



July 10, 2017

The Honorable Scott Pruitt, Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW,  
Washington, DC 20460

Re: Docket ID EPA-HQ-SFUND-2015-0781-0001, CERCLA 108(b) Financial Responsibility Requirements for Facilities in the Hard Rock Mining Industry; Proposed Rule

Dear Administrator Pruitt:

The Arizona Mining Association (“AMA”), on behalf of its members, submits the following comments in response to the U.S. Environmental Protection Agency (“EPA”) Proposed Rule on financial responsibility requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) (“Proposed FR Rule”).<sup>1</sup> The Proposed FR Rule, if implemented, will impose unprecedented financial responsibility requirements on hard rock mines, imposing disproportionately high compliance costs on states where mining is a vital element of the economy without any demonstrated or commensurate environmental benefits.

**I. Statement of Interest**

AMA is a diversified mining association made up of dozens of members dedicated to responsible, sustainable, and safe mining in Arizona. The AMA’s mission is to be the primary advocate of the Arizona mining industry through promoting sound public policy at all levels of government, educating the public about the benefits of mining, and supporting the sustainability of a safe and responsible mining industry. AMA and its members operate, rely on, or are otherwise connected to the hard rock mining industry in Arizona and all have a vested interest in EPA’s final decision on the Proposed FR Rule. AMA and its members are emblematic of the important role that hard rock mining plays in the Arizona economy, as well as the economy of the nation as a whole. In light of the national significance of the mining industry, the AMA hereby supports and incorporates by reference the separate comments of the National Mining Association on the Proposed FR Rule, especially regarding its likely economic impacts.

**II. The Proposed FR Rule Will Impose Unjustifiable Negative Economic Impacts on Arizona’s Hard Rock Mining Industry and The Arizona Economy, and EPA Has Failed to Meaningfully Analyze Such Impacts**

Mining has played a central role in Arizona’s economy since the early 20th century when 25% of wage earners were employed in the mining industry. Although Arizona’s mining industry no longer employs such a substantial percentage of

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<sup>1</sup> 82 Fed. Reg. 3,388 (Jan. 11, 2017).

the state's citizens (primarily due to the population growth in recent decades, and diversification of the economy by other specialized industries that often depend on the products of the mining industry), Arizona remains a top producer of copper in the world, as well as a significant producer of molybdenum, coal, gold, silver, and uranium.

The most recent financial report entitled *Economic Impact of the Mining Industry on the State of Arizona*<sup>2</sup> found the following for the year 2014: (1) Arizona mining companies employed more than 12,000 people, distributed across every county in the state; (2) Arizona mining companies spent \$2.77 billion purchasing goods and services, generating 6,200 jobs and income of \$0.91 billion just among first-tier suppliers; (3) Indirect effects associated with upstream purchases by first-tier suppliers, consumer spending of workers connected to the mining industry, and spending of state and local governments out of new tax revenues amounted to 25,700 jobs and income of \$1.95 billion. In total, accounting for direct and indirect economic impacts, the Arizona mining industry in 2014 is estimated to have provided 43,800 Arizona jobs and income of \$4.29 billion. Benefits from the Arizona mining industry also extend to state and local governments, which collected \$206 million in business taxes and royalties and an estimated \$100 million in individual taxes from mining company employees. Averaged per employee, mining companies pay over five times more in business taxes than the average Arizona business. Likewise, mining company employees pay approximately 44% more in individual taxes than the average worker in the state.<sup>3</sup>

In December 2016, EPA published its Regulatory Impact Analysis ("RIA") for the Proposed FR Rule analyzing, among other things, the economic effects the Proposed FR Rule would have on the hard rock mining industry.<sup>4</sup> Based on a "modeled universe of hardrock mining facilities," EPA concluded that "the per-company annualized costs of [financial responsibility] range from nearly zero percent to 1.1 percent" relative to the companies' revenues.<sup>5</sup> AMA points out, however, that EPA's findings "disregarded companies' other existing financial responsibility and financial assurance obligations, and other factors that may affect the pricing of financial responsibility instruments for companies that have to procure FR instruments for multiple facilities."<sup>6</sup> Further, in assessing potential employment impacts of the Proposed FR Rule, EPA admitted that it lacked "sufficient data to model and quantify changes in mines' employment levels" in connection with the Proposed FR Rule.<sup>7</sup>

EPA's analysis was grossly inadequate and arbitrary because it disregarded these subjects. At best, EPA's conclusion regarding the cost of implementing financial responsibility under the Proposed FR Rule is uncertain, and only reflects a fraction of the likely impacts. The Proposed FR Rule's effect on employment at hard rock mines almost assuredly will be substantial, given increased spending on duplicative federal financial responsibility under its terms. Given the substantial positive effect hard rock mining has on the Arizona economy, and its relationships to related businesses that stretch across the state, the uncertainty surrounding the actual compliance costs and effects on employment (not to mention the redundancy of the Proposed FR Rule in light of other state and federal programs,

<sup>2</sup> L. William Seidman Research Institute, W. P. Carey School of Business, Arizona State University, *The Economic Impact of the Mining Industry on the State of Arizona 2014* (Sept. 2015) (prepared for AMA), available at <http://www.azmining.com/uploads/AMA%20report%202014%20v2%20.pdf>.

<sup>3</sup> See *id.* at 4.

<sup>4</sup> Office of Land and Emergency Management, U.S. Environmental Protection Agency, *Regulatory Impact Analysis of Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry Proposed Rule*, December 1, 2016, available at [https://www.epa.gov/sites/production/files/2016-12/documents/cercla\\_108b\\_ria\\_12\\_1\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/cercla_108b_ria_12_1_2016.pdf).

<sup>5</sup> *Id.* at 6-3.

<sup>6</sup> *Id.* at 6-3 n.61.

<sup>7</sup> *Id.*

as discussed below) requires EPA to withdraw or rescind the Proposed FR Rule.

EPA's RIA also lays bare its determination to override state programs. In particular, Arizona's program is clearly disfavored by EPA, but EPA's proposed rule lacks information or an explanation as to why. In Arizona, based on extrapolations from EPA's documentation for the Proposed FR Rule, it will require 29 of 50 mines to provide financial assurance amounts in excess of \$100 million.<sup>8</sup> Five of the eight mine sites with the largest financial responsibility requirements are in Arizona, and each of those five sites would be required to provide an additional \$300 million in financial responsibility. Further, because EPA's crediting scheme is unclear, this estimate may be in fact understated since there is no assurance that the mine sites will qualify even for those credits that EPA has applied.<sup>9</sup> In Nevada, on the other hand, only one of 13 sites in Nevada would be required to provide more than \$100 million.

It is arbitrary and capricious to develop a formula that treats existing state programs so disparately, without any clear explanation of why this approach is necessary or permissible. There are no deficiencies in the Arizona regulatory programs that justify such a result. As we explain below, Arizona's regulatory programs are comprehensive, site specific and robust, and require financial assurance sufficient to cover risks EPA purports to cover in its proposed rule.

### **III. Arizona's Current Regulatory and Financial Assurance and Programs Already Adequately Address The Risks Identified in the Proposed FR Rule**

AMA joins with other stakeholders, including the Arizona Department of Environmental Quality ("ADEQ") and the Arizona State Mine Inspector ("ASMI"), in recognizing the mature, extensive collection of substantive regulatory programs, both state and federal, that adequately govern hard rock mining operations in Arizona. AMA incorporates their comments by reference and briefly summarizes below two programs of primary importance; namely, Arizona's Aquifer Protection Permit ("APP") and Mine Land Reclamation ("MLR") programs. AMA emphasizes these programs because they impose financial responsibility requirements in addition to their substantive regulatory provisions.

#### **A. Arizona's APP Program Protects Human Health and The Environment from The Risks Identified in The Proposed FR Rule**

Arizona's APP program has been effectively regulating the discharges of "pollutants," which include "hazardous substances," for almost three decades.<sup>10</sup> It protects aquifers, the vadose zone, and even soils at covered facilities by requiring them to obtain APP permits, which require, among other things, (1) the protection of aquifer water quality standards ("AWQS") at the applicable Point of Compliance ("POC"), (2) the implementation of best available demonstrated control technology ("BADCT"), and (3) financial assurance. Facilities, including mines, that discharge "pollutants," which include "hazardous substances," are required to obtain APP permits.

In addition protecting AWQSs and mandating BADCT, the APP program requires owners and operators of discharging facilities to demonstrate "financial capability to construct, operate, close and ensure proper post-closure care of the

<sup>8</sup> See RIA at B-15-16 (Exhibit B-7: Total Responsibility for the Modeled Universe (No Reductions)).

<sup>9</sup> See RIA at B-20-22 (Exhibit B-9: Final (Adjusted) Financial Responsibility for the Modeled Universe).

<sup>10</sup> In contrast, EPA has a lack of experience regarding permitting and oversight for production practices at modern hard rock mines. Further, EPA retains inadequate financial and workforce resources to implement the Proposed FR Rule nationwide. Indeed EPA faces an uncertain path forward, given that CERCLA and EPA's implementing regulations have never been used to create both financial assurance and operational design and engineering requirements at operational mining facilities.

facility.”<sup>11</sup> Specifically, the chosen form of financial assurance, which must be in place prior to initiating operations, must be sufficient to cover (1) facility closure costs; and (2) conduct post-closure monitoring and maintenance.<sup>12</sup> Permittees must periodically demonstrate maintenance of financial assurance to ADEQ.<sup>13</sup>

Generally, a facility’s APP permit and accompanying financial assurance must be in place until it undergoes “clean closure,” which means “implementation of all actions specified in an [APP permit], if any as closure requirements, as well as elimination, to the greatest degree practicable, of any reasonable probability of further discharge from the facility and of either exceeding aquifer water quality standards to the applicable point of compliance or, if an aquifer water quality standard is exceeded at the time the permit is issued, causing further degradation of the aquifer at the application point of compliance.”<sup>14</sup> ADEQ may approve “clean closure” if closure meets the terms of an existing individual APP, closure eliminates all facility discharges to the greatest degree practical, there is no reasonable probability that the facility will exceed AWQS at the applicable POC due to a discharge, and upon closure, the facility does not require post-closure monitoring or maintenance.<sup>15</sup>

#### **B. Arizona’s MLR Program Provides Additional Protection of Human Health and The Environment from The Risks Identified in The Proposed FR Rule**

The Arizona State Mine Inspector (“ASMI”) oversees the MLR program, and is an important part of the state and federal regulatory programs that extensively govern hard rock mining operations and protect public health and the environment in Arizona. The MLR program works side-by-side with the APP program by requiring owners or operators of mining operations over five acres in size to submit reclamation plans and provide financial assurance to cover the life of the mining operation.<sup>16</sup>

Under Arizona’s MLR program, reclamation plans must include measures taken to achieve post mining land use (*e.g.*, addressing safety hazards, stabilizing the land, revegetating, and if necessary, promoting animal habitats), including, if necessary, continued care and monitoring, the requisite costs to perform such measures, the total of which will equal the required amount of financial assurance.<sup>17</sup> An owner or operator’s financial assurance must be in place within 60 days of ASMI’s approval of its reclamation plan and is subject to revision by ASMI every five years to account for potential changes in mining operations.<sup>18</sup> Financial assurance cannot be released unless an owner or operator provides evidence to ASMI that some or all reclamation measure have been performed<sup>19</sup> or substitutes one form of financial assurance for another.<sup>20</sup> Like ADEQ under the APP program, ASMI has broad enforcement options under the MLR program, including authority to issue and enforce compliance orders, suspend, withdraw, or revoke reclamation plan approval, issue injunctive relief, and

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<sup>11</sup> A.A.C. R18-9-A203(B).

<sup>12</sup> A.R.S. § 49-243(N)(3).

<sup>13</sup> A.A.C. R18-9-A203(D).

<sup>14</sup> A.R.S. § 49-201(5).

<sup>15</sup> *Id.*

<sup>16</sup> *See* A.R.S. §§ 27-901 to 27-1026; *see generally* A.A.C. §§ R11-2-301 *et seq.*

<sup>17</sup> *Id.* § 27-971(B)(9), (11). Factors for calculating reclamation costs are found at A.A.C. R11-2-802.

<sup>18</sup> A.R.S. §§ 27-992, 27-993; A.A.C. R11-2-802.

<sup>19</sup> A.A.C. R11-2-817(B).

<sup>20</sup> *Id.* R11-2-817(E).

impose civil penalties.<sup>21</sup>

#### **IV. Conclusion**

As described above, Arizona already has modern and sophisticated regulatory and financial assurance programs that govern mining that have been utilized, developed, and improved through decades of experience and institutional knowledge by Arizona agencies. In tandem with existing federal regulations that govern hardrock mining, they effectively regulate the industry's operations and protect human health and the environment from same risks identified by the Proposed FR Rule through, among other things, financial assurance requirements.

The APP, MLR, and other state and federal programs currently protecting Arizona's public health and environment are effective and efficient, and EPA has not presented any meaningful evidence that calls the performance of these modern programs into question. Thus, the Proposed FR Rule is unnecessary, redundant, and arbitrary. Moreover, considering EPA's admitted uncertainty surrounding the economic impacts of the Proposed FR Rule — and the importance of mining to Arizona's businesses and economy — AMA implores EPA to recognize that the Proposed FR Rule is not only unnecessary, but also will fail to yield any environmental benefits that could possibly offset the negative economic and other impacts of the Proposed FR Rule. Therefore, EPA should take final action to withdraw or rescind the Proposed FR Rule in accordance with its authority.

Sincerely,



Suzanne Kinney  
Interim Manager  
Arizona Mining Association

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<sup>21</sup> A.R.S. §§ 27-1021 to 27-1026.