THE SURETY & FIDELITY ASSOCIATION OF AMERICA
SERVING THE INDUSTRY SINCE 1908

July 14, 2016

Mr. Mathy Stanislaus
Assistant Administrator
Environmental Protection Agency
Office of Land and Emergency Management
Mail Code 5101T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: CERCLA 108(b)
Financial Assurance Requirement

Dear Mr. Stanislaus:

The Surety & Fidelity Association of America ("SFAA") is a non-profit corporation whose member companies collectively write the majority of surety and fidelity bonds in the United States. SFAA is a licensed rating or advisory organization in all states and is designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience. The vast majority of bonds that secure regulatory obligations are provided by SFAA members. We appreciated the opportunity over the last several months to participate in outreach events offered by the Environmental Protection Agency ("EPA") to discuss its proposed implementation of the CERCLA 108(b) financial assurance requirements for the hardrock mining industry. As we approach the December 2016 release of the Notice of Proposed Rulemaking, we submit comments regarding concerns we have identified based on those discussions, including most recently the webinar hosted by EPA on May 17, 2016.

A surety bond is a three party agreement by which the obligation owed by one party (the "bond principal") to another party (the "obligee") is secured by a third party (the "surety"). The breadth of availability of a surety bond is determined by the risk and exposure associated with the bond obligation. The bond's risk and exposure are affected by the scope and nature of the obligation, the size of the obligation and the duration of the obligation. A surety addresses levels of risk through it underwriting requirements. Therefore, as risk levels increase, underwriting requirements may be tightened. Tighter underwriting parameters mean that fewer bond principals may be able to qualify for the bond. Smaller businesses with limited financial resources may have particular difficulty in qualifying for the bond. Based on presentations and discussions regarding the proposed parameters of the bond thus far, we have identified certain aspects of the bond requirement that could restrict availability.

EPA has advised that the financial assurance instrument that the mining facility furnishes under section 108(b) could be used to pay into a trust fund pursuant to an administrative order or a court finding of CERCLA liability to fund the response to a release or threatened release. Other parties, including the public, could make claims against the owner or operator under section 107

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of CERCLA, which would be payable from the financial assurance instrument. A direct action could be made against the instrument under section 108(c). EPA contemplates that the instrument would cover all section 107 liabilities (response costs, natural resource damages and covered health assessment costs).

Scope and nature of obligation

A significant concern is EPA's proposal to make the financial assurance available to multiple potential claimants through the direct action provisions of section 108(c). First, the potential that multiple parties, other than EPA, can make a claim under the surety bond significantly enlarges the surety's exposure to claims, and possibly dilutes the protection available to EPA to fund the response to a release or a threatened release. In addition, we presume the purpose of the financial assurance is to provide assurance of funding for addressing a release. If funds are paid to a third party, what assurance does EPA have that such funds will be used to remediate the effects of the release? Finally, pursuant to section 108(c), third party action arises from a filing of bankruptcy. In many cases, an operator that has filed for bankruptcy still has the ability to comply with its obligations under CERCLA. A bond is a conditional obligation under which the surety's obligations are triggered only when the bond principal has defaulted. Merely filing for bankruptcy should not be the triggering event for rights under the bond. SFAA recommends that EPA should be the only claimant under the bond. Further, the triggering event should be the failure to fund the costs associated with a release. (We submit that a "threatened release" could be too subjective to define the bright line that marks when the surety's obligations are triggered.)

EPA has maintained that the financial assurance required under section 108(c) is independent of existing state and federal bond requirements that operators must meet to secure reclamation obligations. However, the two requirements do, in fact, overlap. For example, it is conceivable that a release would involve groundwater contamination, and many state and federal reclamation bonds secure the restoration or maintenance of water and air quality. The Surface Management Surety Bond required by the Department of Interior Bureau of Land Management ("BLM") (Form 3809-1) secures compliance with the operator's plan of operations and with the regulations set forth in 43 CFR 3802. Environmental requirements are set forth in 43 CFR 3802.3-2, which states in part:

> (a)§ 3802.3-2(a) Air quality. The operator shall comply with applicable Federal and State air quality standards, including the requirements of the Clean Air Act (42 U.S.C. 1857 et seq.).
>
> (b)§ 3802.3-2(b) Water quality. The operator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act (33 U.S.C. 1151 et seq.).
>
> (c)§ 3802.3-2(c) Solid wastes. The operator shall comply with applicable Federal and State standards for the disposal and

> treatment of solid wastes. All garbage, refuse, or waste shall either be removed from the affected lands or disposed or treated to minimize, so far as is practicable, its impact on the environment and the surface resources. All tailings, waste rock, trash, deleterious materials of substances and other waste produced by operations shall be deployed, arranged, disposed or treated to minimize adverse impact upon the environment, surface and subsurface resources.

The response to a release of hazardous substances conceivably would be secured by the 108(b) financial assurance and by the BLM bond. A surety that provides the BLM bond and 108(b) bond for the same facility likely would be facing claims under both bonds. Clear guidance is needed to address how EPA, other federal agencies (such as BLM) and state regulatory agencies will coordinate activities in making the claims involving the same event so that the surety can avoid duplicative liability.

Another risk factor is the duration of the bond. Conceivably, the financial assurance must remain in place during the period of operation, which could be many years. A surety bond with a long duration increases the risk to the surety. When a surety writes a bond for an operator, it is making a judgment about the operator's financial and operational viability over the life of the bonded obligation. As the duration of the bonded obligation becomes longer, and the surety must assess the operator's operation and financial strength for periods of time well into the future, the certainty of the judgment may be lessened. To compensate for the increased risk due to the diminished certainty of underwriting, sureties typically raise their underwriting standards, and provide long-term bonds only to the largest and most financially sound operators. We recommend that the implementing regulations should contain measures by which the surety can control the duration, such as a cancellation clause in the bond.

Amount of assurance

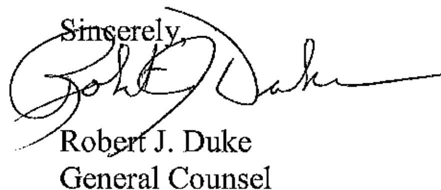
EPA staff has advised that EPA is developing a formula for computing the amount of financial assurance based on the site conditions of the facility. We understand that the formula is based on the historic response costs of over 60 mining sites. Credits to a baseline computation are based on certain best practices that are employed by the facility. During the webinar hosted by EPA on May 17, 2016, EPA offered a few example calculations. The calculations yielded financial assurance amounts that ranged from $25 million to $525 million (the differences due to the characteristics of the facility and the best practices that were employed). Strictly in the context of the size of the surety bond alone, bonds in such amounts conceivably could be available in the market. However, considering that an operator may have multiple facilities, the aggregation of financial assurance requirements could present availability challenges, particularly considering the other risk issues discussed above. (Does EPA have an estimate of the aggregate required amount of financial assurance for the entire hardrock mining industry?)

We submit some suggestions for reducing the amount of required financial assurance. First, as discussed above, there is significant overlap of coverage between the 108(b) financial assurance and the surety bonds currently being furnished to meet state and federal requirements. We understand that EPA will reduce the amount of financial assurance based on the presence of engineering controls required under other state or federal programs. We submit that there should be a dollar for dollar credit for bonds already furnished to state or federal agencies. The Bureau of Ocean Energy Management ("BOEM") is taking a similar approach with respect to its expanded supplemental bonding policy under 30 CFR § 556.53. Under the expanded policy (which has not yet been implemented), it appears more entities with well drilling operations in the Gulf of Mexico will be required to furnish a bond to BOEM. However, many of these entities are parties to a purchase and sale agreement by which a major operator has conveyed a well lease to the entity. These entities already furnish a bond to the major operator (e.g. Chevron). As to these entities, BOEM is contemplating creating a rider adding BOEM as an obligee. This dual obligee private bond would satisfy the BOEM bonding requirement and would eliminate the need for the entity to provide duplicate bonding (to BOEM and the major operator).

Second, if the formula is based on costs from sites that are legacy sites with existing issues, the formula may be overstating the estimated costs, particularly considering that the financial assurance requirement will apply to currently operating sites that are not experiencing a release or a threatened release.

Our concerns that we set forth are not intended to convey that surety bonds will not be available. We simply wish to communicate with EPA potential concerns regarding availability that we have identified at this early stage based on information provided at EPA's various outreach events. We thank you for your consideration and offer SFAA and the surety industry as a resource to assist EPA is developing a workable surety bond requirement.

Sincerely,



Robert J. Duke
General Counsel

cc: Barnes Johnson, Director, Office of Resource Conservation (via electronic mail)

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