Mining and Metallurgical Society of America

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July 11, 2017

Environmental Protection Agency
Office of Resource Conservation and Recovery
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

RE: Comments on the U.S. Environmental Protection Agency's Proposed Rule: Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry

Docket ID No. EPA–HQ–SFUND–2015–0781

Submitted electronically to: http://www.regulations.gov

I. Introduction

The Mining and Metallurgical Society of America ("MMSA") is a 501(c)(6) professional organization composed of senior-level mining professionals dedicated to increasing public awareness and understanding about mining and why mined materials are essential to modern society and human well being. Our members are mining engineers, metallurgists, geologists, and other professionals who work in the mining industry in all parts of the United States. MMSA has been an advisor to Congress, was instrumental in the establishment of the former U.S. Bureau of Mines, and continues support for reasonable mining regulation. Our 109 year-old organization is dedicated to promoting and improving understanding and appreciation of the role of the U.S. mining industry.

MMSA is providing these comments on the U.S. Environmental Protection Agency's ("EPA's") January 2017 Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry Proposed Rule[1] ("Proposed Rule"). MMSA members have serious concerns about this onerous and indefensible rule because it duplicates the financial assurance requirements that are already in place in other federal regulations and in state regulations. These existing federal and state regulations already provide comprehensive environmental protection and Financial Assurance ("FA"), also known as bonds, that protect US taxpayers from shouldering the liability of future cleanups at hardrock mines. Consequently, the Proposed Rule is unnecessary.

[1] Federal Register Vol. 82, No. 7 ("FR") pp. 3388 – 3512.

We believe that implementation of the Proposed Rule would significantly chill investment in this country's hardrock mining industry and significantly increase the Nation's reliance on import of important hardrock minerals including but not limited to copper, zinc, gold, silver, molybdenum, lithium, lead, and rare earths. The adverse consequences stemming from this rule would thwart the development of important domestic supplies of these minerals and interfere with our members' core business interests. The remainder of this letter describes our specific concerns about the Proposed Rule.

II. The Proposed Rule is Seriously Flawed and Unjustifiable

A. CERCLA § 108(b) is Anachronistic and CERCLA § 108(b) FA is Duplicative

The directive in CERCLA § 108(b)(1) made sense when Congress enacted it more than three decades ago when there were few federal or state bonding programs in place. However, fast-forward thirty years and state regulators and the Federal Land Management Agencies ("FLMA")[2] have developed detailed and comprehensive FA requirements. During this rulemaking process, numerous entities including but not limited to state and federal regulators, small business representatives, mining companies, and mining trade associations have provided EPA with a great deal of information about the extensive scope of today's FA programs. For example, the FLMAs have approximately $3.5 billion in FA, Nevada regulators have $2.66 billion, Alaska regulators have $844 million.

The FA that today's state and federal bonding programs require make an EPA-driven FA requirement pursuant to CERCLA § 108(b) redundant. State regulators and the FLMAs have provided EPA with overwhelming evidence of how existing state and federal bonding requirements for hardrock mines reduce environmental and human health risks to an insignificant level. These comprehensive state and federal programs eliminate any reason for the CERCLA § 108(b) financial assurance rule, which is completely superfluous and is not necessary to protect the environment or to shield American taxpayers from exposure to cleanup costs at today's mines.

B. The Premise for the Proposed Rule is Fatally Flawed

Under the Proposed Rule, the state and federal FA requirements, which EPA contends are different from and therefore inadequate to address CERCLA § 108(b) liabilities, can be used to reduce or eliminate CERCLA § 108(b) liabilities. This proves there is no difference between the existing state and federal bonding programs and EPA's Proposed Rule. EPA's claim that CERCLA § 108(b) is different from the FA that state and federal regulators already have is making an illogical distinction without a difference.

EPA cannot have it both ways. The Agency cannot assert that CERCLA § 108(b) FA is designed to cover something different than the FA already available to state and federal regulators, and at

[2] The U.S. Bureau of Land Management ("BLM") and the U.S. Forest Service ("Forest Service)

the same time allow the supposedly different state and federal FA to satisfy CERCLA § 108(b). EPA's recognition that the state and federal programs can reduce or eliminate CERCLA § 108(b) bonding requirements clearly means EPA does not need and cannot justify a duplicative layer of CERCLA § 108(b) financial assurance.

C. EPA's One-Size-Fits-All Formulas are Inferior to the States' and FLMAs' Programs

EPA's Proposed Rule uses generic or one-size-fits-all formulas with simplistic factors like acres disturbed, water treatment rates, and precipitation to calculate financial assurance requirements. Bonds based solely on these factors overestimate or underestimate FA requirements. These seriously flawed formulas must be rejected – they cannot be fixed. As the FLMA and several states described in detail during the SBAR Panel process, FA amounts must consider important site conditions including the geology of the deposit, precipitation, topography, project design, etc., that can have a profound effect on the necessary FA.

To account for site-specific conditions, many states and the FLMA use Standardized Reclamation Cost Estimator (SRCE) software or similar reclamation cost estimating tools to calculate financial assurance obligation based on detailed, site-specific factors at each mine. Bonds calculated with these tools use government contracting rates that assume state and federal agencies will perform the reclamation work. The resulting bonds fully protect the environment and minimize the likelihood of inadequate agency funds to respond to a future release of hazardous substances, natural resource damages, and human health risks.

Although EPA acknowledges that a site-specific approach "*is the most precise approach of the three approaches considered by EPA,*"[3] it abandoned this approach in favor of the generic, one-size-fits-all methodology because basing FA calculations on site-specific conditions "*is the most resource intensive to implement.*" This admission suggests EPA recognizes that it lacks the expertise to develop and review the appropriate site-specific FA calculations. This is another compelling reason why EPA must not insert itself pursuant to CERCLA § 108(b) in the process of determining FA for hardrock mines because the states and FLMAs can do a superior job in calculating optimal FA amounts.

Additionally, the states and FLMA have already done the work in calculating site-specific FA, so there is virtually no additional burden for EPA to adopt site-specific formulas. In fact, EPA's decision to base its FA calculations on an inferior methodology, when other federal agencies and the states offer a better approach, is unjustifiable and therefore arbitrary and capricious.

D. Existing FA Programs Compel Operators to Remediate Identified Releases

EPA has completely overlooked the essential role that the monitoring and reporting requirements in existing state and federal environmental protection regulations play in virtually eliminating the possibility that a release from a permitted hardrock mine would go undetected and un-remediated for a significant period of time. Neither the Proposed Rule nor the supporting documents in the

[3] 82 Fed. Reg at 3460 (Jan. 11, 2017)

docket describe how environmental monitoring systems and reporting requirements in state and federal operating permits act as real-time, early-warning systems that provide state regulators, the FLMAs, and operators with indicators of a possible release of a hazardous substance. If project monitoring data detect a potential release, state and federal regulations compel the operator to investigate the potential release and remediate a confirmed release.

If a release is verified, operators must initiate corrective response actions in a timely manner. This means that a release from a permitted mine is limited in degree and duration. This stands in stark contrast to pre-regulation sites where it was not uncommon for un-remediated releases to occur over a long period of time because they were not detected – especially in the case of releases to groundwater. Today, however, monitoring systems at highly regulated mining operations provide meaningful information about the performance of the site's environmental controls and reveal if there may be a problem that needs to be immediately investigated.

EPA's lack of appropriate focus on monitoring and reporting requirements has contributed to another serious flaw in the Proposed Rule, which is EPA's failure to recognize that the states' and FLMAs' existing regulatory programs include enforceable requirements that compel operators to respond to and remediate a release identified in project monitoring data. Both the states and the FLMAs have the authority to revoke or suspend operator's permit for failure to respond properly to a release. Consequently, monitoring requirements coupled with the states' and the FLMAs' remediation enforcement tools effectively minimize any degree or duration of risk associated with a documented release.

Not only has EPA failed to give adequate consideration to the monitoring, reporting, and remediation requirements in existing state and federal regulations, the Agency has painted a distorted picture of how releases are handled at permitted hardrock mines and mineral processing facilities. This picture fails to disclose that in the event of a release, operators typically use corporate resources to respond to and remediate documented releases. These releases have not created significant public liability exposure because no taxpayer dollars have been spent remediating the releases.

The following EPA documents that are part of the rulemaking docket are exercises in selective omission in which EPA has not told the whole story about how companies have responded to releases:

- U.S. EPA, "Office of Resource Conservation and Recovery, Memorandum to the Record: Releases from Hardrock Mining Facilities" (November 22, 2016).

- U.S. EPA, "Comprehensive Report: An Overview of Practices at Hardrock Mining and Mineral Processing Facilities and Related Releases of CERCLA Hazardous Substances" (November 30, 2016).

- U.S. EPA, "Evidence of CERCLA Hazardous Substances and Potential Exposures at CERCLA § 108(b) Mining and Mineral Processing Sites" (September 2016).

Each of these reports describe alleged releases from currently operating hardrock mining facilities to support EPA's specious conclusion that these sites document there is continuing risk

at hardrock mining facilities that warrants the Proposed Rule. These documents are incomplete because they do not reveal that the operators of many of these sites – not taxpayers – responded to the releases. Operators paid for the investigations to determine whether a release has occurred. If a release is identified, operators paid to characterize the scope and nature of the release and for the development of proposed response activities to mitigate the release. Once regulators have approved the operators' proposed response programs, operators have then paid to implement the plans and monitor their effectiveness. Additionally, it is important to note that in many instances, there were no enforcement actions needed at these sites because operators chose to clean up the sites on a proactive basis to avoid any regulatory sanctions.

In the event of a release at a site where there is no viable operator, state and federal regulators can use FA to respond to a problem. Regulators' use of FA also shields taxpayers from cleanup costs. Thus, there is no need for an additional layer of FA under CERCLA § 108(b).

E. The Office of Advocacy has Urged EPA to Withdraw this "Ill-Advised" Rule

MMSA wishes to emphasize the importance of the January 19, 2017 letter the Small Business Administration's Office of Advocacy ("Advocacy") sent to the EPA Administrator urging EPA to withdraw the Proposed Rule because EPA has not demonstrated any necessity for this rule or justification for the economic hardships it would create:

> "*The agency [EPA] has conspicuously failed to articulate a cohesive response to the argument that state and Federal rules address the same risks comprehensively*." (Advocacy letter at 3).
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> "*Although EPA states that these mining regulations are "distinct" from the CERCLA 108(b) requirements, this does not mean that the Federal and state mining requirements do not address the same response categories using other legal authorities and different language. An entirely duplicative CERCLA § 108(b) financial responsibility program would be inconsistent with the "degree and duration" of risk associated with potential releases from current highly regulated and fully bonded hardrock mines. EPA is proposing an additive regulatory scheme in the absence of a clearly articulated need as to why these existing programs are deficient or require additional financial assurance*." (Advocacy Letter at 5).
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> "*Advocacy strongly recommends that EPA withdraw this ill-advised proposal,"* [which is] "*without evidence that a problem exists warranting intervention…There is no statutory need for this regulation, nor are there any significant environmental benefits demonstrated by EPA…EPA is proposing a rule that would cost the industry $171 million annually for an annual savings to the government of $15.5 million by its own estimate, to address risks that are already addressed by state and Federal agencies*." (Advocacy Letter at 1 and 3).

MMSA urges EPA to issue a CERCLA § 108(b) Final Rule that heeds Advocacy's advice to abandon this fatally flawed Proposed Rule, which is built on faulty and unsound premises.

Alternatively, EPA should write a Final Rule that clearly establishes there is no need for additional CERCLA § 108(b) FA because EPA has obtained conclusive evidence that existing states and FLMAs have FA that fully addresses the degree and duration of risk directive that Congress established in 1980 when it enacted CERCLA § 108(b)(1):

> "*…the President shall promulgate requirements…that classes of facilities establish and maintain* ***evidence of financial responsibility consistent with the degree and duration*** *of risk associated with the production, treatment, storage, or disposal of hazardous substances.*" (Bold emphasis added)

If EPA proceeds with a Final Rule, it should categorically find that there is no difference in the coverage provided by the current FA programs administered by the states and FLMAs and the coverage that EPA is seeking in the Proposed Rule. Consequently there is no demonstrated need for EPA's Proposed Rule. Because EPA's rulemaking process has gathered substantial evidence of adequate FA to address potential future releases of hazardous substances from hardrock mines, EPA has fulfilled the above-noted CERCLA § 108(b)(1) statutory mandate to "establish and maintain evidence of financial responsibility."

III. EPA's Reliance on Legacy Sites to Justify a Need for the Proposed Rule is Inappropriate

EPA has loaded the rulemaking docket with over 230,000 pages of documents, many of which are devoted to describing problems and cleanup activities at pre-regulation legacy sites. EPA's work to compile this information has squandered taxpayer monies because none of it is relevant to this rulemaking, which applies solely to active mines, as discussed below. The overwhelming number of documents pertaining to legacy sites in the docket is an ineffective smokescreen that seeks to obscure the fact that the Agency lacks information about currently operating sites that supports the need for the Proposed Rule.

Although EPA argues that CERCLA cleanup costs incurred at old, pre-regulation mines and non-mining industrial facilities show CERCLA § 108(b) financial assurance is needed for modern mines, Sections 320.1 and 320.2 of the Proposed Rule (FR at 3486) clearly state that the Proposed Rule applies solely to current mine owners and operators:

> § 320.1 Purpose and Scope.
> (a) The purpose of this part is to establish requirements under § 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42, U.S.C. 9601, et seq., for current owners and operators of non-transportation-related facilities to establish and maintain evidence of financial responsibility.
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> § 320.2 Applicability.
> (a) The regulations of this part apply to current owners and operators of facilities that are authorized to operate, or should be authorized to operate, on or after the effective date of the rule under which they become subject to this part.

In the preamble to the Proposed Rule, EPA explains why the rule does not apply to legacy and non-operating sites (FR at 3404):

> "The proposed rule would not apply to owners or operators of past hardrock mining facilities, such as abandoned mines, nor would it apply to former owners or operators of mines that are covered by the rule…Current owners and operators are the primary actors at facilities and as such would be able to evaluate the applicability of the rules and apply the formula to the features present. EPA anticipates that requiring entities that may no longer have the legal rights to access a facility to evaluate it for purposes of determining whether they are subject to the rule and if so, the appropriate amount of financial responsibility, would be difficult in many cases."
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> "…EPA is concerned that a rule applicable to facilities that are not currently active or currently idled would be very difficult to implement, and has the potential to divert significant resources from existing Superfund priorities with minimal benefit to the program. Therefore, EPA believes that attempting to regulate and oversee CERCLA § 108(b) requirements for this vast universe of facilities would impose a tremendous administrative burden on the Superfund program, with the likelihood of very little return."

Because the Proposed Rule does not apply to legacy, inactive, and abandoned sites, EPA cannot use the numerous documents in the docket dealing with the pre-regulations legacy sites to create the misimpression there is a need for a CERCLA § 108(b) FA program. These documents provide no relevant or meaningful information that needs to be considered during this rulemaking. To the contrary, the inclusion of these documents in the docket only serves to confuse and mislead the public that old, pre-regulation sites somehow inform EPA about the need for additional FA at modern mines.

Because the inclusion of documents pertaining to legacy sites in the docket for this rulemaking directly contradicts the stated purposed and scope (§ 320.1) and applicability (§320.2) of the Proposed Rule, EPA should eliminate this contradiction and remove the many inapplicable documents dealing with legacy sites from the docket for the Final Rule. Retaining these documents in the docket would perpetuate the confusion and detract from the public's understanding of this rulemaking.

IV. Conclusions

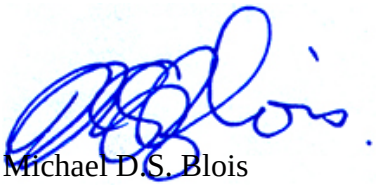
As discussed above, the Proposed Rule is onerous, duplicative, and indefensible. Consequently, EPA must not continue with the January 2017 Proposed Rule. MMSA recommends that EPA write a Final Rule that clearly establishes additional FA pursuant to CERCLA § 108(b) is unwarranted.

In order for EPA to comply with the court-ordered December 1, 2017 deadline to issue a Final

Rule[4], there is urgency for EPA to focus immediately upon developing a Final Rule that acknowledges the overwhelming evidence that current state and federal FA programs are consistent with the "degree and duration of risk of a release of hazardous substance." In conducting this rulemaking, EPA has already satisfied the CERCLA §108(b)(1) mandate to obtain evidence of FA. EPA must now use that evidence to determine that there is no justification for the onerous and duplicative Proposed Rule because state and federal FA programs eliminate the need for EPA's involvement.

MMSA appreciates this opportunity to provide comments on the Proposed Rule. Please do not hesitate to contact us if you have any questions about our comments.

Respectfully submitted:



Michael D.S. Blois
President

[4] January 29, 2016 Order of the U.S. Court of Appeals for the District of Columbia in re: *Idaho Conservation League et al* No. 14-1149.