

IMPACT OF EPA'S PROPOSED RULE UNDER SECTION 108(B) OF CERCLA

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CERCLA 108

Section 108 of the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” or Superfund), 42 U.S.C. 9608, required EPA to:

- identify classes of facilities with the greatest risks for releases of hazardous substances and
- then establish financial responsibility requirements for those facilities.

CERCLA 108 Statutory Language

- “(b)(1) Beginning not earlier than five years after the date of enactment of this Act, the President shall promulgate requirementsthat 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.
- Not later than three years after the date of enactment of the Act, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register....”

Court Decision

- In 2008, several environmental organizations sued EPA on its failure to issue regulations under CERCLA 108(b)
- On February 25, 2009, U.S. District Court ordered EPA to publish a notice no later than May 4, 2009, identifying those classes for which EPA will first issue FA regulations as required by Section 108(b) of CERCLA. *Sierra Club v. Johnson*, (N.D. Cal. No. C08-01409 WHA)
- The Court extended the deadline (at the government's request), requiring EPA to sign a priority notice no later than July 10, 2009

Identification of Mining

- EPA's July, 2009 *Federal Register* notice defined classes of hardrock mining for which EPA would develop financial responsibility requirements under CERCLA §108(b)
 - Hardrock mining is defined as the extraction, beneficiation or processing of metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (e.g., asbestos, gypsum, phosphate rock, and sulfur).
- Additional industry classes beyond mining were identified in later public notices

Current Rulemaking Schedule

- States have provided EPA with info on state mining FA rules
- EPA currently projects that the notice of proposed rulemaking will be published in May 2014

Significant Issues

- Coordination with other Federal/State FA requirements
 - FA required by federal land managers
 - FA required under state mining and environmental protection rules
- Calculation of federal FA
 - What costs should be covered?
 - Flat amount or site-specific?
 - Adequacy of existing facility FA
 - When must they post FA?
 - Which mechanisms can be used?
- Preemption: CERCLA Section 114

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- 42 U.S.C. 9614:

“(d) Except as provided in this title, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this title 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. Evidence of compliance with the financial responsibility requirements of this title shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel or facility.”

State Preemption Issue

- Potential Effect on State Laws:
 - EPA cannot control the interpretation of Section 114 by State courts.
 - State financial responsibility requirements connected with release of a hazardous substance may not be enforceable at facilities that have provided federal FA under CERCLA Section 108(b).
 - This will be determined in courts if facilities challenge State enforcement of their laws.

Preemption Case Law

- Chemclene Corp. v. Pennsylvania Dep't of Environmental Resources, 91 Pa. Cmwlth. 316, 497 A.2d 268 (1985)
 - Preemption under CERCLA 114
- San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County, 121 N.M. 194, 909 P. 2d 754 (Ct. App. 1995)
 - Conflict preemption