KING & SPALDING

Client Alert

Environmental, Health & Safety Practice Group

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EPA Scraps CERCLA Financial Responsibility Proposal[1]

On December 1, 2017, the United States Environmental Protection Agency ("EPA") signed a final rule informing the public of its decision not to issue financial responsibility regulations applicable to hardrock mining facilities under Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[2] EPA's decision follows its January 2017 proposed rule for financial responsibility requirements for the hardrock mining industry.[3] EPA issued the proposed rule pursuant to a 2016 consent order entered by the D.C. Circuit in a lawsuit filed by several environmental organizations.[4] The consent order required EPA to issue financial responsibility regulations for the hardrock mining industry and three other industries – chemical manufacturing, petroleum and coal products manufacturing, and electric power generation, transmission, and distribution. With this final rule, EPA concluded that it satisfied the 2016 consent order obligations regarding regulations for the hardrock mining industry. This action—together with the Trump administration's commitment to regulatory rollbacks—suggests that the Agency is likely to be highly responsive to industry concerns. EPA must still address the remaining industries listed in the consent order, and it could still potentially issue new requirements for these industries. In this regard, EPA's decision not to issue Section 108(b) financial responsibility requirements for hardrock mining facilities offers a useful playbook for chemical, petroleum, and electric power companies to consider in engaging with the Agency about future rulemakings.

Findings Supporting EPA's Decision

The factors discussed below were key to EPA's decision not to issue Section 108(b) financial responsibility regulations for hardrock mining facilities. Questions remain regarding whether EPA's findings in support of its decision can withstand challenges that environmental groups intend to raise in the litigation regarding this rulemaking.

Consideration of other federal and state programs

EPA found that its proposed financial responsibility regulations for hardrock mining facilities failed to consider other federal and state programs when determining the need for Section 108(b) regulations, as is required by its interpretation of CERCLA. EPA also found the existence of potentially duplicative federal financial responsibility requirements relevant to its assessment of the degree and duration of risk and level of risk when

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determining whether to impose Section 108(b) financial responsibility requirements. Consideration of other federal and state programs was critical to EPA's analysis of the degree and duration of risk associated with the facility and the risk to taxpayers of funding a response action.

Significant compliance cost not justified by low risk and taxpayer cost of a response action

EPA determined that CERCLA required it to develop financial responsibility regulations that are "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances," and to establish a level of financial responsibility that EPA determines to be appropriate based on facilities' "payment experience of the Fund, commercial insurers, court settlements and judgments and voluntary claims satisfaction." Absent a specified methodology for this evaluation, EPA based its decision on the reduction in risk due to state and federal mining program requirements and practices of current hardrock mining owners, the reduced costs to the taxpayer from existing financial responsibility requirements, and the resulting reduced risk of a taxpayer-financed federal response action. Based on the impact of modern federal and state regulations of hazardous substances at hardrock mining facilities, and financial responsibility requirements that currently apply to operating facilities, EPA concluded that existing regulations "obviate the need for additional financial responsibility requirements." While EPA acknowledged that the risk of a release is not totally eliminated by the other programs, it found that such residual risk was not sufficient to change its decision not to issue a final Section 108(b) regulation.

In determining the risk and associated cost of responding to hardrock mining activities in the final rule, EPA excluded the cost and risk of responses to historic mining operations, because many of those historic practices would be illegal under current environmental laws and regulations. Based on this, EPA characterized its expenditures for modern hardrock mining facilities as minimal. It found that costs associated with sites discussed in the proposed rule were not relevant to its assessment of the risk because private parties—not the federal government—are paying for the cleanup at those locations.

In the final rule, EPA determined that the cost of complying with its proposed financial responsibility regulations - projected by members of the industry to be $111 - $171 million per year - far outweighed the estimated cost that the proposed rule would save taxpayers. EPA estimated that the proposed rule, including response costs to address legacy sites was, would avoid government costs of only $15 - $15.5 million per year.

Disruption of existing federal and state programs

EPA also cited the potential preemptive effect that financial responsibility regulations may have, pursuant to CERCLA Section 114(d), on state, tribal and local mining programs. Because Section 114(d) exempts a facility that maintains financial responsibility pursuant to CERCLA from complying with state and local rules requiring financial responsibility for release of hazardous substances, several commenters expressed concern about the potential for the proposed Section 108(b) regulations to disrupt existing state and local requirements. In the proposed rule, EPA clearly stated that it does not interpret Section 114(d) to have such a preemptive effect. In the final rule, however, EPA noted that, the courts, not EPA, will decide the effect of Section 114(d). The undesirable and damaging consequences associated with preemption of state and local financial responsibility regulations was another reason EPA elected not to issue financial responsibility requirements for hardrock mining facilities.

Unavailability of financial instruments

EPA also identified concerns regarding the financial instruments that the proposed rule would require as another basis for not issuing a final rule. In comments on the proposed rule, financial industry representatives voiced concerns that Section 108(b)(2)'s provision for a direct action against a guarantor would significantly deter them from providing

required financial assurance instruments to hardrock mining companies. Based on a study performed in connection with the rulemaking, EPA also found that there was significant uncertainty about the adequate availability of instruments needed to comply with the proposed regulations. EPA expressed concern that companies subject to CERCLA financial responsibility requirements for hardrock mining facilities would not be able to obtain a financial instrument that complied with the regulation, which would frustrate the purpose for the rule.

Cost of Compliance

In its final rule, EPA also cited concerns about the cost of the required instruments and compliance. Among those concerns, EPA noted potential bankruptcies, economic impacts due to loss of jobs and tax revenue in states in which hardrock mining companies employ a substantial number of workers, loss of available resources, and the loss of competitive advantage in the international market.

Conclusion

EPA's final rule for the hardrock mining industry reflects careful consideration of the comments submitted by industry and state and federal regulators. EPA did, however, include a word of caution to the industry, noting that its decision did not affect or limit its authority to take response or enforcement actions at any individual facility, including facilities discussed in the final rule. Aside from advising that its decision is specific to the hardrock mining industry only, EPA has not yet signaled what action it will take regarding CERCLA financial responsibility regulations for chemical, petroleum, or electric power industries that are included in the 2016 consent order. In light of EPA's analysis in the December 1, 2017 final rule, companies may consider revisiting the supporting data, their comments and EPA's January 1, 2017 responses[5] to the 2010 advance notice of proposed rulemaking that identified classes of facilities that may warrant financial responsibility requirements for those three industries. However, there may be limits on how far EPA's reasoning in not issuing a final rule for hardrock mining can be extended to facilities in those other industries. For example, modern operations in those industries may not have a comparably low risk of response actions or state financial assurance rules that overlap with potential financial responsibility requirements that EPA may propose for chemical, petroleum, and electric power facilities.

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[1] This Client Alert updates a December 20, 2016 Client Alert announcing EPA's publication of proposed CERCLA Section 108(b) financial responsibility regulations for hardrock mining facilities. Rachel Tennis & Lynn. McKay, *EPA Issues Financial Responsibility Requirements for the Hardrock Mining Industry and Announces Intent to Regulate Other Industries*, King & Spalding LLP Client Alert (Dec. 20, 2016). *See also* Rachel Tennis, Lynn McKay & James Vines, *EPA Issues Financial Responsibility Requirements for the Hardrock Mining Industry and Announces Intent to Regulate Other Industries*, 17 Pratt's Energy Law Report 228-32 (2017).

[2] *See* EPA, Superfund Financial Responsibility, https://www.epa.gov/superfund/superfund-financial-responsibility (last visited December 11, 2017).

[3] Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3388 (January 11, 2017).

[4] *In re: Idaho Conservation League, et al.*, No. 14-1149 (D.C. Cir.).

[5] Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries, 82 Fed. Reg. 3512 (January 11, 2017).