

# CERCLA Section 108(b) Financial Responsibility

A public webinar hosted by the  
United States Environmental Protection Agency  
January 10, 2017

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# Background

- ▶ On December 1, 2016, the EPA Administrator signed, for publication in the *Federal Register*, two actions developed under CERCLA section 108(b):
  - ▶ A proposed rule that would require owners or operators of certain facilities within the hardrock mining industry to demonstrate financial responsibility to cover CERCLA liabilities at their sites.
  - ▶ A notice of intent to proceed with rulemaking on additional classes of facilities within three industry sectors: chemical manufacturing; petroleum and coal products manufacturing; and electric power generation, transmission, and distribution.
- ▶ Both actions were signed in compliance with an order issued on January 29, 2016 by the U.S. Court of Appeals for the District of Columbia Circuit.

# Background (cont.)

- ▶ The proposed hardrock mining rule and the notice of intent to proceed with rulemaking on additional classes of facilities are scheduled for publication in the *Federal Register* on Wednesday, January 11.
- ▶ A copy of the pre-publication version of the proposed hardrock mining rule is currently available at:  
<https://www.epa.gov/superfund/pre-publication-copy-proposed-financial-responsibility-requirements-under-cercla-section>
- ▶ A copy of the pre-publication version of the notice of intent to proceed with rulemaking on additional classes of facilities is currently available at:  
<https://www.epa.gov/superfund/pre-publication-copy-regulatory-determination-notice-financial-responsibility-requirements>

# Submitting Public Comment on the Proposed Hardrock Mining Rule

- ▶ Publication of the proposed hardrock mining rule in the *Federal Register* will trigger a 60-day public comment period, which will end on March 12, 2017.
- ▶ Instructions for submitting public comments are provided in the “ADDRESSES” section of the preamble to the proposed rule.
- ▶ The notice of intent to proceed with rulemaking on additional classes of facilities is not a request for comment; opportunity for public comment will be provided during the rulemaking processes addressing those industry classes.
- ▶ The remainder of this webinar will focus on describing the key provisions of the proposed hardrock mining rule.

# Overview of the Proposed Rule

- ▶ As EPA's first rule under CERCLA section 108(b) authority, the proposed rule would establish a financial responsibility program within Superfund, codified at 40 CFR Part 320.
- ▶ The proposed rule would establish four Subparts within Part 320:
  - ▶ Subpart A - General Facility Requirements
  - ▶ Subpart B - General Financial Responsibility Requirements
  - ▶ Subpart C - Available Financial Responsibility Instruments
  - ▶ Subpart H - Hardrock Mining Facilities

# Overview of the Proposed Rule (cont.)

- ▶ Subparts A, B, and C include foundational components of the CERCLA section 108(b) financial responsibility program, which would be applicable to hardrock mining facilities subject to the proposed rule, and EPA expects that they will also serve as the foundation for future rulemakings under CERCLA section 108(b).
- ▶ Subpart H requirements would be applicable to hardrock mining facilities.

# Subpart A: General Facility Requirements

## § 320.2 - Applicability

- ▶ 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 first become subject to Part 320 requirements, would be required to comply with the provisions of the rule.
- ▶ The requirements of Part 320 would apply until EPA releases the owner or operator from its obligation to maintain financial responsibility.



# Subpart A - General Facility Requirements (cont.)

## § 320.1(b) - Purpose and scope

- ▶ Would require that the amount of financial responsibility be consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances at the facility and must be available to pay for the response costs, health assessment costs, and natural resource damages under CERCLA for which the owner or operator is responsible.

# Subpart A - General Facility Requirements (cont.)

## § 320.5 - Notification

- ▶ Owners and operators would be required to submit a notification to EPA within 30 days of the effective date of the regulation that first makes the facility subject to Part 320 requirements.

## § 320.6 - General Information Submission Requirements

## § 320.7 - Requirements for Electronic Submission of Information

- ▶ Owners and operators would be required to submit information in paper format until an electronic reporting compliance date by which submission in electronic format would be required. EPA will announce this date through the Federal Register.

# Subpart A - General Facility Requirements (cont.)

## § 320.8 - Recordkeeping requirements

- ▶ Requirements for owners and operators to develop a facility record that contains information related to compliance with Part 320 requirements.

## § 320.9 - Requirements for Public Notice

- ▶ Two approaches are proposed:
  - ▶ Approach 1 - Owners and operators would be required to establish and make information available to the public on a “CERCLA Section 108(b) Financial Responsibility Information” website.
  - ▶ Approach 2- EPA would provide information to the public including facility contact information and non-CBI information submitted by the facility to EPA.

# Subpart B - General Financial Responsibility Requirements

## § 320.20 - Applicable financial responsibility amounts

- ▶ Owners and operators would be required to calculate a financial responsibility amount based on class-specific requirements. (For hardrock mining facilities, those requirements are found in Subpart H.)

## § 320.22 - Maintenance of instruments

- ▶ Owners and operators would be required to recalculate the financial responsibility amount three years after the date they are first required to submit the full amount of financial responsibility, and every three years thereafter, and within 60 days after a successful claim against the financial responsibility instrument.
- ▶ This provision also provides for adjustment of the financial responsibility instruments.

# Subpart B - General Financial Responsibility Requirements (cont.)

## § 320.23 - Incapacity of owners or operators, financial institutions

- ▶ Would require owners and operators to notify EPA within ten days of the commencement of voluntary or involuntary proceedings under Title 11 (Bankruptcy) U.S. Code, naming the owner or operator as debtor.
- ▶ Would require owners and operators to provide evidence of other financial responsibility within 60 days in the event of incapacity of an instrument provider.

# Subpart B - General Financial Responsibility Requirements (cont.)

## § 320.24 - Notification of claims brought against owners, operators, or guarantors

- ▶ Would require owners and operators to notify EPA of the filing of any claim pursuant to CERCLA naming the owner or operator (or the owner's or operator's guarantor) as defendant.

## § 320.25 - Facility transfer

- ▶ Would require owners or operators to maintain financial responsibility for a facility or portion of a facility that is transferred until released from that obligation by EPA.
- ▶ Would require a new owner or operator of a facility or portion of a facility to provide evidence of financial responsibility prior to assuming ownership or operation.

# Subpart B - General Financial Responsibility Requirements (cont.)

## § 320.26 - Notification of Cessation of Operations

- ▶ Owners or operators would be required to notify EPA 30 days prior to: (1) the date the facility is no longer authorized to operate, or (2) the date the owner or operator is required under another applicable regulatory program to notify the relevant regulatory authority that the facility is ceasing operations, whichever is earlier.

# Subpart B - General Financial Responsibility Requirements (cont.)

## § 320.27 - Release from financial responsibility requirements

- ▶ Would allow an owner or operator to petition EPA for release from its obligations under Part 320 by submitting evidence to demonstrate that the degree and duration of risk associated with the management of hazardous substances at the facility is minimal.
- ▶ EPA would evaluate facility information, including information submitted by the owner or operator and make a determination.
- ▶ If EPA determines that the degree and duration of risk associated with the management of hazardous substances at the facility is minimal, and that the facility should be released from financial responsibility requirements, EPA would post its draft decision on the Agency's website and provide opportunity for public comment, and post its response to comment and final decision on the EPA website.
- ▶ If EPA determines that the degree and duration of risk associated with the management of hazardous substances is not minimal, EPA would provide the owner or operator a detailed written statement explaining the decision, and provide notice of final decision and its response to comments received.



# Subpart C: Available Financial Responsibility Instruments

- ▶ The proposed rule provides the following financial responsibility instruments.
  - ▶ Letter of Credit - § 320.40
  - ▶ Surety Bond - § 320.41
  - ▶ Insurance - § 320.42
  - ▶ Financial Test - § 320.43 (Option)
  - ▶ Corporate Guarantee - § 320.44 (Option)
  - ▶ Trust Fund - § 320.45
- ▶ The rule proposes two options for the use of a financial test/ corporate guarantee
  - ▶ Not allow the use of a financial test and corporate guarantee (EPA's preferred option)
  - ▶ Allow use of a credit rating-based financial test/corporate guarantee

# Subpart C: Available Financial Responsibility Instruments (cont.)

- ▶ For each financial responsibility instrument, Subpart C of the proposed rule includes:
  - ▶ Regulations establishing requirements for the owner operator's demonstration of financial responsibility, and
  - ▶ Required instrument language in § 320.50.

# Subpart C: Available Financial Responsibility Instruments (cont.)

- ▶ The conditions for payment of the letter of credit, surety bond, insurance, corporate guarantee, and trust fund instruments are included in the required wording of the instruments in § 320.50.
- ▶ Funds from those financial responsibility instruments would be available to pay:
  - ▶ A final judgment from a Federal court awarding CERCLA response costs, health assessment costs, and/or natural resource damages;
  - ▶ For a CERCLA settlement with agencies of the Federal government, including but not limited to administrative settlement and consent decrees; and
  - ▶ Into a trust fund established under a unilateral administrative order.
- ▶ Additionally, note that under CERCLA Section 108(c), parties (including EPA) could also bring a “direct action” claim against the instrument provider.
- ▶ These payment provisions are discussed in section VI.B.5 of the preamble titled “General Provisions on Instrument Payment”.

# Subpart C: Available Financial Responsibility Instruments (cont.)

## Notable Instrument Provisions:

- ▶ The proposed financial responsibility instruments would be specified to pay to any and all third-party CERCLA claimants.
  - ▶ One exception is that two acceptable specifications of the letter of credit are provided for, including one that would pay to the trustee of a trust fund that would hold the letter of credit. [This requirement is discussed in section VI.C.1 of the preamble.]
- ▶ Instrument issuer cancellation provisions include the potential requirement for the instrument provider to fund a standby trust (or in the case of a corporate guarantor, obtain alternate financial responsibility in the name of the owner operator).
  - ▶ The cancellation provisions are intended to ensure continuity of financial responsibility coverage and provide assurance that funds will be available when necessary. [This requirement is discussed at section VI.C.7 of the preamble and individually for each instrument in section VI.C of the preamble.]

# Subpart C: Available Financial Responsibility Instruments (cont.)

## Notable Instrument Provisions (cont.)

- ▶ Surety bonds and corporate guarantees would only be allowed to satisfy the requirements if the Attorneys General or Insurance Commissioners of:
  - ▶ The state in which the surety/guarantor is incorporated, and
  - ▶ Each state in which a facility covered by the instrument is located have submitted a written statement to EPA that the instrument executed as described in the regulations is a legally valid and enforceable obligation in that state.
- ▶ Multiple insurers may cover a single facility and surety bonds may be issued by multiple sureties provided that each issuer is liable for its individual vertical percentage share of the instrument. [These specifications are discussed in sections VI.C.3 in a sub-section titled “multiple insurers” and VI.C.2 in a sub section titled “multiple sureties”.]
- ▶ An owner or operator would be allowed to use a financial responsibility instrument to demonstrate financial responsibility for more than one facility. [This provision is discussed in section VI.C.9 of the preamble titled “Use of a Financial Instrument for Multiple Facilities”.]
- ▶ The proposal discusses and requests comment on the use of captive insurance and risk retention groups. [This discussion can be found in section VI.C.3 in a sub-section titled “issuer eligibility”.]

# Subpart H: Requirements Applicable to Hardrock Mining Facilities

- ▶ Subpart H includes proposed requirements that would apply to owners or operators of facilities within the hardrock mining industry.
  - ▶ Applicability - § 320.60
  - ▶ Timeframes for compliance - § 320.61
  - ▶ Determining the financial responsibility amount - § 320.63

# Subpart H: Requirements Applicable to Hardrock Mining Facilities (cont.)

## § 320.60 - Applicability

- ▶ The proposed rule would apply to the classes of facilities within the hardrock mining industry that were identified by EPA in a July 28, 2009 Federal Register notice (74 FR 37213), except:
  - ▶ Mines conducting only placer mining activities as defined in Section 320.62;
  - ▶ Mines conducting only exploration activities as defined in Section 320.62;
  - ▶ Mines with a disturbance as defined in § 320.62 of less than five acres not located within a mile of mine disturbance that occurred in the prior ten-year period and that do not employ hazardous substances in their processes; and
  - ▶ Mineral processors as defined in § 320.62 with less than five acres of surface impoundment and waste pile disturbance.
- ▶ Owners or operators of facilities that conduct only these limited activities would not be required to comply with the requirements of Part 320.

# Subpart H: Requirements Applicable to Hardrock Mining Facilities (cont.)

## § 320.61 - Timeframes for compliance

- ▶ Owners or operators would be required to comply with the following timeframes for demonstrating financial responsibility:
  - ▶ Amount of health assessment cost component by 24 months after promulgation of the final rule;
  - ▶ Fifty percent of the response and natural resource damages cost components by 36 months after promulgation of the final rule;
  - ▶ The full amount of the response and natural resource damages cost components by 48 months after the promulgation of the final rule.



# Subpart H: Requirements Applicable to Hardrock Mining Facilities (cont.)

## § 320.63 - Determining the financial responsibility amount

- ▶ Owners or operators of hardrock mining facilities would be required to calculate a financial responsibility amount using a formula provided in § 320.63.
- ▶ Owners or operators would be able to satisfy components of the formula by:
  - ▶ Demonstrating that they are subject to, and in compliance with, requirements that will result in minimum degree and duration of risk associated with the management of hazardous substances at a site feature; that their obligation to implement such requirements is imposed in an enforceable document; and that they have demonstrated, and are required to demonstrate, adequate financial responsibility to assure implementation of the requirements, and
  - ▶ Certifying that they are in compliance with the requirements.

# Financial Responsibility Formula Webinar: January 30, 2017

- ▶ On January 30, 2017 (2:00 to 3:00 pm EST), EPA will conduct a public webinar to present an overview of the financial responsibility formula for the proposed rule under CERCLA § 108(b) for classes of facilities in the hardrock mining industry.
- ▶ EPA has set up an electronic mailbox for participants to submit questions prior to the webinar. However, due to the volume of questions anticipated, EPA may not be able to respond to all questions.
- ▶ Advance questions may be submitted by January 23, 2017 to: [108bwebinarquestions@epa.gov](mailto:108bwebinarquestions@epa.gov) with the subject line “financial responsibility formula webinar.” Do not submit comments on the proposed rule to this e-mail box.
- ▶ To ensure EPA considers them, comments on the proposed rule must be submitted in accordance with the instructions provided with the published version of the proposed rule in the *Federal Register*.
- ▶ **Webinar Registration:** <https://clu-in.org/conf/tio/108bfrf>

# Questions and Contact Information

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