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EPA Foregoes Requiring Financial Assurances from the Chemical, Power, Petroleum, and Coal Products Industries

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On December 2, 2020, EPA published its final decision declining to impose financial assurance requirements under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for several industries: chemical manufacturing; power generation, transmission, and distribution; petroleum manufacturing; and coal products manufacturing.

An alternative decision by the Agency would have imposed financial assurance requirements on companies in these sectors through, for instance, letters of credit, surety bonds, insurance, and/or trust funds. Such requirements would have been prospective assurance (rather than in response to past spills or discharges) to ensure available funds *if* their operations were to incur hazardous substance response costs under CERCLA.

Key Takeaways

- **EPA declined to impose new financial assurance obligations on the reviewed energy-related and chemical manufacturing industries**. In its final rule, "[EPA] concluded that facilities in these three industries operating under a modern regulatory framework do not present a level of risk that warrants financial responsibility requirements under CERCLA section 108(b)." 85 Fed. Reg. 77384, 77384 (Dec. 2, 2020).

- **No impact on enforcement**. This rulemaking does not change other aspects of CERCLA, such as provisions that authorize EPA to pursue relief from potentially responsible parties in response to releases or substantial threats of release of hazardous substances. EPA retains its "authority to take a response or enforcement action under CERCLA with respect to any particular facility or industry." *Id.*

- **The rulemaking is final** but legal challenges or other efforts to reverse this decision are likely.

Background

Section 108(b) of CERCLA authorizes EPA to require owners and operators of 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." 42 U.S.C. § 9608(b). EPA may set the amount of financial assurance based on the payment experience of the Superfund.

In a 2010 Advanced Notice of Proposed Rulemaking, EPA identified three groups of industry sectors for possible Section 108(b) financial responsibility requirements: the electric power generation, transmission, and distribution industry; the petroleum manufacturing and coal products manufacturing industries; and the chemical manufacturing industry. In three separate proposed rules issued on July 29, 2019, December 23, 2019, and February 21, 2020, EPA proposed declining financial assurance requirements in these industries. After considering public comments on the proposed rules, EPA has now released a combined final rulemaking consistent with its three proposed rules and declined to impose financial assurance requirements.

EPA's rulemaking has D.C. Circuit precedent on its side. In 2018, EPA declined to impose Section 108(b) financial responsibility requirements on the hardrock mining sector based on EPA's interpretation that the "risk" to be evaluated by the agency under Section 108(b) is exclusively the financial risk of a taxpayer funded cleanup, not health or environmental risks. The D.C. Circuit unanimously upheld EPA's statutory interpretation, further finding that Section 108(b) does not mandate that EPA actually impose any financial assurance requirements, contrary to assertions by plaintiffs. *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

The new rulemaking relies on the same statutory interpretation previously upheld, and thus substantially resolves longstanding uncertainty in multiple industry sectors about the potential for Section 108(b) financial assurance requirements. This issue may continue to be in flux, however, as legal, legislative, and other challenges to the rulemaking are anticipated.

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