

Message

From: Sayer, Matthias, EMNRD [MatthiasL.Sayer@state.nm.us]
Sent: 5/19/2017 8:41:25 PM
To: Wagner, Kenneth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=048236ab99bc4d5ea16c139b1b67719c-Wagner, Ken]
Subject: RE: Oklahoma City
Attachments: ICL-CERCLA-decision.pdf

Ken,

I write to thank you for the time your staff took this week to meet and discuss the CERCLA 108(b) rulemaking in Denver—if you are able, please pass our appreciation along to Patrick Davis and others who were in attendance (I do not have contact info) for their time and patience. It was generally the consensus opinion that the time was well-spent and that the dialogue was productive.

Regarding the rule, I understand that EPA is currently receiving comment, which no doubt will require significant time in the trenches to review and address—God’s speed on that endeavor (insert wide-eyed emoticon). We intend to contribute what will hopefully be useful material for the Agency’s consideration.

As EPA considers its path forward, I did want to briefly discuss its decision to publish or not publish a final rule. From some of the comments made this week it appears that EPA or at least certain staff are operating under the belief that the D.C. Circuit’s January 2016 Order obligates the Agency to publish a final rule on financial responsibility for the hardrock mining sector. That is not the case. The Court order did require that EPA publish a proposed rule by December 1, 2016, however, it did not order EPA to publish a final rule, rather, it ordered EPA to publish a final action on the rule by December 1, 2017. The court made clear in its discussion denying intervention to the mining association that it remains EPA’s discretion whether to publish a final rule under CERCLA 108(b) on hardrock mining financial responsibility. As stated by the court:

“the proposed joint order “does not require EPA to promulgate a new, stricter rule.” Id. at 1324. At most, it “merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule . . . The timeline in the joint motion requires that EPA commence a rulemaking with respect to hardrock mining by December 1, 2016, and provide “notice of its final action” by December 1, 2017 . . . EPA retains “discretion to promulgate a rule or decline to do so” even for the hardrock mining industry. See Perciasepe, 714 F.3d at 1325 n.7; see also 5 U.S.C. § 551(13). The joint motion on consent states that “[n]othing in this Joint Motion should be construed to limit or modify the discretion accorded EPA by CERCLA or the general principles of administrative law.” Joint Mot. 6. It neither resolves the substance of any rulemaking nor even which classes of hardrock mining facilities will be regulated. See 2nd Decl. of Barnes Johnson, Dir. of Office of Res. Conservation and Recovery, Env’tl. Prot. Agency, Ex. 1, at 1 (Aug. 25, 2015) (“framework” for hardrock mining rules). In other words, nothing about this particular order on consent makes it any more likely than in Perciasepe, 714 F.3d at 1324–25, that proposed intervenors will be subject to regulation, much less suffer concrete harm to their interests, cf. Fund for Animals v. Norton, 322 F.3d 728, 733–34 (D.C. Cir. 2003). Because the order sought in the joint motion on consent merely “prescribes a date by which regulation could occur,” proposed intervenors have not established Article III standing.”

See page 17 of the attached decision.

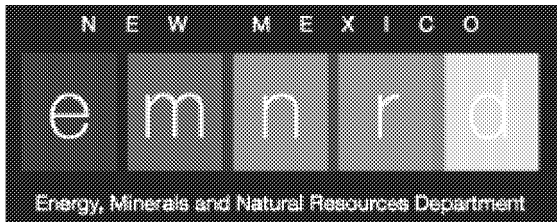
In any event, I am likely telling you what you already know. To the extent EPA determines to move forward with a rule, we do hope, as we will communicate in our comment, that an exemption scheme be incorporated into the rule allowing those states with active, robust hardrock bonding programs, which provide necessary coverage for CERCLA-related risks, to be exempted from the federal rule.

We look forward to continuing to work with EPA on this issue.

Thank you again for your time and attention.

Matthias

Matthias Sayer
Deputy Cabinet Secretary
New Mexico Energy Minerals & Natural Resource Department
Office: 505.476.3200
Fax: 505.476.3220



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From: Wagner, Kenneth [mailto:wagner.kenneth@epa.gov]
Sent: Thursday, May 11, 2017 11:07 PM
To: Sayer, Matthias, EMNRD <MatthiasL.Sayer@state.nm.us>
Subject: Re: Oklahoma City

Matthias:

I agree. I will look to schedule something soon as I was with Wyoming and Colorado for full days this week. In the meantime, feel free to call anytime.

Ken

Kenneth E. Wagner
*Senior Advisor to the Administrator
For Regional & State Affairs*
US Environmental Protection Agency
Office: 202-564-1988
Personal Matters / Ex. 6
wagner.kenneth@epa.gov

On May 10, 2017, at 1:12 PM, Sayer, Matthias, EMNRD <MatthiasL.Sayer@state.nm.us> wrote:

Ken,

Great to meet you this last weekend in Oklahoma City.

Looking forward to your and the Administrator's successes and to working with you on a number of important issues. To that end, there are a number of items we would be interested in discussing and look forward to hopefully seeing you in Santa Fe sometime soon.

Matthias

Matthias Sayer
Deputy Cabinet Secretary
New Mexico Energy Minerals & Natural Resource Department
Office: 505.476.3200
Fax: 505.476.3220

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