

United States Senate

WASHINGTON, DC 20510

August 16, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator McCarthy:

We are writing in regards to the U.S. Environmental Protection Agency's (EPA) forthcoming proposed rule that would impose new financial assurance requirements on the hardrock mining industry under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As chairmen of the Committees on Small Business and Entrepreneurship, and Environment and Public Works, we write to express our continued concerns regarding EPA's insufficient compliance with the Small Business Regulatory Enforcement Fairness Act (SBREFA), which requires EPA and other federal agencies to assess and mitigate for the potential impacts that federal rules can have on small entities.

Last summer, EPA sought self-nominations for a Small Business Advocacy Review (SBAR) Panel on this rule. Two months later, EPA negotiated an expedited rulemaking schedule with certain non-governmental organizations (NGOs) who had filed a lawsuit seeking to compel agency action on this rule. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) approved this expedited rulemaking schedule. Accordingly, EPA must publish a notice of proposed rulemaking no later than December 1, 2016. As you know, the EPA has the right to ask the court for an extension of this deadline with or without the support of the NGOs.

Over 7 months after filing the negotiated rulemaking schedule with the D.C. Circuit, EPA on April 13, 2016, notified 18 small entity representatives (SERs) of their potential selection for the hardrock mining rule SBAR Panel process. On June 9, 2016, EPA held a pre-panel outreach meeting with the potential SERs to provide background on the rulemaking and allow the potential SERs to vocalize their concerns with the rule and communicate what type of information they need to effectively participate in the SBAR Panel process. Following these and other meetings, 12 SERs submitted extensive comments to the agency expressing serious concerns with the rule, including the agency's unwillingness to share key pieces of information (*e.g.*, the formula, the mine sites and selection criteria used to inform the model, and market capacity study) that are critical for the SERs to comprehend the potential impacts of the rule on their businesses and identify alternative regulatory options.

Unfortunately, despite the SERs' concerns, EPA's recent filing with the D.C. Circuit indicates that the agency does not plan to conduct the SBAR Panel according to the letter and spirit of the law or in accordance with its own SBREFA guidance. While EPA's status report states that the agency "expects to begin the [Panel] shortly," maintaining the December 1, 2016, deadline leaves just 111 days (or 75 working days) to accomplish several important regulatory milestones before a proposal receives your signature. First and foremost is the SBAR Panel, which typically takes 60 days from formally convening the panel to the issuance of a panel report with recommendations. As EPA recognizes in its own guidance, "the RFA requires the Agency to consider the Panel Report in selecting proposed regulatory options to address small entity concerns, and where appropriate, to modify the proposed rule[.]" It seems extremely unlikely that the EPA can complete this process and meet the December 1, 2016 deadline without seriously circumventing the rules, compromising the SBAR process and sacrificing the purpose of SBREFA.

This is not the first time we have raised such concerns to EPA about its dismal track record of complying with SBREFA. In fact, at a hearing before the Committee on Environment and Public Works in April, we asked you about EPA's history of submitting rules to OMB for review before the SERs have been able to submit their comments to EPA, particularly in the case of EPA's rule to regulate methane emissions from new oil and natural gas infrastructure.

Other recent examples of EPA rulemakings where the agency submitted a rule to OIRA for review before the SBRFA panel has formally concluded include: *Federal Plan Requirements for Greenhouse Gas (GHG) Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014*; *Model Trading Rules*; *Amendments to Framework Regulations*^[1] and "Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards"^[2]. Another example of EPA not fully complying with a range of requirements under SBRFA includes EPA's widely-criticized decision to certify that its proposed rule to broaden the definition of Waters of the United States under the Clean Water Act would not have a significant impact on small entities. We are continually concerned that EPA's track record on SBREFA compliance remains insufficient and imposes unnecessary burdens on America's small businesses.

Given these concerns, please provide the following within 7 business days:

1. A schedule detailing the dates that EPA intends to formally convene the SBAR panel, hold a Panel meeting with the SERs, request written comments from the SERs, complete the first draft of the Panel Report, and submit the final Panel Report.
2. Written confirmation that that EPA will not conduct the SBAR Panel simultaneously with OMB's interagency review.

^[1] [https://www.sba.gov/sites/default/files/FIP - Advocacy Public Comment - FINAL - 2015-12-21.pdf](https://www.sba.gov/sites/default/files/FIP_-_Advocacy_Public_Comment_-_FINAL_-_2015-12-21.pdf)

^[2] <https://www.sba.gov/sites/default/files/Refineries%20RTR%20-%20Advocacy%20Public%20Comment%20-%202014-10-28%20-%20FINAL.pdf>

If EPA cannot complete the SBAR Panel with adequate amount of time to incorporate the final Panel Report recommendations in the proposed rule *before* OMB's interagency review, we strongly recommend EPA seek an extension of the deadline from the court.

Sincerely,



Chairman David Vitter
Senate Committee on
Small Business & Entrepreneurship



Chairman James Inhofe
Senate Committee on
Environment & Public Works

cc: Mathy Stanislaus, Assistant Administrator, Office of Land and Emergency Management
Barnes Johnson, Director, Office of Resource Conservation and Recovery