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## Pay Me Now or Pay Me Later: Superfund Financial Assurance is on its Way

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Over the past decade, a variety of [financial responsibility rules](#) have been implemented to complement the liability and regulatory objectives of [U.S. environmental policy](#). While [financial assurance requirements](#) (FARs) are not new in U.S. law, their widespread implementation is a rather recent trend.

Now a new regulation has brought FARs to media attention. On [February 25, 2009](#), a U.S. federal 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 \(CERCLA\)](#) and publish the classes of facility that will be subject to these requirements. The deadline for doing this is July 10, 2009.<sup>1</sup>

Industries likely to be affected by the new CERCLA financial assurance regulations are the hardrock and phosphate mining industries, coal-fired power plants, metal finishers, wood treatment facilities and other hazardous waste generators and recyclers.

There may be many opportunities for industry involvement in EPA's regulatory process to promulgate CERCLA

financial assurance regulations. Specialists such as [Latham & Watkins LLP](#) encourage potentially affected companies to consult with legal counsel regarding options for strategic involvement in the development of this regime.

### Why FARs?

[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. Among other purposes, financial assurance acts as a safeguard so that the operator of a site is still responsible for closure and cleanup of a facility even if it goes out of business. FARs generally require submission of a written estimate of the costs of closure of the facility and post-closure costs (including the cost of clean-up of any contamination), as well as a demonstration that the owner or operator will have sufficient funds to cover these costs.

There are FARs for certain facilities currently in place under the [Resource Conservation and Recovery Act \(RCRA\)](#),

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regulations governing underground and aboveground storage tanks, the [Safe Drinking Water Act](#), and [Forest Service and Bureau of Land Management](#) regulations for mining operations on public lands.<sup>2</sup> Despite these existing regimes, environmental groups and some federal agencies claim that there is a void in financial assurance requirements for handlers of hazardous substances, particularly hardrock mining operations.<sup>3</sup>

## The Sierra Club v. Johnson Decision

Section 108(b) of CERCLA mandates that EPA promulgate regulations to ensure that facilities involved with hazardous substances remain financially responsible for cleaning up substances that have been improperly disposed of.<sup>4</sup> The law requires that EPA: (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 no later than December 1985 and, (3) impose financial responsibility requirements "as quickly as can be reasonably achieved" but no later than four years after the date of promulgation of the requirements.<sup>5</sup> By 2009, EPA had undertaken none of these actions.

On March 12, 2008, environmental groups filed suit requesting that the [U.S. District Court for the Northern District of California](#) order EPA to promulgate financial assurance standards on a "reasonable but rigorous schedule."<sup>6</sup> On February 25, 2009, the court ordered EPA to identify the industries that will first be subject to the financial assurance regulations by May 4, 2009 and later extended the deadline to July 10, 2009.<sup>7</sup> The court did not order EPA to promulgate the regulations at this time, but stated that the issuance of the initial notice "will shed light on the merits of the other challenged duties under Section 108(b)."<sup>8</sup>

## Impacts to Industry

Prior to filing the complaint, plaintiffs sent a notice of citizen suit to former

[EPA Administrator Stephen Johnson](#) arguing that, due to 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.<sup>9</sup> Plaintiffs referred to the recent bankruptcy of mining company [ASARCO LLC](#), claiming that ASARCO's environmental liabilities amounted to more than \$1 billion, which would be borne mainly by taxpayers.

It is likely that the mining industry will be impacted by any CERCLA financial assurance regulations for two main reasons:

First, the mining industry is generally not subject to the [RCRA's](#) financial assurance requirements because most solid wastes from mining are exempt from RCRA.<sup>10</sup> 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.<sup>11</sup> These exclusions have resulted in many hardrock mines not being subject to financial assurance requirements for environmental liabilities.

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. Many mine sites end up on the National Priorities List (containing the most contaminated sites in the country) and costs associated with these Superfund mine sites are currently estimated to be \$7.8 billion, \$2.4 billion of which will likely be funded by taxpayers because many of the former mine operators are now defunct or did not post sufficient financial assurances.<sup>12</sup>

Based on these factors, it is likely that EPA may select the hardrock mining industry as a top candidate for EPA's list of classes of facilities.

## Conclusion and Recommendations

Companies within the classes of facilities first identified by July 10, 2009, and those that anticipate being

subject to later CERCLA financial responsibility regulations should consider becoming strategically involved in EPA's rulemaking process in order to contribute to the development of the regime and share data and information with EPA. We strongly encourage potentially affected companies to consult with legal counsel regarding the options for involvement.

Available financial assurance mechanisms under future CERCLA regulations may be limited compared to those currently available under RCRA. Elimination of certain mechanisms (such as the financial test instrument) could add to the costs of compliance for companies.

EPA may focus first on facility owners whose prior actions indicate that they may pose a high risk of default on environmental obligations, including companies with a history of noncompliance with environmental laws.<sup>13</sup> For this reason, now is a good time to start thinking about your company's environmental management practices.

#### Links and References

- [ASARCO LLC](#)
- [Bureau of Land Management](#)
- [CERCLA Overview](#)
- [Ex EPA Administrator Stephen Johnson](#)
- [Financial Assurance](#)
- [Financial Assurance Requirements \(EPA Document\)](#)
- [Forest Service and Bureau of Land Management](#)
- [National Environmental Policy Act \(NEPA\)](#)
- [Resource Conservation and Recovery Act \(RCRA\)](#)
- [Safe Drinking Water Act](#)
- [SEC: Financial Responsibility Rules](#)
- [United States Environmental Protection Agency \(EPA\)](#)
- [U.S. District Court for the Northern District of California](#)
- [U.S. Forest Service](#)

<sup>1</sup> See *Sierra Club v. Johnson et al.*, No. C 08-01409, 2009 US Dist. LEXIS 14819 (N.D. Cal. Feb. 25, 2009). The court originally ordered EPA to publish the list of notice by May 4, 2009 then later extended the deadline

to July 10, 2009. See Stipulation to Amend the May 4, 2009 Deadline for EPA to Publish a Notice of Priority Under CERCLA Section 108(b) and Order Thereon at 4-5, *Sierra Club v. Johnson et al.*, No. C 08-01409 (N.D. Cal. April 9, 2009).

<sup>2</sup> Many states also require financial assurance 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).

<sup>3</sup> 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).

<sup>4</sup> 42 USC. § 9608(b).

<sup>5</sup> See 42 USC. § 9608(b)(1), (b)(3).

<sup>6</sup> Plaintiffs are the Sierra Club, Amigos Bravos, Great Basin Mine Watch and Idaho Conservation League. See *Sierra Club et al., Complaint for Declaratory & Injunctive Relief* at 2.

<sup>7</sup> *Sierra Club, 2009 US Dist. LEXIS 14819*, at \*16.

<sup>8</sup> 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 the 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* at \*8,26.

<sup>9</sup> *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).

<sup>10</sup> 42 USC. § 6921(b)(3)(A) (exempting 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).

<sup>11</sup> 2005 GAO Report at 36.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 35.