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EPA Releases New Details On CERCLA 108(b) Rule For The Hardrock Mining Industry—Foreshadows Rules For Other Industries

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CERCLA section 108(b), enacted in 1980, requires EPA to identify certain classes of facilities that must establish evidence of financial responsibility and directs EPA to promulgate financial assurance requirements for the identified classes. In July 2009, environmental groups sued EPA for failing to implement this provision of CERCLA. Shortly thereafter, EPA identified hardrock mining as the first industry sector for which it will develop financial responsibility rules. To comply with a more recent order from the U.S. Court of Appeals for the District of Colombia, EPA must publish a proposed rule by December 1, 2016, and must finalize the rule by December 1, 2017. On May 17, 2016, EPA hosted a webinar during which it revealed, for the first time, significant details about the proposed rule.

Scope

EPA is considering several exclusions from the scope of the rulemaking—placer mines that do not use hazardous substances, hardrock mining exploration activities, and hardrock operations smaller than five acres would not be subject to the rule. Covered facilities would have to maintain financial instruments sufficient to cover all potential future CERCLA liability, including cleanup costs, natural resource damages, and health assessment costs, without regard to actual risk. Of significant concern, EPA also suggests that it would structure the new requirements "to create financial incentives for improved mining practices." In other words, EPA may use the rulemaking to impose hardrock mine facility design and operating standards.

Baseline Financial Assurance

EPA's rule will propose a method for calculating a "baseline" amount of facility financial assurance and ways to reduce the baseline amount by demonstrating that certain (unspecified) "controls" are in place at the facility. EPA would determine the baseline amount using "statistically derived factors," including components or formula "inputs" associated with:

- particular sources and controls, including acreage impacted (open pits, underground mines, waste rock piles, heap leach pads, in situ leach operations, tailings facilities, process ponds and reservoirs, and slag piles);
- site-wide sources and controls, such as drainage construction and solid and hazardous waste disposal methods;
- operations and maintenance, including short-term and long-term water treatment and site monitoring;

- a fixed amount of financial responsibility for health assessment costs; and
- a fixed percentage for natural resource damages.

Reductions In Return for Controls and Practices

The baseline amount, once determined, could be reduced by employing engineering controls (which may or may not already be present because of other regulatory programs) and "sound mining practices." EPA did not identify specific controls or technologies that could reduce baseline financial assurance, but suggested reductions could be available for:

- controls that reduce volume, toxicity, and mobility of hazardous substances;
- feature-specific source controls;
- site-wide drainage controls;
- water treatment; and
- short- and long-term operation and maintenance and monitoring.

EPA also provided hypothetical cost-of-compliance scenarios that indicate that the cost savings potentially achievable from implementing "best practices" would be significant enough that miners could be compelled to implement EPA's recommended practices. Despite EPA's assurance that it is not imposing "technical requirements regulating the operation, closure, or reclamation of hardrock mining facilities," that could be the practical outcome of the new rules.

Mechanisms

EPA identified a variety of mechanisms that may satisfy the new requirement, including letters of credit, insurance, trust funds, surety bonds and credit-rating-based financial tests, and/or corporate guarantees. EPA has discussed this issue with insurance and other financial assurance providers and acknowledges that some aspects of these instruments would be unique and may require new instruments or features not available currently. For instance, new financial assurance instruments may be structured to pay *directly* into an account or trust fund after CERCLA settlement, issuance of a CERCLA unilateral cleanup order, or court ruling of CERCLA liability. EPA also contemplates that other federal agencies, states, tribes, and the public would be able to file claims, payable from these financial assurance instruments, or brought directly against the financial assurance instrument provider.

Overlap with Existing Financial Assurance Requirements

The mining industry has long argued that EPA's proposed financial assurance requirement would duplicate reclamation and closure bonding requirements already mandated by federal and state law. EPA rejects this argument and maintains that CERCLA financial assurance instruments will be separate from existing instruments and will cover potential cleanup liability that is not addressed under existing law.

Other Industries Affected

This rulemaking is significant for industries beyond hardrock mining because EPA has committed to evaluating the need for financial responsibility regulations for other industries. EPA has indicated that the following industries are likely to be next in line:

- chemical manufacturing
- petroleum and coal manufacturing
- electric power generation, transmission, and distribution

The rule EPA is promulgating for the hardrock mining industry will likely be used as a template for EPA's future rulemakings for these industries. We are tracking the rule's progress closely and would be happy to discuss the information provided, opportunities for participation, and potential implications of the proposal on your operations.