CKRC
CEMENT KILN RECYCLING COALITION

July 11, 2017

VIA E-DOCKET

U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: EPA-HQ-SFUND-2015-0781
Financial Responsibility Requirements Under CERCLA § 108(b)
for Classes of Facilities in the Hardrock Mining Industry
82 Fed. Reg. 3388 (Jan. 11, 2017)

Dear Sir or Madam:

The Cement Kiln Recycling Coalition (CKRC) is a national trade association representing cement companies that use hazardous waste and other secondary materials as alternative fuels and raw materials in cement kilns. Our membership also includes companies that collect, process, and manage secondary materials and companies that provide services to the industry. CKRC appreciates this opportunity to comment on Environmental Protection Agency's (EPA) proposed CERCLA Section 108(a) rule for hardrock mining.

As noted in the Preamble, this rule is the first in a series of rules that will propose to require certain industries to meet financial assurance requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA). The rule proposes that owners and operators of covered facilities "be required to demonstrate financial responsibility to cover the three types of costs associated with releases and potential releases of hazardous substances from their facilities, including response costs, health assessment costs, and natural resource damages." 82 FR 3389.

A. Classes of facilities covered by the rule

Classes of facilities covered by this initial rule are those that "engage in the extraction, beneficiation, and processing of metals, (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (e.g., asbestos, phosphate rock, and sulfur). EPA defines these classes of facilities as the "hardrock mining industry."

EPA reviewed a wide range of mineral commodity classes in order to determine whether these should be included along with hardrock mining operations in this initial proposal for CERCLA 108(b) requirements. In analyzing the scope of possible coverage of this rule, EPA examined 59 nonfuel mineral commodities, considering such aspects as the mining process, whether extraction and beneficiation "routinely use hazardous substances to produce a final product," "whether those operations have a history of releasing hazardous substances into the environment," and whether any site operations are listed on the National Priorities List (NPL). EPA concluded that the 59 classes are not "situated similarly to other classes of hardrock mines" and thus would not be included in this proposed rule. U.S. EPA, June 29, 2009 Memorandum from Stephen Hoffman, OCRC, and Shahid Mahmud, OSTRI, "Mining Classes Not Included in Identified Hardrock Mining Classes of Mines." Thus, in addition to excluding 35,103 coal mining operations from coverage, EPA also excluded 44,845 mines associated with 59 nonfuel hardrock commodities. 82 FR 3390.

EPA conducted a careful study of the possible classes of facilities that would be appropriate to include in the regulated category "hardrock mining." CKRC agrees with EPA's reasoning and conclusion that it would not be appropriate to include in the category covered by this rule, coal mining operations and the 59 nonfuel hardrock commodity classes as noted in the EPA June 29, 2009 Memorandum.

B. Duplication of existing financial assurance obligations

The proposed financial assurance requirements under CERCLA §108(b) would duplicate the financial assurance requirements to which CKRC members are already subject under the Resource Conservation and Recovery Act (RCRA). As mentioned above, CKRC members are cement companies that use hazardous waste and other secondary materials as fuel in cement kilns. CKRC

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members thus own or operate facilities permitted under RCRA Subtitle C, and comply with RCRA Section 3004 financial responsibility requirements. Under RCRA Section 3004, the Administrator must promulgate regulations regarding "financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable…"[1] In accordance with this provision, EPA has regulations in place that require extensive financial assurances.[2] These include, for example: (1) financial assurance for closure of the facility[3]; (2) financial assurance for post-closure care[4]; (3) liability coverage for sudden accidental occurrences[5]; and (4) coverage for non-sudden accidental occurrences.[6]

EPA proposes to require duplicative financial assurance obligations under CERCLA §108(b). EPA asserts that "CERCLA *authorizes* EPA to issue financial assurance requirements to cover CERCLA liabilities, whether or not a facility is subject to financial responsibility requirements under another Federal law. Thus, CERCLA § 108(b) requirements apply even where a hardrock mine or mineral processor may be subject to, for example, Federal reclamation bonding requirements." Notwithstanding EPA's assertion of authority to use CERCLA authority to impose duplicate obligations on an industry, such a use of authority is not justified and not rational for facilities that already comply with the extensive protections of RCRA Subtitle C.

In addition to being subject to RCRA financial responsibility requirements, CKRC members must also comply with extensive State (and local) mining and reclamation regulatory programs. These State programs are long established, are specifically tailored to the States' concerns for their geologic, water and other natural resource characteristics, and fully protect the environment. EPA's proposed CERCLA 108(b) requirements, insofar as they directly and substantially overlap with State or local regulatory requirements, threaten to disrupt the cooperative federalism that is key to effective environmental protection. Because CERCLA expressly preempts any duplicative financial assurance provisions,[7] EPA's rule could result in States having to cede to the federal

[1] *Id*. at §Sec. 3004(a)(6); *see also* §Sec. 3004(t).
[2] *See generally*, 40 C.F.R. §264.140–264.151, Subpart H—Financial Requirements.
[3] 40 C.F.R. § 264.143.
[4] 40 C.F.R. § 264.145.
[5] 40 C.F.R. § 264.147(a).
[6] (1) 40 C.F.R. § 264.147 (b).
[7] 42 U.S.C. § 9614

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government, authority over regulated companies operating within their jurisdictions. The regulation of natural resource extraction has long been the province of State and local government and EPA should carefully avoid preempting State authority.

CKRC appreciates the opportunity to comment on EPA's proposed Hardrock Mining rule. Should you have any questions, please feel free to contact me.

Sincerely,

/s/ Michelle Lusk
Michelle Lusk
Executive Director
Cement Kiln Recycling Coalition

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