



## EPA Halts Financial Assurance Requirements for Hardrock Mining

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EPA continues to walk-back Obama-era regulations. The beneficiary this time is the mining industry, with EPA stating its intention not to issue a final rule establishing financial responsibility requirements for hardrock mining operations. That rule had been proposed by the Obama EPA just days before President Trump took office.

EPA has authority under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) to require specific industries to demonstrate they have the financial wherewithal to respond to releases of hazardous substances from their facilities. Specifically, Section 108(b) of CERCLA seeks to minimize the risk that taxpayers will get stuck with unfunded cleanups by authorizing EPA to require certain “classes of facilities” to establish and maintain “financial responsibility” by posting bonds, insurance, letters of credit, corporate guarantees, or other mechanisms sufficient to remediate any releases of hazardous substances by or from the facility.

The proposed financial responsibility requirements for hardrock mining date back to 2003 when EPA initiated a “120-Day Study” of CERCLA financial responsibility requirements. As a result of the study, EPA suggested financial assurance mechanisms be proposed for “current operating and future risk sites” by 2009. EPA under the Obama Administration expanded the recommendations to include “sites listed on the [CERCLA] NPL before 1990.” In a Federal Register “Priority Notice” issued on July 28, 2009, EPA identified the “hardrock mining sector” as the first industry “for which it would... develop financial assurance responsibility requirements.” To be conservative, EPA said it was issuing these requirements despite the “impacts of modern Federal and State regulations” that had lessened the risk of unfunded cleanups.

The proposed rule, issued just 11 days before President Trump took office, defined “hardrock mining” facilities as those that “extract, beneficiate, and process metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, zinc) and non-metallic, non-fuel minerals (e.g., asbestos, phosphate rock, sulfur).” EPA excluded non-hardrock minerals mines such as “sand, gravel, limestone, and stone; oil, oil shale or gas operations; or the mining and preparation of coal” from the list of covered facilities. A regulated hardrock mine would have been required under the proposal to demonstrate financial responsibility for health assessments, releases of hazardous substances, and damages to

natural resources from each mining location. EPA proposed a comprehensive electronic registration campaign, as well.

EPA's decision that the rule was "not appropriate" was based on its determination that "modern management practices and modern environmental regulations" reduce the risk of tax-payer funded cleanups, a factor it said was ignored under the proposed regulation. Data EPA cited supporting its decision show that releases identified as a cause of past CERCLA cleanup expenditures are now regulated under the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act. As a result, EPA found that mines likely to cause catastrophic releases are no longer in operation. In fact, EPA went so far as to note that the vast majority of CERCLA cleanup costs now being incurred in connection with hardrock mining facilities are to address legacy contamination issues, not releases from mines currently in operation.

The Trump EPA concluded prior data collected for enumerated environmental risks at hardrock mining operations do not support a need for financial assurance. "EPA has reevaluated the administrative record for this rulemaking regarding risk at current hardrock mining operations... and has determined [the] record does not support the proposed rule and supports, instead, a final Agency action of no rule." This determination was based on an evaluation of the three primary reports the proposed rule relied on to identify risk. According to EPA, all three reports failed to demonstrate a need for a financial assurance mechanism at mining operations.

EPA's decision is good news for the hardrock mining industry. It means the industry no longer faces the imposition of additional costs and regulation for risks that are already minimized through their compliance with environmental regulations.

**83 Fed. Reg. 7556 (Feb. 21, 2018)**

**82 Fed. Reg. 3388 (Jan. 11, 2017)**

## **Related People**

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