

**The Honorable Cathy McMorris Rodgers**

**1. Mr. Baird, you point out that EPA initiated action on financial responsibility rules for hard rock mines 25 years after Congress thought the rules would have been complete.**

**a. Since then, the regulatory gap on Federal lands was already filled, wasn't it?**

Yes, the regulatory gap on Federal Lands has been filled since CERCLA 108(b) was passed in 1980; in some areas, several times over. Since 1980 mineral exploration and/or mining operations on Federal Land have become subject to a comprehensive framework of new Federal and State environmental laws and/or major new regulations under, among others programs: the Clean Water Act; the Safe Drinking Water Act; the Clean Air Act; the National Environmental Policy Act; the Toxic Substances Control Act; the Resource Conservation and Recovery Act; the Endangered Species Act; the Federal land Policy and Management Act; the Organic Act of 1897; and the BLM and Forest Service surface management regulations for hardrock mining (43 CFR 3809 and 36 CFR 228A respectively) promulgated pursuant to the last two above mentioned laws. These laws and regulations are "cradle to grave," covering every aspect of mining from exploration through mine reclamation and closure. All of the significant regulations and programs under which mining is regulated by the above cited laws were passed, promulgated or otherwise created after the passage of CERCLA.

Under current law, current mining techniques and current reclamation practices there have been few, if any, orphan mining CERCLA National Priority List ("NPL") sites that arose from activities on Federal Land that have been permitted or approved in the last twenty-five years. Thus, current mining is so tightly regulated by Federal and State environmental laws that the chances of newly permitted mines being placed on the CERCLA NPL as orphans is substantially reduced, even without providing financial assurances.

Nevertheless, and more specifically, when CERCLA was passed in 1980, the Forest Service program for financial assurances for hardrock mines was still in its infancy, since it had only been promulgated in 1974. 36 CFR 228. The BLM program was not even in existence when CERCLA was passed; the BLM program became effective in 1981. 43 CFR 3809. Importantly, in 1999, the National Research Council (NRC) of the National Academy of Sciences, in response to a request from Congress, found that the existing environmental regulatory framework for mining on Federal land is "generally effective" in protecting the environment. *Hardrock Mining on Federal Lands*, National Research Council, National Academy Press, 1999 ("NRC Report"), p. 89. Additionally, the Forest Service and BLM programs were subject to comprehensive

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updating and revision in 2004 and 2001, respectively, to implement the NRC Report recommendations, among other things. The evolution of the Federal and Nevada State financial assurance requirements and programs is chronicled in the attached White Paper: *The Evolution of Federal and Nevada State Reclamation Bonding Requirements for Hardrock Exploration and Mining Projects*.

Thus, the existing regulatory programs already substantially eliminate the degree and duration of environmental risk associated with the current hardrock mining industry. The NRC Report and the Bonding White Paper referenced above demonstrate that current environmental laws, regulations and practices work together with current financial assurance requirements to ensure today's hardrock mines do not become tomorrow's Superfund sites.

Most importantly, even in 1999, even before these comprehensive changes in the Forest Service and BLM regulations, the NRC had determined that "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." *Id.* at 90. Thus, rather than propose a new, duplicative, burdensome and cost-prohibitive program, EPA should work with the Federal land management and State regulatory agencies to improve implementation of existing regulations and financial assurance requirements. Unfortunately, EPA is developing a program that will be redundant with Forest Service and BLM programs in direct contravention of the NRC Report recommendation.

**b. Does EPA participate in the NEPA process, including the Environmental Impact Statement (EIS) associated each site?**

Yes. For hardrock mines on Federal Land, the BLM or Forest Service must implement the evaluation requirements and applicable mitigation measures of the National Environmental Policy Act, most typically, as described in an Environmental Impact Statement ("EIS"). The environmental impacts and the uncertainties associated with project mitigation identified in an EIS provide the factual basis for setting the nature and type of financial assurances for a hardrock mine. EPA already has the option to participate in the preparation of an EIS as a cooperating agency. Under NEPA, a federal, state, tribal or local agency having special expertise with respect to an environmental issue or jurisdiction by law may be a cooperating agency in the NEPA process. A cooperating agency has the responsibility to assist the lead agency by participating in the NEPA process at the earliest possible time; by participating in the scoping process; in developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

Furthermore, EPA has a statutory role in the NEPA process. As described by the EPA Region 6 web site, "Under Section 309 of the Clean Air Act (CAA), EPA is required to review and publicly comment on the environmental impacts of major Federal Actions including actions

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which are the subject of draft and final Environmental Impact Statements, proposed environmental regulations, and other proposed major actions.”

**c. Can EPA challenge any EIS?**

Yes. EPA evaluates and comments upon every EIS, as mandated by 42 USC 7609. Moreover, EPA has the authority to take any EIS that EPA deems inadequate to the Council on Environmental Quality in the Office of the President for final decision-making and disposition. This process is described by the EPA Region 6 website: “If EPA determines that the action is environmentally unsatisfactory, it is required by Section 309 to refer the matter to the CEQ.” The “CEQ” is the Council of Environmental Quality in the Office of the President of the United States.

Accordingly, EPA already has ample existing authorities to participate in and affect the nature and amount of financial assurances. The only major difference between these existing authorities and EPA’s CERCLA 108(b) initiative is that EPA’s CERCLA 108(b) initiative would allow EPA to effectively render irrelevant the decision-making of the Federal land management agencies to whom Congress delegated surface management and financial assurance authority. These two agencies have the decades of experience that EPA cannot claim to possess. When asked about duplication of existing BLM and Forest Service financial assurances, EPA Headquarters’ response was that it will be up to the Federal land management agencies (BLM and Forest Service), to reduce the amount of the financial assurance they receive in order to avoid duplication. Congress delegated surface management authority for regulating and permitting hardrock mines on Federal lands to the land management agencies working cooperatively with the States. EPA should not be allowed to usurp the time-tested programs developed by the BLM and the Forest Service over the past thirty (30+) years. Direct duplication of Federal agency regulation is wasteful and discourages investment in the critical and strategic materials necessary to create domestic jobs and reduce America’s reliance on foreign sources of minerals..

**d. How does that relate to the overall financial assurance process?**

Please see response 1(b) above.

**e. In light of EPA’s involvement in the already established process on Federal lands, what do you think is motivating EPA to make this kind of intrusion on mining activities on Federal lands?**

It appears that EPA’s ultimate objective is to supplant the Federal land management agencies and the states as the sole or lead regulatory and permitting authority for hardrock mines (effectively usurping congressionally delegated authority). Financial assurance is part of the permit enforcement authority and responsibility of the Federal land management agencies. Thus, the

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agency that controls financial assurance effectively controls the entire permitting process. Also, we believe EPA does not understand the breadth and depth of the existing BLM and Forest Service programs. This speculation is supported, in part, by EPA's reliance upon outdated and irrelevant data in determining there might be a need for duplicative regulation with the BLM and the Forest Service programs.

**2. Mr. Baird, Is it your testimony that you oppose Federal regulation of mining operations and financial assurance or that you are concerned that duplicate regulatory regimes do not add environmental protection, but do increase costs?**

We want to make it clear that we do not oppose Federal regulation of mining operations and financial assurance. Neither Formation Capital Corporation, nor the Northwest Mining Association, would support elimination of Federal environmental regulation on Federal Lands. This would mean turning back the clock more than 30 years to a regulatory regime that created the very conditions that caused Congress to enact CERCLA. This would be bad for the environment and bad for the mining industry's efforts to create high paying, year round sustainable jobs. To reiterate, we cannot say it better than the NRC, "improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection. . . ." *Id.* at 90. As we stated above, our primary concern is that EPA will needlessly duplicate already existing federal regulatory regimes under CERCLA 108(b).

Moreover, one of our major concerns with EPA's proposal, if not the major concern, is the increased cost to the industry without any improvement in environmental protection or performance. We have met with representatives of the financial assurance (surety) industry as has EPA. The financial assurance industry representatives have told us and EPA that they do not have financial assurance products to cover the type of program EPA is considering, nor do they have any intent in creating or providing financial assurance products to cover the type of program EPA has described to them and to us. Thus, the only alternative available to mining companies will be cash—cash that otherwise would be available for job creating investments in producing the minerals America requires. Furthermore, the increased costs of an EPA program based on historic NPL data will be an order of magnitude greater than what would actually be required for mines utilizing current practices and permitted under current regulatory programs. The result will be some mines will close prematurely, other mines won't be built, jobs will be lost and America will become more reliant on foreign sources of strategic, critical and necessary minerals.

**3. What was the genesis for the CERCLA Section 108(b) actions by EPA?**

Several environmental organizations sued EPA in March of 2008 to compel EPA to promulgate and implement financial assurance requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See [\*Sierra Club v.\*](#)

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*Johnson*, No. C 08-01409 WHA (March 12, 2008). In February of 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 Section 108(b) of CERCLA. It is important to note that the court did not order EPA to promulgate new financial assurance requirements for hardrock mining or any other industry. EPA has the discretion on whether, when, and how to implement any regulations under CERCLA 108(b), pursuant to the language in the statute. In July of 2009, EPA identified the hardrock mining industry as the first class of facilities for which it would impose these requirements. *See* 74 Fed. Reg. 37, 213 (July 28, 2009). However, for reasons discussed above, we do not find EPA's determination to be legally correct or good policy on Federal Lands.

- 4. CERCLA was enacted more than 30 years ago. You testified that mining practices have improved and enforcement is tougher than it was 30 years ago. Please elaborate.**

Please see the extensive answer provided to Question #1 above.