A Mining Truth Report

How Corporations Evade Liability for Pollution at Closed Mines

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Executive Summary

The mining industry has a record of abandoning mines that are no longer profitable and leaving local communities with the responsibility for environmental clean-up. The result is either ongoing environmental contamination, with community-wide environmental and economic impacts, or a shift of financial burden from the companies to the public to clean up mining pollution.

The U.S. Environmental Protection Agency (EPA) estimates the total cost of mine cleanup for sites listed as national priorities is between $20 and $54 billion.[1]

- The Summitville Gold Mine in Colorado is expected to cost taxpayers $235 million dollars for a cleanup that may take as long as 100 years.[2]
- The Brohm Mine in South Dakota threatened to abandon its site in 1998, leaving the state with only a $6 million bond, which would not even cover water treatment at the site for one year. The site was added to the Superfund list in 2000.[3]
- The Zortman Landusky Mine in Montana will cost $63.5 million to cleanup, of which the company paid less than half.[4]

Unfortunately, these mines are only a few of roughly 130 abandoned hardrock mine sites on EPA's Superfund list.[5] Many of these mines may never be cleaned up due to costs and technological challenges, leaving a contaminated site to pollute nearby water bodies indefinitely.

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[1] *Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements; Priority Notice of Action*, Environmental Protection Agency, July 28, 2009, Section V, Document ID: EPA-HQ-SFUND-2009-0265-0001, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-SFUND-2009-0265-0001 (hereinafter "EPA Hardrock Mining Notice").

[2] "Summitville Cost to Hit $235 Million Under Proposal, Cleanup of Mine Could Take 100 Years", *Denver Rocky Mountain News*, June 28, 2001.

[3] Earthworks Gilt Edge Gold Mine, South Dakota, available at http://responsiblegold.com/gilt_edge.cfm.

[4] "Zortman-Landusky mine cleanup faces challenge," *Missoulian*, May 4 2002, available at http://missoulian.com/article_23bb984d-b6c6-5f7e-8dc7-a713ef78177d.html.

[5] NPL Mining Sites, Environmental Protection Agency (August 2012) http://www.epa.gov/superfund/programs/aml/amlsite/npl.htm.

Brief Background on the Proposed Sulfide Mines in Minnesota

The two proposed sulfide mine projects in northern Minnesota – PolyMet and Twin Metals – are the first of their kind in this state. The pollution associated with sulfide mining is more toxic and lasts longer than our traditional taconite mining. Pollution from sulfide mining may continue for hundreds or thousands of years.

The U.S. Environmental Protection Agency (EPA) has identified hardrock mining as the nation's top toxic producing industry. This industry has contaminated an estimated 40 percent of the headwaters of watersheds in the western United States.[6] The U.S. Forest Service estimates that 10,000 miles of rivers and streams may have been polluted by acid mine drainage from the metal mining industry.[7] To date, mining companies are unable to point to a sulfide mine that has ever been developed, operated and closed without polluting nearby water bodies.[8] Unfortunately, the pollution from sulfide mines not only affects the environment and human health, but also causes long-lasting financial burdens to local communities and states.

The Corporate Structure of the Sulfide Mining Industry

Generally in the hardrock mining industry, exploration is done by a smaller company, called a "junior" mining company. The financial backing is provided by a larger, often multinational, corporation, called a "major" corporation. The major corporation – whether a parent company, large shareholder, or joint venturer – does not own the mine, but rather invests in the mine for the financial gain of its shareholders. The major corporation provides cash to the mine while using the sophisticated corporate structure to avoid liability.

The reason mines employ this structure lies in the law of corporations. Corporations in the U.S. and throughout the world exist primarily to limit liability. The basic strategy is to separate the assets of the business while protecting those assets from potential liabilities. There is nothing illegal about this, and lawyers commonly advise their clients on how to do this.

Major mining companies routinely shield themselves from liability by using a subsidiary corporation, sometimes the junior mining company itself, to own and operate a new mine. The subsidiary will likely send much of the earnings from the mine every year back to the major company, but the subsidiary's only major asset is the mine itself.

While the mine is operating, this arrangement works fine. But when the mine closes, and the subsidiary corporation's "asset" has lost almost all of its value, the local government faces major obstacles if it attempts to recover money from the subsidiary. The government can order the subsidiary to, for example, clean up a toxic waste site, but, by then, the subsidiary may not

[6] EPA Hardrock Mining Notice, Section VI

[7] EPA Hardrock Mining Notice, Section VI.

[8] "Liquid Assets 2000: Americans Pay for Dirty Water," U.S.E.P.A., http://water.epa.gov/lawsregs/lawsguidance/cwa/economics/liquidassets/dirtywater.cfm

have the money to pay because the major corporation has received most of the profits. The major corporation, meanwhile, it is not liable for the cleanup, because its liability is limited to the amount it "invested" in the subsidiary, namely, the now nearly valueless mine property.

The proposed sulfide mines in Minnesota employ this corporate structure. PolyMet Mining Corporation is a Canadian mine development company. Its largest investor is Glencore International PLC, a giant Swiss commodities trader that owns over 24 percent of the PolyMet project and has agreements with PolyMet that may bring that ownership to 35 percent.[9]

PolyMet is the junior mining company that bears the liability in case of problems at the site, but Glencore is the major company positioned to recover much of the profits. Twin Metals is a joint venture between Duluth Metals Limited, a Canadian company, and the Chilean mining giant, Antofagasta. Duluth Metals owns 60 percent of Twin Metals, and Antofagasta owns 40 percent.[10] Twin Metals (which has no mining history) is the junior mining company whose name will appear on permits and other legal documents related to any mine.

One way states try to force corporations to bear the cost of a potential cleanup, is to require financial assurance during permitting or operations. Financial assurance is a "damage deposit" that the mining companies must provide to the state to pay for potential cleanup after closure.

Even effective financial assurance rules have limitations, however. Estimating the cost to cleanup a site and maintain it, perhaps for thousands of years, it is an extremely difficult and often imprecise endeavor. Determining the cost of treating water at a contaminated tailings basin, for instance, as will need to happen at the PolyMet site, is a complex task prone to accounting manipulation and error. In many cases, the amount of financial assurance calculated is dramatically inadequate.

Providing a fund to pay for cleanup of mine contamination also assumes cleanup is possible. Cleanup at large Superfund sites has been notoriously difficult and not always successful, even when the funds were available.[11] While financial assurance helps pay for cleanup efforts, it is far better to prevent pollution before it starts. Sulfide mining companies have yet to demonstrate that they can operate and close a mine safely without polluting nearby water bodies.

Global, Corporate Incentives Trump Local Interests

Consider one of the most dramatic mine bankruptcy cases in modern times – the Summitville Mine disaster. In 1984, the state of Colorado issued Galactic Resources, a Canadian

[9] "Glencore ups its stake in controversial PolyMet mine," Minnesota Public Radio, Dec. 2, 2011, available at http://minnesota.publicradio.org/collections/special/columns/minnecon/archive/2011/12/glencore-upps-it-stake-in-controversial-polymet-mine.shtml.

[10] Twin Metals: Who We Are, http://www.twin-metals.com/who-we-are/

[11] "Superfund Cleanup Stirs Troubled Waters," *New York Times*, August 13, 2012.

corporation, a permit to operate an open-pit gold mine in southern Colorado.[12] In 1991, the state ordered the mine to cease operations due to concerns with metal levels in nearby waters. The state suspected that roughly 85,000 gallons of contaminated water had leaked into nearby creeks from heap-leach pad runoff and through the damaged pad liner, killing an 18-mile stretch of the Alamosa River.[13] The mine completely halted operations in March 1992.[14] In December 1992, Galactic Resources declared bankruptcy and abandoned the site. The financial assurance required by the state was only $4.5 million, $2.3 million of which was in cash, and the rest in liens on the company's equipment.[15] The amount of available financial assurance was barely enough to cover the cost of managing the site for the first year.

At the request of the state, the EPA designated it a federal Superfund site. Cleanup costs are projected to be $235 million and cleanup efforts to take at least 100 years.[16] While the state and federal government were able to collect $28 million as part of a bankruptcy settlement with the mining company, taxpayers will have to shoulder the bulk of the costs.

The story of the Summitville Mine is not unusual in the sulfide mining industry. The Gilt Edge Mine near Deadwood, South Dakota operated from 1988 to 1996. The parent company of Gilt Edge Mine in South Dakota went bankrupt and the mining company threatened to abandon its water treatment efforts at the site in 1999. The Governor of South Dakota immediately went to court, forcing the company to continue water treatment and prevent contaminated water from overflowing into local streams, which would have happened within 72 hours. The company had posted a bond worth only $6 million, an amount insufficient to cover water treatment for a single year.[17] In 2000, South Dakota requested the mine be designated a Superfund site for long-term cleanup, leaving the burden of reclamation costs on taxpayers. The EPA has proposed a cleanup plan that will cost $58 million.[18]

Similarly, Pegasus Gold, a Canadian gold mining company, abandoned the Zortman Landusky Mine in Montana and filed for bankruptcy in 1998. After several lawsuits against the mining company and its creditors following the company's bankruptcy, Montana's taxpayers are still liable for over half of the $63.5 million proposed cleanup.[19]

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[12] JIM KUIPERS, Mineral Policy Center, Center for Science in Public Participation, Putting a Price on Pollution 9 (March 2003).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] "EPA Outlines Plan for Gilt Edge Cleanup", *Rapid City Journal*, June 12, 2008, http://rapidcityjournal.com/news/local/top-stories/epa-outlines-plan-for-gilt-edge-cleanup/article_b4647af1-8d6d-59ad-b069-fef0bcc8f595.html

[19] "Zortman-Landusky mine cleanup faces challenge," *Missoulian*, May 4 2002, available at http://missoulian.com/article_23bb984d-b6c6-5f7e-8dc7-a713ef78177d.html.

The history of financial liability evasion within the sulfide mining industry is deplorable. The under-funding of financial assurance is a chronic problem that unacceptably shifts the financial burden to the public. In 2003, the Mineral Policy Center funded a report that estimated the un-bonded cleanup liability at today's mines would reach $12 billion. Unfortunately, the report's prediction was too low. Today, the EPA estimates the cost of mine cleanup for abandoned hardrock mines on the Superfund list may be as much as $53 billion.[20] Corporations are escaping their environmental messes with no accountability, leaving taxpayers to shoulder the exorbitant bills for cleanup and reclamation.

Minnesota Lacks Sufficient Safeguards

While Minnesota has in place some laws to manage sulfide mining, there are many gaps that expose the state and its citizens to significant risks. Minnesota law requires sulfide mining companies to provide financial assurances for their operations,[21] but these provisions were established roughly 20 years ago and have never been tested. Over the past two decades, concerned experts and advocacy groups have studied the experiences and financial assurance issues in other states, and have identified numerous weaknesses in Minnesota's laws that should be improved. For instance, the existing laws do not require the major mining company to be responsible for financial assurance even where they have substantial participation in decision-making at the mine. The existing laws also do not expressly require a separate trust fund for long-term water quality treatment and monitoring. But Minnesota lawmakers have resisted efforts to strengthen financial provisions for sulfide mines, and proposed mine projects are likely to be held to existing, inadequate requirements.

Minnesotans must contemplate what kind of environmental and financial risks we are prepared to accept with this new industry. Hardrock mining has been dogged by a long track record of shifting financial liability away from the corporation and onto the public. **Are we prepared to shoulder the burden of environmental liability for thousands of years? Are 20-year old, un-tested financial assurance provisions adequate protection against perpetual taxpayer liability?**

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[20] JIM KUIPERS, Mineral Policy Center, Center for Science in Public Participation, Putting a Price on Pollution 9 (March 2003).

[21] *See* Minn. Stat. § 93.44–93.51 (2012) (statutes discussing Reclamation of Lands)(specifically, MINN. STAT. § 93.49 requires mine operators to provide "a bond or other security or other financial assurance satisfactory to the commissioner…."; *see also* Minn. R. 6132 (2012) (financial assurance regulations for Nonferrous Metallic Mineral Mining).