

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1149**September Term, 2014****EPA-74FR37213
EPA-75FR816****Filed On:** May 19, 2015

In re: Idaho Conservation League, et al.,

Petitioners

BEFORE: Henderson, Rogers and Millett, Circuit Judges

ORDER

The petitioners seek a writ of mandamus requiring the Environmental Protection Agency (“EPA”) to issue financial assurance rules, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §§ 9601-9675, to ensure that industries that handle hazardous substances have the financial means to clean up any releases. It has been nearly thirty years since Congress charged EPA with issuing such rules. *See id.* § 9608(b). There 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. *See In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999). EPA’s delay in promulgating financial assurance rules for the hardrock mining industry is particularly troubling given that it has long

conclude[d] that classes of facilities within [that] industry are those for which EPA should first develop [CERCLA financial assurance rules], based upon those facilities’ sheer size; the enormous quantities of waste and other materials exposed to the environment; the wide range of hazardous substances released to the environment; the number of active hardrock mining facilities; the extent of environmental contamination; the number of sites in the CERCLA site inventory, government expenditures, projected clean-up costs and corporate structure and bankruptcy potential.

Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213, 37,218 (July 28, 2009); *see also* Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b), 75 Fed. Reg. 816, 822, 825, 827-30 (Jan. 6, 2010) (similar findings regarding the chemical manufacturing, petroleum and coal products manufacturing, and electric power generation, transmission, and distribution industries).

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This is an original filing in the court, which has discretion to seek additional information about the scope of requested relief as circumstances have evolved and about the foundation for the petitioners' standing under Article III of the Constitution. *Cf. Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1296 (D.C. Cir. 2007). In view of the petitioners' acknowledgment that the January 2016 deadline for action requested in the petition for mandamus is no longer feasible due to the passage of time, see May 12, 2015, Oral Argument Recording at 15:58-16:20, and EPA's acknowledgment that it recently completed the "framework" for a hardrock mining proposed rule, *id.* at 20:49-24:46, it is, on the court's own motion,

ORDERED that the petitioners shall update the time frame for rulemaking that they seek in the petition for mandamus, and EPA shall update its rulemaking schedule, in light of its recent completion of a "framework" for rulemaking, to expedite to the greatest possible extent the implementation of the CERCLA requirement that EPA issue financial assurance rules related to environmental cleanup and reclamation efforts. See 42 U.S.C. § 9608(b); 52 Fed. Reg. 2923 (Jan. 23, 1987). In particular, the parties shall identify the date by which EPA will publish proposed and final financial assurance rules for the hardrock mining industry. See 74 Fed. Reg. at 37,214 (concluding that "hardrock mining facilities present the type of risk that, in light of EPA's current assessment, justifies designating such facilities as those for which EPA will first develop financial responsibility requirements" under CERCLA). The schedule shall include the prior deadline by which EPA will circulate to interested parties the hardrock mining proposed rule "framework" that counsel for EPA identified as completed, see May 12, 2015, Oral Argument Recording at 20:49-24:46, as well as the date by which any comments thereon must be submitted to EPA. The schedule shall further include the date by which EPA will determine whether to issue a notice of proposed rulemaking for the chemical manufacturing, petroleum and coal products manufacturing, and electric power generation, transmission, and distribution industries and, if EPA decides to proceed, the timeline for promulgating the proposed and final rules for those industries.¹ See 75 Fed. Reg. 816. Also, because the court has not yet decided whether the petitioners have Article III standing, they may supplement their declarations with particular reference to the imminence of harm to their members due to the absence of these financial assurance regulations, the particularized risk that the specific companies and operations identified in the declarations pose of not remediating pollution and related harms without the regulations, and how issuance of a writ of mandamus would redress any such harm caused by the absence of the financial assurance regulations. The parties may file supplemental briefs. It is

¹ Judge Millett would not require EPA to advise the court of a timeline for these three industries.

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FURTHER ORDERED that EPA file with the Clerk of the Court a copy of the hardrock mining “framework” referenced by counsel for EPA during oral argument.

Each party’s submissions are due by 4:00 p.m. on June 9, 2015. Any responses are due by 4 p.m. on June 15, 2015. The June 9, 2015 submissions, excluding declarations, may not exceed 20 pages. The responses may not exceed 10 pages. In addition to electronic filing, paper copies shall be delivered to the Clerk of the Court by the time and date due.

The parties are encouraged to confer with one another regarding the schedule and, if possible, to submit a jointly agreed upon proposal.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk