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EPA Publishes New Rule Under CERCLA Section 108(b) for Hardrock Mining Financial Assurance Requirements

After a year of contentious hearings, the Environmental Protection Agency (EPA) on January 11, 2017 published in the Federal Register their newly proposed rule under Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act for the hardrock mining industry. [82 Fed. Reg. 3388 \(Jan. 11, 2017\)](#).

Following publication, a sixty (60) day comment period began wherein all comments are now due on or before March 13, 2017. While 60 day comment periods are not uncommon, typically for complex rulemakings, such as the present one, an agency will provide for a longer period such as 180 days. In light of the abbreviated timeline and the large number of supporting documents that need to be reviewed, it is expected that interested parties may request an extension of the comment period. If the proposed rule becomes final, it would require many mines to potentially apply for additional bonding, or demonstrate the ability to pay, for certain cleanup costs associated with CERCLA § 107, namely: response costs, health assessment costs, and natural resource damages.

In conjunction with their publication of the newly proposed rule, the EPA also published a Notice of Intent (NOI) to begin rulemaking for additional industries. [82 Fed. Reg. 3512 \(Jan. 11, 2017\)](#). Although no comment is being allowed on this NOI at this time, the EPA has indicated that it “has not received evidence that would demonstrate that regulation under CERCLA section 108(b) is not necessary for the Chemical Manufacturing industry . . . , the Petroleum and Coal Products Manufacturing industry . . . , and the Electric Power Generation, Transmission, and Distribution industry . . .” Should the new CERCLA section 108(b) rule become final, it should be expected, based on this NOI, that EPA will continue rulemaking that may result in these other industries being brought under the same, or similar, financial assurance requirements. This Notice appears to satisfy, at least in part, the Order by the D.C. Circuit in *In re Idaho Conservation League* on January 29, 2016, wherein the Court entered an Order establishing an agreed timetable by which the EPA would consider whether other industries should be involved in the financial assurance rulemaking.

The rule continues to face significant opposition from industry groups such as the American Exploration & Mining Association (AEMA) and Western Governors' Association (WGA) as well as key lawmakers. There remains the possibility that the recent change in the administration may

result in delay or alteration to the rule although incoming EPA Chief Scott Pruitt has yet to comment on his intentions.

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