

# CERCLA Section 108(b) Financial Responsibility

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# Presentation Overview

- ▶ Background: CERCLA Section 108(b) Financial Responsibility (FR)
- ▶ CERCLA Section 108(b) Financial Responsibility Proposed Rule Structure
  - ▶ Universe of Facilities to be Regulated
  - ▶ Flow of Funds from the Financial Responsibility Instrument to the CERCLA Cleanup
  - ▶ Financial Responsibility Scope and Amount
  - ▶ Relationship of Section 108(b) Financial Responsibility to State, Tribal, and Local Government Law
  - ▶ Relationship of Section 108(b) Financial Responsibility to Other Federal Law
- ▶ Outreach Activities
- ▶ How to comment on the rule

# Background: CERCLA Section 108(b)

## Financial Responsibility

- ▶ CERCLA is an acronym for the Comprehensive Environmental Response, Compensation and Liability Act of 1980. The law is also called “Superfund.”
- ▶ During this webinar we will refer to this law as “CERCLA.”
- ▶ Section 108(b) of CERCLA directs EPA 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.
- ▶ A key purpose of this provision is to assure that owners and operators make financial arrangements to address risks from the hazardous substances at their sites.
  - ▶ EPA also intends for the rule to create financial incentives for improved mining practices that reduce financial responsibility costs where existing practices ultimately may also help reduce risks and costs to the Superfund program.

# Background: CERCLA Section 108(b) Financial Responsibility (cont.)

- ▶ Section 108(b) also requires that EPA issue a *Federal Register* notice identifying the classes of facilities for which it will first develop requirements.
- ▶ EPA issued that “Priority Notice” on July 28, 2009, and identified classes of facilities within the hardrock mining industry as those for which it would first develop requirements.
- ▶ <https://www.epa.gov/superfund/superfund-financial-responsibility>

# Background: CERCLA Section 108(b)

## Financial Responsibility (cont.)

- ▶ For purposes of the notice, EPA defined “hardrock mining” as the extraction, beneficiation, or processing of metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and nonmetallic, non-fuel minerals (e.g., asbestos, phosphate rock, and sulfur).
- ▶ EPA also identified some classes of facilities that are not included in the rulemaking even though they fell within the above definition of “hardrock mining.” (See *Memorandum to The Record* entitled “Mining Classes not Included in Identified Hardrock Mining Classes of Facilities”, Dated June 29, 2009, EPA-HQ-SFUND-2009-0265-0033).

# Background: CERCLA Section 108(b)

## Financial Responsibility (cont.)

- ▶ On January 29, 2016, the U.S. Court of Appeals for the District of Columbia Circuit issued an order establishing a schedule for EPA proceedings under CERCLA 108(b).
- ▶ The order requires EPA to sign a notice of proposed rulemaking for the hardrock mining industry by December 1, 2016, and to take final action by December 1, 2017.
- ▶ The order also requires EPA to make a determination on whether the Agency will issue a notice of proposed rulemaking on the (a) chemical manufacturing industry; (b) petroleum and coal products manufacturing industry; and (c) electric power generation, transmission, and distribution industry by December 1, 2016.

# CERCLA 108(b) Financial Responsibility

## Proposed Rule Structure

### Regulatory Approach Premises

EPA's Section 108(b) rulemaking approach under consideration proceeds from two premises:

- ▶ CERCLA is a response program that addresses CERCLA Section 107 liabilities - response costs, natural resource damages (NRD), and health assessments - and is distinct from closure and reclamation requirements of federal and state permit programs.
- ▶ Section 108(b) rules complement, but do not change or substitute for, existing Superfund cost recovery and enforcement procedures.

# CERCLA 108(b) Financial Responsibility Proposed Rule Structure (cont.)

The regulatory approach under consideration is based on five foundational components:

- ▶ Universe of facilities to be regulated;
- ▶ Flow of funds from the financial responsibility instrument to the CERCLA cleanup;
- ▶ Financial responsibility scope and amount;
- ▶ Relationship of Section 108(b) financial responsibility to state, tribal, and local government law; and
- ▶ Relationship of Section 108(b) financial responsibility to other federal law.

# A Preliminary Clarification: What the Rule Does *Not* Do

- ▶ EPA's proposed section 108(b) regulations will be stand-alone financial responsibility requirements. There are significant differences between these requirements and other existing requirements for hardrock mining facilities. In particular:
  - ▶ the proposed rule does *not* include technical requirements regulating the operation, closure, or reclamation of hardrock mining facilities; and
  - ▶ the proposed rule does *not* provide financial responsibility to ensure closure or reclamation requirements made applicable to hardrock mining facilities through a permit
- ▶ In addition:
  - ▶ By promulgating and implementing this regulation, EPA is *not* determining that a CERCLA response is required at a regulated facility.
  - ▶ CERCLA liability is unaffected by an owner or operator providing evidence of financial responsibility under EPA's CERCLA 108(b) regulations.

# Universe of Facilities to be Regulated

- ▶ EPA has examined the mining facilities identified in the July 28, 2009 *Priority Notice* to identify classes for financial responsibility regulation.
- ▶ EPA is considering an approach that would identify classes of hardrock mines that the Agency believes present a lower level of risk of injury and would not, therefore, be included in the rulemaking. Classes the agency is considering not including in the rulemaking are:
  - ▶ placer mines that do not use hazardous substances;
  - ▶ exploration mines; and
  - ▶ small mines (less than five acres).
- ▶ Under this approach, the remainder of the hardrock mines identified in the Priority Notice would be included in the rulemaking.
- ▶ EPA would also include in the proposed rule primary processing activities located at or near the mine site that are under the same operational control as a regulated mine.

# Flow of Funds from the Financial Responsibility Instrument to the CERCLA Cleanup

EPA evaluated how the Section 108(b) financial responsibility would supplement existing CERCLA sources of funding to address releases and potential releases of hazardous substances. Under the approach EPA is considering:

- ▶ Instruments that could be used to pay into a special account for a CERCLA settlement, into a trust fund established pursuant to an administrative order, or after a court finding of CERCLA liability.
- ▶ EPA would use existing Superfund enforcement processes first (settlements, orders, and cost recovery actions against potentially responsible parties) to effect clean up.
- ▶ Other parties (i.e., other federal agencies, the states, tribes, the public) could also make claims against the owner or operator under Section 107, payable from the instruments.
- ▶ Under CERCLA Section 108(c), parties (including EPA) could also bring a “direct action” claim against the instrument provider.

# Financial Responsibility Scope and Amount

- ▶ EPA considered what Superfund costs should be covered by the financial responsibility instruments, and how the amount of financial responsibility should be determined.
- ▶ EPA is considering an approach under which owners and operators would be required to establish and maintain financial responsibility instruments to cover all Section 107 liabilities - response costs, natural resource damages, and covered health assessment costs - at their facilities.

# Financial Responsibility Scope and Amount (cont.)

- ▶ To determine the amount of financial responsibility required for response costs, the Agency is developing a formula that would identify an amount of financial responsibility to reflect the primary site conditions and characteristics that would affect the costs of removal or remedial action.
- ▶ The formula would assign dollar values for a facility based on facility and unit characteristics (e.g., open pits; waste rock; tailings; heap leach; process ponds; water management; and, operations, maintenance, and monitoring).
- ▶ Dollar values would be summed to establish the facility's level of financial responsibility.

# Financial Responsibility Scope and Amount (cont.)

- ▶ EPA intends the formula to reflect the relative risk of facility practices in managing hazardous substances, including reductions in risk that may result from compliance with other regulatory requirements.
- ▶ The Agency is considering a fixed amount of financial responsibility for health assessment costs and a fixed percent for natural resource damages, that would be required at all facilities.
- ▶ The total amount of funds would be available for any future response action, natural resource damages, or health assessment. Availability would not be tied to particular site features and would not in any way be driven by components of the formula.

# Financial Responsibility Scope and Amount - HRM Financial Responsibility Formula

- ▶ Under the approach EPA is considering, facility-specific inputs would be used to generate a baseline level of financial responsibility.
- ▶ The baseline could then be reduced through demonstrating that current controls at the facility are in place.
- ▶ EPA anticipates that the formula will need to be reapplied periodically to account for changed facility conditions.

# HRM Financial Responsibility Formula: Categories

- ▶ EPA has identified several categories it is currently analyzing to obtain statistically-derived factors for use in the formula, including components:
  - ▶ Associated with particular sources and controls
    - ▶ Includes open pits, underground mines, waste rock piles, heap/dump leaches, tailings facilities, process ponds and reservoirs, and slag piles
  - ▶ Associated with site-wide sources and controls
    - ▶ Drainage construction
    - ▶ Solid and hazardous waste disposal
  - ▶ Associated with operations and maintenance (O&M)
    - ▶ Interim water management and long-term water treatment
    - ▶ Site-wide O&M and monitoring

# HRM Financial Responsibility Formula: Examples of Expected Formula Inputs

- ▶ EPA is looking at **current** site features as the basis for inputs which an owner or operator will enter to calculate the baseline amount
- ▶ The site features are both readily identifiable by the facility owner or operator, and readily verifiable by the EPA
  - ▶ Acreage of site features (e.g., waste rock acreage)
  - ▶ Presence of an underground mine
  - ▶ Hydraulic head in the underground mine
  - ▶ Distance to surface water
  - ▶ Net precipitation (i.e., precipitation - evaporation)
  - ▶ Use of in-situ leaching
  - ▶ Site-wide water flows in gallons per minute

# HRM Financial Responsibility Formula: Examples of Expected Formula Reductions

- ▶ EPA is looking at **current** engineering controls as the basis for reductions to the baseline amount
  - ▶ Controls may already be present because of other regulatory programs, or undertaken voluntarily.
  - ▶ This approach will both reduce the amount of financial responsibility where strong regulatory controls are already present, and also provide an incentive for sound mining practices that will reduce financial responsibility costs for owners and operators.
- ▶ EPA intends to allow reductions from the baseline amount for controls such as those which result in reductions in volume, toxicity, and mobility of hazardous substances.
- ▶ Categories of reductions may include:
  - ▶ Feature-specific source control capital cost reductions
  - ▶ Site-wide drainage capital cost reductions
  - ▶ Capital and O&M reductions for water treatment
  - ▶ Short- and long-term O&M and monitoring reductions

# Financial Responsibility Instruments

- ▶ EPA anticipates consideration of at least the following financial responsibility instruments:
  - ▶ Letter of Credit
  - ▶ Insurance
  - ▶ Trust Fund
  - ▶ Surety bond
  - ▶ Credit rating-based financial test/ corporate guarantee

# Financial Responsibility Instruments (cont.)

- ▶ EPA has met with representatives of the insurance, surety, and banking communities who are experienced in providing instruments for other financial responsibility programs.
- ▶ Because the CERCLA 108(b) rule differs in operation from other existing programs, aspects of how the instruments would operate are novel.
- ▶ Novel criteria include the payout of the instrument under the direct action provision, the scope of coverage, and the payout to multiple claimants. Instrument providers will have to consider how to address these differences.
- ▶ EPA is considering the financial industry's feedback as it develops the instruments.

# Potential Costs to Comply with the Rule

- ▶ EPA anticipates that the cost for a facility to comply with the proposed rule would largely stem from a limited number of requirements associated with the establishment and maintenance of the financial instrument, including:
  - ▶ Establishing a financial responsibility amount for the facility
  - ▶ Obtaining a financial responsibility instrument for that amount
  - ▶ Recordkeeping and reporting
- ▶ The cost to demonstrate evidence of financial responsibility will depend on site specific factors including: the financial responsibility level established for the facility; the choice of instrument; and other factors that instrument providers might consider.

# Financial Responsibility Mine Example

- ▶ The following example highlights the key inputs used to develop FR amount and instrument pricing.

Commodity, Revenue, # employees	Site Features	Engineered Controls/ Best Practices	Best Practices Credit Reduction	FR Total (\$millions)
<ul style="list-style-type: none"> <li>▪ Gold</li> <li>▪ \$50-\$100m</li> <li>▪ &lt;1,500 employees</li> </ul>	<ul style="list-style-type: none"> <li>• Open Pit ~200 ac</li> <li>• Waste Rock ~700 ac</li> <li>• Tailings Facility ~400 ac</li> <li>• 0"-25" Net Evaporation</li> <li>• Water Treatment Rate ~500 gpm</li> </ul>	Open Pit Alkaline Amendments Waste Rock Segregation	~ 42%	~ \$75

- ▶ The annualized cost of the instrument is driven primarily by the level of financial responsibility required, the parent company's financial characteristics (e.g., risk profile, cost of capital), and which instrument mechanism is used.

Annualized Instrument Costs to obtain \$75 Million in FR (\$millions)		
Instrument Type	Credit Rating	
	BBB-	CCC+
Insurance Policy	\$4m	\$19m
Trust Fund	\$5m	\$26m
Letter of Credit	\$6m	\$28m

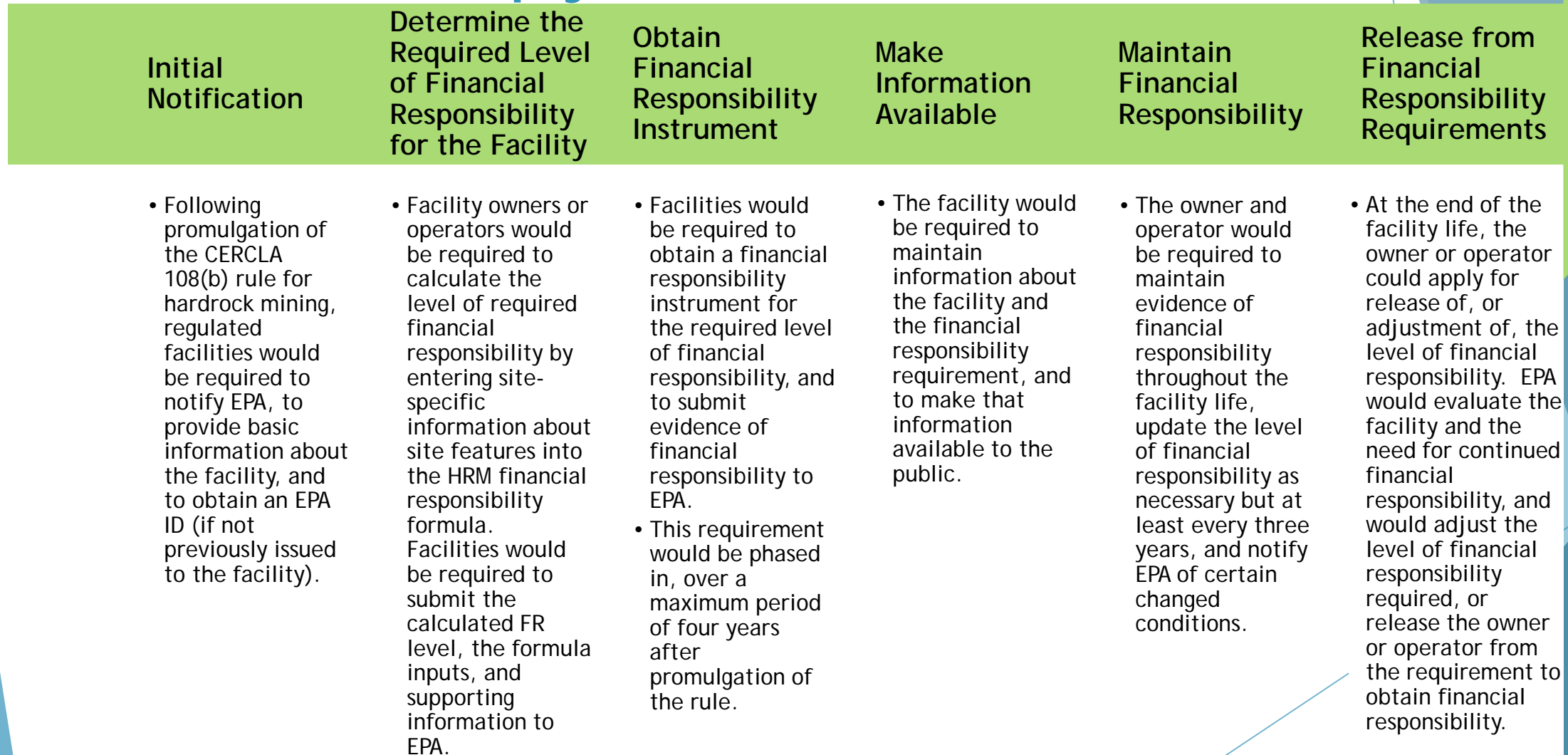
# Potential Costs to Comply with the Rule

Commodity, Revenue, # employees	Site Features	Engineered Controls/ Best Practices	Credit Reduction for Best Practices	FR Total (\$millions)	Credit Rating/ Least Cost Instrument	Annualized Cost of Instrument (\$million)
<ul style="list-style-type: none"> <li>▪ Gold</li> <li>▪ \$50-\$100m</li> <li>▪ &lt;1500 employees</li> </ul>	<ul style="list-style-type: none"> <li>• Open Pit ~200 ac</li> <li>• Waste Rock ~700 ac</li> <li>• Tailings Facility ~400 ac</li> <li>• 0"-25" Net Evaporation</li> <li>• Water Treatment Rate ~500 gpm</li> </ul>	<ul style="list-style-type: none"> <li>• Open Pit Alkaline Amendments</li> <li>• Waste Rock Segregation</li> </ul>	~ 42%	~ \$75	<ul style="list-style-type: none"> <li>• BBB-</li> <li>• Insurance Policy covering known liabilities</li> </ul>	~\$4m
<ul style="list-style-type: none"> <li>▪ Precious metals</li> <li>▪ \$50-\$100m</li> <li>▪ &gt;1500 employees</li> </ul>	<ul style="list-style-type: none"> <li>• Underground Mine</li> <li>• Tailings Facility ~100 ac</li> <li>• 0"-25" Net Evaporation</li> <li>• Water Treatment Rate ~100 gpm</li> </ul>	<ul style="list-style-type: none"> <li>• Tailings Facility Alkaline Amendments</li> <li>• Paste or Filtered Tailings Deposition</li> </ul>	~ 80%	~ \$25	<ul style="list-style-type: none"> <li>• B+</li> <li>• Insurance Policy</li> </ul>	~\$1m
<ul style="list-style-type: none"> <li>▪ Copper</li> <li>▪ +\$1000m</li> <li>▪ &gt;1500 employees</li> </ul>	<ul style="list-style-type: none"> <li>• Open Pit ~1000 ac</li> <li>• Waste Rock ~2000 ac</li> <li>• Tailings Facility ~700 ac</li> <li>• 75"-100" Net Evaporation</li> <li>• Water Treatment Rate ~1,000 gpm</li> </ul>	<ul style="list-style-type: none"> <li>• Wet Tailings Deposition</li> </ul>	~ 24%	~ \$525	<ul style="list-style-type: none"> <li>• BB</li> <li>• Trust Fund</li> </ul>	~\$19m

# Public Participation

- ▶ EPA is committed to ensuring transparency and to providing opportunities for public participation in its programs, including CERCLA.
- ▶ Public participation promotes greater awareness of the federal regulatory requirements.
- ▶ EPA understands that the public can play an important role in ensuring that the regulation achieves its goals.
- ▶ EPA is considering how to incorporate transparency and public participation into the HRM rule.

# Process to Comply with the Rule



# Relationship of Section 108(b) Financial Responsibility to State, Tribal, and Local Government Law

- ▶ EPA's current view is that evidence of financial responsibility under Section 108(b) was not intended to preempt state or local mining reclamation and closure requirements.
- ▶ In particular, Section 108(b) financial responsibility is designed to assure that funds are available to pay for CERCLA liabilities, whereas EPA's review of state law financial responsibility requirements to date indicates that many are designed to assure compliance with state regulatory requirements and thus are not "in connection with liability for the release of a hazardous substance" under CERCLA Section 114(d).
- ▶ Similarly, EPA's current view is that evidence of financial responsibility under section 108(b) was not intended to preempt financial responsibility requirements that are designed to assure compliance with tribal mining reclamation and closure requirements.
- ▶ EPA plans to address this issue in the preamble of the proposed rule.

# Relationship of Section 108(b) Financial Responsibility to Other Federal Law

- ▶ EPA has evaluated the applicability of Section 108(b) requirements at facilities where other federal financial responsibility requirements apply.
- ▶ EPA believes that Section 108(b) requirements, established to address CERCLA liabilities, are distinct from federal closure and reclamation bonding requirements imposed under other statutes.
- ▶ It is important to note that EPA intends the Section 108(b) financial responsibility amount to account for environmentally protective practices already in place, including those required by other regulations.

# Market Study

- ▶ EPA is conducting a study to assess the capacity of third party markets to underwrite financial responsibility instruments required by the 108(b) rulemaking.
- ▶ The draft study examines both the current state and future outlook of the markets for financial responsibility instruments based on publically available and attributable data (from the US Treasury, GAO, Standard & Poor's, industry, and non-profit institutions).
- ▶ The draft study report is currently undergoing internal review. EPA expects to make the report available before it issues the proposed hard rock mining rule.

# Outreach Activities

- ▶ The next several slides describe specific outreach activities EPA will undertake in the coming months, concurrent with development of the proposed rule.
- ▶ EPA will perform any additional public outreach through the EPA's Superfund financial responsibility website.
- ▶ <https://www.epa.gov/superfund/superfund-financial-responsibility>

# Federalism Consultation

- ▶ Pursuant to Executive Order 13132, "Federalism," EPA will consult with state and local government officials.
- ▶ The Order requires that Federal agencies consult with elected state and local government officials, or their representative national organizations, when developing regulations that have *Federalism Implications*.
- ▶ EPA is aware that representatives of the states have expressed concerns regarding CERCLA's express preemption provision in section 114(d). Therefore, the Agency is holding this consultation as part of ongoing efforts to involve its intergovernmental partners in the development of this proposed rule.
- ▶ The consultation provides the opportunity to discuss the approach to the proposed rule and hear concerns from state and local government officials.

# Tribal Consultation

- ▶ EPA will consult with the federally recognized Indian tribes.
- ▶ Each tribe will be notified in writing of our CERCLA Section 108(b) rulemaking and will have the opportunity to request government-to-government consultation.
- ▶ Our goal is to ensure that tribal officials have sufficient information to be able to provide informed input on this rulemaking to EPA.
- ▶ EPA has already identified tribes that have their own financial responsibility requirements for hardrock mining. If more tribes have such requirements, we are interested in that information.

# SBREFA

- ▶ The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires EPA to convene a Small Business Advocacy Review (SBAR) Panel, consisting of representatives from three federal agencies, for proposed rules that will have a significant economic impact on a substantial number of small entities.
- ▶ Small entities are small businesses, small governments, and small organizations including appropriate trade associations. Small entity representatives have the opportunity to offer individual advice and recommendations to the SBAR Panel to ensure that we carefully consider small entity concerns.
- ▶ The SBREFA process for the CERCLA Section 108(b) rulemaking has already begun. We expect it to conclude with a SBAR Panel report listing recommendations to EPA.

# How/When to Comment on the Proposed Rule

- ▶ The “CERCLA 108(b) Financial Responsibility Requirements for Facilities in the Hard Rock Mining Industry; Proposed Rule”, is due to be signed by December 1, 2016.
- ▶ The Proposed Rule will be published in the *Federal Register* and available for public review.
- ▶ The proposed rule will provide instruction on how to comment and the duration of the public comment period.
- ▶ We will consider public comments received during the comment period and EPA will provide responses at the time a Final Rule is issued.

Thank you!