

The CERCLA Section 108(b) Financial Responsibility Rulemaking

Interstate Mining Compact Commission

Bonding Workshop

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Purpose

- Discuss the history and process for developing a proposed financial responsibility program under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) aka Superfund that would first apply to hard rock mining.

Contents

- History
- Scope of CERLA 108(b)
- Potential State Issue



History

- Section 108(b) was part of the original statute passed in 1980.
- Reports in the late 1990s and mid-2000s from EPA's Inspector General and the Congressional Government Accountability Office brought attention to section 108 (b).
- After EPA's own 2004 "120 Day Study" on the Superfund program, we began working to identify appropriate facility classes for action under 108(b).



Lawsuit and court order

- On March 12, 2008, the Sierra Club, Great Basin Resource Watch, Amigos Bravos and the Idaho Conservation League filed suit in the U.S. District Court for the Northern District of California to compel EPA action.
 - Intervenors (all industry groups) were: the Superfund Settlements Project, RCRA Corrective Action Project, American Petroleum Institute and Treated Wood Council.
- On February 25, 2009 the court ordered EPA to publish a “priority notice” in the *Federal Register* identifying those classes for which EPA would first develop regulations.

July 2009 priority notice

- EPA published a *Federal Register* notice in July, 2009.
 - See: <http://www.epa.gov/EPA-WASTE/2009/July/Day-28/>
 - The July priority notice identified elements of the hard rock mining industry as classes of facilities for which the Agency will first develop financial assurance requirements and propounding a definition as:
 - *For purposes of this notice only, hard rock 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).*
- This definition includes both hard rock mining and mineral processing (including primary smelting), but does not include coal mining.

July 2009 priority notice

- The priority notice did four things:
 - 1) Identified elements of the hard rock mining industry as classes of facilities for which the Agency would first develop financial assurance requirements.
 - 2) Committed to developing another *Federal Register* notice identifying additional classes of facilities to evaluate for financial responsibility requirements.
 - 3) Identified five specific additional classes that, at a minimum, the agency would consider in the later notice: Hazardous Waste Generators; Hazardous Waste Recyclers; Metal Finishers; Wood Treatment Facilities; and Chemical Manufacturers.

July 2009 priority notice

- ...four things:

- 4) In evaluating additional classes of facilities, EPA may take several factors into account; e.g.

- a. Information on releases
- b. Sources of contamination
- c. Past experiences
- d. Projected costs
- e. Corporate information

Lawsuit dismissed

- On August 5, 2009 the court dismissed the remainder of the Sierra Club complaint.
- The judge's order did not preclude appeals or additional litigation.

“Additional classes” notice

- On January 6, 2010 EPA published in the *Federal Register* an Advance Notice of Proposed Rulemaking (ANPRM) listing classes for further evaluation and for development, as necessary, of proposed CERCLA Section 108(b) requirements for facility classes in:
 - Chemical Manufacturing
 - Petroleum and Coal Products Manufacturing
 - Electric Power Generation, Transmission, and Distribution
- See: http://www.epa.gov/superfund/policy/financialresponsibility/cercla108b_12-29-09.pdf

“Additional classes” notice

- In our ANPRM we also promised to study several other facility classes for possible later Section 108(b) regulation:
 - Waste Management and Remediation Services
 - Wood Product Manufacturing
 - Fabricated Metal Product Manufacturing
 - Electronic and Electrical Equipment Manufacturing
 - Facilities engaged in the recycling of materials containing CERCLA hazardous substances

Who's potentially included in this financial responsibility proposal?

- EPA intends to cover active mining and mineral processing facilities.
- EPA is analyzing this universe to determine which classes of facilities merit regulation.

CERCLA 108(b) Financial Responsibility

- Directs EPA 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.”

CERCLA 108(b) Financial Responsibility

- “The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the [Administrator] in his[/
her] discretion believes is appropriate based on”
 - the payment experience of the Fund,
 - commercial insurers,
 - courts settlements and judgments, and
 - voluntary claims satisfaction.

CERCLA 108(b) Financial Responsibility

- “To the maximum extent practicable, the [Administrator] shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements.
- Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer.
- In promulgating requirements under this section, the [Administrator] is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this Act.”

CERCLA 108(b) Financial Responsibility

- “Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation.
- Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.”

State issues - preemption

- EPA has developed a collaborative relationship with States and Tribes for many environmental programs, often authorizing States to implement federal programs.
- However, CERCLA Section 114(d) provides that:
 - “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.”
- We know that this provision may affect existing State financial responsibility programs for hard rock mining, and we are working to understand those potential effects.

State issues - preemption

- We are exploring issues raised by the States and others:
 - If a court decision invalidates a State law, how can we assure that sufficient financial responsibility remains in place?
 - Could we provide States with access to the proceeds of federal financial responsibility instruments?
- There are some very good State rules, while others may not include what may be required under a new federal rule.



State issues - authorization

- CERCLA does not include a provision analogous to Section 3006 of the Resource Conservation and Recovery Act (RCRA), under which a state hazardous waste program can be authorized to operate in lieu of the federal program.



Learning from you

- Statute authorizes EPA to specify policy and other contractual terms, conditions, and defenses.
- Eager to hear and learn how other programs have dealt with financial responsibility for this industry.



Questions