Updates
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Hardrock Mining Rule: An Industry Win, Environmental Groups Gear Up for Litigation

The Environmental Protection Agency announced, in a 121-page prepublication decision on December 1, 2017, that it will not issue final regulations under Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act establishing financial responsibility requirements for certain hardrock mining facilities.

Under a court-ordered schedule to conduct rulemaking, EPA initially published its draft bonding rules for the hardrock mining industry on December 1, 2016, proposing a new program under CERCLA 108(b), to be administered by EPA, that would have imposed additional financial responsibility requirements above and beyond the existing bonding regimes administered by states and the federal land management agencies. Comments were initially due on March 13, 2017, but EPA extended the comment period to July 11, 2017 in response to over 60 parties' requests, including industry and environmental groups, for additional time to review the proposed rule and supporting information and to develop and submit comments.

EPA received more than 11,000 comments in response from individuals, industry, trade organizations, environmental groups and federal, state and local governments and agencies. In particular, the U.S. Small Business Administration, Office of Advocacy (SBA) comments strongly advocated for the withdrawal of the proposed rule, stating that it would "impose costly requirements on hardrock mines owned by small firms, without evidence that a problem exists warranting intervention" and "[t]here is no statutory need for this regulation, nor are there any significant environmental benefits demonstrated by EPA." The SBA pointed to the significant costs the proposed rule would have on the mining industry to address risks already effectively managed by state and federal agencies. The SBA stated that EPA had failed to articulate a response to the argument that state and federal rules already address the same risks comprehensively.

Other federal agencies, such as the U.S. Forest Service also commented that the proposed rule appeared duplicative of financial assurance for mine operations on national forest system lands, and recommended that EPA's proposed regulations be modified to avoid duplicative bonding requirements on those lands.

In response, EPA reconsidered its proposed rule, stating in a press release that "[a]fter careful analysis of public comments, the statutory authority, and the record for this rulemaking, EPA is confident that modern industry practices, along with existing state and federal requirements address risks from operating hardrock mining facilities." As a result, EPA concluded that the decision not to issue final regulations will address the concerns of those federal and state regulators and members of the regulated community who commented that the proposed requirements were unnecessary and would impose an undue burden on the regulated community. In support of this decision, EPA determined that:

1. It was within EPA's discretion and consistent with Congressional intent for EPA to consider existing federal and state financial responsibility requirements when examining the "degree and duration of risk" in order to determine whether new financial responsibility requirements under CERCLA are appropriate;
2. It was appropriate for EPA to examine and consider information from hardrock mining facilities operating under modern conditions and under current state and federal regulatory requirements, as opposed to relying on information about historical/legacy mines;
3. While the proposed rule would have considered the protections offered by existing regulatory programs as a means to reduce required bonding levels under EPA's new regime, EPA decided that it is appropriate to consider those existing programs as part of its threshold decision on whether any new CERCLA-based bonding is even necessary; and

4. Based on discussions with commercial insurers and other financial instrument providers, there would be limited availability of financial responsibility instruments to support EPA's proposed rule, and the proposal for direct claims against a guarantor would be at odds with relevant commercial law and practice, significantly deterring industry participation.

EPA's decision has been applauded by industry and many congressional representatives. However, environmental groups have harshly criticized EPA's decision as a 180-degree turn in the wrong direction and have vowed to pursue litigation. Further filings in the current litigation, *In re: Idaho Conservation League, et al*., No. 14-1149 (D.C. Cir. Aug. 11, 2014), are likely, as is litigation once EPA's final decision has been published in the *Federal Register*.

Authors

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