CERCLA 108(b) FINANCIAL ASSURANCE CASE

IDAHO CONSERVATION LEAGUE v. EPA (DC Circuit 18-1141)

DC CIRCUIT OPINION 7.19.19 --- SHORT SUMMARY OF OPINION

The DC Circuit upheld EPA’s decision to not impose financial assurance requirements under CERCLA 108(b) on the hardrock mining industry. The court found EPA’s legal interpretation and analysis of the data to be reasonable.

**SHORT SUMMARY OF COURT’S CONCLUSIONS**

The court agreed that

1) “risk” in 108(b) can focus only on financial risk

 2) EPA is not obligated to impose FA regulations under 108(b)

 3) existing state and federal rules can be seen to adequately address impacts to natural resources

4) individual sites notwithstanding, EPA reasonably concluded that industry-wide FA regs are not justified

5) EPA’s generalized cost/benefit analysis supports its decision against 108(b) FA requirements

**KEY QUOTES FROM DECISION**

- EPA interpreted “risk” of 108(b) to mean the financial risk “that EPA would be required to use the Superfund to finance response actions at currently active mines. We believe the EPA’s interpretation is reasonable. As noted, the Congress used only financial terms to describe the relevant “risk” in the amount clause. *See* 42 U.S.C. § 9608(b)(2).”

- “Because § 9608(b)’s use of “risk” in the general mandate and amount clauses is ambiguous and the EPA’s interpretation is reasonable, we defer to the EPA’s interpretation that it should set financial responsibility regulations based on financial risks, not risks to health and the environment.”

- “[N]othing in § 9608(b) mandates the EPA to promulgate financial responsibility requirements for the hardrock mining industry, authorizing the EPA to decline to do so.”

- EPA “reasonably concluded that “modern regulation of both process discharges and runoff, as well as reclamation requirements to control sources of contamination, significantly address” hardrock mining’s “impacts to natural resources.” *Id.* at 7569. The EPA thus did not arbitrarily or capriciously ignore costs associated with natural resource damage.

- “We decline to substitute our judgment for the EPA’s on the question whether a handful of sites with likely minimal impact on the Superfund justifies industry-wide financial responsibility requirements.”

- Regarding the cost-benefit analysis: “The EPA expressly recognized that its estimates of $111 to $171 million in costs to the hardrock mining industry and $15 to $15.5 million in savings to the federal fisc are “not readily comparable.” *Id.* at 7585. Its acknowledgement demonstrates that the EPA did not intend to conduct a rigorous societal cost-benefit analysis. Instead, the EPA compared in broad strokes the potential impact of the $111 to $171 million annual bill on the hardrock mining industry—more mine closures and bankruptcies and stunted mining development due to lost capital, *id.*—to the relatively small benefit to the federal fisc. Such a general comparison is reasonable.”