

EPA Targets Power and Manufacturing Industries for New Financial Assurance Requirements: Electric Power, Petroleum and Coal Products Manufacturing, and Chemical Manufacturing Affected

January 4, 2010

On December 30, 2009, the U.S. Environmental Protection Agency (EPA) issued an advance notice of proposed rulemaking (ANPR) that identified three industry sectors for which the agency will develop new financial assurance requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The three industry sectors are:

- The electric power generation, transmission, and distribution industry (North American Industrial Classification System [NAICS] 2211)
- The petroleum and coal products manufacturing industry (NAICS 324)
- The chemical manufacturing industry (NAICS 325)

In addition to these three sectors, EPA is also considering whether to develop financial assurance requirements for the following industry sectors: waste management and remediation services, wood product manufacturing, fabricated metal product manufacturing, electronics and electrical equipment manufacturing, and facilities engaged in the recycling of materials containing CERCLA hazardous substances.

EPA's December 30 action, the first step in developing a final rule, follows a similar notice published in July of 2009 in which EPA identified the hard-rock mining industry as the first industry for which it would develop Section 108(b) financial assurance requirements.¹ In that notice, EPA indicated it would develop such rules for the hard-rock mining industry by the spring of 2011.

Financial assurance rules seek to ensure that funding will be available to address potential environmental problems or future environmental obligations, such as the closure of a hazardous waste treatment, storage, and disposal facility; the reclamation of a mine; or the cleanup of a leaking underground storage tank. The primary purpose of financial assurance is to prevent such environmental obligations and costs from becoming public liabilities in the event that a facility owner or operator becomes insolvent. The financial assurance mechanisms typically allowed under existing state and federal environmental regulatory programs include:

¹ See 74 Fed. Reg. 37213 (July 28, 2009).

- Trust fund
- Surety bond
- Letter of credit
- Insurance policy
- Financial test
- Corporate guarantee

Using authority given to it under Section 108(b) of CERCLA, EPA intends to promulgate regulations that require classes of facilities within the identified industrial sectors to establish and maintain evidence of financial responsibility. The statute directs that such rules should be consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.

In determining how to structure this brand-new regulatory regime, EPA will have to evaluate current financial assurance programs, analyze the types and magnitude of risks associated with the handling of hazardous substances in certain industries, decide what amount of financial assurance is needed to address those risks, and decide what types of financial assurance mechanisms will be available to satisfy Section 108(b) obligations. Each of these issues is apt to be intensely controversial because the stakes are so high. Poorly framed financial assurance requirements threaten to undermine profitable operations and needlessly take investment capital out of productive use.

The CERCLA statute as originally enacted in 1980 directed EPA to publish by December 1983 a notice of the classes of facilities for which financial assurance requirements initially would be required, and to promulgate financial responsibility requirements for those classes of facilities beginning no earlier than December 1985. EPA did not do so. In February of 2009, a federal district court ordered EPA to identify those industries that will be subject to Section 108(b) financial assurance obligations.² To comply with the court's order, EPA published the July 2009 notice regarding the hard-rock mining industry and has now followed up with the more recent notice, identifying additional target industries.

EPA will be accepting public comment on this ANPR for 30 days after it is published in the *Federal Register*. This process should entail extensive research, data gathering, and outreach to stakeholders through the solicitation of public comment.

Morgan Lewis lawyers are at the center of the development of financial assurance requirements under Section 108(b), having participated in many EPA rulemakings, including submitting comments on the EPA's initial ANPR related to hard-rock mining. We encourage our clients in the affected industries to get involved in the early stages of this process, submitting comments to EPA, to foster the development of a sensible financial assurance regulatory program that will avoid imposing unnecessary costs and burdens on the regulated community. Morgan Lewis can assist in the preparation of such comments.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

² See *Sierra Club v. Johnson*, 2009 U.S. Dist. LEXIS 14819 (N.D. Cal. 2009).

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