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Comprehensive Environmental Response, Compensation, and Liability Act/Financial Assurance: U.S. House of Representatives Energy and Commerce/Natural Resources Committees EPA Document Request

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The Chairmen of the United States House of Representatives Energy and Commerce Committee and Natural Resources Committee ("Committees") sent an August 9th letter to United States Environmental Protection Agency ("EPA") Administrator Gina A. McCarthy in regards to the agency's work on developing financial assurance requirements for the hard rock and mining industry.

The August 9th letter references the Committee on Natural Resources jurisdiction over the laws that impact the hard rock mining industry and the Committee on Energy and Commerce's jurisdiction over the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

EPA has been driven by judicial decisions to establish a schedule and develop financial regulations for the hard rock mining industry pursuant to certain CERCLA provisions. Section 108(b) requires EPA to promulgate regulations requiring:

...that classes of facilities establish and maintain evidence of financial responsibility consistent with a degree and duration of risk associated with production, transportation, treatment, storage, or disposal of hazardous substances.

This statutory requirement had been in place since CERCLA was originally enacted in 1980.

A judicial order had previously been issued directing EPA to issue financial assurance regulations by January 1, 2016 for four industries (including hard rock mining). The agency identified these industries as a priority.

Financial assurance regulations are intended to provide some assurance that those entities potentially responsible for the release of hazardous substances have the funding and financial resources available to pay for any necessary cleanup or reclamation efforts.

The Committees note in their August 9th letter that they have direct interest in EPA's consideration of regulations that may impact beneficial access to the natural resources of the United States, and

protection of the environment. They express concern as to whether EPA is analyzing existing federal and state requirements in terms of potential or duplicative regulations stating:

...while we recognize the importance of financial assurance, we are concerned about whether EPA has adequately analyzed existing federal and state financial assurance requirements to evaluate properly the need for additional regulation. We are particularly troubled with the issue of preemption and whether the 108(b) rule is duplicative of existing federal and state programs, and if additional regulation is needed, to be sure the new requirements are consistent with other financial assurance programs.

The letter also assesses the importance of mining from a national economic standpoint, along with its potential impact on the environment.

The documents requested by EPA include:

1. A working electronic version of EPA's current model for hard rock mining financial assurance, and all supporting information utilized to develop model inputs, unit valuations, and best practice credit reduction types and factors.
2. Copies of all documents and correspondence regarding the development of the financial assurance model (between the EPA and other federal and state agencies).
3. Copies of all documents and correspondence regarding the development of the financial assurance model (between EPA and financial experts, regulated financial institutions, and financial entities) that potentially could offer services required by any financial assurance regulation created by EPA's proposed draft rule.
4. The draft market capacity study.

The Committees' letter also poses a number of questions addressing issues such as:

- Peer review activities to date
- Opportunities for operator site-specific risk assessment
- Mines EPA is planning on visiting in developing the rule
- Setting the risk thresholds
- Use of filtering techniques in developing the models/formula
- Whether EPA is going to factor in reductions for compliance with existing state and federal laws requiring financial assurance
- Percentage fixed amount EPA is considering for natural resource damages
- Duration of financial assurance obligation
- Information EPA has provided to financial entities that potentially offer services required by financial assurance regulations (in order to do a capacity determination)

[A copy of the August 9th letter can be downloaded here.](#)