CLIENT ALERT

Out from Between a Rock and a Hard(rock) Place: EPA Declines to Pursue CERCLA Financial Assurance Rule for the Hardrock Mining Industry

Dec.20.2017

On December 1, 2017, EPA released the agency's first official about-face on an Obama-era proposed environmental rule. In its final "Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry," EPA concluded that the financial assurance requirements it had proposed under CERCLA for hardrock mining companies in January 2017[1] were unnecessary given developments in the industry and assurances already required under state laws and regulations. The final rule is notable in two respects: (1) it marks the closing of a lengthy and contentious process dealing with CERCLA financial responsibility rules; and (2) it is the first of what likely will be numerous final roll-backs of Obama-era policies.

Background

The financial assurance provisions in CERCLA (officially, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980) are designed to help "ensure that potentially responsible parties (PRPs), and not public funding sources, bear the financial burden of completing Superfund cleanups."[2] CERCLA § 108(b) does not require financial assurance of all industrial categories. Specifically, financial assurance is required only to the extent "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances" from an industrial category.[3]

When it comes to hardrock mining and financial assurance, it all goes back to a 2008 citizen suit against EPA for failure to promulgate financial responsibility requirements under CERCLA § 108 for certain classes of facilities, including hardrock mining.[4] The court in that case ordered that EPA identify classes of facilities that may require financial assurances. As a result, EPA conducted a rulemaking to determine if new requirements were needed for the hardrock mining industry. On July 28, 2009, EPA complied with the court's order, and the agency affirmatively identified hardrock mining as an industry for which it would consider and, as appropriate, adopt financial assurance requirements. EPA provided a general definition of "hardrock mining," which encompassed all hardrock mining activities, including legacy activities conducted prior to modern regulation.[5]

In an attempt to expedite rulemaking, environmental groups filed a new lawsuit in 2014 to compel issuance of financial assurance rules for four specific industrial categories, including hardrock mining. The D.C. Circuit Court of Appeals then ordered EPA to propose a rule for the hardrock mining industry by December 1, 2016, and issue a final rule or determination by December 1, 2017.

On Jan. 11, 2017, the proposed Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry were published in the Federal Register. The proposed rule would have required hardrock mining facilities to take on financial assurance programs. In support, EPA stated that its "research indicated that the hardrock mining and mineral processing industry typically operates on a large scale, and, in some situations," causes large-scale exposure to hazardous substances. In its proposed rule, EPA pointed to eight factors that it has historically considered when assessing the risk profile of an industry and determining whether financial assurance regulation of that industry is required:

1. Annual amounts of hazardous substances released to the environment.
2. The number of facilities in active operation and production.
3. The physical size of the operation.
4. The extent of environmental contamination.
5. The number of sites on the CERCLA site inventory (including both NPL sites and non-NPL sites).
6. Government expenditures.
7. Projected clean-up expenditures.
8. Corporate structure and bankruptcy potential.

The Agency's Decision

EPA received over 11,000 public comments on the proposed rule by July 2017. Having weighed the public comments, EPA determined not to issue any final regulations for the sector. Further, EPA decided against requiring evidence of financial responsibility at hardrock mining facilities. Reasoning that it is appropriate to consider "existing federal and state regulatory programs and improved mining practices at modern mines," EPA concluded that, as a result of existing regulations on mining, as well as voluntary changes in mining practices, modern mines are unlikely to become Superfund sites requiring taxpayer-funded cleanup. EPA thus reversed course from the proposed rule, finding that financial responsibility requirements are unwarranted.

EPA explained that it sought to avoid duplication of other state and federal financial responsibility requirements and considered that the proposed rule might have preempted certain existing state financial responsibility requirements. It also reasoned that the regulated industry may have difficulty obtaining the financial instruments required by the proposed rule. For these reasons, EPA elected not to issue any regulations requiring financial assurance.

Looking Ahead

Although EPA's final decision provides ample reasoning to support its choice not to require financial assurance, that decision necessarily opens the door to legal challenges that are likely to claim alleged violation by EPA of both CERCLA and the court order requiring the agency to undertake a rulemaking. At least one advocacy group has already pledged to challenge the decision. Such a challenge will likely focus on whether CERCLA and the court order, separately or together, required EPA to finalize and implement an actual regulation imposing some form of financial assurance requirements on the hardrock mining sector, not merely that EPA consider its options and complete the rulemaking process.

[1] https://www.federalregister.gov/documents/2017/01/11/2016-30047/financial-responsibility-requirements-under-cercla-108b-for-classes-of-facilities-in-the-hardrock.

[2] https://www.epa.gov/enforcement/financial-assurance-superfund-settlements-and-orders.

[3] 42 U.S.C. § 9608(b)(1).

[4] *Sierra Club v. Johnson*, 2009 WL 482248 (N.D. Cal. Feb. 25, 2009).

[5] Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37213 (July 28, 2009).

[6] *See In re Idaho Conservation League*, 811 F.3d 502 (D.C. Cir. 2016).

[7] 82 Fed. Reg. 3,388-3389 (Jan. 11, 2017).

[8] Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining, 82 Fed. Reg. 3,388-3389 (Jan. 11, 2017).

[9] *Requirements for the Hardrock Mining and Mineral Processing Industry,* EPA, https://www.epa.gov/superfund/superfund-financial-responsibility.

[10] 82 Fed. Reg. 3398 n. 34 (citing 74 Fed. Reg. 37214 (July 28, 2009)).

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