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**Heller to EPA: End Unnecessary Obama-Era Rule That Could Harm Nevada’s Mining Industry**

**Washington, D.C.** – U.S. Senator Dean Heller (R-NV) and several of his colleagues are urging Environmental Protection Agency (EPA) Administrator Scott Pruitt to eliminate a rule proposed by the Obama Administration expands the EPA’s authority to unnecessarily burden Nevada’s mining industry. Its duplicative compliance costs will discourage investment, development, and job creation in the communities that rely on it.

In the letter, the senators argue the proposed rule, the “Financial Responsibility Requirements Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for Classes of Facilities in the Hardrock Mining Industry,” ~~a~~would result in excessive compliance costs and discourage mining companies from investing and providing good-paying jobs to communities that rely on this critical industry. Specifically, the letter argues that mining companies in Nevada and across the nation are already required to meet financial assurance requirements at the federal and state level, and any further mandates from the federal government stand in the way of the industry’s ability to grow in Nevada.

In February, Heller urged the EPA to allow for additional time to review the impact this rule would have on the mining industry. As a result, the [EPA extended the comment period from 60 days to 120 days](https://www.heller.senate.gov/public/index.cfm/2017/2/heller-and-barrasso-praise-extension-of-comment-period-for-epa-s-proposed-mining-rule) and Heller and his colleagues welcomed the opportunity to express their concerns and encourage their constituents to make their voices heard.

**The letter to Administrator Pruitt reads in full below:**

The Honorable Scott Pruitt  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC  20460

*Dear Administrator Pruitt:*

*We greatly appreciate the extension of time for stakeholders to comment on the U.S. Environmental Protection Agency’s (EPA) proposed rule, “Financial Responsibility Requirements Under CERCLA 108(b) for Classes of Facilities in the Hardrock Mining Industry,” which was published in the Federal Register on January 11, 2017 (82 Fed. Reg. 3388).  This extension was necessary to allow stakeholders a meaningful opportunity to review and comment on the many complex issues raised by that proposal.*

*In this letter, we focus on just one issue: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 108(b) financial responsibility rule proposed by the prior administration relies on a misinterpretation of the statute.  As a result, that proposal is unnecessary and duplicative and exceeds EPA’s authority under the law.*

*Section 108(b) of CERCLA is narrowly focused on the risk that the Superfund Trust Fund would have to pay for the costs of responding to releases associated with the management of hazardous substances by high-risk classes of facilities. The statute states that any financial responsibility requirements promulgated under this section must be “consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.” 42 U.S.C. § 9608(b)(1).  This authority requires a two-part analysis. First, because all references to risk in CERCLA section 108(b) are in the present tense, any financial responsibility requirements imposed under that section must be consistent with the risk posed by the current management of hazardous substances.  Second, if there is any current risk, any financial responsibility requirements must be tailored to address only the degree and duration of any current risk, prohibiting duplicative financial assurance requirements.*

*The rule proposed by the prior administration fails to follow these statutory directives.  It improperly relies on legacy contamination and activities that predate modern environmental regulation to claim there are risks associated with the production, transportation, treatment, storage, or disposal of hazardous substances by the hardrock mining industry.  Legacy contamination is not the risk that Congress directed EPA to address under section 108(b) and information about historic mining practices does not form a record basis for a rule under that section.  The analysis put forth by the prior administration also ignores the numerous state and federal financial assurance programs that address any risk that may exist.  As a result, the proposed rule fails to tailor financial assurance “consistent with the degree and duration of risk” as required by section 108(b), contrary to the direction of Congress.*

*As a result of its erroneous interpretation of the statute, the prior administration has proposed a rule that would unlawfully impose duplicative financial assurance requirements.  Section 108(b) expressly states that CERCLA financial assurance is “for facilities in addition to those under subtitle C of the Solid Waste Disposal Act and other Federal law.”  The report of the Senate Committee on Environment and Public Works on S. 1480 in the 96th Congress makes it clear that this language is intended to limit CERCLA financial responsibility requirements to facilities that are not covered by Resource Conservation and Recovery Act financial responsibility or other federal financial responsibility requirements. According to the committee:*

*The bill requires also that facilities maintain evidence of financial responsibility consistent with the degree and duration of risks associated with the production, transportation, treatment, storage, and disposal of hazardous substances. These requirements are in addition to the financial responsibility requirements promulgated under the authority of section 3004(6) of the Solid Waste Disposal Act. It is not the intention of the Committee that operators of facilities covered by section 3004(6) of that Act be subject to two financial responsibility requirements for the same dangers.  S. Rept. 96-848 (2d Sess, 96th Cong.), at 92.*

*The committee report further states that the purpose of this provision is “to extend financial responsibility requirements to facilities and transporters who are not now covered by any requirements under section 3004(6).” Id. (emphasis added). If the Administrator promulgates financial responsibility requirements applicable to a class of facilities, Congress also ensured that duplicative requirements are not later created under state law.  The statute preempts state financial responsibility requirements on facilities that are covered by financial responsibility under CERCLA.  42 U.S.C. § 9614(d).*

*Incredibly, the prior administration interprets CERCLA to authorize the very duplicative requirements that the Senate Environment and Public Works Committee expressly disapproved.  This interpretation must be rejected.*

*Finally, even if EPA could lawfully ignore the plain language of the statute, rely on risks from legacy contamination, and ignore the protection provided by existing financial responsibility requirements, the analysis put forth by the prior administration still does not support a finding that there is a significant financial risk to the Superfund Trust Fund to be addressed under CERCLA.  The past administration determined that its proposed regulation will reduce expenditures from the Superfund Trust Fund for hardrock mining sites by only $527 million over 34 years, or an average of $15.5 million a year.  Fifteen million dollars a year is not a significant risk to the Trust Fund and does not justify the imposition of financial assurance requirements that EPA estimates will cost $171 million a year.  It is our understanding analyses conducted by affected industries estimate the cost of this new federal program to be several orders of magnitude higher.*

*The cost of compliance with this unlawful and duplicative federal program will discourage domestic mineral production and stymie future investment and development opportunities, leading to greater import reliance for metals and minerals, and putting the United States domestic manufacturing, energy, and national security sectors at a major disadvantage. Furthermore, this rule will have substantial adverse impacts to local communities who depend on the high-paying family-wage jobs and tax revenues supported by the industry.*

*We understand that EPA is currently under a court order to finalize a rule by December 1, 2017.  However, the level of financial responsibility requirements under CERCLA section 108(b) is the level “which the President in his discretion believes is appropriate.”  42 U.S.C. § 9608(b)(2) (emphasis added).  After reviewing the statute, the administrative record, and the comments received during the comment period, it is our hope that you will conclude, as we have, that this rulemaking is unlawful and duplicative.*

*Thank you for your consideration and please do not hesitate to contact our offices if we can be of further assistance.*

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