preemption. This does not provide much confidence to the states whose programs could be preempted, and it creates great uncertainty for the states and their mining industry.

It would be prudent and effective -- and less costly for EPA, the industry, the states, and ultimately the taxpayers -- if EPA took the time to engage in thorough and substantive consultation with the states prior to publishing a burdensome, and likely unnecessary, nationwide proposed rule. As noted earlier, the states have acquired decades of expertise in regulating and bonding for hardrock mining. Only after EPA fully understands existing state and federal programs will the agency be positioned to identify whether any gaps exist. If so, EPA should work within the states' existing programs to fill those gaps. If deemed necessary, a rule narrower in scope than where EPA is currently headed could help to ensure that preemption of state laws and regulations is averted, rather than later relying on the courts to decide whether state programs have been preempted on a case-by-case basis.

EPA has repeatedly reasoned that, due to the timeframe imposed by the courts to have a proposed draft rule in place by December 1, there is not time to consult with the states on a deeper level. However, we understand the court's ruling allows for further timeline extensions. In order to do its due diligence, we urge EPA to request a time extension to allow for a more meaningful and comprehensive consultation with the states prior to signing and publishing a proposed rule. We request an in-person meeting with EPA and the states to review and compare state program requirements with EPA's approach, and ideally with the draft rule. A Federalism Briefing followed by two one-hour conference calls between EPA and the states are not sufficient for meaningful consultation to occur.

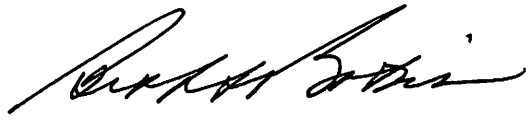
We reiterate our request that EPA provide the draft rule, model and formula for calculation of bond amounts to the states for their review prior to publication of a proposed rule and opening of the public comment period. Considering the comprehensive bonding programs that exist in several states, as demonstrated above, without being able to review the formula or model EPA is developing for calculating financial assurance, it is difficult for the states to provide substantive comments in this area. We also continue to seek responses from EPA to the information requested in our April 20 resolution that was conveyed to Administrator McCarthy by letter dated May 3, 2016 (copy attached).

In conclusion, EPA has not yet adequately demonstrated the need for a CERCLA 108(b) financial assurance rule for hardrock mining. Without evidence to establish otherwise, we maintain that existing state and federal programs for financial assurance are sufficient. EPA has also not provided essential information about the draft rule, calculation model and formula that would allow us to make a complete assessment of the impact it will have on state programs as required by EO 13132. Based on the information

we have been provided, we continue to have serious concerns about the federalism impacts of EPA's current approach. Preemption of effective existing state programs appears certain, which would be devastating to those programs. EPA should therefore simplify and narrow the scope of any proposed rule to take into account the efficacy of existing financial assurance requirements and should include an exemption in the rules for those states that have instituted defined measures to reduce risks associated with the release of hazardous substances.

Thank you for the opportunity to comment on behalf of the states as part of your federalism outreach, and for your serious consideration of these concerns.

Sincerely,



Beth A. Botsis
Deputy Executive Director

Attachment

cc: Gina McCarthy
Linda Barr
Andrea Barbery
Andrew Hanson

Interstate Mining Compact Commission

445-A Carlisle Drive, Herndon, VA 20170
Phone: 703/709-8654 Fax: 703/709-8655
Web Address: www.imcc.isa.us E-Mail: gconrad@imcc.isa.us or bbotsis@imcc.isa.us

COMMISSIONERS

GOV. TERRY MCAULIFFE
Virginia, Chairman

GOV. BILL WALKER
Alaska, Vice Chairman

GOV. GARY R. HERBERT
Utah, Treasurer

GOV. ROBERT BENTLEY
Alabama

GOV. ASA HUTCHINSON
Arkansas

GOV. BRUCE RAUNER
Illinois

GOV. MIKE PENCE
Indiana

GOV. MATTHEW G. BEVIN
Kentucky

GOV. JOHN BEL EDWARDS
Louisiana

GOV. LAWRENCE J. HOGAN, JR.
Maryland

GOV. PHIL BRYANT
Mississippi

GOV. JAY NIXON
Missouri

GOV. ANDREW CUOMO
New York

GOV. PAT MCCRORY
North Carolina

GOV. JACK DALRYMPLE
North Dakota

GOV. JOHN R. KASICH
Ohio

GOV. MARY FALLIN
Oklahoma

GOV. TOM WOLF
Pennsylvania

GOV. NIKKI HALEY
South Carolina

GOV. BILL HASLAM
Tennessee

GOV. GREG ABBOTT
Texas,

GOV. EARL RAY TOMBLIN
West Virginia

GOV. MATT MEAD
Wyoming

ASSOCIATE MEMBERS

GOV. JOHN HICKENLOOPER
Colorado

GOV. SUSANA MARTINEZ
New Mexico

EXECUTIVE DIRECTOR
GREGORY E. CONRAD

May 3, 2016

The Honorable Gina McCarthy
Administrator
Office of the Administrator – Mail Code 1101A
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

Please find attached a resolution that was unanimously adopted by the member states of the Interstate Mining Compact Commission at its recent annual meeting concerning a rulemaking being undertaken by the U.S. Environmental Protection Agency (EPA) concerning financial assurance requirements under Section 108(b) of the Comprehensive Emergency Response, Compensation and Liability Act (CERCLA). We appreciate the effective working relationship that we have enjoyed with the Office of Land and Emergency Management and look forward to addressing the several concerns set forth in the resolution over the coming months, particularly with regarding to federalism and preemption.

Sincerely,

Gregory E. Conrad
Executive Director

cc. Barnes Johnson

Resolution

Interstate Mining Compact Commission

Re. Financial Assurance for Hardrock Mine Reclamation

BE IT KNOWN THAT:

WHEREAS, the development of our Nation's minerals necessarily involves the surface disturbance of the land and often results in impacts to air and water resources; and

WHEREAS, state and national laws provide for the reclamation of land disturbed by mining and for the protection of human health and the environment related to those disturbances; and

WHEREAS, with regard to hardrock and noncoal minerals development, state governments have largely taken the lead in fashioning regulatory programs that address environmental protection and reclamation requirements; and

WHEREAS, an important component of state regulatory programs is the requirement that mining companies provide financial assurances in a form and amount sufficient to fund required reclamation if, for some reason, the company fails to do so in accordance with the state program. These types of financial assurances, often referred to as bonding, protect the public from having to finance reclamation and closure if the company goes out of business or fails to meet its reclamation obligation; and

WHEREAS, all states have developed regulatory bonding programs to evaluate and approve the financial assurances required of mining companies. States have also developed the staff and expertise necessary to calculate the appropriate amount of bonds, based on the unique circumstances of each mining operation, and to make informed predictions of how the real value of current financial assurance may change over the life of the mine, including post-closure; and

WHEREAS, Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C Sec. 9608(b), requires that the U.S. Environmental Protection Agency (EPA) consider promulgating financial responsibility requirements for industrial facilities that take into account the risks associated with their use and disposal of hazardous substances; and

WHEREAS, pursuant to a federal court decision in California (*Sierra Club v Johnson*, 2009 WL 2413094 (N.D. Cal. 2009)) which ordered EPA to move forward with the rulemaking, EPA announced in July 2009 that it selected hardrock mining as the first industry sector for which it would develop financial responsibility requirements under CERLCA Section 108(b) (74 Fed. Reg. 37213, July 28, 2009); and

WHEREAS, pursuant to a D.C. Circuit court decision (Order *In re: Idaho Conservation League, et al.*, No. 14-1149 (D.C. Cir. Jan. 29, 2016)) approving a settlement agreement between the EPA and several non-governmental organizations, EPA is required to publish a notice of proposed rulemaking regarding CERCLA Sec. 108(b) financial assurance for the hardrock mining industry by December 1, 2016; and

WHEREAS, in preparation for its rulemaking, EPA undertook an analysis of reclamation bonding requirements in approximately 20 state regulatory programs throughout the U.S.; and

WHEREAS, since the initiation of EPA's rulemaking initiative, a number of IMCC member states have expressed concern than any bonding requirements that EPA may develop for the hardrock and noncoal mining industry could be duplicative of state requirements, and could even preempt them entirely under EPA's reading of Section 114(d) of CERCLA. The states have also questioned whether EPA has the resources to implement reclamation bonding for hardrock and noncoal mines, since bond calculations usually reflect site-specific reclamation needs and costs; and

WHEREAS, the states are concerned that EPA may be attempting to fill alleged "gaps" in state reclamation bonding programs that either may not exist or that are unrelated to the purpose of a reclamation bonding program;

NOW THEREFORE BE IT RESOLVED THAT THE INTERSTATE MINING COMPACT COMMISSION:

Recognizes the states' lead and primary role in regulating the environmental impacts associated with hardrock and noncoal mining operations within their borders, including financial assurance requirements for reclamation; and

Affirms that IMCC member states are committed to environmental protection and to responsible and comprehensive regulation and bonding for hardrock mining operations; and

Affirms that the states have a proven track record in regulating mine reclamation, having developed appropriate statutory and regulatory controls and dedicated resources and staff to ensure full and effective implementation of their regulatory programs; and

Believes that the states currently have financial responsibility programs in place that are working well and as such should stand in-lieu of federal requirements under Section 108(b) of CERCLA; and

Recommends that an independent, impartial body (such as the National Academy of Sciences) conduct a study to review financial responsibility requirements under state

regulatory programs to determine their sufficiency, to identify any serious gaps, and to recommend whether a federal rulemaking on the matter is needed; and

Urges the EPA to engage with state regulators through the IMCC prior to publishing a notice of proposed rulemaking regarding CERCLA Sec. 108(b) financial assurance for the hardrock mining industry, which should include substantive consultation with and provision of proposals to state regulators before formal rulemaking is launched; and

Requests that EPA provide to state regulators the following: a detailed state consultation timeline and plan for obtaining individual state comments; all technical and scientific materials and analyses used to support any proposed rule, denoting whether any such materials were peer-reviewed; a statement indicating how the EPA solicited ideas about alternative methods of compliance and potential flexibilities in order to reduce the economic burden placed on affected entities; a statement indicating how EPA solicited information from state regulators as to whether the proposed rule will duplicate similar state requirements; a copy of a federalism assessment or the reason why EPA did not complete a federalism assessment; explanation of the reason existing state programs are insufficient to address financial assurance concerns and an analysis of any conflicts in the proposed rule with state programs; and an analysis of financial assurance instruments that would satisfy any proposed EPA requirement

Issued this 20th day of April, 2016

ATTEST:

Gregory E. Conrad

Executive Director