

December 1, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator McCarthy:

Enclosed for your consideration is the Report of the Small Business Advocacy Review Panel (SBAR Panel or Panel) convened for EPA's planned proposed rulemaking entitled "EPA's Planned Proposed Rule Financial Responsibility Requirements for the Hardrock Mining Industry." This notice of proposed rulemaking is being developed by the U.S. Environmental Protection Agency (EPA) under § 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended.

Section 108(b) of CERCLA directs the President¹ to develop 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 at their sites. EPA is considering proposing financial responsibility requirements for CERCLA liabilities under CERCLA § 108(b). EPA also intends for the rule to create financial incentives for mining practices that reduce risk at a facility.

EPA is considering a proposed rule that may require owners and operators to identify a financial responsibility amount for their facility, to demonstrate evidence of financial responsibility, and to maintain the required amount of financial responsibility until released from the requirements of the rule by EPA.

On August 24, 2016, EPA's Small Business Advocacy Chairperson convened this Panel under section 609(b) of the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition to EPA's Small Business Advocacy Chairperson, the Panel consisted of the Director of the Office of Resource Conservation and Recovery within the EPA's Office of Land and Emergency Management, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Chief Counsel for Advocacy of the Small Business Administration (SBA Advocacy or Advocacy). It is important to note that the Panel's findings and

¹ This authority is delegated to EPA for non-transportation-related facilities by Executive Order 12580, §7.

discussion are based on the information available at the time this report was drafted. EPA is continuing to conduct analyses relevant to the proposed rule, and may develop or obtain additional information, including from public comment on the proposed rule, during this process. The options the Panel identified for reducing the rule's economic impact on small entities will require further analysis and/or data collection to ensure that the options are practicable, enforceable, protective of public health, environmentally sound and consistent with CERCLA.

SUMMARY OF SMALL ENTITY AND OTHER OUTREACH

The EPA appreciates that mining is an important part of the economies of many states. The agency has interacted with states and other federal agencies that regulate the mining industry on numerous occasions during our work on the proposal. The EPA engaged with ASTSWMO's Hazardous Waste Subcommittee, Hazardous Waste Managers Conference and Training, and Financial Assurance Subgroup early in the process, presenting information and seeking input into the development of the proposed rule framework. The EPA convened multiple meetings and conference calls with Western Governors' Association (WGA), National Association of Attorneys General (NAAG), and Interstate Mining Compact Commission (IMCC) to better understand existing state programs requiring financial responsibility. These interactions have been helpful and have provided useful information to inform our rulemaking process.

Prior to convening the Panel, EPA conducted outreach with small entities that will potentially be affected by these regulations. In June 2016, EPA invited Advocacy, OMB, and 18 potentially affected small entity representatives (SERs) to a Pre-Panel Outreach meeting and solicited their comments on preliminary information EPA provided. EPA shared the small entities' written comments with the Panel as part of the Panel convening document.

After the SBAR Panel was convened, the Panel distributed additional information to the small entity representatives (SERs) on August 24, 2016, for their review and comment and in preparation for an outreach meeting on August 31, 2016, when the Panel met with the SERs to hear their comments on the information distributed in these mailings. The SERs were asked to provide written feedback on ideas under consideration for the proposed rulemaking. The Panel received written comments from the SERs in response to the discussions at this meeting and the outreach materials. See section 6 of the Panel Report for a complete discussion of SER comments. Their full written comments are also included in the Appendix. In light of these comments, the Panel considered the regulatory flexibility issues specified by RFA/SBREFA and developed the findings and discussion summarized below.

PANEL FINDINGS AND DISCUSSION

Under section 609(b) of the RFA, the Panel is to report its findings related to these four items:

- 1) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

- 2) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
- 3) Identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap or conflict with the proposed rule.
- 4) A description of any significant alternatives to the planned proposed rule which would minimize any significant economic impact of the proposed rule on small entities consistent with the stated objectives of the authorizing statute.

The Panel's most significant findings and discussion with respect to each of these items are summarized below. To read the full discussion of the Panel findings and recommendations, see section 7 of the Panel Report.

A. Number and Types of Entities Affected

The EPA identified approximately 221 mines and mineral processing facilities in the potentially regulated universe; of these, 53 facilities are estimated to have a small owner (including joint ventures), corresponding to 43 firms. Twelve additional mines have owners of unknown size (due to lack of available company data). Most (38) of these 53 facilities engage in mining/extraction; 15 facilities engage in processing/refining only.

See section 3 of the Panel Report for information on the hardrock mining industry's small entity universe.

B. Recordkeeping, Reporting, and Other Compliance Requirements

The EPA is considering requiring that owners or operators develop and maintain a facility record that includes information documenting compliance with the financial responsibility requirements. The facility record must include at least all information required to be submitted to the EPA, and all notifications received from the EPA related to the financial responsibility obligations of the facility.

The EPA estimates industry costs for the owner/operator companies that are unable to utilize a self-insurance option, as the resources expended and/or foregone to obtain a third-party financial responsibility instrument. Additional administrative and recordkeeping costs to industry may include reading the regulations, submitting initial facility information to the EPA and the public, calculating financial responsibility amounts, choosing a financial responsibility instrument, acquiring and maintaining a financial responsibility instrument, recalculating financial responsibility amounts to reflect any changes in facility operations, and any functions the rule requires of owners and operators upon the transfer of a facility, owner or operator default, a CERCLA claim against the owner or operator, and release from financial responsibility.

If EPA were to defer or exempt facilities covered by certain programs, some portion of these paperwork requirements may be able to be eliminated for a large number of mining facilities.

C. Related Federal Rules

EPA is considering developing a proposed rule that, if finalized, would constitute the only financial responsibility regulations for non-transportation related facilities pursuant to CERCLA. As far as the EPA is aware, BLM, USFS, and NRC's financial responsibility regulations for reclamation bonding do not require owners and operators to obtain instruments that are available to pay for CERCLA liabilities. See the discussion in Section 2.4 of the Panel Report which explains the divergent views among the panel members with respect to the role played by the related Federal Rules.

D. Regulatory Flexibility Alternatives

Pursuant to section 603 of the RFA, EPA is preparing an initial regulatory flexibility analysis (IRFA) that examines the impact of the proposed rule on small entities along with regulatory alternatives that could minimize that impact. The intent of the proposed rule is to increase the likelihood that owners and operators will have access to funds necessary to address the potential CERCLA liabilities at their facilities, thus preventing owners or operators from shifting the burden of cleanup to other parties, including the taxpayer. In addition, EPA also intends for the rule to create financial incentives for mining practices that reduce risk at a facility.

In developing recommendations, the Panel has taken into consideration both SER comments and Panel discussion throughout the SBAR Panel process. The EPA explained that the proposed rule is intended to ensure that sufficient funds are available to pay for CERCLA response actions, and is intended to provide an incentive for implementation of sound practices that would decrease the need for future CERCLA actions. The EPA stated throughout the SBAR Panel process that the proposed CERCLA § 108(b) rules should not be duplicative of existing reclamation and closure bonding requirements. Further, the EPA stated that financial responsibility requirements under section 108(b) are distinct from financial responsibility requirements for reclamation and closure under state programs, and thus are not intended to preempt those state requirements.

In developing recommendations, the Panel recognizes that compliance with other regulatory programs may result in site controls and/or practices that can reduce the degree and duration of risks associated with the production, transportation, treatment, storage and disposal of hazardous substances. The EPA is working to reflect the reductions in risk associated with such controls and practices in the level of financial responsibility required by proposing to allow reductions in the financial responsibility amount where risk-reducing practices are in the form of requirements that are enforceable against the owner or operator, the owner or operator is in compliance with the relevant requirements, and the requirements are supported by adequate financial assurance.

SBAR Panel Recommendations:

1. The Panel acknowledges that the existence of regulatory mining programs and the resulting reduction in risk should be accounted for in the amount of financial responsibility required at a facility. The Panel recommends that EPA solicit comment on whether to provide for programmatic-based deferral of the requirement for owners and operators of facilities to calculate an individual financial responsibility amount and to obtain a financial responsibility instrument in situations where all facilities regulated by a particular Federal or state mining program could qualify for reductions for the full response component of the financial responsibility formula – that is, for all response categories, and at all facilities.

EPA believes that this programmatic deferral recommendation addresses the underlying policy concerns of SER requests for programmatic exemptions, while maintaining consistency with the CERCLA § 108(b) rule structure.

2. The Panel recommends that EPA propose to allow reductions to the financial responsibility amount applicable at facility for future requirements that are enforceable against the owner and operator, that are supported by adequate financial assurance, and with which the owner and operator are in compliance. The Panel further recommends that EPA solicit comment on allowing reductions to the financial responsibility amount for other risk-reducing practices and/or controls (e.g., voluntary practices) that are implemented at hardrock mining facilities that should be accounted for in the reductions, and on how, if reductions were allowed for such practices and/or controls, EPA could assure that those controls would remain in place and be effective over time where there is no regulatory program overseeing their maintenance and operation.

3. The Panel recommends that EPA provide in the rule discussion and solicitation of comment on the impact of the financial test on small businesses. The discussion and solicitation of comment should consider whether making a financial test available would increase the available capacity for third-party instruments in the marketplace and increase the availability of such instruments to owners or operators of small businesses and/or whether it would create a competitive disadvantage for small business, and solicit comment on those concerns.

4. The Panel recommends that EPA solicit comment on all aspects of the proposed financial responsibility formula. The Panel recommends EPA solicit comment and data to inform this issue, including comment on specific elements of the formula such as the robustness of the regression analyses, identification and treatment of influential data points (i.e. potential outliers), the use and calculation of the individual smear factors, and the assumption of source controls.

5. The Panel acknowledges that EPA's approach may define specific classes of mines as presenting a lower level of risk of injury, and does not impose requirements on those classes. The Panel recommends that EPA solicit comment on the criteria used to identify lower-level of risk of injury classes in the proposed rule, and whether it would be feasible and appropriate to identify additional classes as presenting a lower level of risk of injury, particularly classes of mines that differ in their operations and

associated risks from more traditional hardrock mines. The panel also recommends that EPA solicit comment on whether such classes of mines, defined based on facility characteristics, could potentially encompass iron ore, phosphate, and uranium mines. The panel recommends that EPA consider submissions from states and regulated entities with regard to low risk substances in its evaluations.

6. The Panel recommends that EPA request comment on whether more alternate or more flexible engineering standards can substitute for some or all of the numeric engineering standards in the proposed reduction criteria (e.g. planning for a 200-year storm event, reduction of net precipitation by 95 percent). The Panel recommends that EPA request comment on whether the proposed reduction criteria would limit flexibility necessary for innovative or different site-specific approaches and, if so, how those might be preserved. The Panel also recommends that EPA request comment on whether other regulatory programs already impose the requirements that would satisfy the reduction criteria.

Advocacy Recommendations:

Advocacy believes the final results of the formula before reductions lead to financial responsibility totals that are an order of magnitude, or more, higher for small mines than the reclamation and closure plans of those mines. See discussion in Section 2.4 comparing the formula and the closure/reclamation costs. Advocacy believes that the current approach could unnecessarily threaten the viability of small mines by use of these inflated estimates. Advocacy recommends that EPA should modify the formula (in final rule) to more closely reflect the probable costs for each response category.

Advocacy recommends EPA reevaluate the formula and account for the costs for small versus large facilities, which are used to calculate the financial assurance amounts. Since the formula is based on an average of the costs for all facilities, it could calculate a higher financial assurance amount for smaller facilities. The agency could explore developing two separate formulas, one for small facilities and the other for large facilities. Further, Advocacy recommends EPA explain why there is a higher figure for financial assurance than State and FLMA program's financial assurance amounts (i.e., the additional cost expected for a CERCLA response as compared to a closure/reclamation plan). Advocacy further recommends that EPA provide additional information to enable comparisons between the reported and formula amounts because some of the formula amounts are provided as annual amounts, and four are provided as net present values.

With respect to credit reductions, Advocacy recommends that EPA also consider exempting a response measure where the mining agency or an independent third party has determined that the response is unnecessary to protect the environment.

Sincerely,



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Enclosure