

A Win For The Mining Industry: EPA Declines To Impose CERCLA 108(b) Financial Responsibility Requirements

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by Wells Parker

Financial assurance and reclamation bond requirements can be a significant cost and regulatory burden for Canadian issuers with mining projects in the United States. Over the last several years, companies with U.S. mining projects have waited while the U.S. Environmental Protection Agency (EPA) has considered expanding the financial responsibility requirements applicable to the hardrock mining industry.

On December 1, 2017, EPA released a pre-publication version of a final rule determining that imposing CERCLA 108(b) financial responsibility requirements on the hardrock mining industry was unwarranted.^[1] The Final Rule satisfies a court-ordered timeline and rejects a proposed rule, published in January 2017,^[2] which proposed regulations imposing CERCLA 108(b) financial responsibility requirements on operators of hardrock mining facilities. Based on information provided during the public comment period and EPA's re-evaluation of the rulemaking record, EPA determined that finalizing the proposed rule and establishing financial responsibility requirements for the industry was inappropriate because:

"the degree and duration of risk associated with the modern production, transportation, treatment, storage or disposal of hazardous substances by the hardrock mining industry does not present a level of risk of taxpayer funded response actions that warrant imposition of financial responsibility requirements."^[3]

EPA's decision is significant for the mining industry, as EPA had estimated that the proposed rule would cost the industry approximately \$111-171 million annually to address an estimated \$15 million in annual unfunded clean-up costs.^[4]

For more information, see Ben Machlis' recent eUpdate on the EPA's Decision available here: www.dorsey.com/newsresources/publications/client-alerts/2017/12/a-win-for-the-mining-industry

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[1] Final Rule: Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, EPA-HQ-SFUND-2015-0781, Pre-Publication Copy (Dec. 1, 2017).

[2] Proposed Rule: Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3,388 (Jan. 11, 2017).

[3] Final Rule, at 47.

[4] *Id.* at 7.