

The CERCLA Section 108(b) Financial Responsibility Initiative

Mine Design, Operation & Closure
Conference

Fairmont, Montana

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Overview

- Discuss the requirements and process leading to publication of a court-ordered CERCLA Section 108(b) “priority notice.”
- Discuss the process and schedule for developing a proposed regulation for hard rock mining.

Existing EPA financial regulations

- EPA currently has financial responsibility regulations for:
 - Hazardous waste treatment, storage and disposal facilities (RCRA)
 - Solid waste disposal facilities (RCRA)
 - PCB commercial storage facilities (TSCA)
 - Petroleum underground storage tanks (RCRA)
 - Underground Injection Wells (RCRA, SDWA)

Congressional Direction

- Section 108(b) of the 1980 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) authorizes the president to establish financial responsibility requirements.
- Executive Order 12580 delegates this responsibility to EPA for non- transportation-related facilities.

Congressional Direction

- Section 108(b) requires the president to:
 - *...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, transportation, treatment, storage, or disposal of hazardous substances.*
 - *...identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register.*

History and a new beginning

- EPA made previous attempts to address section 108(b), but did not complete them.
- Reports in the late 1990s and mid-2000s from EPA's Inspector General and the Congressional Government Accountability Office brought attention to section 108(b).
- After EPA's own 2004 "120 Day Study" on the Superfund program recommended that EPA take action under section 108(b), we began working to identify appropriate facility classes.

Lawsuit Filed

- In March, 2008, the Sierra Club, Great Basin Resource Watch, Amigos Bravos and the Idaho Conservation League filed suit in the U.S. District Court for the Northern District of California to compel EPA action.
 - Industry groups intervened:
 - The Superfund Settlements Project
 - The RCRA Corrective Action Project
 - The American Petroleum Institute
 - The Treated Wood Council.

July 2009 Priority Notice

- Court Order: On February 25, 2009, the court ordered EPA to publish a priority notice for publication in the *Federal Register* identifying those classes for which EPA would first develop regulations.
- The then-new Administration fully supported compliance.
- EPA met the court's deadline with a *Federal Register* notice published July 28th and identifying EPA's highest priority classes as those involving hard rock mining.

See <http://www.epa.gov/EPA-WASTE/2009/July/Day-28/>

Lawsuit Outcome

- On August 5, 2009, the court dismissed the remainder of the Sierra Club complaint.
- The judge's order does not preclude appeals and additional litigation.

Priority Notice contents:

- The July priority notice identified elements of the hard rock mining industry as classes of facilities for which EPA will first develop financial assurance requirements.
 - *For purposes of this notice only, hard rock mining is defined as the extraction, beneficiation or processing of metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (e.g., asbestos, gypsum, phosphate rock, and sulfur).*

Why mining first?

- Significant presence on the CERCLA National Priorities List of “Superfund” sites:
 - Of 1,635 sites proposed, listed or deleted as of October, 2007, 90 (7%) are mining and/or smelting sites.
 - Of \$12.1 billion spent for all sites, \$2.4 billion (21%) was spent on mining.
- Significant Toxic Release Inventory (TRI) releases:
 - 2007 reporting year, the metal mining industry reported releasing nearly 1.15 billion pounds of toxic chemicals, or approximately 28 percent of all releases by U.S. industry required to report under TRI.

Why mining first?

- Industry Unique: Common corporate structures, interrelated corporate failures, and the cyclical nature of commodities prices within the hard rock mining industry increase the likelihood of uncontrolled releases of hazardous substances being left unmanaged.
- Independent Reports: Reports in 1997 and 2004 by EPA's Inspector General, Government Accountability Office reports in 1988 and 2005, and 1999 and 2004 National Research Council reports all identified mining as appropriate to evaluate for regulation.

Developing the Mining Rule

- Statutory standards for rulemaking:
 - *Consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.*
 - *The level of financial responsibility shall be initially established and, when necessary, adjusted, to protect against the level of risk which [EPA in its] discretion believes is appropriate based on:*
 - *The payment experience of the Fund*
 - *Commercial insurers*
 - *Courts settlements and judgments*
 - *Voluntary claims satisfaction*

Developing the Mining Rule

- Statutory standards for rulemaking (continued):
 - *To the maximum extent practicable, [EPA] shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements.*
 - *Financial responsibility may be established by any one, or any combination of, the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer.*
 - *[EPA] is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable.*
- Section 108(b)(3) provides for phase-in of requirements as quickly as can reasonably be achieved, but not later than four years from date of promulgation and, where possible, via incremental, annual increases in the requirements.

Developing the Mining Rule

- EPA process for mines on federal land:
 - Evaluate BLM and USFS financial responsibility requirements for hard rock mine reclamation to determine similarities and differences and to see whether these requirements meet the statutory requirements.
 - Explore ways to address gaps with little or no duplication.

Developing the Mining Rule

- EPA process for mines on state and private land:
 - Evaluate state financial responsibility requirements for hard rock mining to determine whether these requirements meet EPA's goals.
 - CERCLA Section 108(b) does not address state delegation. Other sections of CERCLA discuss state sovereignty
- Develop a a national implementation scheme that might also be applicable to additional industry sectors EPA has identified

Mining Rule Schedule and Community Engagement

- We expect to publish a proposed mining rule in spring 2011.
- As we work on a proposed rule, EPA is interested in hearing from hard rock mining communities, and those with an interest in hard rock mining, to inform our rulemaking.
- We are looking for community contacts and welcome your suggestions.

Additional Classes

- We expect to publish a proposed rule for additional classes in late summer, 2011.
 - A *Federal Register* notice published January 6, 2010 identified the targets of this rule as portions of the:
 - Chemical Manufacturing industry
 - Petroleum and Coal Products Manufacturing industry (not including coal mining)
 - Electric Power Generation, Transmission, and Distribution industry (due to coal ash)
 - The same January 6 *Federal Register* notice identified additional groups for further study:
 - Waste Management and Remediation Services
 - Wood Product Manufacturing
 - Fabricated Metal Product Manufacturing
 - Electronic and Electrical Equipment Manufacturing
 - Facilities engaged in the recycling of materials containing CERCLA hazardous substances



Questions?

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Questions?

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Appendix-CERCLA § 108(b)

- (1) Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements (for facilities in addition to those under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the *Federal Register*. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.
- (2) The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. To the maximum extent practicable, the President shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. In promulgating requirements under this section, the President is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this chapter.
- (3) Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation. Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.

Appendix-CERCLA § 108(b)

- (4) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting +and maintaining the evidence of financial responsibility.
- (5) The requirements for evidence of financial responsibility for motor carriers covered by this chapter shall be determined under section 31139 of title 49.

(Pub. L. 96-510, title I, Sec. 108, Dec. 11, 1980, 94 Stat. 2785; Pub. L. 99-499, title I, Secs. 108, 127(c), Oct. 17, 1986, 100 Stat. 1631, 1692.)