



# The Fertilizer Institute

Nourish, Replenish, Grow

Andrew T. O'Hare  
Vice President, Public Policy

August 25, 2017

The Honorable Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460  
[www.regulations.gov](http://www.regulations.gov)

***Re: Additional Comments of The Fertilizer Institute Regarding EPA's Proposed Rule Entitled "Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry," 82 Fed. Reg. 3,388 (Jan. 11, 2017); Docket ID No. EPA-HQ-SFUND-2015-0781***

Dear Administrator Pruitt:

On July 11, 2017, The Fertilizer Institute ("TFI") submitted comments on the above-referenced Proposed Rule to explain why the potash and phosphate sectors should be excluded from the "high risk" classes of "hardrock" mining facilities ("HMFs") designated as subject to the rulemaking.<sup>1</sup> As set forth in extensive detail in TFI's comments last month, the Proposal Rule and accompanying administrative record clearly demonstrate that *both* the potash *and* the phosphate sectors should not be included in this rulemaking because:

- (1) facilities in these two sectors do not present anywhere close to the "highest level of risk of injury," and, therefore, do not require any further evidence of financial responsibility;
- (2) the facilities are thoroughly regulated by existing state and federal laws and regulations;
- (3) for phosphoric acid mineral processing facilities, any risks either already have been, or will be, addressed through EPA's National Enforcement Initiative under the Resource Conservation and Recovery Act ("RCRA") that requires operational changes, best management practices, and significant financial assurance; and,
- (4) for phosphate fertilizer manufacturing facilities, they are beyond the scope of this rulemaking as they are in the manufacturing sector, not the mining/mineral processing sector.

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<sup>1</sup> "The Fertilizer Institute's Comments on The U.S. Environmental Protection Agency's Proposed Rule Entitled 'Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry,' 82 Fed. Reg. 3,388 (Jan. 11, 2017)" (July 11, 2017) (Dkt. EPA-HQ-SFUND-2017-0781-2633) (hereinafter, "TFI's 2017 Comments").

Capitol View  
425 Third Street, S.W., Suite 950  
Washington, DC 20024

202.515-2704  
202.962.0577 fax  
[www.tfi.org](http://www.tfi.org)

In reviewing comments submitted through mid-August, TFI has not identified any that advocate for the inclusion of the potash sector, or challenge excluding it.<sup>2</sup> Regarding the phosphate sector, TFI has only identified two comments that advocate for the inclusion of phosphate mining, and none that oppose excluding phosphoric acid manufacturing and phosphate fertilizer manufacturing.<sup>3</sup> TFI's submission today responds to the assertions made by the two commenters advocating including phosphate mining in any final CERCLA § 108(b) rule.

### STATEMENT OF INTEREST

TFI represents the nation's fertilizer industry including producers, importers, retailers, and wholesalers, and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information, and public communication programs.

Many TFI members operate, or rely on, mining operations producing raw materials for fertilizer production, including the mining of phosphate ore and potash, which are inappropriately identified in the Proposed Rule as "hardrock mining" that would be subject to EPA's forthcoming financial responsibility requirements pursuant to CERCLA § 108. TFI members also operate, or depend on, facilities which extract, beneficiate, or process phosphate ore and potash, and thus potentially fall within the scope of the Proposed Rule.

Specifically, TFI represents five of the seven companies (Mosaic Fertilizer, LLC, Nu-West Industries, Inc., PCS Phosphate Company, Inc., J.R. Simplot Co., and White Springs Agricultural Chemicals, Inc., d/b/a/ PCS Phosphate – White Springs) with nine of the eleven phosphate mine sites in the United States that EPA has identified as subject to the rulemaking<sup>4</sup> (Mosaic Fertilizer, LLC Four Corners, South Fort Meade, South Pasture, and Wingate Mines; Nu-West Industries, Inc. Rasmussen Ridge Mine; PCS Phosphate Company, Inc. Lee Creek Mine; J.R. Simplot Co. Smoky Canyon and Vernal Mines; and White Springs Agricultural Chemicals, Inc., d/b/a/ PCS Phosphate – White Springs Swift Creek Mine).<sup>5</sup> In addition, TFI represents two of the three companies<sup>6</sup> (PCS Phosphate Company, Inc. and J.R. Simplot Co.) with three of the four identified co-located phosphate mines/mineral processing facilities (PCS Phosphate Company, Inc. Lee

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<sup>2</sup> See TFI's 2017 Comments at 43-53.

<sup>3</sup> See *id.* at 9-42.

<sup>4</sup> See EPA, "CERCLA 108(b) Financial Responsibility Formula for Hardrock Mining Facilities - Background Document (Peer Review Draft)," at E-2 to E-18 (Sept. 19, 2016) (Dkt. EPA-HQ-SFUND-2015-0781-0500) (hereinafter, "Financial Responsibility Document"). TFI does not represent Manko Co. and P4 Production, LLC/Monsanto Co.

<sup>5</sup> TFI is simply restating the Agency's position regarding the phosphate mines that will be subject to the rulemaking and neither endorses nor agrees with EPA's designations.

<sup>6</sup> See Financial Responsibility Document at E-2 to E-18. TFI does not represent P4Production/Monsanto Co. - Monsanto Chemical Co.

Creek/Aurora, J.R. Simplot Co. Smoky Canyon/Don, and J.R. Simplot Co. Vernal/Rock Springs).<sup>7</sup> TFI also represents one of the two “stand-alone” phosphate fertilizer manufacturing facilities in the United States that are subject to the rulemaking<sup>8</sup> (Mosaic Fertilizer, LLC Uncle Sam).<sup>9</sup> Additionally, TFI represents three of the four companies<sup>10</sup> (Compass Minerals, Intrepid Potash, and Mosaic Potash Carlsbad Inc.) with active potash production facilities in the United States.<sup>11</sup>

Based on the operations of its members, and its significant input to date regarding this rulemaking, TFI has a substantial interest in the Proposed Rule.

**Like the Proposed Rule and Administrative Record, the Two Comments Advocating for the Inclusion of Phosphate Mining in Any Final CERCLA § 108(b) Rule Fail to Demonstrate That Phosphate Mining Represents a “High Risk”**

TFI identified two comments advocating for the inclusion of phosphate mining in any final “hardrock” mining financial responsibility rule: (1) Earthworks and a number of other non-governmental organizations;<sup>12</sup> and (2) Tribal Caucus of the Region 10 Tribal Operations Committee (“RTOC”).<sup>13</sup> As will be explained below, nothing in the comments alters the conclusion that phosphate mining is not a “high risk” activity that warrants inclusion of this sector in any final CERCLA § 108(b) rule for HMFs.

The Earthworks’ 2017 Comments rely extensively on a 2012 U.S. Government Accountability Office (“GAO”) report regarding phosphate mining on federal lands in Idaho.<sup>14</sup> Those comments simply cherry-pick certain statements from the “Highlights” section of the Report.<sup>15</sup> They fail to respond to, let alone even recognize, the important facts in the 2012 GAO Phosphate Mining Report regarding: (1) meaningful modifications made to federal oversight programs since the discovery of selenium discharges in 1996; (2) substantial efforts by the federal agencies and the owners and operators of the phosphate mines to characterize and address the discharges; (3) increased financial assurance to cover these activities (including reimbursement of

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<sup>7</sup> TFI is simply restating the Agency’s position regarding the co-located phosphate mines/mineral processing facilities that will be subject to the rulemaking and neither endorses nor agrees with EPA’s designations.

<sup>8</sup> See Financial Responsibility Document at E-2 to E-18. The Mississippi Phosphates facility is no longer operational, and is not a TFI member.

<sup>9</sup> TFI is simply restating the Agency’s position regarding the “stand-alone” phosphate fertilizer manufacturing facilities that will be subject to the rulemaking and neither endorses nor agrees with EPA’s designations.

<sup>10</sup> See Financial Responsibility Document at E-2 to E-18. TFI does not represent Micro-Lite, LLC.

<sup>11</sup> TFI is simply restating the Agency’s position regarding the potash production facilities that will be subject to the rulemaking and neither endorses nor agrees with EPA’s designations.

<sup>12</sup> Letter from Bonnie Gestrung, Earthworks, *et al.*, to Scott Pruitt, EPA (July 10, 2017) (Dkt. EPA-HQ-SFUND-2015-0781-2739) (hereinafter, “Earthworks’ 2017 Comments”).

<sup>13</sup> Letter from William J. Maines, Region 10 RTOC, to Scott Pruitt, EPA (July 11, 2017) (Dkt. EPA-HQ-SFUND-2015-0781-2729) (hereinafter, “RTOC’s 2017 Comments”).

<sup>14</sup> See GAO, “Phosphate Mining: Oversight Has Strengthened, but Financial Assurances and Coordination Still Need Improvement” (May 2012), available at <http://www.gao.gov/products/GAO-12-505> (hereinafter, “2012 GAO Phosphate Mining Report”).

<sup>15</sup> See Earthworks’ 2017 Comments at 15-16.

the responsible agency(ies) oversight costs); and, (4) the key fact that the discharges resulted from historical, not current, mining practices.

The 2012 GAO Phosphate Mining Report was developed in response to congressional inquiries regarding selenium discharges at Idaho phosphate mines<sup>16</sup> and examines: (1) federal oversight of mining operations and changes since the discovery of selenium discharges in 1996; (2) actions taken by federal authorities and mine operators to address the impacts; and, (3) types and amount of financial assurance and the ability of the financial assurances to cover future cleanup costs.<sup>17</sup> Given the scope of these inquiries, GAO did not seek to evaluate the substantial distinctions that exist between historical and modern mining practices, even though GAO recognized the potentially significant risks raised by historical mining practices no longer used.<sup>18</sup> The GAO identified three active phosphate mines with selenium discharges that are identified by EPA as subject to the CERCLA § 108(b) rulemaking: (1) the J.R. Simplot Co. Smoky Canyon Mine; (2) the P4 Production/Monsanto South Rasmussen Mine; and, (3) the Nu-West Industries, Inc. North Rasmussen Ridge Mine.

As to the first study objective (federal oversight of mining operations and changes since the discovery of selenium discharges in 1996), the GAO concluded that the Bureau of Land Management (“BLM”) and U.S. Forest Service (“USFS”), the two federal agencies with primary authority over mining on federal lands, have undertaken a number of actions to strengthen their oversight of phosphate mining “to reduce the likelihood that new and ongoing mines will result in additional sources of selenium contamination and improve the management of ongoing CERCLA cleanups.”<sup>19</sup> An example of these efforts is the requirement for more detailed environmental analyses for approving mine plans, including the identification of potential selenium sources, evaluation of how the phosphate mines would affect surface water and groundwater, and an evaluation of engineering models for options to prevent or mitigate any selenium impacts.<sup>20</sup>

Another example of changes to federal oversight to address potential selenium discharges is a requirement for more comprehensive mine plans, including modifying mining practices, some of which historically were required by the federal agencies with oversight of the operations.<sup>21</sup> For example, historical requirements dictated the use of center overburden shale (the layer that typically contains higher selenium concentrations) for cap cover materials, based on the thought that this material would be best for revegetation of the area. However, current requirements specify that overburden containing higher concentrations of selenium must not come in contact with the surface to minimize the potential for selenium discharges to the environment, effectively addressing this concern regarding historical practices.

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<sup>16</sup> Selenium is a naturally occurring metal within the mineral host matrix, with selenium concentrations varying regionally and found in the Western United States phosphate reserves.

<sup>17</sup> 2012 GAO Phosphate Mining Report at 4.

<sup>18</sup> *Id.* at 8-10 (discussing the risks raised by historical overburden management practices).

<sup>19</sup> *Id.* at 19.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 20.

In addition, and subsequent to the 2012 GAO Phosphate Mining Report, practices continue to evolve. As examples, owners and operators of phosphate mines in Idaho employ a number of other practices to prevent selenium discharges, including:

- (1) preserving available growth resources for reclamation by storing the materials in special growth media areas;
- (2) diverting “clean” run-on water around disturbance areas by using a network of diversion berms and ditches to prevent contact with mine overburden rock and to maintain a supply of clean surface water to wetlands and drainages located downgradient of the mine;
- (3) collecting surface water runoff from disturbance areas by using perimeter ditches, berms or trenches that convey potentially impacted water from ODAs to collection ponds;
- (4) characterizing, segregating and stockpiling cap and cover materials to ensure that higher selenium containing materials are placed deeper in the mine pit to minimize the chance of surface contamination, and using low selenium-containing material with low permeability for infiltration for the cap and cover; and,
- (5) using low selenium-containing material for haul roads and road grades of 10% or greater to help maintain clean water flow in existing drainages.

These practices for existing and new phosphate mines in Idaho will continue to improve the management of any naturally occurring selenium present in the host matrix and are included in permit obligations, best management practices, and reclamation practices designed to prevent the potential for selenium discharges.

Finally, GAO correctly observed that BLM, since 2001, requires full-cost financial assurances for new mines.<sup>22</sup> These financial assurances are based on the entire cost of reclaiming a given mine site, including the costs of hiring contractors and covering oversight and overhead costs to perform the work.<sup>23</sup>

As to the second study objective (actions taken by federal authorities and mine operators to address the impacts), the GAO correctly notes that area-wide investigations began in 2001, under the lead of the Idaho Department of Environmental Quality (“IDEQ”), and the response costs are being reimbursed by the phosphate mine operators under the terms of a settlement agreement.<sup>24</sup> The area-wide investigation costs to be reimbursed are as follows: (1) IDEQ – \$5,000,000 over 10 years; (2) EPA – all direct and indirect costs; (3) USFS – all direct and indirect costs; and,

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<sup>22</sup> *Id.* at 20-21.

<sup>23</sup> *Id.* at 20.

<sup>24</sup> *Id.* at 28.

(4) Shoshone-Bannock Tribes – \$65,000/annually for three years.<sup>25</sup> Further, GAO reports site-specific investigations commencing in 1998 and continuing as of March 2012.<sup>26</sup>

In addition to the general information in the 2012 GAO Phosphate Mining Report, TFI is aware of specific efforts to address or resolve potential environmental risks at active phosphate mines. For example, at the J.R. Simplot Co. Smoky Canyon Mine/Pole Canyon Overburden Disposal Area (“ODA”), during 2006-2008, Simplot implemented a removal action with USFS oversight that included constructing (1) a pipeline to convey diverted Pole Canyon Creek flow around the ODA, (2) an infiltration basin to direct remaining Pole Canyon Creek flow into the Wells Formation aquifer upstream of the ODA, and (3) a run-on ditch adjacent to the northern edge of the ODA to direct run-on from the adjacent slopes into Pole Canyon Creek below the ODA.<sup>27</sup>

Second, since the 2012 GAO Phosphate Mining Report, and based on a January 2013 removal action memorandum signed by the USFS, Simplot agreed to (1) re-grade portions of the ODA to reduce the potential for ponding of infiltration, (2) install a cover of three feet of Dinwoody over a minimum of two feet of chert/limestone to reduce infiltration into the ODA and to prevent exposure to selenium in soil and vegetation, (3) install stormwater run-on/run-off controls to convey water off the ODA, and (4) revegetate the Dinwoody surface using native non-selenium-accumulation species to control erosion.<sup>28</sup> These activities have been completed and are expected to reduce water entering the ODA by 99%,<sup>29</sup> thereby allowing the selenium concentrations in down-stream groundwater and surface water to achieve the appropriate cleanup or water quality standards through monitored natural attenuation. Based on settlements with the applicable oversight agencies, including EPA, USFS, IDEQ, and the Shoshone-Bannock Tribes, Simplot agreed to reimburse the agencies for oversight costs associated with this work.<sup>30</sup>

Further, at the P4 Production/Monsanto South Rasmussen Mine ODA, P4 Production/Monsanto entered into a Consent Decree with the United States in 2011. In that Decree, P4 agreed to pay a \$1.4 million civil penalty, spend approximately \$875,000 on

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<sup>25</sup> See Letter from Alan L. Prouty, J.R. Simplot Co., to U.S. Environmental Protection Agency at 5 (July 11, 2017) (Dkt. EPA-HQ-SFUND-2015-0781-2782) (hereinafter, “Simplot’s 2017 Comments”).

<sup>26</sup> 2012 GAO Phosphate Mining Report at 28.

<sup>27</sup> See USFS Website re: “Pole Canyon Overburden Disposal Area” (last visited May 11, 2017), <https://www.fs.usda.gov/detail/ctnf/news-events/?cid=STELPRD3834756>; see also Simplot’s 2017 Comments at 7. Notably, while Earthworks discusses selenium impacts at the ODA, it fails to mention any of the publicly-available information discussing the actions taken by the J.R. Simplot Co. to respond to, and address, the discharges. See Earthworks’ 2017 Comments at 16-19.

<sup>28</sup> *Id.*

<sup>29</sup> See USFS Website re: “Pole Canyon Overburden Disposal Area” (last visited May 11, 2017), <https://www.fs.usda.gov/detail/ctnf/news-events/?cid=STELPRD3834756>.

<sup>30</sup> See, e.g., *In re Smoky Canyon Phosphate Mine*, “Administrative Settlement Agreement and Order on Consent/Consent Order For Non-Time-Critical Removal Action,” at §§ XXV and XXVI (2006); *In re Smoky Canyon Phosphate Mine*, “Administrative Settlement Agreement and Order on Consent/Consent Order For Non-Time-Critical Removal Action,” at §§ XXIII, XXIV, and XXV (2013); see also Simplot’s 2017 Comments at 7 (identifying over \$7.5 million in reimbursed oversight costs from 2003 – 2017).

monitoring, and prevent selenium and other heavy metals from entering local waters.<sup>31</sup> Next, in 2012, P4 Production/Monsanto entered into a Consent Order with IDEQ to address groundwater concerns at the ODA.<sup>32</sup> According to publicly available information, a source characterization report for the ODA was completed in August 2013, the ODA remedial action plan was completed and new monitoring wells were installed in 2015, and work on the remedial design and implementation plan are underway.<sup>33</sup> Like the Simplot settlements, the P4 Production/Monsanto settlement with IDEQ requires reimbursement of agency oversight costs.<sup>34</sup>

Finally, for GAO's third study objective (types and amount of financial assurance and the ability of the financial assurances to cover future cleanup costs), it concluded that approximately \$91 million in financial assurance was being held to cover mine reclamation and related activities, and site assessment and remediation activities.<sup>35</sup> Only about five percent of this amount was covered by corporate guarantees.<sup>36</sup> As of 2017, and for only two active phosphate mines in Idaho owned by TFI members, financial assurance requirements totaled over \$154 million. The vast majority of these requirements are in forms other than corporate guarantees.

While Earthworks is quick to cherry-pick and emphasize limited passages from the 2012 GAO Phosphate Mining Report to assert that phosphate mining should be included in any final CERCLA § 108(b) rule, Earthworks fails to recognize that federal regulatory oversight has substantially broadened and increased since the selenium discharges were identified in 1996. Similarly, the underlying facts belie Earthworks' position: The discharges at issue result from historical mining practices no longer used today; only three of the 16 mines identified with selenium discharges are identified by EPA as subject to the rulemaking; the owners and operators of these mines are addressing the selenium discharges; oversight agencies are being reimbursed for their oversight costs; and financial assurance is in place to cover the work being done. Thus, nothing in the Earthworks' 2017 Comments refutes TFI's position that phosphate mines are not "high risk" HMFs and, therefore, should not be included in any final CERCLA rule.<sup>37</sup>

The RTOC's 2017 Comments encouraging the inclusion of phosphate mining are sparse, comprising only five lines and containing conclusory and unsupported statements such as

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<sup>31</sup> See U.S. Department of Justice ("DOJ"), "Idaho Mining Company Agrees to Pay \$1.4 Million Penalty to Settle Alleged Clean Water Act Violations" (Apr. 20, 2011), available at <https://www.justice.gov/opa/pr/idaho-mining-company-agrees-pay-14-million-penalty-settle-alleged-clean-water-act-violations>; see also *United States v. P4 Production, LLC*, No. 4:11-cv-00166-BLW, "Consent Decree" (D. Id. 2011).

<sup>32</sup> See Southeast Idaho Selenium Project, "Update: Phosphate Mine Site Investigations and Cleanup in Southeast Idaho" (May 2016), available at <https://www.deq.idaho.gov/media/60178549/phosphate-mine-site-investigations-cleanup-southeast-idaho-fact-sheet.pdf>; see also *In re P4 Production, LLC*, "Consent Order" (2012).

<sup>33</sup> See Southeast Idaho Selenium Project, "Update: Phosphate Mine Site Investigations and Cleanup in Southeast Idaho" (May 2016), available at <https://www.deq.idaho.gov/media/60178549/phosphate-mine-site-investigations-cleanup-southeast-idaho-fact-sheet.pdf>.

<sup>34</sup> See *In re P4 Production, LLC*, "Consent Order," at ¶ 25 (2012).

<sup>35</sup> 2012 GAO Phosphate Mining Report at 41.

<sup>36</sup> *Id.* (((\$4.5 million in corporate guarantees/\$91 million in financial assurance) x 100% = 4.9 percent).

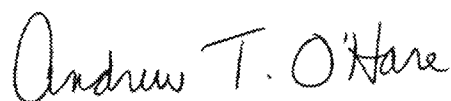
<sup>37</sup> See TFI's 2017 Comments at 9-27.

phosphate mining “presents a substantial risk of injury” and “[has] cost agencies millions in health assessment and cleanup costs.”<sup>38</sup> As set forth in detail in TFI’s comments, EPA’s rulemaking record supports the exclusion of phosphate mining from any final rule because it does not present a “high risk” and is more like the 59 sectors proposed for exclusion from the rulemaking.<sup>39</sup> Similarly, although agencies have incurred oversight costs, these costs have been reimbursed by the responsible owners/operators. Thus, the RTOC’s 2017 Comments do nothing to support the inclusion of phosphate mines as “high risk” HMFs.

### CONCLUSION

TFI appreciates your consideration of these additional comments on the Proposed Rule. Nothing in other parties’ comments submitted to the administrative record alters TFI’s position that EPA should explicitly recognize in the final rule that (1) the phosphate and potash sectors do not represent the “highest” risk, (2) any risks in these sectors are already adequately addressed by federal, state, or local requirements and RCRA consent decrees (for phosphoric acid manufacturing facilities), and, therefore, the Agency should clearly exclude these sectors in the regulatory text of the final rule. Please contact me at Ex. 6 or by email at [aohare@tfi.org](mailto:aohare@tfi.org), with any questions.

Sincerely,



Andrew T. O’Hare  
Vice President, Public Policy

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<sup>38</sup> RTOC’s 2017 Comments at 3.

<sup>39</sup> EPA Memorandum re: “Mining Classes Not Included in Identified Hardrock Mining Classes of Facilities” (June 29, 2009) (Dkt. EPA-HQ-SFUND-2009-0265-0033 and EPA-HQ-SFUND-2015-0781-0303); *see* TFI’s 2017 Comments at 9-27.