

# ADVISORY

## SULLIVAN & WORCESTER LLP ENVIRONMENTAL ADVISORY

### EPA to Initiate Financial Responsibility Rulemaking Proceeding under CERCLA Section 108(b)

#### EPA Identifies Three Industry Sectors in Advance Notice of Proposed Rulemaking

On January 6, 2010, the U.S. Environmental Protection Agency ("EPA") issued an advance notice of proposed rulemaking ("ANPRM") designating classes of facilities within three industries for which the Agency is considering imposing financial responsibility requirements pursuant to Section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). See 75 Fed. Reg. 816 (Jan. 6, 2010). CERCLA § 108(b) provides that EPA "shall 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." 42 U.S.C. § 9608(b). The three industries included in the ANPRM are the Chemical Manufacturing Industry (NAICS 325); the Petroleum and Coal Products Manufacturing Industry (NAICS 324); and the Electric Power Generation, Transmission and Distribution Industry (NAICS 2211).

#### Background of Financial Responsibility Requirements

EPA and state environmental agencies with EPA-delegated program authority require regulated entities to provide assurance of their financial ability to fund remediation, corrective measures, or closure and post-closure obligations, as applicable, under a number of regulatory programs. As more companies are facing financial hardship or declaring bankruptcy, regulators have intensified their focus on ensuring that covered entities fulfill their financial responsibility obligations. In April 2009, EPA's Office of Enforcement and Compliance Assurance announced that compliance with financial responsibility obligations remains a national enforcement priority, and that the Agency would identify recalcitrant parties and pursue enforcement cases against them. Moreover, EPA is working with the States to ensure compliance with EPA-delegated state regulatory programs.

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## Financial Responsibility Requirements

Financial responsibility requirements arise in a number of contexts. For example, Resource Conservation and Recovery Act ("RCRA") regulations, 40 C.F.R. parts 264 and 265, mandate that owners and operators of permitted and interim status facilities establish a financial assurance instrument equal to the current estimated cost of fulfilling closure or post-closure obligations at their facilities. RCRA regulations also direct owners and operators to demonstrate financial responsibility for bodily injury and property damage to third parties caused by both sudden and nonsudden accidental occurrences arising from the facility's operations. Financial assurance is also required by Federal and state underground storage tank regulations, *e.g.*, 40 C.F.R. part 280, subpart H; state above-ground storage tank laws; Underground Injection Control Program regulations, 40 C.F.R. part 144, subpart F; and RCRA permits and CERCLA consent decrees.

Acceptable financial assurance instruments under the regulatory programs include:

- a trust fund, funded up-front or by annual payments, with the applicable agency named as the beneficiary;
- a surety bond guaranteeing payment into a trust fund or guaranteeing performance of closure/post-closure activity, accompanied by a standby trust fund;
- an irrevocable standby letter of credit, accompanied by a standby trust fund;
- insurance; and
- fulfilling the financial test by demonstrating that the regulated entity meets a combination of certain financial thresholds, certified annually.

Cost estimates must be reviewed annually and adjusted for inflation. The amount of the financial assurance instrument must be increased within 60 days of upward revisions to the cost estimate.

## Focus of EPA on the Financial Test Criteria

In 2007, EPA began analyzing whether the RCRA Subtitle C financial test criteria for hazardous waste facilities, which had not been updated since 1982, required revision. In fact, some states have ceased allowing companies to use the financial test due to concerns that the criteria are outdated and no longer adequately predict a company's continued financial solvency. In early 2009, EPA withdrew a proposed rule to revise the RCRA financial test criteria that had been submitted for review to the Office of Management and Budget by the prior administration. According to the Agency's Fall 2009 Semiannual Regulatory Agenda, the timetable for releasing a revised proposed rule remains to be determined.

## Rulemaking Under CERCLA § 108(b)

Unlike the financial assurance regulations under the RCRA program, which apply to all owners and operators of hazardous waste facilities, CERCLA § 108(b) calls for EPA to promulgate requirements for classes of facilities to 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" by such facilities. In determining levels of financial responsibility under CERCLA § 108(b), EPA considers the level of risk "based on the payment experience of the [Superfund], commercial insurers, courts [sic] settlements and judgments, and voluntary claims satisfaction" across a class of facilities. 42 U.S.C. § 9608(b).

In *Sierra Club v. Johnson*, No. C 08-01409 WHA (N.D. Cal.), several environmental organizations filed a citizen suit against EPA alleging that the Agency violated the law when it neglected to promulgate financial responsibility regulations under CERCLA § 108(b). On February 25, 2009, the court ordered EPA to publish a list of industry sectors that may be required to establish financial responsibility for remediation costs.

In the January 6 ANPRM, EPA highlighted the following factors it used to determine that the three candidate industry sectors may present a degree and duration of risk justifying a financial responsibility requirement:

(1) The amounts of hazardous substances released to the environment; (2) the toxicity of these substances; (3) the existence and proximity of potential receptors; (4) contamination historically found from facilities; (5) whether the causes of this contamination still exist; (6) experiences from Federal cleanup programs; (7) projected costs of Federal clean-up programs; and (8) corporate structures and bankruptcy potential.

75 Fed. Reg. at 818. Furthermore, the EPA considered whether implementing financial responsibility requirements under CERCLA § 108(b) would successfully reduce these risks. *Id.*

On February 4, 2010, EPA extended the comment period for the ANPRM until April 6, 2010. EPA is not requesting comment on the methodology it applied to determine the basis for selecting the three candidate industries for potential rulemaking; rather, the Agency is requesting comment, among other things, regarding whether EPA should develop a proposed financial responsibility regulation under CERCLA § 108(b) for these industries. EPA also is seeking data and information concerning the risks posed by classes of facilities within these industries, and the appropriate nature and extent of any proposed financial responsibility requirements.

Previously, in July 2009, EPA issued a notice stating that it first would develop CERCLA § 108(b) financial responsibility requirements for certain facilities in the Hardrock Mining Industry. *See* 74 Fed. Reg. 37,213 (July 28, 2009). EPA has slated publication of the proposed Hardrock Mining Rule for Spring 2011, with proposed rules for additional classes of facilities within other industry sectors expected shortly thereafter. According to EPA, at the time of the January 6 ANPRM, additional classes of facilities that may be covered by proposed financial responsibility rules in the future include the Waste Management and Remediation Services Industry (NAICS 562), the Wood Product Manufacturing Industry (NAICS 321), the Fabricated Metal Product Manufacturing Industry (NAICS 332), the Electronics and Electrical Equipment Manufacturing Industry (NAICS 334 and 335), and facilities engaged in the recycling of materials containing CERCLA hazardous substances.

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If you have questions about federal or state financial responsibility requirements under environmental regulatory programs, or need assistance in assessing your company's compliance with such obligations, please contact any member of Sullivan & Worcester's Environmental & Natural Resources Group.

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