

A Win For The Mining Industry: EPA Declines To Impose CERCLA 108(b) Financial Responsibility Requirements

December 4, 2017

On December 1, 2017, the U.S. Environmental Protection Agency (EPA) released a pre-publication version of a final rule determining that imposing CERCLA 108(b) financial responsibility requirements on the hardrock mining industry was unwarranted.¹ The Final Rule satisfies a court-ordered timeline and rejects a proposed rule, published in January 2017,² which proposed regulations imposing CERCLA 108(b) financial responsibility requirements on operators of hardrock mining facilities. Based on information provided during the public comment period and EPA's re-evaluation of the rulemaking record, EPA determined that finalizing the proposed rule and establishing financial responsibility requirements for the industry was inappropriate because:

"the degree and duration of risk associated with the modern production, transportation, treatment, storage or disposal of hazardous substances by the hardrock mining industry does not present a level of risk of taxpayer funded response actions that warrant imposition of financial responsibility requirements."³

EPA's decision is significant for the mining industry, as EPA had estimated that the proposed rule would cost the industry approximately \$111-171 million to address an estimated \$15 million in unfunded clean-up costs, annually.⁴

Background

CERCLA Section 108(b), originally enacted in 1980, provides EPA the authority to require that "classes of facilities establish and maintain evidence of financial responsibility consistent with the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."⁵ It also required EPA to "identify those classes for which requirements will be first developed" by December 1983 and that "[p]riority in the development of such requirements shall be accorded to those facilities, owners, and operators which [EPA] determines present the highest risk of injury."⁶ This deadline was never met.

In 2008, several environmental organizations sued to require EPA to publish the required

Related Capabilities

- Mining
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priority notice and the U.S. District Court for the District of Northern California ordered EPA to identify the priority classes of facilities.⁷ In July 2009, EPA published a Priority Notice in the Federal Register identifying classes of facilities in the hardrock mining industry sector as the first classes for which financial responsibility requirements would be developed. EPA also determined that classes of facilities in the chemical manufacturing, petroleum and coal products manufacturing, and electric power generation, transmission and distribution industries would be next in line for development of CERCLA 108(b) financial responsibility requirements.⁸

Five years later, EPA had not developed a rulemaking proposal, and environmental organizations returned to court to require EPA to proceed with the CERCLA 108(b) rulemaking. In January 2016, the D.C. Circuit approved a consent decree that established a schedule under which EPA would proceed with the CERCLA 108(b) rulemaking and publish a proposed rule by Dec. 1, 2016, and a final rule by Dec. 1, 2017.⁹

Accordingly, In December 2016, EPA released its proposed rule requiring facilities in the hardrock mining industry to establish and maintain evidence of financial responsibility.¹⁰ The proposed rule included general requirements regarding the instruments that could be used to demonstrate financial responsibility under CERCLA 108(b) and specific regulations for applying CERCLA 108(b) financial responsibility requirements to the hardrock mining industry.¹¹ Industry, states, and other federal agencies that regulate the hardrock mining industry submitted comments on the proposed rule urging EPA not to finalize the proposed rule. A common theme in many of these comments was that EPA's evaluation of risk presented by the industry failed to account for the realities of modern mining practices and existing state and federal regulation, including reclamation bonding requirements, of the industry.

Final Rule

The Final Rule released on December 1, 2017, states that "EPA is not requiring evidence of financial responsibility under section 108(b) at hardrock mining facilities."¹² To support its decision, EPA determined that "the rulemaking record it assembled [for the Proposed Rule] does not support imposing financial responsibility requirements under section 108(b) on current hardrock mining operations."¹³ EPA also stated that the proposed rule's assessment of risk "did not adequately consider the degree to which existing federal and state regulatory programs and improved mining practices at modern mines reduce the risk that there would be unfunded response liabilities at currently operating mines."¹⁴

In addition to determining that CERCLA 108(b) financial responsibility requirements for the hardrock mining industry are unwarranted, EPA also declined to finalize the general regulatory provisions regarding CERCLA 108(b) financial responsibility instruments, which were included in the proposed rule.¹⁵ EPA justifies this decision because "there is no need to issue final requirements [regarding financial responsibility instruments] at this time as they would not be applicable to any classes of facilities until such time as final section 108(b) regulations applicable to classes of facilities are issued."¹⁶

Impact of Final Rule

While the release of the Final Rule is significant for the mining industry, it is unlikely that EPA's Final Rule will go unchallenged. Environmental groups have already indicated their intention to seek judicial review of EPA's Final Rule.¹⁷

In addition, this Final Rule and the expected challenges are likely to have a significant impact on the rulemakings to consider CERCLA 108(b) financial responsibility requirements for the chemical manufacturing, petroleum and coal product manufacturing, and electricity generation, transmission and distribution industries. EPA had committed to an aggressive rulemaking schedule to evaluate these industries and develop CERCLA 108(b) requirements, if necessary.¹⁸ EPA's decision regarding hardrock mining provides a great deal of insight into how they might approach financial responsibility requirements for these other industries.

¹ Final Rule: Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, EPA-HQ-SFUND-2015-0781, Pre-Publication Copy (Dec. 1, 2017).

² Proposed Rule: Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3,388 (Jan. 11, 2017).

³ Final Rule, at 47.

⁴ *Id.* at 7.

⁵ 42 U.S.C. § 9608(b)(1). The President has delegated his authority under CERCLA 108(b) to the EPA.

⁶ *Id.*

⁷ *Sierra Club, et al. v. Johnson*, No. 08-01409.

⁸ Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements under CERCLA 108(b), 75 Fed. Reg. 816 (Jan. 6, 2010).

⁹ *In re: Idaho Conservation League et al.*, No. 14-1149.

¹⁰ 82 Fed. Reg. 3,388.

¹¹ *Id.*

¹² Final Rule, at 9.

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ *Id.* at 101.

¹⁶ *Id.*

¹⁷ Suzanne Featherston, *EPA says no to final Superfund rules*, Elko Daily Free Press (Dec. 1, 2017).

¹⁸ Notice of Intent to Proceed with Rulemakings: Financial Responsibility Requirements for Facilities in the Chemical, Petroleum, and Electric Power Industries, 82 Fed. Reg.

3,512.