CERCLA 108 (b) Financial Responsibility for the Mining Industry

Informative Presentation

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CERCLA 108(b), 42 U.S.C. § 9608(b)(1)

(b)(1)Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements . . . That classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

SARA – Superfund Amendments and Reauthorization Act

- Enacted October 17, 1986
- Stressed the importance of permanent remedies in cleaning up hazardous waste sites
- Required Superfund actions to consider the standards and requirements found in other State and Federal environmental laws and regulations;
- Provided new enforcement authorities and settlement tools;
- Increased State involvement in every phase of the Superfund program;
- Increased the focus on human health problems posed by hazardous waste sites;

Timeline of CERCLA 108(b)

- **Executive Order 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193**
  - Review of post SARA financial responsibility requirements delegated from POTUS to the EPA Administrator
- **1987-2009: No requirements generated under CERCLA**
  - States and federal land management agencies take the lead in regulating hardrock mining and generate their own financial responsibility requirements
- **2009: Litigation - Sierra Club, Great Basin Resource Watch, and the Idaho Conservation sue EPA Administrator over CERCLA 108(b) inaction**
  - *Sierra Club, et al. v. Johnson*, No. 08-01409 (N. D. Cal.) – the court orders EPA to publish 2009 Priority Notice
- **July 27, 2009 - Obama Administration – *Identification of Priority Classes of Facilities for Development of CERCLA 108(b) Financial Responsibility Requirements,* 74 FR 37213**
  - EPA publishes notice July 28, 2009 Priority Notice – identifying hardrock mining as its priority for development of financial responsibility requirements

- **2014 - Litigation to force the EPA to finalize its CERCLA 108(b) rule – *In re: Idaho Conservation League, et al*., No. 14-1149**
  - May 2015 Court Order – sets scheduling for proposed hardrock mining rule by December 1, 2016 and final rule by December 1, 2017
- **Summer 2016 - The proposed rule is formulated and the EPA seeks input from the Small Entity Representatives (SERs)**
  - Many changes are made to the proposed rule due to comments from the SERS
- **January 11, 2017 – the EPA posts proposed rule in the Federal Register with a sixty (60) day comment period. 82 Fed. Reg. 3388**
- **March 13, 2017 to July 10, 2017 – Trump Administration extends the deadline for public comment**
  - The Trump Administration indicated that it was considering killing the rule
  - Industry preferred a "no action" alternative
- **December 1, 2017 – EPA Administrator signed federal register notice of decision to pursue no rule**
- **February 21, 2018 – Final Rule Published. 83 Fed. Reg. 7556**
  - CERCLA 108(b) Financial Responsibility for hardrock mining not warranted – the "no action" alternative

The "How" of CERCLA 108(b) Rule for Hardrock Mining

- **Purpose**
  - "Establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances."
- **Financial Assurance Formula**
  - **Response Costs** – based on a formula
  - **Health Assessment Costs** – $550,000 all sites
  - **Natural Resource Damages** – 13.4% of the response costs at each site

$$TotalFinancialResponsibility_y = \frac{Deflator_{y*}}{D_{eflator2014}} \times \left(\left[\sum_{i=1}^{n} ResponseCost_i \right] \times [1 + OverheadOversight_r] \times StateAdjustmentFactor_s \times 1.134 + \$550{,}000 \right)$$

How CERCLA 108(b) Worked

- **Additional Bonding**
  - Calculated without consideration for duplicative state and federal bonding
  - Recalculated every 3 years
- **Reduction of Financial Responsibility for Compliance**
  - When “in compliance with requirements that will result in a minimum degree and duration of risk”
- **Allowed Financial Instruments**
  - $7.44 billion (no corporate guarantees) *EPA preference*
  - $5.12 billion (self insure)
- **Continual Oversight and Regulatory Authority**
- **Bonding Release**
  - No automatic release of bond upon mine closure or state-required reclamation
  - Discretionary EPA release after notice & comment
- **Financial Liability**
  - Financial Guarantors & owners/operators
- **Publicly Available Bonding Information**
  - Availability of citizen challenges

How CERCLA 108(b) Worked

- **Initial Notification**
  - Notify EPA of basic facility information within 30 days of effective date of the final rule
  - EPA determination and issuance of I.D.
- **Determine Required Level of Financial Responsibility**
  - Self calculation based on formula
  - Supply data / evidence supporting calculation to EPA
  - No approval mechanism
- **Obtain Financial Responsibility Instrument**
  - 2 years (24 months) Health Assessment costs $550,000
  - 3 years (36 months) 50% of all response costs and NRD
  - 4 years (48 months) Remaining 50% of response costs and NRD
- **Maintenance of Financial Responsibility**
  - 3 year, or less, review of financial responsibility
  - Must notify EPA of certain changed conditions
  - Must maintain evidence of financial responsibility throughout facility life, and perhaps beyond
- **Discretionary Release of Bonding**
  - Open to public notice and comment prior to any agency action to release bond.

Industry Concerns - Comments

- **COSTS**
  - Level of financial assurance needed is not consistent with the degree and duration of risk
  - Industry costs of $111-117 million annually for estimated $15 million in unfunded clean-up costs
- **DUPLICATIVE**
  - Duplicative of other federal bonding (i.e. BLM & USFS Bonding regimes)
  - Duplicative of State reclamation bonding (Mont. Code Ann. 82-4-300 *et. seq.*)
  - Preemptive of State bonding
- **ECONOMIC**
  - Economic ramifications unaddressed
- **BONDING**
  - Restricting an already limited bonding market
  - Increased liability exposure to financial guarantors
- **BAD EVIDENCE / OUTDATED PROBLEM**
  - Reliance on data the does not demonstrate risk
  - Reliance on evidence for facilities that are not to be regulated under the rule

Final Rule – EPA Justifications

- **Final Rule = No rule**
  - EPA declined to impose financial responsibility requirements
- **EPA's Basis for Decision**
  - "EPA has . . . reconsidered whether the rulemaking record supports the proposed rule in light of **EPA's interpretation of the statute**, **review of the record**, and the **information and data received through public comment**." 83 Fed. Red. 7560 (emphasis added).
- **EPA's Reasoning**
  - 1) The reduction in risk due to the requirements of existing federal and state mining programs
  - 2) The reduced costs to the taxpayer resulting from effective mining programs, existing financial responsibility requirements, and owner/operator responses
  - 3) Reduction in the risk of the need for federally financed response actions

EPA Justifications – Statutory Basis

- **Reasoning**
  - Congressional intent was to grant broad discretion to EPA in evaluating the "degree and duration of risk"
    - Successful state programs would be disrupted by CERCLA 108(b)

"believes that it is consistent with Congressional intent to consider state laws before imposing federal financial responsibility . . . Congress did not mean for EPA to disrupt existing state programs that are already successfully regulating industrial operations to minimize risk."

    - Focus on evidence from facilities employing "modern mining conditions" as opposed to historic sites

". . . despite its focus on currently operating facilities, the proposed rule relied on a record of releases of hazardous substances from facilities and payments to respond to such releases that does not present the same risk profile as the modern facilities to which the rule would apply. . ."

EPA Justifications – Administrative Record

"EPA has reevaluated the administrative record . . . and has determined that the record . . . supports a final Agency action of no rule."

- **Basis for Decision**
  - Reviewed the three reports used as evidence for determining the "degree and duration of risk"
    - (1) "Evidence Report"; (2) "Releases Report"; and (3) "Practices Report"
      - **"Evidence Report"**
        - Most evidence based on releases from activities that occurred pre-1980
        - Evidence Report admits the cause of some identified releases are now regulated under the CAA and RCRA
      - **"Releases Report / Practices Report"**
        - "fails to address whether the releases resulted in the expenditure of federal dollars"
        - "fail to distinguish releases that predate modern regulation and are now prohibited by law or otherwise regulated"
        - Based on releases at facilities with significant mining activity that predates modern mining practices
  - Existing Federal & State Regulatory Requirements (*i.e. FLPMA, CWA, CAA, RCRA, NEPA)*
  - Low Risk of Payment from the Superfund

EPA Justifications – Public Comments

- **Comments Supporting the Proposed Rule**
  - Failed to show how **modern mining** practices would continue to result in releases
  - EPA acknowledges some "residual risk" of future water contamination that always exists with mining, but "such residual risk does not change EPA's conclusion that it is not appropriate to issue final section 108(b) requirement . . ."
- **Comments Against the Proposed Rule**
  - Inappropriate Information Used
    - Legacy/historic mining **are not comparable** to modern mining practices
    - Information regarding past releases, due to historic mining practices, does not, In and of itself, demonstrate any current risk
  - Failure to Consider Relevant Data
    - Reduced risk of costs being passed on to taxpayer – history of owner/operator paid response actions
    - State and Federal Regulations that regulate and prohibit past practices
- **Evidence Rebutting EPA's Site Examples**
  - Reassessment of Claimed Costs to Taxpayers
    - i.e. – Golden Sunlight Mine (Montana)
  - Examples where Program Requirement were subsequently modified to address the problem
    - i.e. - Zortman and Landusky Mine (Montana)
    - i.e. – Kendall Mine (Montana)
    - i.e. – Beal Mine (Montana)

EPA Justifications – Additional Obstacles

- **Potential Disruption of State, Tribal, and Local Mining Programs**
  - Preemption of State, tribal, and local bonding requirement – not EPA's choice but left up to the court
  - "thus EPA cannot ensure that preemption will not occur. . .EPA believes that preemption of state financial assurance requirements . . .would be an undesirable and damaging consequence."
- **Challenges in Determining the Level of Financial Responsibility**
  - Formula failed to take into account existing bonding (federal, state) and thereby was not consistent with the degree and duration of risk associated with hardrock mining
- **Economic Concerns**
  - $111-$171 million annual cost to industry for $15-$15.5 million cost avoidance to the federal government
- **Concerns Regarding Financial Responsibility Instrument Availability**
  - Direct Action against 3rd Party financial guarantors will discourage bonding and result in providers exiting the market
- **Challenges in Identifying the Facility**
  - Inability to predetermine the source of contamination (past practices or current operations) results in less financial institutions willing to provide surety

Potential Challenges

- **EPA decision is "final agency action" – subject to challenge**
  - Published in the Federal Register Feb. 21, 2018
    - 90 day window to challenge. *See* 42 USC 9613(a)
  - Filing Deadline – May 22, 2018
  - Venue: D.C. Circuit Court of Appeals
- **Basis for challenges**
  - Arbitrary and Capricious decision to not promulgate a rule
  - Short of the Statutory Mandate to promulgate a rule
  - Logical outgrowth
- **Standards of Review**
  - Chevron Deference – interpretation of its statutory authority
  - "Arbitrary & Capricious Standard" – decision to not issue a final rule
    - Is EPA's decisions supported by the record
    - Did EPA fail to consider a relevant fact or issue in its analysis

Recent Activity

- Earthworks and the Idaho Conservation League (original litigants) submitted a FOIA request to EPA in 2018
  - FOIA Request – for "communications, records, and actions" from the date of the 2016 President election through the end of 2017
  - Requests all records and communications between EPA and stakeholders who advocated for the "no action" alternative
    - Includes – Western Governor's Association; USFS; BLM, National Mining Association; Freeport McMoRan, Rio Tinto, Pebble, etc.
  - EPA's estimated response time – November 2019
- Expectation – Lawsuit filed before May 22, 2018
  - FOIA request will either support claims or they will voluntarily withdraw those claims not supported

Questions?

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