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EPA Proposes Rule on Financial Responsibility for Cleanups in Mining Industry

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On December 1, 2016, EPA Administrator Gina McCarthy signed a proposed rule under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that, if finalized, would impose new requirements for demonstrating financial responsibility for potential cleanups of certain facilities in the hardrock mining industry.

Simultaneously, the administrator signed a notice that EPA will proceed with analyzing the need for developing similar CERCLA Section 108(b) requirements for three additional industry sectors – the chemical manufacturing industry (NAICS 325), the petroleum and coal products manufacturing industry (NAICS 324) and the electric power generation, transmission and distribution industry (NAICS 2211). The chemical manufacturing sector includes agricultural chemical and pharmaceutical manufacturing. The EPA made clear, however, that it has not determined that financial assurance would be required for these industry sectors or the order in which the industry sectors will be reviewed.

A 60-day public comment period will start when the mining rule is published in the *Federal Register*. A final rule is not expected to be issued before December 1, 2017, and would be phased in over four years.

The primary elements of the proposed rule include:

Facilities covered.

Generally, facilities that engage in the extraction, beneficiation and processing of metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium and zinc) and nonmetallic, nonfuel minerals (e.g., asbestos, phosphate rock and sulfur).

Primary processing activities at or near a mine and under the same operational control.

Facilities not covered.

Under a 2009 EPA Memorandum, certain mining classes consisting mostly of crushed rock and stone (granite, marble, limestone, etc.).

Placer mines that do not use hazardous substances, exploration mines and small mines.

Interaction with existing CERCLA financial assurance. EPA envisions Section 108 financial assurance as a separate and stand-alone requirement allowing EPA and others to access existing CERCLA financial assurance first and then make claims against the Section 108 mechanism. This raises concerns about overlapping, duplicative financial mechanisms.

Determination of amount of financial assurance. EPA will develop a formula that assigns a dollar amount to individual facility and unit characteristics (e.g., open pits, waste rock, tailings, process ponds, water management and O&M) that will be summed for a baseline total. Also, EPA is considering adding a fixed amount for potential health assessment costs and a fixed percentage for potential natural resource damages.

Potential reductions for current engineering controls. Engineering controls implemented under other regulatory programs or voluntarily that result in reductions of volume, toxicity and mobility of hazardous substances (e.g., source controls, site drainage improvements, water treatment) may qualify for reductions to the baseline amount.

Interaction with existing state financial assurance mechanisms. EPA's current view is that Section 108 financial assurance would be in addition to and would not pre-empt existing state or federal mine bonding or closure requirements – which is likely to be a point of contention. However, EPA notes that the Section 108 amount would take into consideration environmentally protective engineering controls implemented under other programs.

What This Means to You

Owners and operators of potentially affected hardrock mining facilities should undertake an initial analysis of the potential impact of the proposed rule and evaluate options for reducing the amount of financial assurance that might ultimately be required. In addition, impacted persons should consider submitting comments on the proposed rule. Owners and operators of facilities in the industries subject to further review by EPA should also consider following the development of the mining regulation, as it will likely serve as a model for potential similar regulation of those industries.

Contact Us

For more information on how the proposed rule may impact your business, please contact Jason Flower or Robert Wilkinson of Husch Blackwell's Environmental team or your Husch Blackwell attorney.

Husch Blackwell provides industry-focused counsel to clients in the mining, chemical manufacturing, energy and natural resources, agricultural and healthcare industries, as well as broad environmental guidance under CERCLA, Resource Conservation and Recovery Act and other remediation and cleanup regimes.