EPA Given Dec. 1 Deadline to Prepare Financial Rule-Making Process for Hardrock Mining Industry

In re Idaho Conservation League, et al., Petitioners

(Case No. 14-1149, D.C., Jan. 29, 2016)

By Thierry R. Montoya

On Aug. 8, 2014, several environmental groups filed a writ of mandamus directing the Environmental Protection Agency to issue financial assurance rules pursuant to the Comprehensive Environmental Response, Compensation and Liability Act for the hardrock mining industry, including a timetable by which the EPA would consider whether other industries would be involved in financial assurance rule making (i.e., chemical manufacturing, petroleum and coal tar manufacturing, electricity generation and transmission). The financial assurance rules would obligate companies performing CERCLA remedies to provide a standing financial mechanism (bond, insurance, letter of credit, guarantee) against the EPA-project remedy cost. After nearly 30 years of delay, on May 19, 2015, the court ordered EPA to update its schedule for rule making to impose financial assurance rules on the hardrock mining industry and to provide a date by which the EPA will decide whether similar rules will be issued for other industries. Presently before the court was an order on consent settling an agree schedule for rule making for hardrock mining and a timetable to consider other industries.

Background

In 1980, Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." (*Burlington N. & Santa Fe Ry. Co. v. United States,* 556 U.S. 599, 602 (2009).) CERCLA requires that parties responsible for hazardous substance pollution bear the cost of cleanup. (42 U.S.C. § 9607.) Quite after, however, responsible parties include businesses that have been liquidated through bankruptcy, restructured to limit liability for environmental cleanup or are otherwise unable to shoulder cleanup costs. ((2005) GAO Report at 6-7.) Most of these "orphan" sites are borne by the public, through a trust fund known as "Superfund." (42 U.S.C. § 9611.) Superfund was initially funded by designated taxes that expired in 1995.

Although public funding for cleanups has decreased, the number of sites requiring cleanup has not. The most contaminated of these sites are listed for priority remediation — the National Priorities List. (42 U.S.C. § 9605.) The cost to clean up a single site can be quite high, so the cost to clean up all orphan sites presents an astronomical financial challenge.

In 1980, Congress directed the EPA to enact rules requiring that facilities involved with hazardous substances demonstrate financial responsibility sufficient to remedy any environmental damage caused by their operations. (42 U.S.C. § 9608(b).) Congress intended to ensure there were funds available for hazardous substance response should a company become insolvent or be otherwise unable to conduct the necessary response activities. Since 1980, the EPA did not take any steps to promulgate financial responsibility rules until 2009 when it first identified the hardrock mining industry as a priority for future rule making. But until the petitioner's writ, the EPA had not done anything more to begin the rule-making process other than to identify hardrock mining as its initial industry of concern.

In this case, the court found the EPA's delay "particularly troubling" because the EPA identified the hardrock mining industry as the first for which it would develop rules, "the enormous quantities of waste and other materials exposed to the environment," the range of hazardous substances released and the number of sites already in the CERCLA cleanup inventory. (Order at 1; 74 Fed. Reg. 37, 213 (July 28, 2009).) The court stated that "[t]here is a limit to how long a court will entertain an agency's excuses for its inaction in the face of a congressional common to act." (Order at 1-2.)

The petitioners' writ sought to have the court order the EPA to finalize financial assurance rules by Jan. 1, 2016. At oral argument on May 12, 2015, the EPA admitted that the January 2016 deadline was no longer feasible. So on May 19, 2015, the court ordered that petitioners and the EPA confer on the date by which the EPA would propose and finalize financial assurance rules for the hardrock mining industry as well as the date by which the EPA would decide whether to propose such rules for three other industries.

As confirmed in this opinion, the parties met to propose an order on consent setting forth the agreed upon rule-making schedule. Specifically, the EPA agreed to commence rule making for the hardrock mining industry by Dec. 1, 2016, and publish its final action by Dec. 1, 2017. The parties jointly decided that the EPA would decide by Dec. 1, 2016, whether it would proceed with rule making for any additional industries. If so, the EPA proposed to complete final action for the first industry by Dec. 2, 2020, the second industry by Dec. 1, 2021, and the third by Dec. 4, 2024. (*Id.*)

Court's Ruling

The court granted the motion holding that at "least one of the petitioners has standing under Article III of the Constitution, and because the joint motion resolves the issues presented by the petition for mandamus, the court has no occasion to decide whether EPA's delay in promulgating section 108(b) regulations was unreasonable delay for which mandamus would lie." (*Id.*)

The court approved the consent decree setting a deadline for Dec. 1, 2017, for the EPA to develop rules requiring the hardrock mining industry to post bonds to cover the cost of cleanups. The order also requires the EPA to decide by Dec. 1, 2016, whether financial assurance bonds will be required for the chemical manufacturing industry, petroleum and coal products industry, and the electric power generation, transmission and distribution industry.

Conclusion

CERCLA is not the only statute containing financial assurance requirements. The Resource Conservation and Recovery Act also requires financial assurances; however, only a small fraction of facilities that generate, handle or dispose of hazardous substances are subject to RCRA financial assurance requirements.

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