

Client Alert

Latham & Watkins Environment,
Land & Resources Department

Pay Me Now Or Pay Me Later: Superfund Financial Assurance Is On Its Way

Introduction

On February 25, 2009, a US federal district court judge ruled that the United States Environmental Protection Agency (EPA) must identify industries that would be subject to future financial assurance regulations under the Comprehensive Environmental Recovery and Liability Act (CERCLA).¹ The court ordered that EPA must publish the classes of facility that will be subject to future CERCLA financial assurance requirements by May 4, 2009. No financial assurance regulations currently exist for the CERCLA regime and this order represents the first step towards their promulgation.

This decision is particularly noteworthy given the recent focus on the importance of ensuring that a source of funding will be available to address the potential for a future clean-up of a hazardous waste site if the operator declares bankruptcy or is otherwise insolvent. As attention on the financial solvency of companies has escalated due to the current global economic crisis and the rising number of bankruptcies, environmental groups have increased pressure on EPA to issue regulations requiring companies to provide assurances that they will be able to address potential clean-ups of hazardous waste—including through the current litigation. Thus, industries that

handle hazardous substances and may be subject to CERCLA should anticipate that a financial assurance regime under CERCLA is forthcoming.

A complex process lies ahead for EPA in determining how to structure this new regime, including evaluating the types of risks certain industries may face, determining what types of financial assurance mechanisms will be permitted, and analyzing what gaps exist in current financial assurance programs. There may be many opportunities for industry involvement in this process, either on an individual basis or through a trade association. We strongly encourage companies that may potentially be affected by CERCLA financial assurance requirements to consult with legal counsel regarding the potential options for strategic involvement with the development of this regime, particularly at the front-end of the process when information-sharing with EPA will be critical.

Industries likely to be affected by the future CERCLA financial assurance regulations are the hardrock and phosphate mining industries; coal-fired power plants;² metal finishers; wood treatment facilities; and other hazardous waste generators and recyclers. We believe that the hardrock mining industry is particularly likely to be

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identified in the May 4, 2009 notice of classes of facilities.

Background on Financial Assurance Requirements

Financial assurance requirements generally call for regulated entities to demonstrate adequate financial resources to fund future environmental obligations, such as closure of a facility or the reclamation of a mine. These requirements are in place to compel operators to fund future environmental obligations in the event that the operator cannot or will not pay for the activity on its own accord, such as in the event of bankruptcy. Types of financial assurance generally include mechanisms such as trust funds, surety bonds, letters of credit, insurance, issuance of financial test and corporate guarantees, typically with the government regulator named as beneficiary.³

Financial assurance regulations for certain facilities are currently in place under the Resource Conservation and Recovery Act (RCRA), 40 C.F.R. Parts 264-265, Subpart H. These regulations apply to owners and operators of hazardous waste treatment, storage and disposal facilities, and require the submission of a written estimate of the costs of closure of the facility (including the cost of clean-up of any contamination) and post-closure monitoring and maintenance costs, as well as a demonstration that the owner or operator will have sufficient funds to cover these costs.⁴ Other federal regulatory schemes that require financial assurance include regulations governing underground and aboveground storage tanks, the Safe Drinking Water Act, and Forest Service and Bureau of Land Management regulations requiring financial assurance for mining operations on public lands.^{5,6}

Despite these existing regimes requiring financial assurance for environmental liabilities, there has been a perceived void in financial assurance requirements

for handlers of hazardous substances. More than 231,000 businesses filed for bankruptcy between 1998 and 2003, and the Department of Justice filed 136 actions in bankruptcy cases on behalf of EPA in that same time period for claims related to environmental clean-up costs where the operator did not or could not pay.⁷ EPA itself has recognized the need for further attention to financial assurance requirements, identifying the issue as a National Enforcement Priority for 2008-2010.⁸ Additionally, the absence of CERCLA financial assurance regulations has been criticized by several commentators, including environmental groups and the US General Accountability Office (GAO), which has published reports on the need for financial assurance requirements for Superfund sites, particularly with respect to hardrock mines.⁹ The US District Court for the Northern District of California took an initial step in filling this void in *Sierra Club v. Johnson*.

CERCLA Financial Assurance Requirements and the *Sierra Club v. Johnson* Decision

Section 108(b) of CERCLA mandates that regulations be promulgated to ensure that facilities involved in any way with hazardous substances would remain financially responsible for cleaning up substances that were improperly disposed.¹⁰ The law sets forth three specific actions for EPA¹¹ to undertake: (1) publish notice of the classes of facilities for which financial responsibility requirements would first be required by December 1983; (2) promulgate financial responsibility requirements for those classes of facilities beginning no later than December 1985; and (3) impose such financial responsibility requirements "as quickly as can be reasonably achieved" but no later than four years after the date of promulgation of the requirements.¹²

Twenty-eight years after the enactment of CERCLA, EPA had taken no action on any of the three requirements under Section 108(b). On March 12, 2008, four environmental groups, including the Sierra Club, filed suit against the EPA requesting that the US District Court for the Northern District of California order the EPA to promulgate financial assurance standards on a “reasonable but rigorous schedule.”¹³ According to a GAO report referenced by the court, EPA “has cited, among other things, competing priorities and lack of funds” as reasons for its failure to promulgate these regulations and publish the notice of classes of facilities subject to them.¹⁴

On February 25, 2009, the court ruled on the parties’ cross-motions for summary judgment and ordered EPA to identify the industries that will first be subject to the financial assurance regulations by May 4, 2009.¹⁵ The court did not address the merits of the arguments regarding EPA’s duty to promulgate the financial responsibility regulations, but decided to hold those issues in abeyance pending EPA’s issuance of the notice of classes of facilities to be affected by the potential rules. The court stated that the issuance of the notice “will shed light on the merits of the other challenged duties under Section 108(b).”¹⁶

Impacts to Industry: Hardrock Mining May Be at the Top of EPA’s List

Prior to filing their complaint, plaintiffs sent a notice of citizen suit to former EPA Administrator Stephen Johnson arguing that due to both the lack of financial assurance requirements under CERCLA, and the fact that “Superfund’s \$3.8 billion surplus has now been spent,” taxpayers were now carrying the financial burden for Superfund cleanups.¹⁷ Plaintiffs used the example of the recent bankruptcy of a mining company, ASARCO LLC, to illustrate their views. Plaintiffs claimed that ASARCO’s environmental liabilities

encompassed 94 Superfund sites, amounting to more than \$1 billion, a great portion of which, plaintiffs stated, would fall on the taxpayers’ shoulders.

While the mining industry may not be the sole target of potential CERCLA financial responsibility requirements, plaintiffs are correct to anticipate that the mining industry will be likely be impacted by any such regulations. This is true for two reasons. *First*, the mining industry is generally not subject to RCRA’s financial assurance requirements because RCRA exempts from regulation solid wastes from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.¹⁸ Additionally, the Forest Service and Bureau of Land Management’s financial assurance requirements for mines do not apply to mines on state or private land.¹⁹ These exclusions have resulted in many hardrock mines not being subject to financial assurance requirements for environmental liabilities. The issuance of CERCLA financial assurance regulations could extend EPA’s reach to these mines.

Second, EPA’s Inspector General has noted that hardrock mining can result in significant environmental problems, the clean-up of which can be complex and costly.²⁰ For example, as of 2004, there were 63 hardrock mining sites on the National Priorities List (otherwise known as the Superfund list, containing the most contaminated sites in the country), with an estimated total cleanup cost of \$7.8 billion, \$2.4 billion of which will likely be left to taxpayers to fund.²¹ Additionally, there is a significant number of abandoned hardrock mines (an estimated 161,000 in 12 Western states alone), and many of the former mine operators are now defunct or did not post sufficient financial assurances to fund reclamation and potential clean-up of contamination at the sites. This leads to a significant shortage of funds to address clean-up of these mines, and

clean-up—if undertaken at all—is often funded through taxpayers’ dollars.

These two factors led GAO to suggest that “EPA may want to consider hardrock mining a high priority” in developing CERCLA financial assurance requirements.²² Based on these factors, and coupled with the limited time granted to EPA to publish the notice of classes of facilities by the court (less than 70 days), it is likely that EPA may not consider other less visible industries, and will select the hardrock mining industry as a top candidate for EPA’s list of classes of facilities, due by early May 2009.

Conclusion and Recommendations

While the court’s recent decision in *Sierra Club v. Johnson* does not settle the issue of whether EPA will be ordered to promulgate financial responsibility requirements, EPA’s obligation to publish a notice of classes of facilities is a first step in that direction. If and when EPA is ordered to promulgate financial responsibility regulations, this process will likely take several years to be completed (depending on any timelines that may be imposed in future court rulings), with the possibility of involvement by potentially affected companies in the near term. Accordingly, because action by EPA is on its way, we offer the following concluding thoughts and recommendations:

- The industries potentially impacted by CERCLA financial assurance regulations may include the hardrock and phosphate mining industries; coal-fired power plants;²³ metal finishers; wood treatment facilities; and other hazardous waste generators and recyclers.
- Companies within the classes of facilities first identified by May 4, 2009 and those in classes of facilities that anticipate being

subject to later CERCLA financial responsibility regulations should consider becoming involved in and monitoring EPA’s rulemaking process from the beginning, both informally and through the formal comment procedures. The development of the financial assurance regime will be complex and will require the collection of significant amounts of information about the types of risks certain industries may face, an analysis of what types of financial assurance instruments will be permitted, and a determination of what gaps exist in current financial assurance regimes, among many other considerations. Involvement at the front-end of the process will allow industry to contribute to the development of the regime and share data and information with EPA. Thus there will be many opportunities for industry involvement in this process, either on an individual basis or through a trade association. We strongly encourage companies that may potentially be affected to consult with legal counsel regarding the potential options for becoming strategically involved with the development of this regime.

- Note that the suite of financial assurance mechanisms under future CERCLA financial assurance regulations may be more narrow than those currently available under RCRA. For example, under RCRA, a company is not required to arrange for a financial guarantee with a third-party where it passes certain financial tests based generally on financial ratios, including a measurement of net assets relative to the estimated closure and post-closure costs. Both EPA’s own Environmental Financial Advisory Board and groups such as the Association of State and Territorial Solid Waste Management Officials have advised that this financial test mechanism is “inadequate” and that EPA should reconsider its use of

this form of financial assurance.²⁴ It is possible that EPA may heed this advice and eliminate this mechanism from the CERCLA financial assurance options, thereby substantially adding to the costs of compliance for companies.

- In its 2005 report, GAO recommends that EPA give priority when developing CERCLA financial assurance regulations to “facility owners whose prior actions indicate they may pose a high risk of default on environmental obligations,” including consideration of a company’s history of noncompliance with environmental laws.²⁵ For this reason, now is a good time to start thinking about your company’s environmental management practices with respect to sites at which hazardous substances are being handled or managed, and begin to anticipate the eventual need to provide financial assurance for activities at those sites.
- Given the current economic climate, if your company is already subject to financial assurance requirements under RCRA or another regulatory regime, it may be prudent to ensure that your existing mechanism is sufficiently backed up by the issuing institution.

Endnotes

¹ See *Sierra Club v. Johnson et al.*, No. C 08-01409, 2009 US Dist. LEXIS 14819 (N.D. Cal. Feb. 25, 2009).

² In response to the recent coal ash spill in Tennessee, EPA announced on March 9, 2009, that it would propose regulations by the end of the year for the management of coal ash. The Agency has already requested information from electric utilities with surface impoundments containing coal combustion waste, under CERCLA Section 104(e). See http://www.epa.gov/epawaste/nonhaz/industrial/special/fossil_coalashletter.htm. While this announcement may be an indication that EPA will address financial responsibility for coal ash waste via a non-CERCLA regulatory mechanism, the spotlight

on coal combustion waste could also result in coal-fired power plants ranking high on EPA’s list of potential classes of facilities to be subject to future Superfund financial responsibility regulations.

³ See e.g., 40 C.F.R. §§ 264.143; 264.145.

⁴ See generally 40 C.F.R. Parts 264-265; see also EPA, *Financial Assurance for Hazardous Waste Treatment, Storage, and Disposal Facilities (TSDFs)*, available at, <http://www.epa.gov/epawaste/hazard/tsd/td/ldu/financial/index.htm>.

⁵ See e.g., 43 C.F.R. § 3809.500 *et seq.* (Bureau of Land Management financial assurance requirements for mines); 36 C.F.R. §228.13 *et seq.* (Forest Service financial assurance requirements for mines).

⁶ Many states also provide for financial assurance requirements for mining operations. See e.g., A.R.S. § 27-991 *et seq.* (Arizona financial assurance requirements for mines); N.A.C. § 519A.350 *et seq.* (Nevada financial assurance requirements for mines); and N.M.A.C. § 19.10.12.1201 *et seq.* (New Mexico financial assurance requirements for mines).

⁷ See US GAO, *Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public*, GAO-06-900T (“2006 GAO Report”) at 4 (June 15, 2006).

⁸ See US EPA, *October 2007 FY08-FY10 Compliance and Enforcement National Priority: Financial Responsibility Under Environmental Laws*, available at, <http://epa.gov/compliance/data/planning/priorities/financialresp.html>.

⁹ See e.g., US GAO, *Hardrock Mining: Information on Types of State Royalties, Number of Abandoned Mines and Financial Assurances on BLM Land*, GAO-09-429T (February 26, 2009); 2006 GAO Report; US GAO, *Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations*, GAO-05-658 (“2005 GAO Report”) (Aug. 2005).

¹⁰ 42 USC. § 9608(b).

¹¹ This authority granted to the President by statute was delegated to the Department of Transportation for transportation-related facilities, and the EPA for all other sites. See Executive Order No. 12,580, 52 Fed. Reg. 2,923 (Jan. 23, 1987).

¹² See 42 USC. § 9608(b)(1), (b)(3).

¹³ *Sierra Club et al.*, Complaint for Declaratory & Injunctive Relief at 2.

¹⁴ *Sierra Club*, 2009 US Dist. LEXIS 14819, at *16.

¹⁵ In doing so, the court rejected EPA's argument that the environmental groups' claim was time-barred by a six-year statute of limitations. Instead, the court found that EPA's failure to publish the notice of classes was a continuing violation, and for that reason the traditional statute of limitations did not bar plaintiffs' claim. The court also held that the plaintiff environmental groups had no standing to pursue their claims against the DOT because of failure to show an injury fairly traceable to DOT's action or inaction. See *Sierra Club*, 2009 US Dist. LEXIS 14819, at *8,26.

¹⁶ *Id.* at *28.

¹⁷ *Sierra Club, Amigos Bravos, Great Basin Mine Watch, Idaho Conservation League, Notice of Citizen Suit Concerning Failure of the EPA Administrator to Comply with a Mandatory Duty to Promulgate Regulations Under CERCLA* (Nov. 6, 2007).

¹⁸ 42 USC. § 6921(b)(3)(A)

¹⁹ 2005 GAO Report at 36.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 35.

²³ See footnote 2.

²⁴ 2005 GAO Report at 44-46.

²⁵ *Id.* at 35.

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