

EPA Identifies Industries To Be Regulated Under CERCLA § 108(b)

EPA Issues ANPRM Identifying Additional Industries That Could Be Subjected to CERCLA Section 108(b) Financial Responsibility Requirements

Beveridge & Diamond, P.C., January 25, 2010

On January 6, 2010, the United States Environmental Protection Agency (“EPA”) or (“the Agency”) issued an advance notice of proposed rulemaking (“ANPRM”) that identifies classes of facilities within three industries - the Chemical Manufacturing Industry (NAICS 325), the Petroleum and Coal Products Manufacturing Industry (NAICS 324), and the Electric Power Generation, Transmission and Distribution Industry (NAICS 2211) - as those for which EPA plans to develop, as necessary, a proposed regulation identifying appropriate financial responsibility requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). This ANPRM follows EPA’s July 28, 2009 notice of proposed rulemaking where EPA identified classes of facilities within the Hardrock Mining Industry as those for which the Agency will first develop financial responsibility requirements under CERCLA Section 108(b). In the January 6 ANPRM, EPA also identifies the Waste Management and Remediation Services Industry (NAICS 562), the Wood Products Manufacturing Industry (NAICS 321), the Fabricated Metals Product Industry (NAICS 332), and the Electronics and Electrical Equipment Manufacturing Industry (NAICS 334 and 335), as well as facilities engaged in the recycling of materials containing CERCLA hazardous substances, as requiring further study for EPA to decide whether to begin development of proposed financial responsibility requirements for those sectors.

EPA will be taking comment on this ANPRM through February 5, 2010. While it is expressly not seeking comment on its methodology for identifying the three industries that are the subject of the ANPRM, it is seeking comment on several other issues. With respect to the classes of facilities within the three industries, EPA requests information to assist it in determining the risks associated with those facilities and whether financial responsibility mechanisms would be effective in reducing those risks. It requests information on existing financial responsibility obligations within the industries, specifically seeking input and advice from the insurance and surety industries. EPA also seeks guidance from other regulators on their experience in developing an effective environmental financial responsibility program.

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Background

As adopted in 1980, Section 108(b) of CERCLA requires that EPA adopt financial responsibility 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.” As of early 2008, EPA had not taken any regulatory action under Section 108(b), despite a statutory deadline requiring it do so in the 1980s and subsequent EPA and GAO studies focusing attention on EPA’s failure to take such action.

In March 2008, environmental groups sued EPA in the U.S. District Court for the Northern District of California to compel EPA action. On February 25, 2009, the court ordered EPA to publish a priority notice identifying those classes of facilities for which EPA would first develop regulations under Section 108(b). In order to comply with the Court’s order, EPA published the July 28, 2009 Hardrock Mining notice, in which it identified that industry as its priority for the development of financial responsibility requirements. In that notice, EPA stated it would continue to gather and analyze data on additional classes of facilities, and would consider them for possible development of Section 108(b) requirements. The recent January 6, 2010 ANPRM identifies those additional classes of facilities.

EPA identified the January 6, 2010 industry sectors using information related to sites listed on the National Priorities List (“NPL”), data on hazardous waste generation from the 2007 Resource Conservation and Recovery Act (“RCRA”) Biennial Report, and data from the Toxics Release Inventory (“TRI”). In selecting the Chemical Manufacturing Industry, EPA noted that it considered the large scale of the industry, its release of large quantities of CERCLA hazardous substances and generation of substantial quantities of hazardous waste, and the large number of industry facilities on the NPL. It also noted the number of bankruptcies in the industry that resulted in or will likely require significant Federal responses. The Petroleum and Coal Products Manufacturing industry (dominated by the petroleum refining business) was selected based on its high TRI numbers, the significant quantities of hazardous waste generated (second only to the Chemical Manufacturing Industry), the high costs associated with the cleanup of those NPL sites, and the large number of active facilities and potential for ongoing releases. In selecting the Electric Power Generation, Transmission, and Distribution Industry, EPA particularly

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noted the industry's generation of large quantities of solid waste, including coal combustion residuals. The Agency highlighted the recent release of coal ash from the Tennessee Valley Authority's Kingston plant and the resulting remediation expense -- estimated to range from \$933 million to \$1.2 billion according to EPA estimates.

Issues and Next Steps

The contours of the Section 108(b) financial responsibility program that will ultimately be adopted by EPA are far from clear. As stated above, Section 108(b) requires that the standards (1) be consistent with the degree and duration of risk, that is posed by certain activities - production, transportation, treatment, storage and disposal, and (2) be developed with regard to the risks posed by these management activities as they relate to "hazardous substances." Potentially, this program could be far broader than the RCRA Subtitle C financial responsibility requirements, which are tied to the far more limited class of "hazardous wastes" and are not required for risks associated with production or transportation. CERCLA also provides that EPA should cooperate and seek advice from the commercial insurance industry in developing these financial responsibility requirements. In addition, CERCLA sets forth the types of financial mechanisms that could be used to meet the financial responsibility requirements - insurance, guarantee, surety bond, letter of credit, or qualifications as a self-insurer - but adds that EPA can specify which contract or policy terms are necessary and which may be unacceptable.

Of particular concern in the subsequent rulemaking is the potential that EPA will severely restrict or disallow the use of certain forms of financial responsibility, particularly any financial test mechanism. That mechanism, which is the least expensive form of financial responsibility (and the least cumbersome to satisfy), has been the subject of increasing scrutiny. The restriction or removal of the financial test mechanism or similar limitations, which are acceptable under the RCRA financial responsibility program, could result in substantial and unnecessary cost to industry.

EPA has announced that in developing these regulations, it will canvass and evaluate other existing state and federal sources of financial responsibility requirements, including those established under RCRA, with the goal of not adopting duplicative requirements. Moreover, EPA has also stated that it will consider the issue of state delegation, which CERCLA is silent on.

EPA plans on publishing a proposed Hardrock Mining Rule in Spring

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2011. For the classes of facilities identified in the final rule subsequent to the January 6, 2010 ANPRM, EPA will propose a rule in late Summer 2011. It has not indicated when it will take further action on the classes of facilities within the five additional sectors it identified for further study. In the ANPRM, EPA cautions that in identifying classes of facilities within these industries in the notice, the Agency does not intend to indicate that other classes in other industry sectors are no longer being considered for future rulemaking.

If you have questions regarding EPA Section 108(b) financial responsibility rulemaking, please contact Don Patterson at (202) 789-6032 or dpatterson@bdlaw.com, or Peter Gregg at (512) 391-8030 or pgregg@bdlaw.com.