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EPA Proposes Complex, Costly and Overdue Rules Governing Financial Responsibility for Hard Rock Mines and Processing Facilities and Has Scheduled Proposal of Similar Additional Rules for the Chemical, Petroleum, Coal and Electric Power Industries

On December 1, 2016, EPA Administrator Gina McCarthy complied with a court order and signed a proposed Superfund rule to require facilities in the hard rock mining industry to provide financial assurance for cleanup and related environmental costs, as required by Section 108(b) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). 42 U.S.C. § 9608(b). EPA intends the rule to provide adequate funding for CERCLA cleanups, if such work is needed at an affected facility. A pre-publication version of the rule is available for review at https://www.epa.gov/superfund/superfund-financial-responsibility

This rule is expected by EPA and by the industry to be quite costly, between US$111 and US$171 million a year, according to EPA – more according to some industry critics. In part because of its expected cost, and in part because of its great complexity, the proposal and EPA's decisions about the final rule are expected to be controversial.

Section 108(b) required EPA to promulgate these rules by December 1985, more than 30 years ago, a delay that was the basis for environmental groups' lawsuit and the court order setting the schedule to propose the rule, December 1, 2016, and to finalize it by December 1, 2017. In *re Idaho Conservation League*, 811 F.3d 502 (D.C. Cir. 2016). Because of this court-mandated schedule and the undeniable long delay in EPA action, the change in Administrations is very unlikely to affect the timing of EPA's decision.

That court order also required EPA to make a determination about several additional industrial segments whose facilities may be required to post similar financial assurance. Administrator McCarthy did so on December 1, designating the Chemical Manufacturing Industry, the Petroleum and Coal Products Manufacturing Industry and the Electric Power Generation, Transmission and Distribution Industry as sectors whose facilities will be considered for such financial assurance requirements. A schedule for action is included in the court's order and in the EPA notice, though neither the court nor EPA determined the sequence in which the three additional industry financial assurance rules would be decided. A pre-publication version of the Regulatory Determination Notice for additional industries may be viewed at https://www.epa.gov/superfund/superfund-financial-responsibility

We discuss below key aspects of the hard rock mining proposal, as well as the court-ordered schedule to decide whether and what financial assurance requirements will govern facilities in the chemical, petroleum, coal and electric power industries.

I. Hard Rock Mining Proposal: Frequently Asked Questions

What facilities are affected?

EPA has included mines for metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, zinc) and non-metal, non-fuel minerals (e.g., asbestos, phosphate rock, sulfur) and facilities for the "beneficiation and processing" of these ores and minerals, facilities such as smelters.

EPA is soliciting comments about the scope of the facilities covered by the proposal.

The number of mines and related facilities included within the scope of this rule is in flux. EPA has excluded many smaller mines from the proposed rule, as well as some classes of mine, such as placer mines. EPA estimates that there are around 221 affected facilities, some of which include both a mine and a processing facility. Most of the affected facilities are in the western states; gold, copper and iron ore are the most commonly mined commodities in this group of 221 facilities.

Sand, gravel, limestone and stone mines are not included within the scope of the proposed rule.[1] Neither are oil, oil shale, natural gas or coal mining and preparation operations included in this rule,[2] though they may be in a later round, as noted below. By the same token, some evaporative mines and mines that use in-situ leaching of brines or with solvents are included within the scope of the rule. The notice includes a lengthy list of affected minerals subject to the rule if the operation meets the other requirements, a list ranging from alumina to zirconium, and including many tongue-twister minerals and elements.[3]

It is likely that environmental groups will seek to include more facilities and some affected industry sectors to argue for the exclusion of additional classes of mines and ore preparation facilities.

1 Pre-publication notice, p. 250.
2 Id.
3 Id. p. 253.

What will an affected facility have to show EPA in order to comply with the proposed rule?

In order to comply, a facility would need to show third-party financial instruments to demonstrate that it has secured the needed resources to pay for estimated environmental remediation efforts and natural resource damages. EPA has asked for comment as to whether it should allow a financially strong facility owner or operator to self-insure or use a corporate guarantee to satisfy these requirements. The latter course has become more controversial over the past few years, as commodity prices have sharply declined and the financial strength of some owners and operators has been adversely affected.

How much is this likely to cost?

EPA estimates, based on its modeling, that the median financial responsibility amount per facility will be US$37 million. EPA also estimates that the total financial responsibility needed by the industry is US$7.1 billion. EPA has estimated annualized compliance costs to be 2.3% to 2.4% of total financial responsibility, well over US$100 million per year. This proposal is an "economically significant regulatory action submitted to the Office of Management and Budget," a "major rule" for regulatory purposes.

How will the required amount of financial responsibility be calculated?

In the proposed rule, EPA presents a Hard Rock Mining Financial Responsibility Formula that includes:

1. Health assessment costs (a fixed US$550,000 is assumed for all sites);
2. Natural resource damages (proposed at 13.4% of response costs);
3. Response costs (based on a complex formula, including site-specific information for disturbed acreage, tailings piles, process ponds, slag piles and water treatment); and
4. State-specific adjustments (based on tables in various appendixes to the proposal).

The actual amount of financial responsibility required may be reduced by site-specific environmental controls. The offset is intended to encourage responsible environmental management. EPA is seeking comment on the details of all these calculations. At least one commenter has argued that EPA has overstated the required financial responsibility by relying upon unrepresentative and very costly remedial examples.

What third-party financial instruments can be used to satisfy the financial responsibility requirement?

The proposed rule allows the demonstration of financial responsibility to be made by letter of credit, insurance, trust fund and surety bond. It seeks input on whether to permit self-insurance or a corporate guarantee. EPA's insurance study indicates that EPA can help assure adequate capacity in the insurance market for these instruments by allowing:

- A variety of financial instruments to meet requirements,
- Formation of risk retention groups (RRGs), and
- Self-insurance or corporate guarantees, in some cases.

These issues are complex, in part because section 108(c) of CERCLA provides that a direct action (lawsuit) can be brought against the insurer, other issuer or guarantor if the owner or operator posting the instrument or guarantee is in bankruptcy. EPA's rule specifies required wording to be included in such instruments, in part to address issuers' concerns about the direct action provision of the law.

When will facilities have to demonstrate compliance with the rule?

Affected facilities will have to give initial notice to EPA within 30 days of the effective date of the rule. Within 60 days of the effective date, the affected facility will need to create a website concerning its financial responsibility, with the same information it submits to EPA, including required updates.

The proposed rule will require evidence of financial responsibility in the correct form to be provided to EPA. The posting of financial instruments is on a longer schedule than the notices to EPA. Responsibility for health assessment costs must be in place within 24 months of the final rule's publication, responsibility for 50% of NRD and response costs posted 36 months after publication, and full NRD and response cost instruments posted 48 months after publication.

What about other bonding or financial assurance requirements under other federal or state law?

EPA states in the notice that this financial responsibility requirement does not preempt other federal and state bonding requirements which may apply under mine reclamation laws. In EPA's view, this CERCLA requirement is additive, and existing coverage under other programs does not take its place, given the differing requirements of the different regulatory programs. Under the proposed rule, state reclamation bonds are not reduced and do not reduce the financial assurance required of a facility by the proposed rule.

How can I address problems with EPA's proposal?

EPA has solicited comments about the merits and problems with its proposal, and has requested comments on specific aspects of the proposal. Those comments are due to EPA 60 days after publication of this proposed rule in the Federal Register. Although that date has not yet been fixed, the comment deadline seems likely to be mid-February 2017.

It is critical to provide your comments now if you have concerns about the proposed rule. In general, the most persuasive comments to EPA are those presenting detailed factual information, explanations of specific problems with proposed language that offer alternative language or approaches to EPA. Because rules are reviewed by courts based on evidence submitted to EPA, now is the critical time to submit factual data and analysis.

Petitions for review of the final EPA rule must be filed in the U.S. Court of Appeals for the D.C. Circuit within 90 days of the publication of the final rule in the Federal Register. Appellate courts, absent rare circumstances, do not allow submission of additional factual evidence.

II. Schedule for Financial Responsibility Rule Proposals and Decisions for Chemical, Petroleum, Coal and Electric Power Industries

EPA previously identified three additional industry segments (based on NAICS codes) for potential regulation under section 108(b) of CERCLA. These are:

- Chemical Manufacturing (NAICS 325)
- Petroleum and Coal Products Manufacturing Industry (NAICS 324)
- Electric Power Generation, Transmission and Distribution Industry (NAICS 2211)

Under the court-ordered schedule, EPA decided on December 1, 2016 that it would proceed with financial responsibility rulemaking for each of these three industry categories, really four if coal and petroleum product manufacturing are separated. EPA stated in the December 1 notice that it will decide "at a later [unspecified] date" the order in which these industries are to be addressed.

The first proposal is due July 2, 2019; the second proposal on December 4, 2019; and the third on December 1, 2022. Final decisions on the content of such regulations are due on December 2, 2020 for the first industry; on December 1, 2021 for the second; and on December 4, 2024 for the third.

In its proposal for the hard rock mining industry, EPA emphasized that there are many issues unique to hard rock mining and processing. Thus, the notice stated that the agency might take different approaches to regulations for industries considered later.

Nonetheless, many of the basic requirements, such as the mandatory wording of financial instruments, the timing and content of information to be submitted to EPA, and related cross-cutting policy choices will likely be set in the first rulemaking. The rules for the hard rock mining industry are likely to become a template on many of the "generic" issues, making comment by interested parties from other industries appropriate in the first round.

For the chemical manufacturing industry, one contrast with the mining industry is the coverage of many chemical manufacturing facilities by the Resource Conservation and Recovery Act (RCRA), which may include financial responsibility for closure for some of these installations. By contrast, the mining industry was largely exempted from RCRA requirements by the 1980 Bevill Amendment, so for chemical facilities, EPA will need to determine how to reconcile RCRA financial responsibility requirements for closure from those under section 108(b) of CERCLA.

Similarly, for the petroleum manufacturing industry, in addition to reconciling RCRA requirements, the section 108(b) requirements will need to be reconciled with the financial responsibility requirements for petroleum storage facilities under section 311 of the Clean Water Act. 33 U.S.C. §1321. For the electric power sector, EPA will have to consider how to harmonize recent requirements for coal ash landfills with section 108(b).

Finally, the insurance industry, including firms writing surety bonds, as well as the banking industry in issuing letters of credit, may be well served to review and comment on the practicality of EPA's proposal, particularly as to the required wording of key financial instruments.

III. Upcoming Events

The Agency will receive comments for 60 days from publication of the hard rock mining rule in the Federal Register, which is expected around mid-December, making comments due in mid-February 2017. Although there have already been calls for a longer comment period, EPA must adopt a final rule on December 1, 2017 in order to meet the court-imposed deadline. Consequently, those interested in commenting will need to move quickly to submit detailed factual information and thoughtful argument to EPA if they wish to address significant concerns with the provisions of the proposed rule.

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