

# Client Alert

Environmental, Health &amp; Safety Practice Group

December 20, 2016

## **EPA Issues Financial Responsibility Requirements for the Hardrock Mining Industry and Announces Intent to Regulate Other Industries**

On December 1, 2016, EPA signed a proposed rule setting forth financial responsibility requirements for the hardrock mining industry under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>1</sup> Other industries will also find this proposed rule of interest because, on the same day, EPA announced its intention to move forward with the regulatory process for three other classes of facilities: chemical manufacturing, petroleum and coal products manufacturing, and electric power generation, transmission, and distribution.<sup>2</sup> EPA anticipates that core financial responsibility program requirements will apply to these other classes of facilities. Accordingly, EPA is actively soliciting comments now from “all interested parties, including representatives of industries other than the hardrock mining industry.”<sup>3</sup>

### *Legal Authority and Timing of Regulatory Process*

Section 108(b) of CERCLA requires EPA to promulgate regulations requiring that certain “classes of facilities establish and maintain evidence of financial responsibility.” Pursuant to Section 108(b), EPA must prioritize “classes of facilities” for regulation based on risk of injury from use of hazardous substances. EPA failed to identify its first priorities by the statutory deadline of December 11, 1983. In response to a lawsuit by several environmental organizations, EPA agreed earlier this year to a rulemaking schedule. The resulting consent order issued by the D.C. Circuit set forth a schedule for future actions by EPA.

EPA issued the current notices pursuant to the D.C. Circuit order’s deadline of December 1, 2016. The hardrock mining rule must be finalized by December 1, 2017. In addition, the order provides that if EPA decides to “proceed with rulemaking” for the chemical, petroleum, or electric power industries, it must propose successive rules by July 2, 2019, December 4, 2019, and December 1, 2022. Importantly, EPA’s December 1 notice clarifies that it “is not a determination that requirements are necessary for any or all of the classes of facilities within the three industries, or that EPA will propose such requirements – rather, it is an announcement that EPA intends to move forward with the regulatory process.”<sup>4</sup> Accordingly, it remains unclear whether EPA will ultimately propose rules for these three classes of facilities or, if so, which industry will be subject to regulation first.

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## *Framework of Financial Responsibility Program*

EPA's proposed rule would require owners and operators of hardrock mining facilities to demonstrate financial responsibility for all three categories for which CERCLA imposes liability: response costs, natural resource damages, and health assessment costs.

The proposal would require owners/operators to calculate their obligations pursuant to a formula developed by EPA. When calculating the required amount for a specific facility, an owner/operator would have to determine whether specified site features that EPA correlates with response costs at existing Superfund sites are present. Certain categories would carry a fixed dollar amount of financial assurance, while others would be addressed on the basis of acreage. Financial responsibility for natural resource damages would be fixed at 13.4% of the response costs and financial responsibility for health assessment costs would be a fixed amount of \$550,000 per facility. The financial responsibility amount submitted to EPA would have to be certified by an independent qualified professional engineer.

EPA would potentially grant reductions in the calculated financial responsibility amount for facilities that demonstrate compliance with other risk-reducing regulatory requirements. To obtain a reduction, an owner/operator would have to demonstrate that it meets general and category-specific performance standards, that the risk-reducing regulatory requirements are enforceable, and that it is currently in compliance with those requirements.

## *Financial Responsibility Instruments*

The hardrock mining proposal considers two alternative sets of financial instruments that could be available under the rule. Under EPA's preferred option, owners/operators would not be allowed to use "self-insurance" (i.e., the credit rating-based financial test), which is one of the traditional options available under CERCLA settlements. The only available instruments would include a letter of credit, a surety bond, insurance, or a trust fund. Under the alternative, owners/operators with high credit ratings would be able to use the financial test or corporate guarantee upon demonstrating substantial net worth and U.S. assets. All instruments would include obligations to pay for an unsatisfied final judgment from a federal court or a CERCLA settlement with the federal government. Instrument providers would also be subject to "direct action" claims under CERCLA if the liable party is in bankruptcy, reorganization, or arrangement or outside the reach of federal court jurisdiction. Direct action under Section 108(b) financial responsibility instruments is a statutory requirement that is not subject to EPA discretion.

The proposal would require owners/operators to recalculate their financial responsibility every three years or in the event of a successful claim against a CERCLA § 108(b) financial responsibility instrument. EPA approval would be required to lower the amount of an existing financial responsibility instrument. EPA approval would also be required for an owner/operator to be released from Section 108(b) financial responsibility obligations. EPA would potentially release facilities only upon transfer of ownership/operation or demonstration of "minimal" risk, which is not defined in the proposal.

## *Public Availability of Information*

Upon establishing financial responsibility, an owner/operator would be required to provide public notice of compliance on a website it creates and maintains. In the alternative, EPA is considering the possibility of making compliance information available on the agency's website.

## *Key Issues*

- Overlap with existing programs. EPA's proposal raises concerns about potential overlap with existing requirements. In developing a formula for calculating financial responsibility, EPA relied on engineering cost estimates from state and federal mining reclamation and closure plans. This approach suggests either that there is overlap between reclamation and cleanup activities – which EPA denies – or that the formula will not generate cost estimates that are reliably tied to projected cleanup activities. Companies in other industries may wish to evaluate their existing financial assurance obligations under RCRA or state hazardous waste programs to determine the potential for overlap.
- Cost. EPA's estimated cost of compliance is significantly greater depending on whether the financial test is available. EPA's primary reason for disfavoring the financial test is the “boom and bust nature inherent to the hardrock mining industry and recent volatility in commodity prices and global markets.”<sup>5</sup> This explanation suggests that EPA will remain averse to allowing use of the financial test in future financial responsibility rules for other commodity-based industries, such as chemicals and petroleum.
- Availability of required instruments. Financial industry representatives have expressed unwillingness to offer financial responsibility instruments that will make them subject to “direct action.” EPA has attempted to address these concerns by proposing instrument options that would reduce the potential burden on issuers. However, these options involve departures from standard practices in the financial industry and would lead to even higher costs for entities regulated under Section 108(b). For example, in response to financial institutions' concern about issuing letters of credit that would potentially require them to respond to multiple claims by unnamed beneficiaries, EPA has proposed that the instrument provider may pay into a trust fund that will in turn be responsible for managing the claims. EPA recognizes that this approach would generate significant trustee fees and expenses that would likely reduce the value of the trust and/or the instrument.
- Coordination with other regulated parties. Where facilities are owned or operated by more than one party, owners/operators would be required to plan out and apportion the responsibility for establishing and maintaining financial responsibility instruments, which would add transaction costs. Further, EPA's proposal does not address what would happen in event of a disagreement.

## **Conclusion**

Companies in other industries should take seriously EPA's invitation to comment now. Because of the D.C. Circuit consent order, which requires EPA to promulgate a final rule by December 2017, the new administration will have limited discretion to change course on the hardrock mining rule. On the other hand, the wording of the order may leave EPA with discretion to decide that rules for other industries are not warranted. Robust, well-reasoned comments have the potential to affect not only the substance of the current rule, but also EPA's decision about how—and even whether—to extend CERCLA financial responsibility requirements to other classes of facilities. The pre-publication versions of the notices were released on EPA's website on December 2. After the official versions appear in the Federal Register, interested parties will have sixty days to file comments on the proposed rule.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."*

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<sup>1</sup> The prepublication notices can be found at <https://www.epa.gov/superfund/superfund-financial-responsibility>.

<sup>2</sup> NAICS Codes 324, 325, and 2211.

<sup>3</sup> *Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry*, Pre-Publication Copy, at 43 [hereinafter *Prepublication Proposed Rule*].

<sup>4</sup> *Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries*, Pre-Publication Copy, at 2.

<sup>5</sup> *Prepublication Proposed Rule 165*.