

# United States Senate

WASHINGTON, DC 20510

October 18, 2011

The Honorable Lisa Jackson  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Dear Administrator Jackson:

In February of 2009, following a 2008 lawsuit (*Sierra Club v. Johnson*, No. 08-01409 (N.D. Cal. Feb. 25, 2009)), the U.S. Federal District Court for the Northern District of California ordered the Environmental Protection Agency (EPA) to identify and publish notice of classes of facilities that may be subject to future financial assurance requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Sec. 108(b). In July 2009, the EPA identified the hardrock mining industry as the first class of facilities for which it would impose such requirements. Six months later, the EPA identified additional classes of facilities within three industries for which it plans to develop financial assurance requirements, in addition to requiring further study to determine if financial assurance requirements are warranted for several other sectors. We write to express procedural and substantive concerns with this matter, in addition to asking you for clarification on several outstanding questions.

The process by which the EPA came to make the decision to promulgate financial assurance regulations is disconcerting. The court decision directed the EPA only to publish notices of classes of facilities as specified in CERCLA Section 108 (b)(1). Taking the additional step of issuing regulations was not addressed in that decision. As you know, the EPA successfully argued (*Sierra Club v. Johnson*, No. 08-01409 (N.D. Cal. Aug. 5, 2009)) that promulgating financial responsibility regulations and the timing thereof are discretionary because CERCLA Section 108 (b) does not specify a deadline for doing so; the EPA has the discretionary authority to decide when to move forward with regulations. As such, we are unclear as to why the EPA proceeded with this proposed rulemaking, which amounts to a reversal of a position that the EPA has taken for the last 26 years, without any specific, legitimate justification for doing so.

In order to gain a better understanding of the EPA's rationale for promulgating a rule implementing financial assurance program under CERCLA Section 108(b), we are requesting that you provide answers to the following questions:

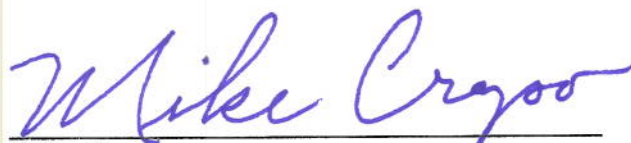
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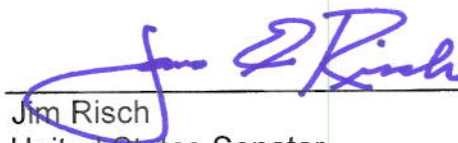
1. Since the EPA has argued before that the timing to promulgate regulations under CERCLA 108(b) is discretionary and EPA has not exercised this discretion in nearly 26 years, why is the EPA moving ahead now?
2. Have previous Administrations tried to promulgate CERCLA 108 (b) requirements since 1985? Why or why not?
3. Is the timing of the EPA's recent decision to move forward promulgating CERCLA 108(b) regulations motivated or initiated by the recent litigation referenced above?
4. During this economic climate, why does it make sense for the EPA to go forward with promulgating regulations under CERCLA 108(b)?

Thank you for your time and attention to this matter. We look forward to receiving your responses in the near future. If you have any further questions please contact Luke Tomanelli or Jessica Rubado of my staff at (202) 224-6142.

Sincerely,



Mike Crapo  
United States Senator



Jim Risch  
United States Senator