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Submitted via www.regulations.gov

Ms. Sarah Reese
Office of Regulatory Policy and Management
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

***RE: Comments on EPA's "Evaluation of Existing Regulations"***
***Docket #: EPA-HQ-OA-2017-0190***

Dear Ms. Reese:

Mosaic Fertilizer, LLC (Mosaic) appreciates the opportunity to submit the following comments regarding "Evaluation of Existing Regulations." This Request for Information was published in the *Federal Register* on April 13, 2017 at 82 FR 17793. In that notice, comments were requested to be posted to the regulations.gov website by May 15, 2017.

This letter focuses on items of high priority. For more comprehensive comments, please review the comment letter submitted to this docket by The Fertilizer Institute (TFI).

## Scope of U.S. Phosphate Operations

Mosaic is one of the world's largest producers of manufactured phosphate products with 15% of the world phosphate production. For more than a century, Florida's phosphate industry has been a major economic driver in central Florida. We currently own or control more than 350,000 acres of land and have approximately 3,600 employees in central Florida (with an additional 2,200 contractors working at our Florida sites). We also own two fertilizer manufacturing plants in Louisiana with approximately 400 employees. *

According to a 2015 study released by Port Tampa Bay, phosphate accounts for nearly 71 percent of the Port's $17.2 billion annual economic activity. In addition, the phosphate industry supports more than half of the Port's 85,000 direct, indirect and related jobs.

We are proud to be a competitive producer with strong customer relationships, and have the financial strength to invest in growth and innovation. We've led the industry in developing high-quality premium products that help farmers succeed, while demonstrating our shared commitment to good corporate citizenship in all of our operating communities. Our products nourish about 70% of the nation's crops, helping to maintain a stable and reliable food supply.

* *As of March 2017, Mosaic Fertilizer LLC and its parent, The Mosaic Company have a total of 4,655 employees in the U.S., including 414 employees at the Carlsbad, NM potash mine and the corporate office in Plymouth, MN.*

**Comments**

The following information regarding repeal, replacement or modification of regulations is being submitted in your suggested format.

1. **CERCLA 108(b) – Proposed Regulation**
   a. Regulation: 40 CFR Part 320; Published in the Federal Register 82 FR 12333; Docket #: EPA-HQ-SFUND-2015-0781-2379
   b. Potential Impact:
      Annual cost: >$500,000/ year for additional (duplicative) financial assurance
   c. Recommendation: Remove phosphate and potash mining from the definition of Hard Rock Mining or cancel the proposed rulemaking altogether.
   d. Summary of Concern:

The proposed CERCLA rule with respect to phosphate and potash mining is unnecessary and duplicative, as confirmed in a review by the Small Business Administration and Small Business Regulatory Enforcement Fairness Act panel (SBRFA). Phosphate and potash mining operations present very low risk with respect to hazardous material use and risk of releases, and do not employ practices used by Hard Rock Mining (HRM) enterprises (*i.e.,* gold or copper). During the development of the proposed CERCLA 108(b) rule, 59 mined commodities—as matter of policy—were excluded due to low risk. Phosphate mining is similar to excluded commodities and is unlike HRM in material respects. For example, in Florida both phosphate mining and aggregate mining (an excluded commodity) involve shallow pits (< 100 ft) of unconsolidated materials and use only physical separation processes in beneficiation (no chemical reaction or leachate). There are no phosphate mines on the CERCLIS list.

With respect to potash, potash is a salt. Salt mining is among the 59 mining commodities excluded from the scope of the CERCLA rule as being low risk, and potash mining employs the same processes as salt production. Because it is a salt, potash should be categorized as a salt, and thus exempt.

While phosphate mining presents low risk from its use of hazardous materials, Mosaic has a financial responsibility to complete reclamation—to return mined land to beneficial use. To guarantee this, bonds are the mechanism typically used to provide the assurance of adequate funding. For example, one Mosaic Florida mine posts bonds in the amount of about $40 million, based on actual costs, to assure reclamation is completed. The costs and bonds are verified and updated annually. To compare this to the liability generated in the CERCLA 108(b) formula—an almost impossible exercise because the HRM assumptions and processes don't correlate to phosphate mining—the CERCLA formula yields a financial assurance requirement in the amount of about $400 million for the same mine – an order of magnitude greater. Maintaining bonds on all Mosaic phosphate mining operations at this level would increase Mosaic's costs by well over $500,000 per year, provided the marketplace has such capacity, and would underwrite a risk that is wholly unsupported.

This proposed rule also includes fertilizer manufacturing in the HRM category. Fertilizer manufacturing is akin to chemical manufacturing, not HRM. Chemical manufacturing is a separate category which may

be subject to future rulemaking. The main environmental risks associated with Mosaic's fertilizer manufacturing operations have already been evaluated and addressed under RCRA settlement agreements. EPA has deemed the bulk of wastes from those operations to be "high volume/ low toxicity" and subject to RCRA's Bevill exemption. Notably, those settlements required Mosaic to place $630 million into trust to backstop the company's commitment to close and care for phosphogypsum stack systems, which store a by-product generated during our fertilizer production process.

**2. Clean Water Act Section (404) – Existing Regulation**

a. Regulation: 40 CFR Part 230; (and companion ACOE regulations 33 CFR 320) , including the 2008 Mitigation Rule

b. Potential Impact:

Due to the 6 to 8 year time frame experienced for issuance of a large 404 permit, mine plans may have to be changed and adjusted to maintain, to the extent possible, production while awaiting permit issuance. The unpredictability of the permitting process results in tremendous uncertainty in production planning, adds significant costs to both production and permitting, and may unjustifiably delay a project for years.

c. Annual cost: Several million dollars/ year in inefficiencies typically occur for permit processing times in excess of 6 years.

d. Recommendation: Add streamlining/ time efficiency provisions, clarify the meaning of various concepts, and reduce the complexity of delegation of the program to the states.

e. Summary of Concerns: Issues with the 404 Permit Program include:

- Lack of fixed time frames for agency reviews – This allows the permit process to drag out for years, with no urgency on the part of agency staff to finalize. Issues may be reviewed and revisited several times during this process whether by a single reviewer, or when agency staff turnover occurs. It is recommended this process be amended to mirror regulations such as those in the State of Florida, 62-330 Florida Administrative Code. For example, upon application submittal, the Florida Department of Environmental Protection (FDEP) has 30 days to review and submit a formal Request for Additional Information (RAI). The applicant then has 90 days to respond. Either party may request a time extension if more time is needed for complex review or response. Upon receipt of the additional information response, the process repeats. This process allows state permit applications, with essentially the same review criteria, to be processed in about half the time it takes to process a federal 404 application.

- Uncertainty due to EPA permit veto authority – Mine development requires the commitment of significant resources. EPA's authority to veto a permit after issuance puts that investment at risk. It is recommended that the rule be changed to provide certainty that a final, effective permit is, in fact final, subject to customary re-openers.

- Overlap between the Army Corps of Engineers and EPA and program delegation – The 404 process is complicated by the need to interact with multiple federal agencies that may not have the same objectives. Delegation of the 404 process to the State of Florida would significantly streamline the permitting process. Care, however, should be taken not to overly complicate the state assumption process. For example, an overbroad scope of waters remaining subject to federal authority under Section 10 of the Rivers and Harbors Act may make assumption impractical. Delays could also ensue without a clear definition of the boundary between federal and state jurisdictional waters. A process that is too subjective, becomes vulnerable to challenges and delays.

- Waters of the U.S. – Mosaic supports revising the Waters of the U.S. rule using Scalia's standard defining the extent of federal jurisdiction through "relatively permanent waters." This will remove much of the subjectivity from federal wetland delineations, improving efficiency, and being closer to the original focus of the regulation on navigable waters.

- Beyond that, the permitting process is manifest with confusing, seemingly arbitrary interpretations. Here are examples we have encountered with the EPA and ACOE under the 2008 Mitigation Rule.

    - Example 1: Compensatory Mitigation Sustainability

Ex. 1: 33 CFR 332.7(b) states - *Sustainability.* Compensatory mitigation projects shall be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary.

Summary of the Issue (Compensatory Mitigation Sustainability): This provision has been interpreted to require funding into perpetuity, even for systems without active engineering features. Natural systems are considered self-sustaining and once performance standards have been achieved for permittee responsible mitigation (with no engineering features), these systems are also self-sustaining. Natural, undisturbed wetlands evolve, *e.g.,* in vegetation composition, over time due changes in natural conditions. The ACOE's interpretation of its rule in this manner—not mandated by the rule or underlying statute—seeks to prevent such natural evolution in favor of mandating intervention to maintain an unnatural static system. Even so, the codified Conservation Easement itself (*i.e.,* 33 CFR 332.4(c)(4) Site Protection Instrument) provides assurance of perpetual protection in natural condition, regardless of current and future owners of the property, through the agency's right to enforce baseline conditions. Therefore, the interpretation of this provision that a perpetual funding arrangement is required, is both unreasonable in interpretation, and also adds unreasonable time and expense to permit processing and long term project costs.

- Example 2: Grazing and Long Term Management

Ex. 2: 33 CFR 332.7(a)(2) states - The mechanism providing long-term protection of the compensatory mitigation site (*i.e.,* management plan or real property instrument) must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

Summary of the Issue (Grazing and Long Term Management): The ACOE/ EPA recently interpreted this provision as a prohibition against grazing. Grazing, however, particularly in accordance with best management practices (BMPs) has an important and beneficial role in ensuring wetland mitigation sites remain sustainable, with grazing fulfilling an important ecological maintenance function on many state of Florida conservation lands (See also Fla. DACS Publication P-01280, Best Management Practices for Florida Cow/ Calf Operations, 2008). Grazing can also create economic activity on large expanses of land that reduces management needs, as well as creates a funding source for other management—such as fencing and clean-up of unauthorized trash dumping. Grazing is compatible with the easement because it helps control invasive plants and maintains lower height of ground cover plants, desirable for a number of species of protected wildlife. Without grazing, more intense chemical treatment (herbicide) may be required which adds chemicals to the soil column.

The beneficial use of grazing has also been recognized by the U.S. Department of Agriculture (USDA) in its Wetland Reserve Program, where the USDA worked with ranchers to protect, restore and enhance private property wetlands. Regardless of how one comes down on the ultimate policy question of grazing or no grazing, it is so fundamental to rural property use that a decision to prohibit grazing should either be done at the congressional level or—at a minimum—through specific rulemaking. Thus, in accordance with the provision above, grazing should be considered consistent with the plain language of the rule, and particularly compatible with large rural compensatory mitigation sites (over 1,000 acres) that have been grazed for generations yet are still in excellent condition.

**3. EPA – RMP Rule – Existing Regulation**

a. Regulation: 40 CFR Part 68; Comment Period open until 05/19/2017 in re: Extending Effective Date to 02/19/2019
Docket #: EPA-HQ-OEM-2015-0725-0760

b. Potential Impact: This rule increases the administrative burden on operating companies and local first responders without a corresponding or measurable increase in safety or benefit. Creates extra expense through recordkeeping and production, rapid turnaround times and potential security risks with respect to record production, hiring of 3rd party auditors with no direct facility knowledge to lead incident audits/ investigations, and mandated five (5) year Safer Technology and Alternative Analysis (STAA) reviews.

c. Annual Cost: Annual costs reflect the addition of administrative recordkeeping time at an estimated cost of about $60,000/year per facility.

d. Recommendation: Repeal the rule as unfounded with respect to significant increases to operator costs without correlating benefits.
e. Summary of Concerns:

These regulations require public release of sensitive materials related to potential facility vulnerabilities which can increase, not decrease, risk by mandating a facility to provide any information deemed relevant by local emergency planners, with no exemptions or protection of confidential business or security related information. This increases the potential that such information may be used for an unlawful purpose, posing risks to the facility and host community. The rule also expands the incident auditing process, requires the process to be led by a 3rd party auditor with no direct knowledge of the facility. It requires a "Safer Technology and Alternatives Analysis" (STAA) to be performed every five (5) years and even if findings support the use of current equipment as the best economically feasible technology, General Duty Liability can be enhanced if an incident occurs.

In addition there is duplication and overlap of the Occupational Safety and Health Administration's (OSHA) Process Safety Management (PSM) program and the EPA's Risk Management Program (RMP). These programs have separate recordkeeping and reporting obligations and separate teams of federal agency officials involved in administration and enforcement. These programs should be consolidated into one to improve efficiency.

4. Matters Pending from Previous Administration
   a. **EPA Conductivity Guidance**
      i. Regulations: Draft guidance document entitled: *"Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity"*, released on December 23, 2016, 81 FR 94370; Docket Number: EPA-HQ-OW-2016-0353
      ii. Potential Impact: Technical flaws in this guidance would result in more complex stream standards without a corresponding environmental benefit to the protection of sensitive aquatic life.
      iii. Comment Letters: See Florida Department of Environmental Protection (FDEP) Comment letter EPA-HQ-OW-2016-0353-0044 and Cardno Comment Letter regarding Florida environmental concerns EPA-HQ-OW-2016-0353-0038
      iv. Recommendation: Withdraw the draft Conductivity Guidance

**b. NPDES Permit Update**

i. Regulations: Proposed regulation entitled: *"National Pollutant Discharge Elimination System (NPDES): Applications and Program Updates"* released on May 18, 2016, 81 FR 31344; Docket Number EPA-HQ-OW-2016-0145

ii. Potential Impact: Revising 40 CFR 123.44(k) to allow EPA broad discretion to intervene in certain "Administratively Continued Permits" by reclassifying them as "Proposed Permits" would result in more process and delay, without corresponding benefits to water resources. Because in Florida, there is an interrelationship between NPDES permits and solid waste management approvals, if EPA were to usurp the state's NPDES permitting authority, it would result in increased administrative burden to the applicant to obtain a separate solid waste management approval. Further, this expansion of EPA authority is contrary to its own expressed opinion (See EPA's Response to Petition for Mandamus, *in re Sierra Club, Case No 12-1860 (1st Cir. March 14, 2013, pg 10-12)*), where EPA claimed that due to permit complexities and the need in some cases for detailed analyses, states are in the best position to set priorities and allocate resources.

iii. Comment Letters: See FDEP Comment letter EPA-HQ-OW-2016-0145-0111 and The Fertilizer Institute (TFI) Comment Letter EPA-HQ-OW-2016-0145-0167

iv. Recommendation: Withdraw the proposed NPDES Permit Update Rule

We appreciate the opportunity to provide this information. Please let me know if we can provide further assistance. My contact information is provided above.

Sincerely,

Deedra M Allen

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Director – Regulatory Affairs