

*Submitted via Regulations.gov*

July 11, 2017

Ms. Barbara Foster  
Office of Resource Conservation and Recovery  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

Re: Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry, Docket ID No. EPA-HQ-SFUND-2015-0781, 82 Federal Register 3388 (Jan. 11, 2017)

Dear Ms. Foster:

The American Bankers Association (ABA)<sup>1</sup> appreciates this opportunity to comment on the Environmental Protection Agency's (EPA) proposed rule implementing financial responsibility requirements for hardrock mining companies pursuant to section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposed rule sets out several ways for hardrock mining companies to show the financial ability to pay for any CERCLA response costs, health assessment costs, and natural resource damages at the company's facility. In addition to using letters of credit, surety bonds, insurance, and other means to demonstrate financial responsibility, the company may establish a trust with a bank as trustee, also known as a corporate trustee, for the benefit of paying out CERCLA claims.

Many of our member banks act as corporate trustee for trusts established under EPA rules for the benefit of addressing environmental and other remediation costs. As such, ABA and its members have a great interest in these rules. Addressing the issues raised in our comments (which include specific suggested amendments to the trust agreement language laid out in proposed 40 CFR 320.50) would go far to increase the interest of banks, savings associations, and trust companies (collectively, banks) in participating in this business.

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<sup>1</sup> The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

## **General Comments on the Proposal**

Due to the relatively low fees that are charged for this business, most corporate trustees of environmental remediation trusts find it imperative to limit their duties and liabilities, including by limiting their discretion over the management and distribution of the trust assets. In other words, this business has evolved into a relationship where the bank acts as an administrative trustee, akin to an escrow agent, safeguarding the trust assets, maintaining trust accounting, tax and other records, communicating with grantors and beneficiaries, and acting on direction of third-parties as to the investment of the trust assets and the distributions from the fund. Because of the economic realities of acting as trustee, a corporate trustee will not accept investment discretion or the responsibility of determining the validity of a claim asserted against the trust. Thus, in order to make these arrangements workable for corporate trustees, we strongly urge EPA to modify the trust agreement language in 40 CFR 320.50, as we suggest below.

## **Prerequisites to Undertaking Role as Corporate Trustee**

In addition to a number of specific comments on the proposed trust agreement, ABA notes that there are three prerequisites in order for the general structure and nature of these trusts to be a feasible business opportunity.

First, the corporate trustee must be directed by the EPA Administrator as to payments from the fund and must have no discretion or responsibility for evaluating, investigating, or determining the validity of a CERCLA claim. Inasmuch as this business is a low-fee business, potential risks to the bank must be mitigated by ensuring that third-parties are responsible for certain decisions. One of the greatest potential risks in these trusts is that a claim may be paid out (improperly or properly) leaving other claims unsatisfied. The bank is not in the position, nor does it have the expertise, to assess whether a CERCLA claim is valid under a court order, settlement, or other disposition. In addition, in the case of multiple claims being made simultaneously, without enough assets in the trust to satisfy all claims, a corporate trustee cannot be responsible for determining the timing of claims or apportioning funds *pro rata* among claimants, if necessary.

Second, to limit further a corporate trustee's potential exposure, the corporate trustee must be directed by the grantor regarding asset management of the fund and must have no discretion to

make investments on behalf of the trust. We suggest limiting the investment options that the grantor can choose to those that would be lower risk and more likely to guard the principal of the trust. We understand this arrangement to be common for other environmental remediation trusts with corporate trustees.

Third, under the written agreement and CERCLA laws and regulations, the trust and the corporate trustee cannot be deemed a CERCLA “guarantor.” Clarity regarding the limited discretion on the part of the corporate trustee would be best met by EPA promulgating a rule that explicitly states that neither the trustee nor the trust is a guarantor.

The bank as trustee neither creates nor offers the trust, but simply accepts the appointment as trustee and carries out the duties required under the agreement and relevant law. The trustee also does not “provide evidence of financial responsibility,” nor does it issue, underwrite, or offer for the grantor to obtain an instrument similar to insurance, guarantee, surety bond, or letter of credit.<sup>2</sup> The relationship of the trustee in these trusts is akin to an escrow agent that safeguards assets, maintains records, and executes transactions as directed by third-parties. Moreover, if the trust were considered a guarantor, the trustee would still need to act on behalf of the trust and accept and consider claims made by parties other than EPA against the trust.

In the proposed trust agreement, EPA attempts to make this arrangement more appealing to corporate trustees by stating that there is not an intention for the *trustee* to be the guarantor, but that instead the trust itself would be the guarantor. However, a reading of CERCLA indicates that the trust cannot meet the definition of guarantor. Under 42 U.S.C. 9601(13), guarantor is defined as “any *person*, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this Act.” [Emphasis added] A person is defined as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.”<sup>3</sup> Absent from the list defining “person” is a reference to a trust; hence we believe that the trust itself cannot be a “guarantor.” Even if the trust met the definition of guarantor, it can only act through the trustee, and therefore the trustee may be left responsible to consider and evaluate direct action with regard to CERCLA claims. The banks considering this business would find that an objectionable condition for offering their services.

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<sup>2</sup> See, 42 U.S.C. 9608.

<sup>3</sup> 42 U.S.C. 9601(21).

## Other Comments and Suggested Amendments to the Trust Agreement

ABA and its members suggest specific amendments to the Trust Agreement provided in proposed 40 CFR 320.50, and we attach those amendments in Appendix A to this letter.

Adopting them would make it more likely that corporate trustees would take on this business.

We highlight below the material amendments we propose in the order of the proposed sections of the regulation:

- EPA contact information
  - Because a corporate trustee needs to identify the EPA Administrator who is responsible for directing it as to payments from the fund, we suggest amending that line to specify the contact information of that person.
- Account Number
  - For privacy reasons and to mitigate the risk of fraud, banks prefer not to include account number information in the Agreement. We suggest deleting this line from the Agreement.
- Preamble to the Sections
  - In order to clarify the tax status of the Trust, we have suggested adding language specifically stating that the Trust is an irrevocable grantor trust.
  - Due to difficulties with administering letters of credit, the terms of which can vary from instrument to instrument, ABA member banks would prefer not to accept these as payments into the Trust nor be directed to invest in them as assets of the Trust. We suggest removing the reference in the preamble, as well as in other sections of the Agreement, as noted below (e.g., Sections 3 and 6).
- *Section 1. Definitions as used in the Agreement.*
  - We suggest adding the definition of the term “Trust,” to mean the trust created under this Agreement.
- *Section 3. Establishment of the Trust Funds*
  - We suggest eliminating all references to letters of credit, including from the list of permissible investments. As noted above, banks engaged in this business find these instruments to be difficult to administer because of the variety of terms and templates for these instruments.
  - The language in this section should expressly state that the Trustee is not a “guarantor” under CERCLA. In addition, the language stating that the Trust is the guarantor should be eliminated.
- *Section 4. Payments from the Fund*
  - For corporate trustees to participate in this business, they must have no discretion as to claim evaluation, amount, recipient, and timing of payments from the fund.

Accordingly, the EPA Administrator should determine the validity of CERCLA claims and direct the Trustee as to payments for EPA-approved claims.

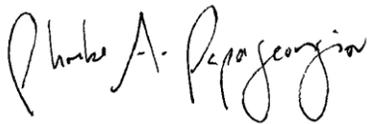
- Getting direction from the EPA Administrator would eliminate concerns about simultaneous claims, complexity of claims made for different facilities or operators, and fraudulent claims, among other things.
- *Section 5. Payments Comprising the Fund*
  - We suggest allowing only cash contributions to the Fund by the Grantor. Cash is the easiest asset for the Trustee to accept and then direct toward the appropriate directed investment option.
- *Section 6. Trustee Management*
  - The Grantor must direct the Trustee to make permissible investments on behalf of the Fund.
  - The Trustee must be a *directed* trustee, as allowed under state law, and should have no discretion over the investments of the Trust assets, no responsibility for selection of investment options under the Trust, and should not render investment advice to the Grantor.
  - We recommend limiting the investment options that the Grantor may choose to the following:
    - Securities or obligations of federal, state, and local governments.
    - Demand and time deposits in an insured institution, including self-deposits of the corporate trustee.
    - Government money market mutual funds, including affiliated funds of the corporate trustee.
- *Section 8. Express Powers of Trustee*
  - We suggest removing all references to Trustee discretion, such as the power to compromise or adjust claims in favor or against the Fund, as well as drawing on letters of credit. Corporate trustees do not want discretion over payments from the Fund, including adjustments to claims; rather the EPA Administrator should direct the Trustee.
- *Section 9. Taxes and Expenses*
  - We suggest changing the language about the source of funds for taxes and expenses so that the Trustee may look to the Trust first and then to the Grantor if there are insufficient funds.
- *Section 10. Annual Valuation*
  - We suggest adding standard language allowing the Trustee to use and rely on pricing services. In addition, we suggest adding language that gives the Grantor and EPA notice as to valuation of Trust assets.
- *Section 11. Advice of Counsel and Professionals*
  - We suggest adding language about (1) other types of professionals upon whom the Trustee may rely, and (2) a clear statement that the Trustee is not liable for any negligence or misconduct of third-parties who are appointed with reasonable care.

- *Section 12. Trustee Compensation*
  - The Trustee should be allowed to deduct reasonable compensation and expenses, including extraordinary expenses, from the Trust for services as agreed to by the Grantor. If the Trust Fund assets are insufficient, the Trustee may seek compensation directly from the Grantor.
- *Section 13. Successor Trustee*
  - Before transferring a Trust to a Successor Trustee, the current Trustee should be permitted to deduct from the Trust any fees and expenses then due or owed.
  - We suggest amending language that requires that the notice be provided by certified mail to include other agreed-upon methods of communication.
- *Section 17. Irrevocability and Termination*
  - We suggest changing the title of this provision to clarify that the Grantor has a reversionary interest in the Trust upon termination.
  - We also suggest other changes to dictate what happens to the Trust if there are no more assets or if the Grantor ceases to exist.
- *Section 18. Immunity and Indemnification*
  - We recommend the addition of language stating that the obligations and indemnification provided in this section shall survive the Trustee resignation or removal, as well as the termination of the Trust.
- *Proposed Section 21. Regulatory Compliance*
  - Corporate trustees need reassurance in the Trust Agreement that all parties will provide necessary information to comply various regulations and laws, including Bank Secrecy Act and anti-money laundering laws and regulations.
- *Proposed Section 22. Force Majeure.*
  - This recommended language regarding circumstances that may disrupt the Trustee's responsibilities but that are out of its control are standard provisions required for corporate trustees to engage in this business.
- *Proposed Section 23. Limitation of Trustee Liability and Duties.*
  - This proposed new section clarifies in one place the role of the Trustee and the limits on the Trustee's duties and liability. This section contains standard provisions that corporate trustees would favor.
- *Proposed Section 24. EPA Administrator.*
  - This proposed section clarifies the role of EPA Administrator, as well as discusses successor EPA Administrators.

## Conclusion

ABA appreciates this opportunity to share our members' comments on the trust agreement language that could potentially provide opportunities for banks to be more involved in offering financial services via new trustee business. If you have any questions, we would be more than happy to provide additional information about corporate trustees and their interests.

Sincerely,



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## Appendix A

### ABA Suggested Amendments to Proposed 40 CFR § 320.50

§ 320.50

Wording of the instruments.

(a)(1) A trust agreement for a trust fund, as specified in 40 CFR 320.45 must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted.

#### TRUST AGREEMENT

EPA Administrator contact information:

[Insert Name, Phone Number, Mailing Address of EPA and Point of Contact(s)]

~~Account Number: [insert account number]~~

Trust Agreement (the “Agreement”) is entered into as of [insert date] by and between [insert name of owner(s)/operator(s)], a business [insert relevant entity (corporation, partnership, association, proprietorship, etc.)], (the “Grantor”) and [insert name of corporate trustee], [insert “incorporated in the state of [name of state]” or “a national bank”] (the “Trustee”).

Whereas, the United States Environmental Protection Agency (“EPA”) has established regulations applicable to the Grantor requiring that an owner or operator of a facility subject to the regulations demonstrate financial responsibility as proof that funds will be available when needed for payment of CERCLA response costs, health assessment costs, and natural resource damages at the facility.

Whereas, the Grantor has elected to establish an irrevocable grantor trust to provide all or part of such financial responsibility ~~and/or to receive the proceeds from a letter of credit to assure all or part of such financial responsibility~~ for the facilities identified herein.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this ~~a~~Agreement, and the Trustee is willing to act as trustee,

Now, therefore, the Grantor and the Trustee agree as follows:

#### *Section 1. Definitions as used in this Agreement.*

a) “Grantor” means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor solely by operation of law.

b) “Trust” means the trust established pursuant to this Agreement.

c) “Trustee” means the Trustee who enters into this Agreement and any successor Trustee appointed in accordance with Section 13 hereof.

*Section 2. Identification of Facilities and Financial Responsibility Amounts.* This Agreement pertains to the facilities and CERCLA 108(b) financial responsibility amounts identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, current owners and operators, and the current financial responsibility amount, and portions thereof, for which financial responsibility is being demonstrated by this Agreement.]

*Section 3. Establishment of Trust Fund.* The Grantor ~~and the Trustee~~ hereby establishes a trust fund (the “Fund” or the “Trust”) for the benefit of any and all parties with valid third-party CERCLA claims against the Grantor or other current owners and operators arising from the operation of the facilities covered by this Agreement. The ~~Grantor and Trustee do not intend for the Trustee to qualify as~~ not a “guarantor” as that term is used in CERCLA sections 101(13) and 108(c)(2), and therefore ~~intend that~~ the Trustee will not be subject to a direct action by Trustee’s agreement to act as Trustee for the Fund. ~~The Grantor and Trustee intend for the Fund to qualify as a “guarantor” as that term is used in CERCLA sections 101(13) and 108(c)(2), and therefore intend that only the Fund will be subject to any direct action brought pursuant to CERCLA section 108(e)(2).~~ The Fund is established initially with cash as consisting of property, which are acceptable to the Trustee, described in Schedule B attached hereto. Such ~~property funds,~~ along with any other monies ~~and/or property~~ subsequently transferred to the Trustee, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement, are referred to herein collectively as the Fund. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor under CERCLA.

*Section 4. Payments from the Fund.* The Trustee has no discretion as to whether, how much, and to whom payments for valid CERCLA claims shall be made. The Trustee shall be directed as to the payments from the Fund by the EPA Administrator and has no duty to determine the validity of any CERCLA claim submitted. The Trustee shall make payments from the Fund upon written direction of the EPA Administrator on behalf of ~~to~~ parties with valid CERCLA claims against the Grantor or other current owners or operators at the facility(-ies). To make these payments, the Trustee ~~shall draw on any letters of credit described in Schedule B and/or shall make payments from the funds held by the Fund described in Schedule B.~~ The Trustee shall make payment from the Fund for valid third-party CERCLA claims, as determined by the EPA Administrator, only up to the lesser of: (1) The value of the valid third-party CERCLA claim; or (2) the amount of CERCLA 108(b) financial responsibility provided for the facility(ies) associated with the claim provided by the Fund as identified in Schedule A.

The Trustee shall satisfy valid unpaid CERCLA claims received by the EPA Administrator by making payments ~~on a first come first served basis~~ from the Fund only upon receipt from the EPA Administrator of one or more of the following documents and only in amounts up to the values specified in the document(s):

(i) ~~A written signed statement from the EPA Administrator along with a final court judgment~~ dated at least 30 days earlier from a Federal court, in favor of the claimant, awarding CERCLA response costs, health assessment costs, and/or natural resource damages associated with a facility covered by this Agreement against the Grantor or any of the current owners or operators at a facility covered by this agreement;

(ii) A written signed statement from the EPA Administrator ~~or another Federal government agency~~ requesting payment from the Fund on the grounds that payment has not been made as required by a CERCLA settlement associated with a facility covered by this Agreement and with any of the current owners or operators; or

(iii) A written signed statement from the EPA Administrator ~~or other Federal government agency~~ requesting payment from the Fund into a trust fund established pursuant to a CERCLA unilateral administrative order on the grounds that performance at a facility covered by this Agreement has not occurred as required by a CERCLA unilateral administrative order issued to a current owner or operator that references this trust agreement.

~~In addition to one of the documents listed above, all claimants must also present the following:~~

~~A signed statement from the claimant certifying that these amounts have not been recovered or paid from any other source, including, but not limited to, the owners or operators, insurance, judgments, agreements, and other financial responsibility instruments.~~

~~In the event of simultaneous valid claims that exceed the value of the Fund, the Trustee shall pay the claimants a pro rata share of their claim determined by the size of each valid claim.~~

~~In addition to the payment instructions above, in the case of a release or threatened release from a facility covered by the Agreement, any claim authorized by section 107 or 111 of CERCLA may be asserted directly against the Fund as provided by CERCLA section 108(c)(2) subject to the limitations in CERCLA section 108(d). The Fund shall be entitled to all rights and defenses provided to guarantors by CERCLA section 108(c). The Fund is available for paying and defending claims in these instances.~~

~~The Trustee shall notify the EPA Administrator and Grantor of any payment made under this Section within five (5) working days. If the Grantor ceases to exist, such notice shall be provided to the EPA Administrator.~~

In addition, if notified by the EPA Administrator in writing that the trust fund contains amounts in excess of the required CERCLA 108(b) financial responsibility amount, the Trustee shall refund to the Grantor or other party as designated by the EPA Administrator such amounts in excess of the required CERCLA 108(b) financial responsibility amount.

*Section 5. Payments Comprising the Fund.* Payments made to the Trustee for the Fund shall consist solely of cash or securities acceptable to the Trustee and/or a standby letter of credit as specified in 40 CFR 320.50(b). ~~In the event of receipt of a notice of a decision not to extend the~~

~~expiration date of a letter of credit from an institution issuing a letter of credit held by the Fund, the Trustee shall draw on the letter of credit prior to expiration occurring and deposit any unused portion of the credit into the Fund if the EPA Administrator informs the Trustee that the owner operator did not establish alternate financial responsibility and obtain written approval of such alternate financial responsibility from the EPA Administrator within the time frame provided by 40 CFR 320.40(k) and (l).~~

*Section 6. Trustee Management.* ~~The Trustee shall have no investment discretion and shall only invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with the Grantor's disclosures investment direction communicated in writing to the Trustee from time to time of the names of all current owners and operators and their affiliates including issuers of securities or other obligations, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Grantor may only direct the Trustee shall to invest the assets of the Fund in the following permitted investments discharge its duties with respect to the trust fund with undivided loyalty and solely in the interest of the beneficiaries and with the reasonable care, skill, and caution of a prudent investor, in light of the purposes, terms, distribution requirements, and other circumstances of the trust; except that:~~

~~(i) Securities or other obligations of the Grantor, or any other current owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the Federal, or a state or local government;~~

~~(ii) The Trustee is authorized to invest the Fund in Time or demand deposits of the Trustee or third-party institution, to the extent insured by an agency of the Federal or state government; and~~

~~(iii) Government money market funds, as defined in 17 CFR 270.2a-7, including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee is authorized to hold and draw upon standby letters of credit specified as in 40 CFR 320.50(b);; and~~

~~(iv) The Trustee is authorized to hold cash awaiting investment or distribution un-invested for a reasonable time and without liability for the payment of interest thereon.~~

If the Trustee has not received a written instruction from Grantor at any time that an investment decision must be made, Trustee is directed to holds the funds in cash. Grantor acknowledges that, to the extent applicable, it has received from Trustee a current copy of the prospectus for the investment it has authorized in Schedule B prior to providing such direction. All investments shall be made in the name of Trustee. Notwithstanding anything to the contrary contained herein, Trustee may, without notice to the parties hereto, sell or liquidate any of the foregoing investments at any time for any disbursement of funds permitted or required hereunder. All investment earnings shall become part of the Fund and investment losses shall be charged against the Fund. Trustee shall not be liable or responsible for loss in the value of any investment made pursuant to this Agreement, or for any loss, cost or penalty resulting from any sale or liquidation of investments. With respect to any funds or investment instruction received after twelve

o'clock, p.m., [Eastern/Central/Pacific] Time, Trustee shall not be required to invest such funds or to effect any investment instruction until the next day upon which banks in [city and state where funds are held] and the New York Stock Exchange are open for business.

The parties hereto acknowledge that Trustee does not have a duty to provide investment advice nor will it provide any such advice.

[Moved with amendments to Section 6, Trustee Management]Section 7. Common and Collective Investment Practices. The Trustee is expressly authorized in its discretion:

~~(a) To transfer from time to time any or all of the assets of the Fund to any common or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be jointly invested with the assets of other trusts participating therein; and~~

~~(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.~~

*Section 8. Express Powers of Trustee.* Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

~~(b) To hold and draw upon standby letters of credit that are worded as specified in 40 CFR 320.50(b);~~

(e**b**) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(d**c**) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(ed) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or state government;

~~(f) To compromise or otherwise adjust all claims in favor of or against the Fund.~~

*Section 9. Taxes and Expenses.* All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses shall be paid directly by the Grantor. All other expenses incurred by the Trustee in connection with the administration of this Trust including, but not limited to fees for tax preparation, accounting, or legal services rendered to the Trustee, the compensation of the Trustee, and all other proper charges, expenses, and disbursements of the Trustee not paid directly by the Grantor shall be paid from the Fund.

*Section 10. Annual Valuation.* The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate EPA Administrator a statement confirming setting forth the value of the Trust including the value of any funds held by the Trust and of any letters of credit held by the Trust. ~~Any letters of credit shall be valued at the face amount less the value of any draws.~~ Any securities in the Fund shall be valued at market value as of no more than sixty days prior to the anniversary date of establishment of the Fund, provided that the parties hereto acknowledge and agree that the Trustee shall only be required to report the value of any asset on statements, books, and records according to the price provided by pricing services and sources relied upon by the Trustee. The failure of the Grantor to object in writing to the Trustee within 930 days after the statement has been furnished to the Grantor and the EPA Administrator shall constitute a conclusively binding assent by the Grantor barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement. A monthly statement sent by the Trustee shall satisfy this requirement.

*Section 11. Advice of Counsel and Professionals.* The Trustee may from time to time consult with counsel or other professionals, who may be counsel or contracted by the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel or other professionals, and shall not be responsible for the negligence or misconduct of any counsel or other professional appointed by the Trustee with reasonable care.

*Section 12. Trustee Compensation and Reimbursement of Expenses.* The Trustee shall be entitled to reasonable compensation and reimbursement of expenses, including extraordinary expenses, from the Fund for its services as agreed upon in writing from time to time with the Grantor. If the Trust does not have sufficient funds, the Grantor shall promptly pay compensation, fees, including extraordinary fees, owed to the Trustee upon receipt of an itemized invoice. The Grantor hereby grants to the Trustee as security interest in, lien upon, and right of offset against the Fund

*Section 13. Successor Trustee.* The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund (minus any and all fees and expenses then due and owing to the Trustee). If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the Trust in a writing sent to the Grantor, the EPA Administrator, and the present Trustee by certified mail or other agreed-upon method of communication 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

*Section 14. Instructions to the Trustee.* All orders, requests, and instructions to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor or EPA Administrator may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Administrator to the Trustee shall be in writing, signed by the EPA Administrator, or designee thereof, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA Administrator hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

~~*[Moved with amendments to Section 4, Payments from the Fund] Section 15. Notices of Payment.* If a payment for CERCLA response costs, health assessment costs, and/or natural resource damages is made under Section 4 of this trust, the Trustee shall notify the Grantor of such payments and the amounts thereof within five (5) working days. If the Grantor ceases to exist, such notice shall be provided to the EPA Administrator. Further, the Trustee shall notify the EPA Administrator of all claims against the Fund resulting from a direct action under CERCLA section 108(c).~~

*Section 16. Amendment of Agreement.* This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the EPA Administrator, or by the Trustee and the EPA Administrator if the Grantor ceases to exist.

*Section 17. Irrevocability, ~~and~~ Termination, and Reversionary Interest of the Grantor.* Subject to the right of the parties to amend this Agreement as provided in Section 16, *Amendment of Agreement*, this Trust shall be irrevocable and shall continue until terminated either (1) at the written agreement of the Grantor, the Trustee, and the EPA Administrator; or (2) by the Trustee and the EPA Administrator, if the Grantor ceases to exist; or (3) upon distribution of all assets in the Trust. Upon termination of the Trust, all remaining Trust property, less final Trust

administration fees and expenses, shall be paid to the Grantor, or at the written direction of the EPA Administrator if the Grantor ceases to exist.

*Section 18. Immunity and Indemnification.* The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any and all personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense. EPA does not indemnify either the Grantor or the Trustee due to the restrictions imposed by the Anti-Deficiency Act, 31 U.S.C. 1341. The obligations of the Grantor and the indemnity provided under this Section shall survive the resignation or removal of the Trustee and the termination of this Agreement.

*Section 19. Choice of Law.* This Agreement shall be administered, construed, and enforced according to the laws of the state of [enter name of state].

*Section 20. Interpretation.* As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

*Section 21. Regulatory Compliance.* In order to comply with the laws, regulations, and executive orders in effect from time to time applicable to banking institutions, including, but not limited to, those relating to the Bank Secrecy Act and federal anti-money laundering laws, the Trustee is required to obtain, verify, record, and maintain certain information on individuals and entities that have a business relationship with the Trustee. Each of the parties agree to provide to the Trustee, upon request from time to time, such identifying information and documentation as may be required to comply with these laws and regulations.

*Section 22. Force Majeure.* The Trustee shall not be responsible or liable for any failure or delay in the performance of its obligation under this Agreement arising out of or caused, directly or indirectly, by circumstances beyond its reasonable control, including, but not limited to, earthquakes; fire; flood; wars; acts of terrorism; civil or military disturbances; loss of or malfunctions of utilities, computer or communications services; or labor disputes. The Trustee shall use commercially reasonable efforts, consistent with accepted practices in the banking industry, to resume performance as soon as reasonably practicable.

*Section 23. Limitation of Trustee Liability and Duties.* The Trustee shall perform only such duties as are expressly set forth herein and no duties shall be implied. The Trustee shall have no liability under and no duty to inquire as to the provisions of any agreement other than this Agreement. The Trustee's sole responsibility shall be for the safekeeping, recordkeeping, and disbursement of the Fund in accordance with the terms of this Agreement. The Trustee shall not be charged with knowledge or notice of any fact or circumstance except as provided by the Grantor or EPA Administrator in writing pursuant to this Agreement. The Trustee shall not be liable for any error in judgment made in good faith by an officer or employee of the Trustee,

unless it shall be proved that the Trustee was grossly negligent in ascertaining the pertinent facts or acted intentionally in bad faith. No provision of this Agreement shall require the Trustee to risk or advance its own funds or otherwise incur any financial liability or potential financial liability in the performance of its duties or the exercise of its rights under this Agreement.

Section 24. EPA Administrator. The party listed on Exhibit A has been appointed the EPA Administrator for the Fund. The Trustee shall not be liable for acting upon any notice, request, consent, direction, requisition, certificate, order, affidavit, letter, or other paper or document relied upon in good faith and to have been signed by the authorized EPA Administrator identified on Exhibit A hereto. If a revised Exhibit A or a rescission of an existing Exhibit A is delivered to the Trustee by an entity that is a purported successor to such EPA Administrator, such document shall be accompanied by additional documentation satisfactory to the Trustee showing that such entity has succeeded to the rights and responsibilities of the EPA Administrator under this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and ~~their corporate seals to be hereunto affixed and~~ attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 320.50(a) as such regulations were constituted on the date first above written.

End Part

[Signature of Grantor

[Printed Name of Grantor]

[Title]

Attest:

[Title]

~~[Seal]~~

[Signature of Trustee]

[Printed Name of Trustee Official]

[Mailing Address, Telephone Number, Email of Trustee Official]

Attest:

[Title]

~~[Seal]~~

(2) The following is an example of the certification of acknowledgement which must accompany the Trust Agreement for a trust fund as specified in 40 CFR 320.45 of this chapter. State requirements may differ on the proper content of this acknowledgement.

State of

County of

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]