WILMERHALE

Environmental Protection Agency Will Not Pursue Financial Assurance Rule for Hardrock Mining

DECEMBER 5, 2017

Introduction

On December 1, the Environmental Protection Agency (EPA) announced that it will not promulgate a final rule requiring hardrock mining facilities (i.e., facilities for the extraction, beneficiation, and processing of metals and non-metallic, non-fuel minerals) to establish financial assurances under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Had EPA moved forward with promulgating a final rule, the statute would have required an effective date within four years. 42 U.S.C. § 9608(b)(3). Because the agency has instead stepped back from the proposed rule, there is no immediate need for hardrock mining companies to prepare to establish the types of financial assurance mechanisms the proposed rule envisioned.

The announcement concludes a rule-making process that began when the previous administration released a proposed rule one year ago, and that is itself the result of protracted litigation by environmental groups seeking to force action by EPA. While EPA's decision eliminates the concern that hardrock mining companies would have to establish some new or additional forms of financial assurance to comply with the new rule, it does not put the issue to bed completely. Environmental groups will likely return to the courts and appeal the decision not to proceed.

Proposed Rule

Section 108(b) calls on the president (with delegated authority to EPA) to "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, . . . treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b)(1). The agency has discretion to establish the magnitude of the financial responsibility that will be required and the mechanisms which count as proof of those financial requirements. *Id*. § 9608(b)(2).

On December 1, 2016, EPA released a proposed rule that used historical data from prior CERCLA

cleanups and natural resource damage restoration at mining sites to set the amount of required assurances for hardrock mining facilities. Under the proposed rule, the obligation could be satisfied through establishment of a surety bond, a letter of credit, trust fund, or insurance. The draft rule also proposed for consideration, but did not endorse, allowing companies to "self-insure" by showing they met certain financial metrics.

Earlier Litigation

The proposed rule was the result of a string of legal battles dating back to 2008 when environmental groups first sued EPA in the US District Court for the Northern District of California for failure to meet the agency's statutory obligations to establish requirements for financial assurances under Section 108(b). The court agreed that CERCLA created a non-discretionary obligation that EPA identify (by 1983) the first "classes of facilities" for which it would then promulgate requirements. *Sierra Club v. Johnson*, 2009 WL 482248 (N.D. Cal. Feb. 25, 2009). The court ordered EPA to comply, belatedly, with this statutory charge, and EPA did so in July 2009, identifying hardrock mining facilities, among a few other industries. The court also found, however, that EPA had discretion as to when and whether it would establish the ultimate requirements for the classes of facilities so identified, and that the case before it was, therefore, not the appropriate mechanism to force EPA action. *Sierra Club*, 2009 WL 2413094 (Aug. 5, 2009).

Environmental groups brought a separate challenge in 2014 in the DC Circuit alleging unreasonable delay on the part of EPA in promulgating financial assurance regulations for hardrock mining facilities, and seeking to compel EPA action. In settlement of that claim, EPA and the environmental petitioners agreed that the agency would propose a rule by December 1, 2016, and would take final action on that proposed rule by December 1, 2017. *See In re Idaho Conservation League*, 811 F.3d 502 (D.C. Cir. 2016).

Decision Not to Promulgate

In declining to move forward with last year's proposed rule, EPA relies on Section 108(b)'s charge to establish requirements "which the President *in his discretion* believes [are] appropriate." *See* 42 U.S.C. § 9608(b)(2) (emphasis added). EPA cites "existing federal and state regulatory programs and improved mining practices at modern mines" to support its conclusion that no financial assurance rule is necessary for the hardrock mining industry today. Environmental Protection Agency, Final Rule, "Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry," at 7 (Dec. 1, 2017).

Conclusion

EPA clearly seeks to close the book on the process that was required under the settlement in *In re Idaho Conservation League*. However, the issue merits continued monitoring, as environmental groups have already announced their intention to return to the courts for another round of litigation to force EPA to act.