IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IDAHO CONSERVATION LEAGUE, EARTHWORKS, SIERRA CLUB, AMIGOS BRAVOS, GREAT BASIN RESOURCE WATCH, and COMMUNITIES FOR A BETTER ENVIRONMENT, *Petitioners*, v. SCOTT PRUITT, Administrator, U.S. En1`vironmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondents*.	No. 18-1141

MOTION TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27, and D.C. Circuit Rules 15(b) and 27, the New Mexico Energy, Minerals and Natural Resources Department, the New Mexico Environment Department, the Arizona Department of Environmental Quality, and the States of Alaska, Arkansas, Colorado, Louisiana, Michigan, Montana, Nevada, Utah, South Carolina, South Dakota, Wisconsin, and Wyoming ("Intervenor States") respectfully move to intervene in support of Respondents Scott Pruitt, Administrator, U.S. Environmental Protection Agency, and the U.S. Environmental Protection Agency

("EPA") in the above-captioned petition for review of EPA's final action entitled "Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry" ("CERCLA 108(b) Action"). 83 Fed. Reg. 7556 (Feb. 21, 2018).

Intervenor States have conferred with the parties regarding their positions on this Motion. Petitioners take no position on intervention; Respondents consent to intervention.

BACKGROUND

The CERCLA 108(b) Action is the culmination of a decade-long process in which EPA sought to meet its obligations under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The process began in 2008, after EPA was sued and then directed by a federal district court to comply with a nondiscretionary duty under CERCLA 108(b). *Sierra Club v. Johnson*, No. C 08-01409, 2009 WL 482248 (N.D. Cal. Feb. 25, 2009). Under CERCLA Section 108(b), EPA is required to promulgate requirements "that classes of facilities 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." 42 U.S.C. § 9608(b)(1). Before issuing the requirements, EPA must first "identify those classes for which requirements will be first developed." *Id.*

In July 2009, pursuant to the court order, EPA identified certain classes of active hardrock mining facilities as the priority class of facilities for which financial responsibility requirements might be promulgated. EPA then began a lengthy process of consulting with stakeholders, including industry and the States. During this process the Intervenor States and others expressed serious concern that a federal financial assurance program would preempt and displace critical aspects of state regulatory programs. By November 2014, EPA had developed an anticipated schedule that would result in the adoption of a final rule—should EPA determine that a rule was needed—by August 2019. However, in August 2014, environmental groups filed a lawsuit seeking to force EPA to act on a more accelerated schedule. EPA and the plaintiffs finalized a settlement a year later, committing EPA to issue a proposed rule by December 1, 2016, and to take final action by December 1, 2017.

In accordance with that schedule, and despite numerous concerns raised by States, EPA issued a proposed rule in December 2016. EPA stated that it did not intend to preempt state financial responsibility but admitted that "[i]t is the courts that would make any final determinations about the preemptive effect of CERCLA 108(b) regulations at any particular facility." 82 Fed. Reg. at 3403 n.46. The Intervenor States submitted extensive comments on the Proposed Rule, either directly or through the Interstate Mining Compact Commission.

Following review of comments, EPA issued the CERCLA 108(b) Action in February 2018, determining "that modern regulation of hardrock mining facilities, among other factors, reduces the risk of federally financed response actions to a low level such that no additional financial responsibility requirements for this industry are appropriate." 83 Fed. Reg. at 7565. In support of this conclusion, EPA relied heavily on state regulatory programs and described in detail the programs of Nevada, New Me,xico, Alaska, Colorado and Montana. *Id*. at 7572–77. EPA reiterated its position from the Proposed Rule that it did not intend to preempt state financial responsibility, but stated that it now "believes that preemption of state financial assurance requirements, should it occur, would be an undesirable and damaging consequence of section 108(b) requirements." *Id*. at 7584.

STANDARD FOR INTERVENTION

Petitioners have brought this case under 42 U.S.C. § 9613(a), which provides for review of regulations promulgated under CERCLA. Section 113(i) of that statute, which governs intervention in such actions, provides that "any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless [it is shown] that the person's interest is adequately represented by existing

parties." 42 U.S.C. § 9613(i). This standard mirrors the standard set forth in Rule 24 of the Federal Rules of Civil Procedure, which this Court may look to in considering motions to intervene in appeals under Rule 15(b). *See Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985).

ARGUMENT

I. The Intervenor States' interests will be impaired if Petitioners prevail in this appeal.

In the decades since CERCLA 108(b) was enacted, States have adopted statutes and developed their own regulatory programs governing hardrock mining facilities, including financial assurance requirements. These programs comprehensively regulate all aspects of the mining process, including reclamation, closure, water pollution prevention, and abatement of pollution, and impose financial responsibility requirements to ensure that these measures will be fully funded if a mining company becomes unable to carry them out. These financial responsibility requirements can be substantial: Nevada currently holds nearly $2.8 billion in financial assurance for hardrock mines; New Mexico holds over $600 million.

During the period prior to the issuance of the Proposed Rule, and then during the comment period on the Proposed Rule, the States expressed two overriding concerns: first, that any rule under CERCLA 108(b) for operating

hardrock mines is now unnecessary because state mining regulatory programs already address the risks identified in CERCLA 108(b) and therefore eliminate the need for federal financial responsibility; and second, that a proposed rule under CERCLA 108(b) would pose a significant preemption risk to the States' mining regulatory programs.

The preemption risk is based on CERCLA Section 114, which provides in pertinent part as follows:

> [N]o owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility.

42 U.S.C. § 9614(d). Thus, if EPA were to require financial responsibility for active hardrock mining operations under CERCLA 108(b), EPA would put at risk billions of dollars in financial responsibility already in place under state laws. Such a result would severely undermine the States' mining regulatory programs, many of which have been in place for decades and are fully regulating active hardrock mining operations in those States.

If Petitioners prevail on their appeal, the interests of the Intervenor States in preserving their existing regulatory programs and financial responsibility for the mining operations within their borders would be impaired.

II. The Intervenor States' interests are not adequately represented by the existing parties.

No existing party to this appeal adequately represents the interests of the Intervenor States. While Respondents and the Intervenor States share the objective of upholding the CERCLA 108(b) Action, Respondents are not the appropriate party to advance the federalism interests of States with respect to preemption of state regulatory programs. The Intervenor States' participation in this case is necessary given the significant interrelationship between state regulatory programs, including financial assurance requirements for hardrock mines, and the proposed federal responsibility at issue in the CERCLA 108(b) Action. The Intervenor States can provide specific arguments and insights concerning the role of State programs that were a critical component underlying the CERCLA 108(b) Action.

III. The Intervenor States' motion is timely.

Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b) require that a motion to intervene in a proceeding under those rules be filed within 30 days after the petition for review is filed. The Petitioners in this case filed their petition for review on May 16, 2018. This motion is therefore timely filed within 30 days after the petition.

CONCLUSION

For the foregoing reasons, the Intervenor States respectfully request that the Court grant this motion and that the Intervenor States be designated as Intervenor-Respondents in the above-captioned proceeding.

DATED: June 15, 2018

Respectfully submitted,

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CERTIFICATE AS TO PARTIES, AMICI CURIAE, AND RELATED CASES

Under Circuit Rules 27(a)(4) and 28(a)(1)(A), the movants state as follows:

Parties, Intervenors, and Amici

Petitioners:. Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities For A Better Environment.

Respondents: Scott Pruitt, Administrator, U.S. Environmental Protection Agency, and the United States Environmental Protection Agency.

Intervenors: None at this time.

Amici: None at this time.

Related Cases

None at this time.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on June 15, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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Petitioners,

v.

SCOTT PRUITT, Administrator, U.S. En1`vironmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

No. 18-1141

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limitation of Fed. R. App. P. 27(d)(2)(C) because this document contains 1,386 words, and within the word limit of 5,200 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type.

DATED this 15th day of June, 2018.

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