

EPA Is Considering CERCLA Financial-Responsibility Requirements for Several Industries

By Shata L. Stucky

The Environmental Protection Agency (“EPA”) continues to add to the list of industries which may become subject to financial-responsibility requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), Section 108(b), 42 U.S.C. § 9608. Previously, on July 28, 2009, EPA identified facilities within the hardrock mining industry as the first class of facilities that would be subject to financial-responsibility requirements under CERCLA. *Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements*, 74 Fed. Reg. 37,213 (July 28, 2009).

On January 6, 2010, EPA announced its plans “to develop, as necessary,” financial-responsibility requirements for classes of facilities within three additional industries: (1) the chemical manufacturing industry, (2) the petroleum and coal products manufacturing industry, and (3) the electric power generation, transmission, and distribution industry. *Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b)*, 75 Fed. Reg. 816, 816 (Jan. 6, 2010). The carefully worded announcement, however, leaves EPA some room to adjust its selection of facility classes: “EPA will carefully examine specific activities, practices, and processes involving hazardous substances at these facilities, as well as Federal and State authorities, policies, and practices to determine the risks posed by these classes of facilities and whether requirements under CERCLA Section 108(b) will effectively reduce these risks.” 75 Fed. Reg. at 818.

In the January announcement, EPA also identified additional classes of facilities for which EPA “plans to conduct further in-depth study before deciding whether to begin development of a proposed regulation.” *Id.* These classes include facilities engaged in recycling activities associated with materials containing CERCLA hazardous substances, which do not fit within a particular industry, and four specific industry sectors: (1) the waste management and remediation services industry, (2) the wood product manufacturing industry, (3) the fabricated metal product manufacturing industry, and (4) the electronics and electrical equipment manufacturing industry. *Id.*

Background. Since its enactment in 1980, CERCLA has required EPA to promulgate financial-responsibility regulations for the owners and operators of certain classes of facilities that produce, transport, treat, store and dispose of hazardous substances. 42 U.S.C. § 9608(b)(1). Specifically, CERCLA calls for regulations that require these “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.” *Id.*

Although CERCLA does not set a date by which the financial-responsibility rules must be promulgated, it requires EPA to identify “classes for which requirements will be first developed” within three years of the enactment of CERCLA or, in other words, by the end of 1983. *Id.* EPA missed this deadline by a long shot. In 2005, the Government Accounting Office (“GAO”) published a report criticizing EPA’s failure: “EPA has not yet implemented

a 1980 statutory mandate under [CERCLA] to require businesses handling hazardous substances to maintain financial assurances By its inaction on this mandate, EPA has continued to expose the [CERCLA] program, and ultimately the U.S. taxpayers, to potentially enormous cleanup costs at facilities that currently are not required to have financial assurances for cleanup costs, such as many gold, lead, and other hardrock mining sites and metal-plating facilities.” GAO, *Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations* 5 (Aug. 2005).

Frustrated with EPA’s failure to promulgate the financial-responsibility regulations, several environmental organizations sued EPA in 2008. *Sierra Club v. Johnson*, No. C 08-01409 (N.D. Cal. Mar. 11, 2008). In February 2009, the U.S. District Court for the Northern District of California ordered EPA to comply with the CERCLA mandate to identify classes of facilities to be covered under financial responsibility regulations. *Sierra Club v. Johnson*, No. C 08-01409, 2009 WL 482248 (N.D. Cal. Feb. 25, 2009) (unpublished). Five months later, in July of 2009, EPA issued the notice cited above that identified facilities within the hardrock mining industry as the first classes of facilities that would be subjected to CERCLA financial-responsibility requirements. 74 Fed. Reg. 37,213.

Criteria for Selecting Industries to Regulate. EPA has identified several factors that it applies to determine whether to propose financial-responsibility regulations for certain classes of facilities. These factors include:

- (1) [t]he amounts of hazardous substances released to the environment;
- (2) the toxicity of these substances;
- (3) the existence and proximity of potential receptors;
- (4) contamination historically found from facilities;
- (5) whether the causes of this contamination still exist;
- (6) experiences from Federal cleanup programs;
- (7) projected costs of Federal cleanup programs; and
- (8) corporate structures and bankruptcy potential.

74 Fed. Reg. at 37,218. EPA also considers “whether financial responsibility requirements under CERCLA Section 108(b) will effectively reduce these risks.” *Id.* EPA has indicated that it may add additional classes of facilities to the list of industries already under consideration: “it should not be assumed that other industry classes are no longer being considered and will not be identified for future rulemakings.” 75 Fed. Reg. at 819.

Expectations for the Regulations. Financial-responsibility requirements can be satisfied under CERCLA by any one, or any combination, of insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. 42 U.S.C. § 9608(b)(2). These same financial-assurances mechanisms have been required by EPA under the Resource Conservation and Recovery Act (“RCRA”). See 42 U.S.C. § 6924(t)(1). Similarly, EPA has imposed these types of financial-assurance requirements on companies under CERCLA consent decrees. Thus, EPA’s past practices provide insight into the types of mechanisms that will be accepted under the new CERCLA financial-responsibility requirements:

- Under the **insurance option**, a company must demonstrate its ability to meet its obligations by obtaining an insurance policy covering the estimated cost of the obligations. GAO, *supra*, at 40.
- Under the **guarantee option**, a company must demonstrate its ability to meet its obligations by obtaining “a written guarantee from an affiliated entity, such as a parent corporation.” *Id.*
- Under the **surety-bond option**, a company must demonstrate its ability to meet its obligations by obtaining a “bond from an approved surety company guaranteeing that its obligations will be met.” *Id.*
- Under the **letter-of-credit option**, a company must demonstrate its ability to meet its obligations by providing “an irrevocable standby letter of credit issued by a financial institution guaranteeing payment of the obligations up to a specified amount.” *Id.*
- Under the **self-insurer option**, a company must demonstrate its ability to meet its obligations by passing a financial test that evaluates certain financial ratios or requires a minimum bond rating. *Id.*

In recent years, the self-insurer or financial-test option has come under criticism, in part because the standards established under certain regulations (e.g., RCRA regulations) are outdated. This problem could be avoided easily by EPA through mandates for larger amounts of coverage under the new CERCLA financial-responsibility

requirements. But critics have identified additional problems with the financial-test option. For example, some critics emphasize that a company's financial health can change quickly and dramatically, that companies have a strong incentive to pass the financial test, and that EPA and state regulators may not have the time or expertise to properly evaluate compliance. GAO, *supra*, at 43-46. In response to these criticisms, EPA may establish more stringent requirements under the CERCLA financial-test option than the requirements established under other federal laws.

Timeline for EPA's Financial Responsibility Proposal. EPA's website states that there are "plans to propose a financial responsibility rule in the spring of 2011 for classes of facilities within the hard-rock mining industry, with a proposal for additional classes following within a few months." EPA, [Superfund Financial Responsibility](#), (last visited June 4, 2010). Companies within the hardrock mining industry, the chemical manufacturing industry, the petroleum and coal products manufacturing industry, and the electric power generation, transmission, and distribution industry should keep a close watch on these rules, particularly since insurance companies, bonding companies, and financial institutions will scrutinize financial requests regarding environmental liabilities more closely in the future.

If you have any questions about this newsletter, please contact the author listed above or the Riddell Williams attorney with whom you normally consult.

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Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192

Telephone: 206.624.3600
Facsimile: 206.389.1708
www.riddellwilliams.com