House Committee on Natural Resources
Subcommittee on Energy and Mineral Resources

Testimony by
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Proposed rule – CERCLA 108(b) Financial Responsibility Requirements

Mr. Chairman, members of the Committee, my name is Bret Parke, and I am the Deputy Director of the Arizona Department of Environmental Quality. It is a privilege for me to be here today and I appreciate the opportunity to offer testimony regarding the U.S. Environmental Protection Agency's (EPA) proposed rule on CERCLA[1] Section 108(b) Financial Responsibility Requirements for hardrock mining (hereafter proposed rule).[2]

As you learned from my bio, I am a career environmental professional with deep family roots in public service in the protection and enhancement of Arizona's rich and diverse environment.[3]

I would like to begin by expressing gratitude to EPA for its recent efforts to engage with and understand the true impacts the proposed rule will have on Arizona and other states for which hardrock mining is a significant economic driver. It is through such collaboration that I believe EPA will come to understand the significant and robust environmental regulatory infrastructure already being effectively administered by state and federal programs that prevent and mitigate the very risks EPA seeks to address through the proposed rule.

Earlier this month, the State of Arizona through ADEQ, along with many states and government associations, requested that EPA withdrawal the proposed rule and determine that no EPA action is necessary or appropriate under CERCLA 108(b).[4] In making this request, ADEQ identified several key elements of the proposed rule that makes it untenable for Arizona, and that I would like to share with you today.

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[1] the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.
[2] https://www.federalregister.gov/documents/2017/01/11/2016-30047/financial-responsibility-requirements-under-cercla-108b-for-classes-of-facilities-in-the-hardrock.
[3] Incidentally, if you have not seen the original *The Lorax* book or movie from Dr. Seuss, I highly recommend it.
[4] As permitted by the Court in its decision in On Petition For Writ of Mandamus to the United States Environmental Protection Agency, *IN RE: IDAHO CONSERVATION LEAGUE, ET AL., PETITIONERS*, No. 14-1149 (D.C. Cir Jan. 26, 2016) (available at https://www.cadc.uscourts.gov/internet/opinions.nsf/1F012EA1238D7A3C85257F490054E52E/$file/14-1149-1596081.pdf).

The modern regulatory permitting programs that ADEQ cited in its comments, and that I will discuss today are site-specific and preventative in nature. In contrast, the 1980 CERCLA law's financial responsibility mandate is remedial and was founded on the contingency that an unpermitted release will lead to a financial burden on taxpayers. I believe that CERCLA's 108(b) financial responsibility (FR) rulemaking mandate and express federal preemption of related state FR, is antiquated and unworkable in the current existing regulatory permitting and FR environment.[5] And, CERCLA's mandate to apply the history of Superfund and judgments associated with legacy environmental contamination thirty-seven years later, in 2017, is unjustified. Modern state regulatory permitting programs and related FR ameliorate the very risk Congress was addressing more than three decades ago when it passed CERCLA.

Indeed, in the intervening years EPA inexplicably delayed the rulemaking process, states, including Arizona, and the federal government filled the gap with sophisticated environmental regulatory permitting and land management programs to govern the hardrock mining industry. ADEQ's formal comments on the rule listed seven distinct programs currently applicable to mines that prevent and mitigate the "duration and degree of risk" associated with the hardrock mining industry. Many of the federal regulatory permit programs that were developed have now been delegated to and are administered by the states. These state implemented regulatory programs are progressive in that they require modern engineering and design, and application of new control technology.

These mature and sophisticated state and federal regulatory programs have made the requirement to promulgate the proposed rule duplicative and unnecessary.

This fatal flaw is well documented in Arizona. Although EPA acknowledges the existence of Arizona's Aquifer Protection and Mining Lands Reclamation Act programs, EPA overlooked the broad applicability and effectiveness of these programs.

In fact, since the development, implementation, and integration of these state and federal regulatory programs, no currently operating mine facility release has triggered a call by ADEQ on a financial responsibility mechanism in Arizona.

In addition to the technical and legal inadequacies of the proposed rule, the economic and administrative burden to Arizona government and industry significantly outweighs any perceived but undemonstrated environmental benefit that EPA suggests will occur if the proposed rule is enacted. To provide you context for this comment, the hardrock mining industry is an integral part of maintaining sustainable, healthy and prosperous communities throughout Arizona and other hardrock mining states.

Mining has played a central role in Arizona's history and Arizona remains a top producer of copper in the world, as well as a significant producer of molybdenum, coal, gold, silver, and uranium. In 2014 alone, mining companies in Arizona employed more than

[5] https://www.law.cornell.edu/uscode/text/42/9608.

12,000 people, spent $2.77 billion purchasing goods and services throughout the state generating 6,200 jobs, and provided income of $910 million to just the first-tier suppliers working to support mining.[6] Including both 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.

ADEQ recently conducted a financial screening analysis modeled under the proposed rule based on an EPA-provided example that suggests the financial impacts to Arizona mines could be extreme: totaling $1.8 billion in additional financial responsibility for just the two Arizona mines.

This is an extraordinarily high financial burden on mine operators, and the state and its citizens that is not warranted, given the lack of evidence to support EPA's assertion that the proposed rule would yield an environmental benefit.

Mining is a global competition. Every additional regulation upon the industry to operate in the United States should be carefully considered by policymakers. The EPA's own estimated CERCLA 108(b) financial responsibility cost to just the mining industry is $7.1 billion. Notably, EPA identified thirty-six percent of hardrock mining businesses are small businesses, and EPA estimates that the proposed rule will have a significant impact on a substantial number of small entities. The record, including the financial market capacity study requested by congress (P.L. 114-113)[7], demonstrates that the financial markets are unsure, unfamiliar and currently do not underwrite this type of third-party accessible, direct actionable, long-tailed financial responsibility. What this means is that the market will include a premium to price the unknown risk.

In addition, as documented in ADEQ's formal comments, the technical and legal documentation supporting EPAs rulemaking process is fatally flawed because it was driven by a litigation driven timeline.

This is especially important to note given that mining is only the first sector, and EPA has already published advanced notice of intent for a proposed rulemaking for three more nationally strategic sectors; manufacturing, petroleum and coal products manufacturing, and the electric power generation, transmission, and distribution industries.[8]

In closing, I'd like to share with you one of the cornerstones of our philosophy at ADEQ. We believe that a healthy environment can only be achieved if we acknowledge and embrace the complex world in which we operate. By working closely with our stakeholders, and by identifying and expanding the nexus between the environment, the

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[6] The Economic Impact of the Mining Industry on the State of Arizona: for the year 2014. L. William Seidman Research Institute, W. P. Carey School of Business, Arizona State University (available at http://www.azmining.com/uploads/AMA%20report%202014%20v2%20.pdf).

[7] https://semspub.epa.gov/work/HQ/196705.pdf.

[8] https://www.epa.gov/superfund/superfund-financial-responsibility.

economy and the community, we can best achieve our mission to protect and enhance public health and the environment, and create a win-win for the people that live in the great state of Arizona. The CERLA 108(b) proposed rule on which I have provided testimony on today, is largely duplicative and fails to recognize the complexities of our existing regulatory and environmental ecosystem. If enacted, the proposed rule will yield significant negative economic and state program impacts in Arizona. It will also have an outsized effect on the limited number states with hardrock mining, and the generally rural communities in which they exist. As a result, we strongly encourage EPA to withdraw the proposed rule.

That concludes my testimony and I would be happy to answer any questions you may have.