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# What Mine Operators Can Expect From New EPA Initiatives

*Law360, New York (March 20, 2012, 1:47 PM ET)* -- The U.S. Environmental Protection Agency (EPA) is supposedly in the process of promulgating Comprehensive Environmental Response, Conservation and Liability Act (CERCLA) Section 108(b) financial-assurance regulations. Budget and election-year politics notwithstanding, the EPA is required to act following the U.S. District Court's Feb. 25, 2009, decision in the Sierra Club, et al. v. Johnson case.[1]

Hardrock mining facilities are the EPA's top priority. The EPA specifically identified the following facilities within the hardrock mining sector:

1. Facilities that extract, beneficiate or process metals, e.g., copper, gold, iron, lead magnesium, molybdenum, silver, uranium and zinc; and
2. Nonmetallic, nonfuel minerals, e.g., asbestos, gypsum, phosphate rock and sulfur.

Originally, the EPA stated that it intended to promulgate the regulations for mines in the spring of 2011, but that has now been pushed back to March 2012. The EPA reportedly is working to finalize the rule by December 2012.

Those facilities affected would be required to have financial assurance in place within four years of the EPA issuing the rule. However, now may be the best time for mine operators to work with existing stakeholders to strengthen existing financial assurance arrangements and thereby head off the more draconian aspects of the EPA's present initiatives.

## Avoiding Duplication

New federal financial assurance requirements could have significant adverse impacts on U.S. mine operations. An EPA financial assurance program under CERCLA would have the authority to preempt state programs (see §114(d)).

Accordingly, federal agencies that already require financial assurances because of their stake in public lands where a considerable amount of mining takes place, i.e., the U.S. Bureau of Land Management (BLM) and/or the U.S. Forest Service may have to lower or otherwise modify their bonding requirements to avoid duplication in the form of overlapping financial burdens.

Several other potential problems may arise out of the EPA's new mandate. The EPA apparently is using National Priorities List (NPL) Superfund data to calculate financial assurance needs. This approach, which seems unduly conservative, could lead to bonding amounts far larger than is needed, because NPL sites reflect some of the worst environmental conditions and have been remedied as government projects. NPL data generally consists of pre-environmental regulation legacy sites and former mineral processing sites which are not representative of a lot of mines.

Apparently, the EPA also will attempt to bring historic contamination into the bonding requirements for current mines. In order to do this, the EPA's analysis will include abandoned mines and extend beyond the current boundaries of existing operations as described in the plan of operations.

In other words, the EPA may use financial assurance requirements to force existing mining operations to tackle historic conditions that the existing operations could have had nothing to do with. This could accelerate demands on existing mines to address legacy environmental issues and perhaps have the perverse effect of putting some mine operations out of business.

## Much Progress Has Been Made Since 1980

The mining industry's principal concern at this point reportedly is that the EPA's efforts must reflect these significant changes in the regulatory environment since the advent of CERCLA in 1980. The EPA's efforts must reflect these positive changes as opposed to simply broadening EPA authority. In other words, this initiative should not fix what is not broken by implementing a program now based on a 30-year old statute.

Considerable progress has been made in programs to prevent existing industrial operations from becoming new Superfund sites, including mine reclamation bonding. It is imperative that the present EPA initiative complement, rather than complicate, these programs.

The experience of the states and the two key federal land-management agencies over the last 30 years provides valuable insights into the relative effectiveness of government requirements for financial assurance. This experience should inform any assessment of what needs to be done under a financial assurance program today.

Another important change in circumstances is that private insurance, as a practical matter, is presently available only in a limited sense to address many environmental concerns. This is contrary to Congress's expectation in 1980 that environmental insurance and surety markets would flourish in the wake of federal financial assurance requirements.

At the time, it was thought that private insurance would be central to industry efforts to manage environmental risks, such as those associated with hazardous waste management or underground storage tasks, etc. Ironically, the environmental legislation designed, in part, to take advantage of a private insurance market did much to discourage the development of such a market. The fear of overwhelming environmental liability has scared off most insurance companies.

The history of Resource Conservation and Recovery Act (RCRA) financial assurance is particularly instructive in this regard and explains, in part, why RCRA financial assurance did not evolve as anticipated.

At least one large multinational insurance company has abandoned its efforts to embrace mine reclamation bonding. Another has introduced a product as part of a reclamation bonding program, but the initiative is still in the developmental stages and requires potential customers, including states, to enter into a confidentiality arrangement merely to review it.

It also has been reported that the multinational insurance broker, Marsh Inc., advised the EPA that it has no products available to address the issues which are the subject of the proposed financial assurance regulations.

It seems clear, therefore, that some creative thinking will be required to come up with alternative methods for providing the necessary assurances, such as corporate guarantees for companies with sound finances, or some sort of litmus tests or necessary rating levels, e.g., Standard & Poor's, etc., for publicly traded mining companies.

In addition, creative solutions should be encouraged, such as the use of collateral trusts, captive insurance companies or other similar financial arrangements that allow for flexibility in resource allocation and appropriate use of capital — short of simply tying up cash or credit.

## Specific Concerns of the Mining Industry

A successful, effective new EPA initiative must take into account the above factors if it is to avoid both repeating the same mistakes and stifling economic growth. More specifically, issues of particular concern for the hard rock mining industry are:

1. The potential for the EPA requirements to duplicate existing state and federal BLM and Forest Service requirements, thus adding to existing financial burdens;
2. The possibility that the EPA requirements will preempt state requirements and interfere with existing federal requirements, thereby adding to existing regulatory and administrative burdens;
3. The possibility that the EPA will move forward with its present proposal to promulgate fixed-rate, "one-size-fits-all" regulations for hard rock mines that ignore the unique nature of each mine's history, location, geography, terrain, geology and climate, resulting in inappropriate and unnecessary requirements;
4. A lack of flexibility in the methods which can be used to satisfy the financial assurance obligations. For example, cash and letters of credit are costly, tie up capital and are unnecessary when a company can document sufficient resources and financial stability; and

5. That the requirements will be based upon worst-case scenarios and consequently be so financially onerous that they will effectively shut down the domestic hard rock mining industry. Ironically, to the extent that these factors put some mines out of business, this could result in the creation of more Superfund sites.

## The Role of Mining Associations and Political Developments

Various mining associations are taking active roles in this matter. Generally speaking, these associations seem to believe that the best outcome would be for the EPA to promulgate financial assurance regulations that take into account existing state, BLM and Forest Service requirements. The EPA's role would then be limited to filling in gaps in existing programs.

The recent focus has been on getting the BLM and Forest Service to defend their existing financial assurance programs and on the fact that existing sites subject to federally regulated financial assurance have a solid track record when it comes to avoiding future potential liability as Superfund sites. After all, most mining takes place, at least in part, on federal lands.

Not surprisingly, a number of other initiatives are under way on the political front: for example, there appears to be significant disagreement even within the EPA about the scope and nature of the necessary assurances. The regional administrators (RAs) of EPA Regions Eight, Nine and Ten are concerned about, and reportedly are pushing back against, EPA headquarters' proposal to promulgate "one-size-fits-all" regulations. The RAs recently sent an as-yet unpublished letter to headquarters addressing the issue and reiterating their support for existing programs.

Moreover, a 1996 federal law, the Small Business Regulatory Fairness Act (SBRFA), requires that a panel be established to review the potential impacts of the proposed regulations on small businesses, such as mine operations with fewer than 500 employees.

When that panel is convened shortly, the options that are being considered by the EPA will become available for public scrutiny. Apparently, the lawyer advising the panel has already written to the EPA stating that it should consider other options in addition to the "one-size-fits all" requirements.

In addition, Sen. Lisa Murkowski of Alaska reportedly also has written a letter to the EPA specifically expressing concern about potentially onerous financial assurance requirements for hard rock mines.

## Conclusion

Domestic U.S. mine operations are faced with a slew of requirements. CERCLA 108(b)'s initial emphasis on the mining industry likely will result in an additional regulatory layer being imposed over these existing burdens. With regulations slated for a few years out, now is an opportune time for mine operations to look at strengthening their financial assurance arrangements in conjunction with existing state and federal agency programs.

Ultimately, the best defense against further EPA regulation may be a solid offense that ensures that no existing mine operation becomes a Superfund site. This may be the best way to demonstrate that very little additional financial assurance is necessary.

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[1] The Sierra Club brought suit seeking to force the EPA to promulgate regulations consistent with its existing statutory mandate. The U.S. District Court ordered EPA to "close a loophole" under CERCLA §108(b) and identify the industries that will be subject to financial assurance requirements. However, the Court did not order EPA to issue a rule instituting a financial assurance program, only to identify target industries.