EPA Says No Risk from CERCLA Financial Assurance Exemptions for Three Named Industries

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EPA has promulgated a final rule declining to impose final assurance requirements on the electric power, petroleum and coal manufacturing, and chemical manufacturing industries to clean up spills of hazardous substances.

I. CERCLA

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 to promote timely cleanup of pollution and ensure the costs of cleanup are borne by ?potentially responsible parties? (PRPs) ? not taxpayers. CERCLA allows EPA to either clean up a site using ?Superfund? and, where possible, sue to recover those costs, or order PRPs to clean it up using the PRPs? money.

Section 108(b) of CERCLA authorizes EPA to require certain classes of facilities to establish financial assurance to cover the costs associated with cleaning up a release of hazardous substances from their facilities. The classes of facilities are determined by ?the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances.? The level is set and adjusted based on the payment experience of EPA using the CERCLA Superfund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction. The types of financial assurance that can be used to meet the requirement include insurance, guarantees, surety bonds, letters of credit, or qualification as a self-insured.

Section 108(b) required EPA to develop and publish a list by 1983 of the first priority classes of facilities for which financial assurance would be required. EPA failed to do so, was sued in 2008 to compel its performance, and was ordered by a court to issue a priority list in 2009. EPA published a 2009 Priority Notice naming the hard rock mining industry as its first priority for financial assurance requirements and committing to gather information on other classes of facilities to which Section 108(b) might apply.

II. Final Rule History

In 2010, EPA published an ?Advance Notice of Proposed Rulemaking? (Advance Notice) requesting comments on whether or not to propose CERCLA financial assurance requirements on the hard rock mining industry and three other industries: electric power, petroleum and coal manufacturing, and chemical manufacturing industries. In 2014, environmental groups sued, requesting an order requiring EPA to issue rules immediately requiring CERCLA financial assurance from all four industries. The Court did not issue the requested order, but agreed the administrative rulemaking process should proceed. EPA consented to a schedule for the administrative rulemaking process for all four industry classifications, beginning with the hard rock mining industry.

In 2017, EPA published a proposed rule setting financial responsibility requirements for the hard rock mining industry and requesting comments. In February of 2018, EPA announced its final decision not to require financial assurance for hard rock mining facilities, finding it was unnecessary due to existing federal and state programs and modern mining practices. Another lawsuit followed, and EPA?s decision was upheld by the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit held that the ?risk? requiring financial assurance under Section 108(b) does not refer to risk to human health or the environment, but refers to financial risk and, more specifically, the risk of having to use taxpayer money to clean up releases of hazardous substances from a particular class of facilities. The court further found that EPA has discretion to decide which classes of facilities need regulating in this area, and, where existing financial assurance obligations exist under other state or federal statutes or regulations for a particular class or the risk is otherwise determined to be low, EPA may exempt that class from CERCLA?s financial assurance obligations.

Following the D.C. Circuit ruling in the hard rock mining case, EPA addressed the remaining three industries by issuing three separate proposed rules in late 2019 and early 2020 (Proposed Rules). The Proposed Rules addressed comments received from the 2010 Advance Notice and requested further comments on whether the electric power, petroleum and coal manufacturing, and chemical manufacturing facilities pose a financial risk of future use of Superfund for releases of hazardous substances. During the comment period, EPA received comments, evaluated modern management practices and existing regulations governing the affected industries, and looked at funds used at current CERCLA cleanup sites connected to these industries. As stated in the Proposed Rules, EPA found adequate protections already exist to protect against costly releases and to require financial accountability from operators. For example, EPA found that the chemical manufacturing industry is highly regulated under other federal and state programs governing hazardous waste and stormwater and wastewater management, are generally financially viable, often have existing financial assurance in place under state or federal hazardous waste laws, and do not have a modern day history of releases requiring uses of Superfund for cleanup. In fact, EPA found only 34 CERCLA sites connected to the chemical manufacturing industry that have a potential to impact the Superfund, a small number given EPA?s estimate of approximately 13,480 chemical manufacturing facilities in existence today.

III. Conclusion

EPA?s recent announcement exempting electric power, petroleum and coal manufacturing and

chemical manufacturing industries from CERCLA financial assurance requirements is not a decision to give these industries free rein to pollute the environment with no consequences. If a chemical manufacturing or coal manufacturing site releases hazardous substances and a CERCLA cleanup is ordered, the potentially responsible parties (including the owner or operator of the facility) will be on the hook for cleanup costs whether or not they have financial assurance in place. The Consolidated Notice does not take away this result. Rather, EPA?s decision is a pragmatic one that does not impose additional proactive financial burdens on certain industries that already are heavily regulated and often already have other financial assurance requirements. EPA?s decision simply finds the financial risk of not imposing additional financial assurance requirements so low as to make such additional requirements unnecessary. Of course, this is not a done deal, as lawsuits are likely, and the Biden administration may require EPA to reevaluate its current position. Further, if Democrats control both the House and the Senate, the Congressional Review Act could be used to roll back this final action.

Financial Responsibility Requirements Under CERCLA Section 108(b), 85 Fed. Reg. 77384 (Dec. 2, 2020).

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