

## CLIENT ALERT

### EPA Ordered To Prepare Timeline For CERCLA Financial Responsibility Rulemaking

Jun.22.2015

Frustrated with the "nearly thirty years" time between Congress' instruction to EPA to issue financial assurance rules pursuant to Section 108(b) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>1</sup> the U.S. Court of Appeals for the District of Columbia Circuit has ordered EPA to update its schedule for rulemaking to impose financial assurance rules on the hardrock mining industry in *In re: Idaho Conservation League*, No. 14-1149 (May 19, 2015) (Order). The court also ordered EPA to provide a date by which the agency will decide whether it will issue similar rules for other industries that EPA has identified as needing financial assurance requirements—the chemical manufacturing industry, petroleum and coal products manufacturing, and the electric power generation, transmission and distribution industry. If EPA does decide to proceed with a rulemaking for those industries, it must also provide the court with a timeline for that future rulemaking.

CERCLA Section 108(b) requires EPA to promulgate rules for classes of facilities that must demonstrate and maintain financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.<sup>2</sup> With that provision, Congress intended to ensure that there are funds available for hazardous substance response should a company become insolvent or be otherwise unable to conduct the necessary response activities. EPA took no steps to promulgate financial responsibility rules until 2009 when, pursuant to court order, the agency first identified portions of the hardrock mining industry as its priority for a future rulemaking, to be followed by rules for the chemical manufacturing, petroleum and coal products manufacturing, and the electric power generation, transmission, and distribution industries.<sup>3</sup> Despite that identification, EPA has not begun the rulemaking process beyond developing what it calls a "framework" for a hardrock mining rulemaking that it has not shared publicly.

The court's order comes in response to a 2014 petition for writ of mandamus filed by several non-governmental environmental groups (ENGOs) seeking to require EPA to ensure that industries that handle hazardous substances will have the financial means to clean up any inadvertent releases. The court found EPA's delay in promulgating financial assurance rules for the hardrock mining industry "particularly troubling" because EPA has identified that industry as the first for which EPA should develop those rules given the size of the industry and the large footprint of facilities, the "enormous quantities of waste and other materials exposed to the environment," the extent of contamination and the range of hazardous substances released, and the number of sites already in the CERCLA clean-up inventory.<sup>4</sup> The court indicated 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 command to act" and issued this order to seek additional information to better shape the scope of relief, since the time between the petition's filing and the court's order has all but mooted petitioners' requested rulemaking timetable.<sup>5</sup>

Although the court is still weighing whether the petitioners have Article III standing, the court gave the parties until July 7 to prepare a joint proposed schedule for rulemaking. The court also will allow the petitioners to supplement the record to support their standing claims. In addition, because EPA indicated at oral argument that it has completed a "framework" for a hardrock mining proposed rule, the court ordered EPA to file a copy with the court. EPA is, however, construing that order to mean that it

must only share that framework with the parties to the litigation. EPA has refused to preview its framework with any entity that is not currently a party.<sup>6</sup>

Meanwhile, EPA's website indicates that it plans to propose a financial responsibility rule in 2016 for hardrock mining. EPA also is moving to create a small business advisory panel to provide input during the rulemaking process.

For a copy of the court's order, click [here](#).

For a copy of the petition, click [here](#).

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<sup>1,2</sup> 42 U.S.C. § 9608(b).

<sup>3</sup> See 74 Fed. Reg. 37,213 (July 28, 2009) (hardrock mining); 75 Fed. Reg. 816 (Jan. 6, 2010) (other industries).

<sup>4</sup> Order at 1; 74 Fed. Reg. 37,213 (July 28, 2009).

<sup>5</sup> Order at 1-2.

<sup>6</sup> Several entities have pending motions to intervene before the court.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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