Hardrock Mining/Superfund: D.C. Circuit Court of Appeals Decision Addressing U.S. Environmental Protection Agency Declination to Issue Financial Responsibility Requirements

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The United States Court of Appeals for the District of Columbia ("Court") issued a July 19th decision addressing the United States Environmental Protection Agency's ("EPA") decision to not develop financial responsibility regulations for the hardrock mining industry pursuant to certain Section 108(b) of the Comprehensive, Environmental, Response, Compensation, and Liability Act ("CERCLA"). See *Idaho Conservation League, et al. v. Andrew Wheeler, Administrator, U.S. Environmental Protection Agency, et al.,* No. 18-1141.

EPA published on February 21, 2018, a Federal Register Notice announcing its decision to not issue the regulations. See 83 Fed. Reg. 7556.

Section 108(b) requires EPA to promulgate regulations requiring:

. . . classes of facilities identified by the EPA to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.

The statutory requirement has been in place since CERCLA was originally enacted in 1980.

A number of environmental groups had previously filed suit against EPA arguing that the agency's failure to develop such regulations was a violation of CERCLA. The D.C. Circuit in a prior decision granted a motion by the environmental groups and EPA established a schedule of promulgation of CERCLA financial assurance regulations for the hardrock mining. However, EPA in the February 21, 2018 Federal Register Notice stated that it had decided not to issue final regulations based on an interpretation of the statute and analysis of the record developed for the rulemaking.

Six environmental organizations jointly petitioned the D.C. Circuit for review of EPA's February 21st declination decision. They argued that the decision was contrary to CERCLA, arbitrary and capricious and procedurally defective. The environmental organizations' two arguments included:

- EPA wrongly interpreted "risk" and the operative provisions of 42 U.S.C. § 9608(b) as limited to the risk of taxpayer-funded response actions

- Regardless of the meaning of “risk” CERCLA requires EPA to promulgate some financial responsibility requirements to the hardrock industry

The D.C. Circuit applied the Chevron two-step framework, deferring to EPA’s interpretation if:

1. the statutory text is ambiguous, and
2. the EPA’s interpretation of the text is reasonable.

The D.C. Circuit denies the Petition, determining that EPA’s interpretation of the term “risk” is reasonable. It had first found that the CERCLA provision’s use of “risk” in the general mandate clause is ambiguous.

The Court further rejects the argument that CERCLA mandates that EPA promulgate financial responsibility requirements. Also rejected is an arbitrary and capricious argument that the agency ignored certain financial risks and supported the decision with a faulty economic analysis. Finally, it rejects the argument that the decision should be vacated because it is not a “logical outgrowth” of the previous proposed rule.

Note that Arkansas Attorney Leslie Rutledge was one of a number of State Attorney Generals that intervened on behalf of EPA’s decision not to promulgate the rules.

A copy of the opinion can be downloaded here.