2011 Tribal Lands Forum
CERCLA 108(b) – Hard Rock Mining
Financial Responsibility Regulation

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August 23, 2011
Green Bay, Wisconsin
Why We’re Moving Forward on Financial Responsibility

• EPA has financial responsibility regulations in place for other program areas.
• The objective of this regulation is to keep Tribes from being left holding the bag for cleaning up mining sites when necessary.
Why Hard Rock Mining?

• Of the 1,635 NPL sites that were proposed, listed, or deleted as of October 2007, 90 of them – seven percent – are mining or smelting sites.
• The metal mining industry disposes of large amounts of waste to the environment.
• Independent reports identified mining as appropriate to evaluate for this type of regulation.
• Fluctuating metals prices make the mining industry susceptible to bankruptcy.
Potential for Preemption

• Under CERCLA section 114(d):
  – …no owner or operator of a facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such facility.

• The statutory language on preemption is problematic, but a reality.

• We know that it is likely to have a significant effect on States.
Tribes and Preemption

• We are in the process of investigating the effects of this provision on Tribal financial responsibility programs for hard rock mining.

• We are aware that California’s Hoopa Valley Tribe, the Oglala Sioux and the Hopi have financial responsibility ordinances in place.

• We would like to hear from Tribes that have ordinances or are developing them.
General Principles for the Rule

• Significantly reduce the cost to the taxpayer for cleanup of hazardous substances at these sites.

• Collaborate with federal land managers (especially BLM/USFS), Tribes and States to avoid duplicative requirements.

• Strike a balance between site-specific considerations and the desirability of national consistency.
Our partnership with Tribes will be key to developing a regulation that makes sense and avoids duplicating existing programs.

In the near future OSWER will send a letter to all federally recognized Tribes offering consultation on this proposed regulation.

OSWER will consult with Tribes in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes*.
EPA is Exploring These Issues:

- What kinds of potential environmental effects and costs will be covered?
- Who will be covered by the financial responsibility requirement?
- What levels of financial responsibility will be required?
- What kinds of financial instruments are appropriate?
- Whether, and how, can culturally important places be valued when it comes to financial responsibility.
EPA is Exploring These Issues:

• What is the timing for implementation of these requirements?

• How do these requirements relate to federal requirements of BLM and the Forest Service?

• How do these requirements relate to those under Tribal and State law?
EPA is Exploring These Issues:

• What kinds of costs may be predictable and appropriate for inclusion in financial responsibility estimates?

• Is a tiering or classification among facilities feasible, identifying major and minor facilities, and facilities that could be deferred from regulation?

  • How relevant are factors such as location, acreage, and the nature of materials being mined?
Your Comments are Important

• Constructive suggestions will be helpful as EPA continues developing a proposed rule.

• Questions?