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Comprehensive Environmental Response, Compensation and Liability Act/Hardrock Mining: February 21st Announcement of Declination to Issue Financial Responsibility Requirements

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The United States Environmental Protection Agency ("EPA") published a February 21st Federal Register Notice announcing its decision to not issue final regulations for Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") financial responsibility requirements for hardrock mining facilities. See 83 Fed. Reg. 7556.

EPA had previously proposed on January 11, 2017, regulations that would impose financial responsibilities on such facilities. See 82 Fed. Reg. 3388.

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

... classes of facilities 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.

This statutory requirement has been in place since CERCLA was originally enacted in 1980.

A number of environment groups previously filed suit against EPA arguing that the agency's failure to develop such regulations was a violation of CERCLA. The United States Court of Appeals for the District of Columbia in a January 29th decision granted a motion by the environmental groups and EPA establishing a schedule for promulgation of CERCLA financial assurance regulations for the hardrock mining industry.

EPA in the February 21st Federal Register Notice states that its decision not to issue final regulations is based on an interpretation of the statute and analysis of the record developed for the rulemaking. It further states in part:

EPA has analyzed the need for financial responsibility based on risk of taxpayer funded cleanups at hardrock mining facilities operating under modern management practices and modern environmental regulations, i.e., the type of facilities to which financial responsibility regulations would apply. That risk is identified by examining the management of hazardous substances at such facilities, as well as by examining federal and state regulatory controls of management and federal and state financial responsibilities requirements. With that focus, the record demonstrates that, in context of CERCLA Section 108(b) the degree and duration of risk associated with the modern production, transportation,

treatment, storage or disposal of hazardous substances by the hardrock mining industry does not present a level of risk of taxpayer funded response actions that warrant imposition of financial responsibility requirement for this sector.

The Federal Register Notice includes:

- Overview of Section 108(b) and other CERCLA provisions
- History of the Rulemaking
- Recent Litigation Under Section 108(b)
- Hardrock Mining Priority Notice
- Hardrock Mining Proposed Rule
- Statutory Interpretation
- Evaluation of Administrative Record
- Federal and State Regulatory Requirements
- Risk of Payments from the CERCLA Fund
- Comments Supporting the Final Rulemaking
- Comments Opposing the Final Rulemaking
- Decision to Not Issue the General Facility Requirements of Subparts A through C in this Final Rulemaking
- Obstacles to Developing and Implementing Section 108(b) Financial Responsibility Requirements for Hardrock Mining Facilities

It is safe to assume that the environmental organizations that initiated this litigation will challenge EPA's decision.

[A copy of the Federal Register Notice can be downloaded here.](#)