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March 3, 1989

The Honorable Max Baucus
United States Senate
Washington, DC 20510

. . . distributed as another membership service by the American Mining Congress

Dear Senator:

Enclosed are comments of the American Mining Congress (AMC) on S.2773, the "Waste Minimization and Control Act of 1988," which you sponsored last year. We understand that you plan to reintroduce the bill in the current Congress. I am pleased to provide you with the mining industry's views in the hope that they will be helpful as your Subcommittee considers this legislation.

The American Mining Congress is an industry association that encompasses: (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry.

I would be happy to discuss these comments with you or your staff at your convenience. We look forward to working with you in your leadership role of this issue that is of utmost importance to the mining industry.

Sincerely,

John A. Knebel
President

Enclosure

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President

COMMENTS OF THE AMERICAN MINING CONGRESS

ON THE

WASTE MINIMIZATION AND CONTROL ACT OF 1988

FEBRUARY 28, 1989

COMMENTS OF AMERICAN MINING CONGRESS
ON THE WASTE MINIMIZATION AND CONTROL ACT OF 1988

One of the issues facing the Congress in its upcoming deliberations concerning reauthorization of the Resource Conservation and Recovery Act (RCRA) is the extent to which Congress will address regulation of mining wastes. The American Mining Congress (AMC), which has been involved with various aspects of federal mining waste regulation for over a decade, offers the following comments on a major RCRA reauthorization bill, the "Waste Minimization and Control Act of 1988," offered by Senators Baucus and Durenberger late in the last session of the 100th Congress. The first part of these comments is a summary of AMC's position, followed by detailed analysis and some recommendations.

SUMMARY

AMC generally supports legislation amending Subtitle D of RCRA with respect to the management of solid wastes from mining, beneficiation, and processing of ores and minerals. Such legislation should be directed toward completing the decision-making process for these wastes, which began with the Bevill Amendment to RCRA in 1980. AMC believes, however, that the Subcommittee preferably should consider legislation for mining and mineral processing wastes separately from amendments for markedly different wastes or industries, because the issues and available information vary considerably and deserve focused effort that an omnibus legislative package cannot provide.

Maintaining state primacy is fundamentally important to any solid waste management legislation, whether or not it groups mining and mineral processing wastes with other waste categories. State primacy is important to mining waste regulation not only because preserving ongoing state programs and existing expertise is appropriate, but also because the States can more efficiently apply and monitor requirements necessary to protect health and the environment based on the widely varying conditions that exist at mining industry facilities. To legislate a program for these sites that is based on a Subtitle

C approach would virtually guarantee the imposition of uniform national standards under a redundant federal-state program. This cannot be justified by the marginal, if any, risks to health and the environment that these sites pose today.

Legislation should be designed to provide for enhanced federal oversight of EPA-approved state mining waste programs, with authority in EPA to establish, implement, and enforce a program if a state fails to obtain approval. To the maximum extent feasible, the legislation should build on the existing legal structure. It should not require wholesale changes to existing regulatory mechanisms, such as operating permit or approval systems, and it should not impose uniform minimum technology requirements in lieu of allowing requirements tailored to meet site-specific conditions.

AMC urges that any legislative initiative in the area of waste reduction or minimization not gloss over the very different origins, quantities, and character of wastes generated in different industries. The hardrock mining and processing industry, for instance, has extremely limited options to reduce its wastes that are predominantly a byproduct of the elemental makeup of its feedstock. Nonetheless, our industry has made major advances in recycling and reuse of materials, which have resulted in substantially lowered concentrations of metals in the wastes that must inescapably be generated. Mandatory waste reduction legislation is not needed to spur further advances in the mining industry. AMC recommends that the Subcommittee follow the recommendations of its own analytical staff, the Office of Technology Assessment, and consider, at most, legislating national waste reduction goals, not mandatory standards.

Finally, AMC urges the Subcommittee to revise the bill's national policy statement establishing an across-the-board hierarchy for approaches to waste management. The bill should recognize that all five of the approaches identified are legitimate, and the choice of one, or an appropriate mix, must depend on the circumstances of a particular industry, a particular plant, and even a particular process. The hardrock mining industry inherently has less flexibility to alter feedstocks, processes, and other aspects of production than many industries. We are concerned that a Congressional mandate to EPA and

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the States to emphasize source reduction, for example, would be totally unworkable if applied to our facilities.

NEED FOR LEGISLATION

A substantial body of information about mining and mineral processing wastes has been gathered and analyzed under the Bevill Amendment to RCRA enacted in 1980. EPA has filed its report to Congress, has issued its formal determination on mining wastes, and has completed a study and draft report to Congress on mineral processing wastes. EPA determined that compliance with RCRA Subtitle C requirements would be technologically impracticable and economically infeasible for mining waste management facilities and concluded that it should develop rules under the existing authority in Subtitle D of RCRA to guide State regulation of mining wastes. EPA also stated that it may seek amendments to Subtitle D granting it express oversight and enforcement authority with regard to state programs.

EPA embarked on developing the administrative side of the Subtitle D mining waste program in the form of the so-called "Strawman" rule proposal. The Western Governors Association, AMC, and other organizations have reviewed the initial drafts of the "Strawman" and commented that it failed to acknowledge ongoing state regulatory programs, subordinated the States' decision-making to EPA's with respect to permitting and the setting of performance standards, and generally dispensed with the States' authority to consider site-specific, facility-specific, and waste-specific factors when imposing regulatory requirements to insure protection of public health and the environment. Recent meetings between state representatives and EPA staff have provided encouraging signs that the "Strawman" will be redrafted to meet many of the States' concerns and be more consistent with the Administrator's formal determination of 1986.

AMC is optimistic that the revised "Strawman" will represent an appropriate balance between state and federal interests. If it does, the only amendments to RCRA needed for mining wastes would be to authorize EPA to prescribe a state-specific program where a state fails to do so and to enforce that program and permits issued under it.

The prospects for mineral processing wastes, however, are not as bright. The Bevill Amendment study, determination, and recommendation process has been interrupted by decisions of Federal courts and subsequent EPA rulemakings. Those actions list as hazardous some processing wastes and would remove most of the other processing wastes from potential Subtitle D regulation, thereby relegating them to Subtitle C if they exhibit a hazardous characteristic. Such a fragmenting of regulatory approaches is totally inconsistent with the integrated nature of extraction, beneficiation, and processing operations in the industry AMC represents. This fragmented approach would ignore the real-world technical and economic interdependence of our industry's operations. This is not a theoretical objection. Application of the RCRA "mixture" and "derived from" rules will necessarily push many mining and beneficiation wastes at integrated facilities out of Subtitle D and into Subtitle C, because they will take on the regulatory character of listed or characteristic hazardous wastes. In addition, the corrective action requirements in Section 3004(u), which may apply to the processing wastes, would have much the same effect on the mining and beneficiation portions of an integrated facility.

AMC urges the Subcommittee to direct its legislative efforts on mining industry wastes toward these problems we have identified. In many respects, the provisions of S. 2773 ignore EPA's 1986 recommendations and go beyond what is needed for a reasonable regulatory approach. AMC does not support the bill's approach of combining measures for municipal landfills with those for mining and other Bevill Amendment study wastes. Nor can AMC support the approach, taken in at least two places in the bill, of blurring the distinctions between Subtitle C and Subtitle D requirements. This approach will not work for industry or for the State agencies that must carry out Federal regulatory dictates. AMC and its members offer their assistance to help tailor legislation designed to fit limited problems.

STATE/FEDERAL RELATIONSHIP

The principal problem with the bill, in AMC's view, is that it subordinates the States' role to that of EPA. In virtually all important areas of solid waste management, the bill adopts or approaches the RCRA Subtitle C structure, which is a uniform, nationwide federal program delegated to authorized states. This contrasts with the existing RCRA Subtitle D approach, which is a state primacy program under Federal guidance and oversight. EPA's determinations and recommendations on mining wastes do not justify the bill's dramatic shift away from primary reliance on the States. No case has been made by EPA or in the hearings held last year on S. 2773 that existing state regulatory programs and modern mining waste management practices have failed to protect public health and the environment. AMC is concerned that the bill's current provisions would result in governmental inefficiencies and greater costs due to the overlap of state and federal powers and responsibilities. The mining industry operates to a large extent in a resource-limited world of fierce international competition; it needs certainty and continuity at home that the "multiple-stop shopping" inherent in federal-state regulatory redundancy cannot provide.

Solid Waste Management Guidelines

Section 204 of the bill would require EPA to set "minimum design and operating standards" for several categories of waste management facilities, including those "for materials generated from the exploration, development, and processing of ores and minerals, including heap and dump leach piles." This is the only listed category that uses the term "materials generated" rather than "wastes," and it threatens to single out the mining industry for expansion of RCRA's jurisdiction well beyond its current reach. The bill should use language consistent with RCRA and make clear that it applies only to "wastes," which means materials that are discarded. AMC also is concerned about the bill's apparent substitution of the terms "exploration, development, and processing of ores and minerals," for "extraction, beneficiation, and processing of ores and minerals," which is used in Sections 8002(p), 3001(b), and 3004(x) of RCRA. The new terms are not defined in the bill. AMC hopes that these terminology changes are merely drafting oversights and do not represent a new policy initiative. Use of the term "source" in Section 204(d) also appears to be a drafting oversight, as that term is one used in other environmental statutes but not RCRA.

The "design and operating standards" guidelines called for by Section 204 appear to be more prescriptive than is appropriate or necessary for mining waste management facilities. Any federal guidelines should be considered and applied as appropriate by the States to meet site-specific, waste-specific circumstances, and protect public health and the environment. Although this ultimate protective goal is expressed in Section 204(f), that section also would require that the federally established design and operating standards embody "best available control technology" (BACT) for both active and inactive mining waste management facilities. BACT is not defined, but the term's origins are in the Clean Air Act where it applies to new, not existing, facilities. When the BACT requirement is read together with the bill's guideline requirements for liners and leachate collection systems and treatment of discharges of all contaminants, it appears inescapable that EPA would have a mandate to set uniform national standards to meet "worst case" conditions, from which States would have little discretion to vary.

Permit Requirements

Section 203's permit requirements represent still further federal takeover of state primacy in solid waste regulatory decision-making. AMC is not aware of any demonstration that state administrative approval procedures--whether traditional permitting or some other enforceable approach--are inadequate to impose conditions under which waste management facilities may operate. Surely such deficiencies as may exist do not necessitate the wholesale voiding of existing state permits one year after this bill's enactment, which would be the result of the requirements in Sections 203(a), (b), (c) and (e). If, for example, a state does not have the authority after one year to issue permits based on "best professional scientific and engineering judgment," EPA would have to take over permitting immediately, because all of the State's permits would be terminated.

The bill's only alternative to this chaotic permit situation is the provision stating that a facility would be deemed to have a permit if it can demonstrate that it is releasing no hazardous substances or is controlling such releases by meeting Subtitle C corrective action requirements. Obviously, this would directly contradict the conclusions of the RCRA Studies and the EPA regulatory determination. Further, this is not a realistic option for mining waste management facilities, which of necessity must utilize land disposal practices. That these facilities have at least some minor releases of metals is almost certain, because by definition mine sites contain naturally occurring elements typically found in mineralized zones. These facilities would not be carrying out RCRA Section 3004 corrective action because they have never been legally subject to Subtitle C requirements.

Two other problems with the bill's federalized permit scheme should be noted. First, Section 203 would not appear to allow states to continue existing, legally enforceable approval mechanisms that are the equivalent of traditional permit approaches. AMC recommends that "permit" be defined to include such approval procedures, provided they incorporate opportunity for public participation. Second, the 10-year maximum permit life the bill would prescribe is unwarranted. States should be allowed the option to issue permits (or approvals) for the life of a facility so long as there are adequate provisions for reopening the permit for revision when regulatory requirements or other material circumstances change. AMC's experience is that a regulatory program presents an abundant workload for industry and government without adding arbitrary and unnecessary milestones that create work but serve no substantive purpose.

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Federal Enforcement

With respect to any state that is operating an approved program, Section 205 should provide for primary enforcement by the state and a programmatic review by EPA of state enforcement activities. RCRA amendments creating a Subtitle D program for mining wastes should provide for supplementary enforcement by EPA only in those states that choose not to have or fail to develop an approved program. The proposed language in Section 205(a)-(e) should apply only in the absence of a state program. The 60-day notice to the state in Section 205(a) should expressly include an opportunity for the state to determine whether it agrees a violation has occurred and to respond to EPA. In addition, the public hearing called for in Section 205(b) should be an adjudicative hearing, because many facts may be in dispute, and cross-examination must be available to help insure accuracy.

Section 202 of the bill also contains provisions of an enforcement nature--the federal funding and permitting moratorium that would automatically take effect in a state that does not submit a plan for EPA approval. This moratorium is much broader in scope and more severe than the Clean Air Act measures upon which it is patterned. All federally funded, guaranteed, or permitted activities would be covered, irrespective of their contribution to solid waste management problems. The exemption language is illusory, because virtually all the activities contemplated would generate some solid waste.

WASTE REDUCTION AND RECYCLING

Goals and Standards

AMC agrees with several of the waste reduction and recycling initiatives included in Title III of the bill but believes that some of the provisions should be revised or deleted altogether. AMC supports the concepts of establishing an Office of Waste Minimization within EPA, providing for technical assistance grants to states, creating a National Packaging Institute, and fostering recycling through selected federal procurement guidelines. We also support establishment of national hazardous waste reduction or minimization objectives.

AMC does not believe, however, that the mandatory waste reduction approach proposed in Section 305 of the bill is feasible for industry in general. Certainly it is not workable for the ore and mineral mining and processing industry. Due to geological and metallurgical constraints, feedstock composition, and technological and economic infeasibility of major process changes, the mining industry has limited flexibility to reduce wastes. Our industry has made and is continuing to make advances in the recycling and reuse of materials, within the unique limitations we face, and has succeeded in turning historically discarded materials into marketable products. Based upon our experience in developing and implementing waste reduction practices, AMC believes that flexible national goals for hazardous waste reduction are appropriate, as long as implementation of those goals is left to industry on a plant-by-plant basis so that the realities of economics and technology can be addressed. States should be assigned a role in fostering and overseeing progress in industrial waste reduction through their regulatory and commercial development programs.

AMC agrees with the recommendations against mandatory waste reduction made by the U.S. Congress' Office of Technology Assessment (OTA) in its 1986 report, "Serious Reduction of Hazardous Waste for Pollution Prevention and Industrial Efficiency." These conclusions from the report's summary are particularly relevant and should guide the Congress in its consideration of waste reduction legislation:

> OTA finds that it would be extraordinarily difficult for government to set and enforce waste reduction standards for a myriad of industrial processes. Summary, page 10.
>
> As long as waste reduction is a voluntary effort by industry, the site-specific character of waste reduction can be handled by the individual

> waste generator. But if government were to require waste reduction it would face major difficulties in determining what is technically and economically feasible or practical for a specific industrial operation. Id. page 49.
>
> [S]ome types of mandatory waste reduction regulations with enforced penalties for non-compliance could harm international competitiveness for some industries and products because they are too inflexible, are inattentive to site-specific constraints, or ignore capital investment needs. Id. page 23.

To ignore these OTA conclusions and embark on a mandatory standard waste reduction program such as that in Section 305 would be a mistake . The plant-by-plant waiver provisions contained in the section would not provide practical relief. They recognize technical infeasibility as grounds for a waiver but say nothing about economic infeasibility. Furthermore, waivers under Section 305 would be conditioned upon employing continuous monitoring equipment for a host of substances that are not regulated, in most instances, under RCRA or under other environmental programs that require appropriate monitoring. Where the mining and mineral processing industry is concerned, the section would mandate continuous monitoring equipment that does not exist for many processes and substances.

Regulation of product constituents

As an industry that supplies materials incorporated in a multitude of products, the membership of AMC is concerned that the regulatory approach that Section 310 would apply to product constituents is excessively rigid and redundant. The Section 310 program of mandatory waste reduction is at odds with the well-considered conclusions of the OTA Report. AMC is not aware of any factual basis for the section's approach of placing 10 products each year on a "hit list" and believes that dictating such an approach will result in regulatory decisions with inadequate scientific support. If the disposal of certain products were to be shown to present risks to human health or the environment, adequate authority now exists in RCRA to require improved disposal practices. Finally, if altered disposal requirements could not adequately reduce risks, EPA has authority under the Toxic Substances Control Act (mentioned in Section 310) to regulate or prohibit substances that create unreasonable risks.

Federal Procurement Guidelines

Section 311 of the bill concerns Federal procurement guidelines for various products. AMC favors the section's basic purpose of having the Federal Government substantively involved in enhancing markets for products containing recycled materials. The section goes too far, however, by prescribing standards for recycled material content when EPA does not set a guideline. This is an unnecessary intrusion into the marketplace. For example, recycled lead already competes successfully with the virgin material and is used in more than 50% of lead-acid batteries manufactured nationwide; Section 311's standard would at best skew the market toward government purchases and create verification paperwork. The section's "default" standard for recycled aluminum is equally unnecessary, although it at least contains an express recognition that product cost and quality may be considered--an element lacking in the recycled lead standard.