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March 29, 2016

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (1101A)
Washington, D.C. 20460

Dear Administrator McCarthy:

Many western states rely on the hard rock mining industry for economic development and employment. Western states where mining occurs have staff dedicated to mine permitting and compliance. They ensure that hard rock mining facilities are designed, constructed and operated to minimize risks to the environment and ensure reclamation. State regulators ensure proper mine closure on both private and public lands when the time comes. They coordinate with federal land agencies to ensure bonding is adequate.

A recent D.C. Circuit court decision approved a settlement agreement negotiated by the Environmental Protection Agency (EPA) and several non-governmental organizations. It requires EPA to publish a notice of proposed rulemaking pursuant to section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for the hard rock mining industry by December 1, 2016.¹

Western Governors are concerned that EPA may impose additional financial assurance requirements on the hard rock mining industry. As stated in section A(3) of WGA Policy Resolution 2014-07, [Bonding for Mine Reclamation](#) (attached to these comments and incorporated by reference), western states have developed regulatory bonding programs to evaluate and approve financial assurance requirements for hard rock mining operations. Each western state has also developed detailed design, construction, operating, monitoring and permitting standards for hard rock mining facilities.

Governors have specific concerns with the potential introduction of EPA bonding requirements including:

- *Duplicative Federal Regulations* – Proposed federal requirements would duplicate existing state financial assurance requirements and could preempt existing state requirements for hard rock mining operations. They would require compliance with federal design, construction and

¹ Order *In re: Idaho Conservation League, et al.*, No. 14-1149 (D.C. Cir. Jan. 29, 2016).

operating standards, to the exclusion of proven state standards. These additional financial assurance requirements would impair western economies and the hard rock mining industry in America. Section B(2) of WGA Policy Resolution 2015-09, [National Minerals Policy](#), reinforces the importance of the mining industry to both local and national economies. Reliable supplies of American minerals play a critical role in meeting national security needs.

- *Inappropriately Hampering Effective State Programs* – EPA has not indicated to states what, if any, problems or gaps the agency perceives in state financial assurance requirements. EPA has likewise failed to indicate that modern, state-driven standards necessitate any alternative program. Western states have the staff and expertise necessary to ensure environmental compliance, reclamation and site closure. Reclamation and closure bonding calculations are based on the unique circumstances of each mining operation, the local ecology and post reclamation land use. Local expertise allows for informed decisions on financial assurances required – based on real values over the life of the mine and after its closure. Many of the hard rock mines in the Western U.S. are on private or public lands, and at times on both. Only state regulatory agencies can oversee bonding and closure on sites with dual ownership and split mineral estate.
- *Failure to Recognize States' Primacy Role in Water Management* – Hard rock mine reclamation and bonding are required to protect water resources. States are identified under the Clean Water Act as the primary regulators of water. It is appropriate to recognize the lead and primary role of states in regulating water-related impacts incident to mine reclamation – including associated bonding requirements.

The referenced D.C. Circuit court order directed EPA to determine by December 1, 2016 whether to issue notice of proposed rulemaking on CERCLA 108(b) financial assurance requirements for (a) chemical manufacturing; (b) petroleum and coal products manufacturing; and (c) electric power generation, transmission and distribution industries. We note similar concerns regarding EPA's introduction of bonding requirements for these industries.

Prior to publishing a notice of proposed rulemaking for any of these industries EPA should consult with Governors and engage state regulators. This should occur early in the process – before rulemaking. Substantive consultation during development of rules or decisions should occur well before formal rulemaking is launched. This should include a review by Governors and state regulators of any proposals before they are sent to the White House Office of Management and Budget for finalization.

Honorable Gina McCarthy

March 29, 2016

Page 3

As part of early consultation on any proposals, we request that EPA provide Governors and state regulators the following:

- A detailed state consultation timeline and plan for obtaining individual state comments from Governors and state regulators;
- 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 the Governors and state regulators as to whether the proposed rule will not 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 the concerns and an analysis of any conflicts in the proposed rule with state programs; and
- Analysis of financial assurance instruments that would satisfy any proposed EPA requirement.

Western states are committed to environmental protection and to responsible and comprehensive regulation and bonding for hard rock mining operations. Western Governors urge you to consider the concerns raised here.

Sincerely,



Matthew H. Mead
Governor of Wyoming
Chairman, WGA



Steve Bullock
Governor of Montana
Vice Chair, WGA

cc: Honorable Lisa Murkowski, Chairwoman, Senate Energy & Natural Resources Committee;
Honorable Maria Cantwell, Ranking Member, Senate Energy & Natural Resources Committee;
Honorable Fred Upton, Chairman, House Energy & Commerce Committee;
Honorable Frank Pallone, Ranking Member, House Energy & Commerce Committee



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Western Governors' Association
Policy Resolution 2014 - 07

Bonding for Mine Reclamation

A. **BACKGROUND**

1. All Western states in which mining occurs have staff dedicated to ensuring that ongoing mine operations develop and follow appropriate reclamation plans.
2. An important component of a state's oversight of mine reclamation 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 itself fails to do so. These types of financial assurances, often referred to generically 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.
3. All Western states have developed regulatory bonding programs to evaluate and approve the financial assurances required of mining companies. The states have developed the staff and expertise necessary to calculate the appropriate amount of the bonds, based on the unique circumstances of each mining operation, as well as to make informed predictions of how the real value of current financial assurance may change over the life of the mine, and even post-closure.
4. Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9608(b), requires EPA to promulgate financial responsibility requirements for industrial facilities that take into account the risks associated with their use and disposal of hazardous substances. After the Sierra Club sued EPA for failing to timely comply with this section of CERCLA, a federal District Court in California ordered EPA to do so.¹
5. In response to the Court's ruling, EPA announced in July, 2009 that it had selected hard-rock mining as the first industry sector for which it would undertake an analysis of whether federal bonding requirements under CERCLA Sec. 108² were needed.
6. Since EPA's 2009 announcement, Western Governors have expressed concern that any bonding requirements that EPA may develop for the hard-rock mining industry could be duplicative of state requirements, and could even pre-empt them entirely. The Governors have also questioned whether EPA has the resources to implement

1 See Sierra Club v. Johnson, 2009 WL 2413094 (N.D. Cal. 2009)

2 See 74 Fed. Reg. 37213 (July 28, 2009).

reclamation bonding for hard-rock mines, since bond calculations usually reflect very site-specific reclamation needs, tasks and costs.

7. State mining agencies provided detailed comments to EPA in August 2011 on the structure and extent of each state's hard rock mining financial assurance requirements. EPA has yet to indicate if or what problems or gaps the agency has found in existing state requirements. Recently, EPA indicated that a rulemaking on this issue is not likely for at least another year.

B. GOVERNORS' POLICY STATEMENT

1. Because mine reclamation is needed primarily to protect adjacent waters, it is both appropriate and consistent with Congressional intent to recognize the states' lead and primary role in regulating water related impacts of mine reclamation, including the associated bonding. See Clean Water Act, Sec. 101(b), 33 U.S.C. § 1251(b).
2. Western states have a proven track record in regulating mine reclamation in the modern era – including for hard rock mines -- having developed appropriate statutory and regulatory controls, and are dedicating resources and staff to ensure responsible industry oversight.
3. In contrast, EPA currently has no staff dedicated to oversight of mine reclamation, or to the approval of bonding associated with mine reclamation. As a consequence, if EPA proceeds to promulgate bonding requirements for the hard-rock mining industry under CERCLA Sec. 108, it will have to create a new federal regulatory program -- an unnecessary investment of federal funds -- at a time when the federal government is trying to get its fiscal house in order.
4. Western Governors believe that states currently have financial responsibility programs in place that are working well, and that functional programs should not be duplicated or pre-empted by any program developed by EPA pursuant to Section 108(b) of CERCLA.

C. GOVERNORS' MANAGEMENT DIRECTIVES

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.