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ENVIRONMENTAL LIABILITIES

Hardrock Mining Cleanup Obligations

Statement for the Record by John B. Stephenson, Director
Natural Resources and Environment





Highlights of [GAO-06-884T](#), a report to the Committee on Environment and Public Works, U.S. Senate

Why GAO Did This Study

Key federal environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which established the Superfund program, require that parties statutorily responsible for pollution bear the cost of cleaning up contaminated sites. In many cases, liable parties meet their cleanup responsibilities. However, many parties responsible for hardrock mining sites include businesses that no longer exist, having been liquidated through bankruptcy or otherwise dissolved. Under these circumstances, some hardrock mining companies that have caused environmental contamination have left the problem for others, typically the government, to address.

We were asked to provide a statement for the record on the cleanup of contamination resulting from hardrock mining as it relates to our August 2005 report, *Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations* ([GAO-05-658](#)). We made nine recommendations in this report aimed at reducing the government's financial burden for costly environmental cleanups. The agency generally agreed with many of the recommendations, stating its intent to further evaluate some of them.

www.gao.gov/cgi-bin/getrpt?GAO-06-884T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact John B. Stephenson at (202) 512-3841 or stephensonj@gao.gov.

ENVIRONMENTAL LIABILITIES

Hardrock Mining Cleanup Obligations

What GAO Found

EPA could better ensure that companies at high risk of incurring environmental liabilities—including hardrock mining companies—meet their cleanup obligations by making greater use of existing authorities. Most significantly, EPA has not implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to provide the agency evidence of their ability to pay to clean up contamination that could result from their operations. Businesses can provide this evidence, called financial assurance, in several ways, including providing a letter of credit from a financial institution and establishing a dedicated trust fund. The 1980 law requires EPA to use a risk-based approach for both (1) identifying the entities that would be covered and (2) specifying the financial assurance coverage they would be required to have. The law also requires EPA to give priority in developing these requirements to those classes of facilities, owners, and operators that EPA believes present the highest level of risk of injury. Although implementing the financial assurance requirement could help avoid the creation of additional Superfund sites and could provide funds to help pay for cleanups, EPA has cited competing priorities and lack of funds, among other things, as reasons for having made no progress in this area for nearly 25 years. Without the mandated financial assurance regulations, significant gaps in EPA's environmental financial assurance coverage exist, thereby increasing the risk that taxpayers will eventually have to assume financial responsibility for cleanup costs. For example, none of EPA's current financial assurance regulations require companies or industries that pose significant risk of environmental contamination to provide assurance that they can meet cleanup obligations for potential accidents or spills of hazardous substances or wastes.

Hardrock mining can cause significant environmental problems; these sites are typically large, complex, and costly to clean up. For example, in 2004, the EPA Inspector General estimated that cleaning up 63 mining sites on the Superfund's National Priorities List would cost up to \$7.8 billion. In applying the Superfund law's risk-based approach for developing financial assurance requirements, EPA may want to consider hardrock mining—for example, gold, copper, and iron ore mining—a high priority because it presents taxpayers with an especially serious risk of having to pay cleanup costs for thousands of abandoned, inactive, and operating mines in the United States. Some mine owners have defaulted on multiple occasions on environmental liabilities associated with their mines, and the cleanup costs for these sites are being, or are expected to be, borne largely by taxpayers. As a result, EPA may wish to give priority in developing financial assurance requirements to facility owners whose prior actions indicate that they may pose a high risk of default on their environmental obligations. Finally, financial assurances for businesses at risk for environmental contamination can help mitigate the fact that businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups by, for example, separating their assets from their liabilities using subsidiaries to protect their assets.

Mr. Chairman and Members of the Committee:

We are pleased to have the opportunity to comment on the cleanup of contamination resulting from hardrock mining as it relates to our work on environmental liability issues. Key federal environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ which established the Superfund program, require that parties statutorily responsible for pollution bear the cost of cleaning up contaminated sites.² In many cases, liable parties have met their cleanup responsibilities. However, many parties responsible for hardrock mining sites include businesses that no longer exist, having been liquidated through bankruptcy or otherwise dissolved. Under these circumstances, some hardrock mining companies that have caused environmental contamination have left the problem for others, typically the government, to address.

As the Committee considers legislation that would waive certain cleanup requirements for such parties as industry partners and nonprofit organizations who agree to clean up contaminated hardrock mining sites abandoned by their owners, it is also appropriate to consider other actions the government can take to better ensure that companies with a high risk for incurring environmental liabilities—including hardrock mining companies—meet their cleanup obligations. As detailed in our 2005 report on environmental liabilities, the Environmental Protection Agency (EPA) could better ensure that bankrupt and other financially distressed businesses carry out their cleanup responsibilities by making greater use of EPA's existing authorities and enforcement tools.³

Most significantly, EPA has not implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to provide the agency evidence of their ability to pay to clean up potential spills or other environmental contamination that could result from their

¹For simplicity in this testimony, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 will generally be referred to as the Superfund law.

²The Superfund law generally applies to cleanups of contaminated sites that are no longer in use. RCRA generally applies to operating businesses that treat, store, or dispose of hazardous wastes.

³*Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations*, [GAO-05-658](#), Aug. 17, 2005.

operations. Businesses can provide this evidence, called financial assurance, in several ways, including providing a letter of credit from a financial institution and establishing a dedicated trust fund. The 1980 law requires EPA to use a risk-based approach for both (1) identifying the entities that would be covered and (2) specifying the financial assurance coverage they would be required to have. The law also requires EPA to give priority in developing these requirements to those classes of facilities, owners, and operators that EPA believes present the highest level of risk of injury. Although implementing the financial assurance requirement could help avoid the creation of additional Superfund sites and could provide funds to help pay for cleanups, EPA has cited competing priorities and lack of funds, among other things, as reasons for having made no progress in this area for nearly 25 years.

As we noted in our 2005 report, in applying the Superfund law's risk-based approach for developing financial assurance requirements, EPA may want to consider hardrock mining—for example, gold, copper, and iron ore mining—a high priority because history tells us that it presents taxpayers with an especially serious risk of having to pay cleanup costs for thousands of abandoned, inactive, and operating mines in the United States. As detailed in a 2004 report by EPA's Office of Inspector General, hardrock mining can cause significant environmental problems, and these sites are typically large, complex, and costly to clean up.⁴ According to the EPA IG report, 63 hardrock mining sites were on the Superfund's National Priority List (NPL) and another 93 sites had the potential to be added to the list. At least 19 of the 63 NPL mining sites had estimated cleanup costs of \$50 million or more. In total, the 63 sites were estimated to cost up to \$7.8 billion to clean up, \$2.4 billion of which was expected to be borne by taxpayers rather than the parties responsible for the contamination. The IG report also highlighted the fact that the projected operation and maintenance period for cleanup remedies ranges from 40 years to "in perpetuity." Thus, the costs to taxpayers would increase if the liable

⁴EPA, Office of Inspector General, *Nationwide Identification of Hardrock Mining Sites*, 2004-P-00005 (Washington, D.C.: Mar. 31, 2004).

parties expected to pay for the cleanup remedies proved to be unable to do so.⁵

Further, we reported in 2005 that some mine owners have defaulted on multiple occasions on environmental liabilities associated with their mines, and the cleanup costs for these sites are being, or are expected to be, borne largely by taxpayers. These owners may reasonably be viewed as at high risk for defaulting on environmental obligations associated with mines or businesses that they currently own. For example, one individual is associated with several businesses that have filed for bankruptcy protection. Like other mine owners with serial bankruptcies involving contaminated mining sites, this owner continues to operate businesses having sites with significant contamination whose cleanup may eventually fall to the Superfund. If EPA developed and implemented the financial assurance regulations that the Superfund law mandates, EPA could require such owners to provide financial assurances now for existing and future cleanups, thereby reducing the amount that taxpayers would otherwise likely be required to pay.

However, without the mandated financial assurance regulations, significant gaps in EPA's environmental financial assurance coverage exist, thereby increasing the risk that taxpayers will eventually have to assume financial responsibility for cleanup costs. First, none of EPA's current financial assurance regulations require companies or industries that pose significant risk of environmental contamination to provide assurance that they can meet cleanup obligations associated with potential accidents or spills of hazardous substances or wastes. For example, when EPA reaches settlement agreements with parties regarding cleaning up existing Superfund sites, the agency generally requires the businesses to provide financial assurance demonstrating their ability to pay for the agreed-upon cleanup activities. Similarly, under RCRA's corrective action program, EPA typically requires that owners and operators of hazardous waste treatment, storage, and disposal facilities provide financial

⁵The EPA Inspector General reported that at least one "clearly viable" party had been identified for 70 percent of the 63 NPL mining sites (including 11 percent where the viable party was a federal agency, such as the Department of the Interior). However, the report also emphasized that EPA should be concerned about the viability of these parties over time because of the long-term nature of the cleanups liabilities at mines.

assurance for cleanups of spills or other existing contamination at hazardous waste facilities.⁶

Another significant gap in financial assurance coverage that the Superfund mandate could address involves types of waste excluded from RCRA coverage. Some types of wastes associated with mining activities can result in substantial cleanup costs but are excluded from the definition of hazardous wastes and therefore are not regulated under RCRA's hazardous waste provisions. This exclusion has resulted in a significant gap in financial assurance. In addition, we note that mining activities on private lands are not covered by the Department of the Interior's Bureau of Land Management financial assurance requirements for mines on federal land it manages.⁷ However, some of these mining facilities handle hazardous substances as defined under the Superfund law, and, therefore, financial assurance regulations issued under the Superfund law could apply to these facilities. The Superfund financial assurance mandate could also address the significant gap in financial assurance that exists because generators of hazardous waste (such as metal-plating facilities), which are regulated under RCRA, are generally not required to maintain any financial assurances for contamination they have caused.

By its inaction on the Superfund mandate to require businesses to provide financial assurance, EPA has continued to expose the Superfund program, and ultimately the U.S. taxpayers, to potentially billions of dollars in cleanup costs for facilities that currently are not required to have financial assurances for cleanup costs, such as many gold, lead, and other hardrock mining sites and metal-plating facilities. By implementing the financial assurance requirement under Superfund, EPA could help close the financial assurance gaps discussed above by requiring financial assurances for cleaning up existing and future contamination at facilities that handle hazardous substances but are not subject to RCRA's closure/post-closure or corrective action programs, including many mining sites and facilities that generate, but do not treat, store, or dispose of hazardous waste. These financial assurance gaps may be more significant since the authority for an

⁶RCRA's closure and post-closure financial assurances cover normal costs of closing and conducting post-closure care but do not cover cleanups stemming from accidental releases.

⁷ Our report *Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs*, [GAO-05-377](#) (Washington, D.D.: June 20, 2005) recommends ways for BLM to better manage financial assurances it requires of operators to guarantee reclamation costs if they fail to reclaim BLM-managed lands after operations cease.

environmental tax on corporations, crude oil, and certain chemicals, that had largely funded the Superfund program expired in 1995. As a result, the federal government's general appropriations fund is increasingly being tapped to fund the cleanups paid for by the Superfund trust fund when responsible parties do not. For example, for fiscal year 2004, EPA's appropriation for the Superfund program was from general revenues only.

As we noted in our 2005 report, EPA may wish to give priority in developing financial assurance requirements to facility owners whose prior actions indicate that they may pose a high risk of default on their environmental obligations. Factors EPA may wish to consider in evaluating owner risk include compliance history—such as a history of noncompliance with environmental laws, including cleanup obligations, and magnitude of past, current, and potential environmental liabilities.

Finally, financial assurances for businesses at risk for environmental contamination can help mitigate the fact that businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups by, for example, separating their assets from their liabilities using subsidiaries. A subsidiary that is engaged in a business that is at risk of incurring substantial liability, such as mining or chemical manufacturing, can protect its assets by transferring the most valuable ones—such as equipment and patents—to a related entity, such as the parent or other subsidiary engaged in less risky endeavors. The high-risk subsidiary can continue to use the transferred assets, as appropriate, by leasing or renting them. It has become common practice for experts in asset protection to recommend that corporations protect their assets in this way. A goal is to continually draw down on the subsidiary's remaining assets, such as cash from the sale of equipment, to pay operating expenses, including rental and lease payments and salaries. If a liability arises, the high-risk subsidiary's remaining assets may be reached—but generally not those of the parent corporation or other subsidiaries to which assets were transferred.

While these asset protection strategies are generally legal depending on the circumstances, it is generally unlawful to transfer assets with the intent to hinder or defraud creditors. Most states have laws that contain prohibitions on fraudulent transfers. Creditors generally must seek to invalidate such transfers within 4 years of their occurrence. Perhaps for these reasons, publications by financial and legal advisors have suggested that asset transfers be implemented in stages over time to avoid calling attention to them. The use of such strategies by parties liable for environmental cleanups presents a significant challenge to EPA in

obtaining cleanup costs because it is hard for the agency to know about such transfers, much less obtain sufficient information to successfully challenge them within the time permitted by law. Further, because businesses typically are aware of Superfund liabilities for many years before they actually have to fund the cleanups, they have ample time to reorganize and structure themselves in ways that can limit the expenditures they may be required to make in the future.

In closing, these are issues we believe the committee should consider in evaluating legislation to encourage the cleanup of contaminated hardrock mining sites. Our report on environmental liabilities identifies several ways EPA can and should protect its financial interests, including implementing the mandate in the Superfund law to require businesses at risk of environmental contamination to provide financial assurance that it can clean up any spills or contamination that might occur in the future.

GAO Contact and Staff Acknowledgments

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