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United States Department of Agriculture

JUL 20 2011

Office of the Secretary  
Washington, D.C. 20250

The Honorable Lisa Murkowski  
Committee on Energy and Natural Resources  
United States Senate  
304 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senator Murkowski:

Thank you for your letter of March 8, 2011, regarding actions being taken by the United States Environmental Protection Agency (EPA) related to financial assurance requirements, including bonds, for hardrock mines in the United States. I apologize for the delayed response.

On July 28, 2009, EPA published a priority notice identifying classes of facilities in the hard rock mining industry as those for which EPA would first develop financial responsibility requirements under section 108(b) of CERCLA (*see* 74 Federal Register 37,213 (July 28, 2009)). This notice followed a February 25, 2009, U.S. District Court order (later amended) to identify and publish the notice (*see Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 U.S. Dist. LEXIS 14819 (N.D. Cal. February 25, 2009)).

USDA's Forest Service has existing requirements that provide for financial assurances on hardrock mining operations on National Forest System lands. The EPA has been working with the Forest Service as it develops the rule in order to ensure that both agencies appropriately implement their statutory authorities. This includes protecting the public interest in ensuring that taxpayers do not bear the cost of addressing releases of hazardous substances and that the Federal government provides a streamlined set of requirements for those developing hardrock mineral resources. The Forest Service is continuing to work with the EPA towards this end.

To the extent several of your questions are directed at the content of deliberative interagency communications in an ongoing rulemaking, they raise important confidentiality concerns for the Executive Branch. Enclosed are answers to your questions as they pertain to the Forest Service. I defer further questions on the timing and content of the rule to the EPA.

Again, thank you for writing.

Sincerely,

Thomas J. Vilsack  
Secretary

Enclosure

## Enclosure

### **Responses to Questions regarding Actions being taken by the Environmental Protection Agency (EPA) related to financial assurance requirements, including bonds, for hardrock mines in the United States.**

- 1. Has your agency received any information from EPA indicating that it intends to pursue a “one-size-fits-all” approach under CERCLA Sec. 108(b) for hardrock mining? If so, what information has been provided and has your agency expressed any concerns with this approach?**

The Forest Service understands that the EPA is working to develop regulatory requirements under CERCLA § 108(b). The Forest Service and EPA have discussed approaches to establishing financial assurances during meetings and follow-up teleconferences. The Forest Service has provided expertise based on its experience regulating hardrock mining operations on the public lands. The Forest Service has also provided EPA with information associated with the current Forest Service regulations.

- 2. Has your agency received any information from EPA regarding how legacy (pre-1990) hardrock mining (or processing) sites listed on the CERCLA National Priorities List (NPL) impacted their identification of the industry as posing a high risk under CERCLA Sec. 108(b)? If so, what information has been provided and has your agency expressed any concerns with this approach?**

EPA’s priority notice of action published in the Federal Register on July 28, 2009, 74 Fed. Reg. 37,213 (July 28, 2009), described eight factors it considered in identifying hardrock mining under CERCLA § 108(b). One of the eight factors considered by EPA was the number of mine sites on the CERCLA site inventory (including both National Priority List (NPL) sites as well as non-NPL sites). The Forest Service has provided EPA with information on the way mining and reclamation practices have evolved from past practices.

- 3. Has your agency received any information from EPA indicating that it intends to link the cost of remediating legacy (pre-1990) hardrock mining (or processing) sites to the calculation of future financial assurance requirements that may be imposed under CERCLA Sec. 108(b)? If so, what information has been provided and has your agency expressed any concerns with this approach?**

The EPA has indicated that it has not yet determined the methodology by which the proposed rule will identify the amount of financial assurance required. The Forest Service has provided EPA with information regarding modern mining practices and Forest Service methodology for establishing financial assurances.

**4. Please provide a description of how your agency currently calculates financial assurance requirements applicable to hardrock mines on federal lands.**

The Forest Service process for calculating financial assurance for hardrock mines is described in its Training Guide for Reclamation Bond Estimation and Administration For Mineral Plans of Operation authorized and administered under 36 CFR 228A; USDA – Forest Service, April 2004. The aforementioned Training Guide emphasizes the following for financial assurance estimation:

- Estimates should be made by experienced personnel;
- Estimates should assume that all equipment, supplies and work will be provided under federal contract;
- Unit costs for labor, equipment or materials should be made or verified on a site by site basis;
- Estimates should include direct and indirect costs;
- Direct costs should include interim operation and maintenance, hazmat testing and removal, water treatment, demolition and disposal of facilities, earthwork, erosion control, revegetation, cost of required mitigation, and long-term operation, maintenance and monitoring;
- Indirect costs should include redesign, mobilization/demobilization, contractor costs, agency project management, contingencies and inflation; and
- Estimates should be reviewed periodically to ensure they are adequate.

**5. Can your agency approve a plan of operations that poses a high risk of unnecessary or undue degradation of public lands? How would your agency typically respond to a plan of operations that it believed posed a high risk of unnecessary or undue degradation of public lands?**

The term “unnecessary and undue degradation” of public lands is derived from the Federal Land Policy and Management Act. The term "unnecessary and undue degradation" is also defined in the Bureau of Land Management’s (BLM) hardrock regulations and, therefore, only applicable to BLM-managed lands. Regulations at 36 CFR 228A direct the Forest Service to require and approve plans of operation (Plans) for activities that may result in “significant disturbance of surface resources” in order to “minimize adverse environmental impacts” and reclaim surface disturbance.

The Forest Service works with proponents at the project design stage to develop any changes or additions deemed necessary to comply with our regulatory requirements for environmental protection and to mitigate adverse environmental effects. Additionally, we incorporate appropriate monitoring and inspection into plan approvals to ensure mitigation is achieving the intended result and/or provide information to develop an adaptive management strategy.

**6. Does your agency have the authority to impose financial assurance requirements for post-mining, long-term monitoring, maintenance and treatment operations?**

Although not explicitly stated in our hardrock bonding regulation at 36 CFR 228.13, the Forest Service interprets our role as having the authority to impose financial assurance requirements for post-mining long-term monitoring, maintenance and treatment operations. We are working to clarify our internal guidance to apply an appropriate discount to long-term/perpetual financial assurance calculations; the consideration of uncertainty and risk in both water modeling and financial assurance calculations; and the types of financial instruments the Forest Service may accept for long-term reclamation obligations.

**7. How many hardrock mining and beneficiation plans of operation has your agency approved since 1990?**

- a. How many of those sites are, or have been, placed on the CERCLA NPL?
- b. How many of those sites placed on the CERCLA NPL involve(d) a responsible party that pays (paid) for the cost of short-term removals or long-term remediation, either in part or in whole? What is the aggregate dollar amount spent by these responsible parties? What is the aggregate dollar amount spent by the federal (or state) government?

The total number of hardrock mines permitted since 1990 is 2,685; no sites have been placed on the CERCLA NPL list.

**8. Does your agency coordinate – or has it coordinated in the past – with states to develop financial assurance requirements for hardrock mines on non-federal lands? If so, please describe this coordination.**

The Forest Service has and continues to coordinate with States to develop financial assurance requirements when dealing with individual sites involving both National Forest System lands and non-federal lands expressly for the purpose of avoiding duplicate bonding of operators. This coordination typically takes the form of agreements describing how financial assurance will be estimated, what financial assurance (bond) instruments are acceptable, who holds the instruments, and how the penal sum of these instruments are to be allocated in the event of operator default.

**9. Please provide all documents, records, papers, reports, agreements, notes, correspondence, presentation, analyses, comments, and any other materials generated by your agency as part of an inter- or intra-agency process associated with the EPA's CERCLA Sec. 108(b) rulemaking.**

This request for documents prepared as part of an ongoing rulemaking process for which no draft rule has yet been proposed implicates important confidentiality interests for the Executive Branch. We are happy to provide a briefing or additional material on the Forest Service's program as well as to participate in a multi-agency briefing with the EPA and the BLM if that is preferred.