EPA Signals Shift Away from Allowing Self-Guarantees to Satisfy Financial Assurance Requirements

by Irvin M. Freilich and David J. Miller

For many years, the United States Environmental Protection Agency (EPA) has required that parties responsible for remediating contaminated sites under the Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA) post financial assurances to ensure that sufficient funds are available to fund the required remedial action. However, the agency's first comprehensive guidance on financial assurance requirements under CERCLA was not issued until 2015.[1]

The guidance suggests the EPA is concerned about the use of 'self-guarantees,' or the financial test, as a financial assurance mechanism, because the risks associated with it are much greater than those that involve immediate funding. Based on the guidance, it appears the EPA prefers that responsible parties set aside dedicated funds by means of trust funds or other arrangements to ensure funding will remain available throughout the remediation timeframe. Consequently, when parties agree to perform a cleanup at a Superfund site, even though the remediation may take many years to complete, the responsible parties may be required to come up with the total amount of remedial costs at the beginning of the remediation process.

The guidance indicates a clear preference for money being put aside up front rather than other mechanisms, such as corporate guarantees and insurance policies, which allow responsible parties to spread the costs over time and soften the financial burden. Moreover, as a result of a recent appeals court

decision, concepts the EPA embraces in the guidance may soon become codified directly into the agency's regulations governing site remediation.

Overview of Financial Assurances

CERCLA provides the EPA with broad authority to direct parties to bear the costs of remediating environmental contamination for which they are responsible.[2] In exercising this authority, the EPA can either require that responsible parties reimburse the agency for the cost of a remediation[3] or command the responsible parties to conduct the remediation themselves.[4] In directing and overseeing cleanups, the EPA generally requires that responsible parties provide some form of financial assurance (*i.e.,* a guarantee they have access to sufficient funding to complete the remedial work required at a given Superfund site). Financial assurances are designed to serve several purposes. First, financial assurances ensure funding to complete a remediation exists if a responsible party becomes insolvent. Second, financial assurances ensure that remedial activities at Superfund sites do not languish due to lack of funding and create additional risks to human health and the environment as a result.

There are several different mechanisms by which a responsible party may satisfy a financial assurance obligation imposed by the EPA. The most commonly employed methods are trust funds, surety bonds, letters of credit, insurance policies, and so-called self-guarantees.[5] Some of these mechanisms, such as trust funds, require that responsible parties set aside certain sums to fund remedial activities at the outset of the remediation. A self-guarantee, by contrast, allows a responsible party to demonstrate it has the financial wherewithal to cover the cost of a remediation without the need to resort to other financial assurance mechanisms.[6]

Contaminated sites subject to oversight by a state environmental agency may also have financial assurance requirements. In New Jersey, for example, state regulations require responsible parties either enter into a 'remediation trust fund agreement,' obtain a letter of credit or environmental insurance policy, satisfy the state's self-guarantee requirements, or obtain public funding.[7]

Unlike the New Jersey regulations, the EPA's legal authority to impose financial assurance requirements on responsible parties is somewhat murky. Section 108(b) of CERCLA directs the EPA to create regulations that require responsible parties to demonstrate they have the financial ability to fund a remediation throughout the cleanup process. Specifically, Section 108(b) provides that:

> Beginning not earlier than five years after December 11, 1980, 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 wastes. Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.[8]

However, despite the relatively clear obligation imposed on the EPA, it has made virtually no progress toward finalizing the regulations contemplated by Section 108(b) in the several decades following its enactment. The EPA has, nonetheless, imposed financial assurance requirements on responsible parties in the absence of specific regulations. Rather than rely on regulatory authority to impose financial assurance mandates, the EPA has instead relied on its settlement and enforcement authority under CERCLA to require that responsible parties post some form of financial assurance. The EPA accomplishes this by adding financial assurance provisions to settlement agreements (*i.e.,* when a responsible partly voluntarily takes on a remediation, it also agrees to provide financial assurances through one of the mechanisms acceptable to the EPA). Alternatively, when the EPA directs a recalcitrant responsible party to conduct a cleanup, the agency will issue a unilateral administrative order (UAO) compelling the party to begin the remediation and comply with a financial assurance requirement. While the EPA's authority under CERCLA is broad, it is less than clear whether it includes the ability to mandate financial assurances in the absence of regulations promulgated pursuant to Section 108(b).

EPA Hints at Move Away from Self-Guarantees

As noted above, in 2015 the EPA published the guidance on the application of financial assurances in Superfund settlement agreements and UAOs,[9] which provides an overview of existing financial assurance requirements and mechanisms.[10] The guidance explains that, at present, financial assurance requirements are embodied in settlement agreements entered into with responsible parties or in UAOs, and that a settlement agreement may take the form of a consent decree approved by a court if the EPA has initiated litigation against the responsible party or administrative consent orders issued by the EPA with the cooperation of the responsible party outside of the litigation context.[11] The guidance also makes clear that it does not directly address any financial assurance requirements that may be required pursuant to regulations promulgated under Section 108(b).

As explained further in the guidance, the EPA is suspect of self-guarantees due to the lack of dedicated funds to cover the costs of a cleanup and the corresponding risk that funding may not be available in the future if the responsible party encounters financial difficulties.[12] Similarly, the guidance expresses concerns about the use of insurance policies due to delays often associated with the claims process.[13] Based on the guidance, the EPA is plainly shifting away from allowing responsible parties to provide self-guarantees as a satisfactory method of financial assurance and moving toward mechanisms that set aside dedicated funding.

Requiring dedicated funds up front can present several serious issues for responsible parties. First, money set aside pursuant to a financial assurance requirement is tied up for an unknown period of time. Depending on the size of the site and the extent of the contamination, responsible parties may be forced to set aside funds for many years. Moreover, the amount required to be segregated and used only for the remediation can be considerable. According to the guidance: "EPA's standard approach is to require a financial assurance amount that is at least equal to the most recent cost estimate for the applicable work at issue and is not offset by financial assurance required pursuant to other authorities."[14] Accordingly, a financial assurance amount for any given Superfund site could easily rise to tens of millions of dollars; for the largest sites, the financial assurance amount can reach well above $100 million. Tying up such significant sums can have major financial impacts on a business.

It is also unclear how payment for remedial activities will work as a practical matter. To what extent can the financial assurance funds be used to pay for ongoing remediation expenses? This issue is further complicated at multi-party sites, where individual parties may prefer one mechanism over another but the EPA may prefer to retain joint and several liability among the responsible parties, even after allocation of liability has been agreed upon.

Litigation under CERCLA Section 108(b)

Some clarity on these issues may be on the horizon. Recently, in response to an action filed in a federal appeals court, the EPA agreed to promulgate industry-specific financial assurance regulations as required by Section 108(b), something it had not done for the preceding 30 years. Under Section 108(b), the EPA is required to identify specific industries for which it will create financial assurance regulations, and then propose and adopt those regulations.[15]

The litigation proceedings started in 2008, when several environmental organizations brought suit against the EPA in the United States District Court for the Northern District of California seeking to force the EPA to engage in rulemaking pursuant to Section 108(b). Specifically, the organizations sought an order requiring the EPA to: 1) publish notice of the classes of facilities for which financial assurance requirements would be necessary, 2) promulgate financial assurance requirements for the identified classes of facilities, and 3) incrementally impose financial assurance requirements as quickly as reasonably possible, but not later than four years after promulgation.[16]

On cross-motions for summary judgment, the court ordered the EPA to "identify and publish notice of classes as specified in Section 108(b)(1) by May 4, 2009."[17] In response, the EPA published a priority notice it would promulgate financial assurance regulations for the hard rock mining industry.[18] Thereafter, the EPA also published a notice stating it planned to develop "as necessary" financial assurance requirements for the chemical manufacturing, petroleum and coal manufacturing, and electrical power generation industries.[19] As explained below, the EPA has not yet finalized the financial assurance regulations for the hard rock mining industry or published proposed financial assurance rules for the other identified industries.

In response to the EPA's failure to comply with the order entered by the district court in 2009, six environmental organizations brought an action in the United States Court of Appeals for the District of Columbia in 2014, seeking to compel the EPA to finalize the financial assurance rules by Jan. 1, 2016, for the previously identified industries.[20] In that matter, the court ordered the EPA and the environmental organizations to confer regarding the date by which the EPA would propose and finalize financial assurance rules for the hard rock mining industry and the date by which the EPA would decide whether to propose financial assurance rules for the three other identified industries.[21] The parties filed a joint motion seeking an order pursuant to which the EPA would begin the rulemaking process for the hard rock mining industry by Dec. 1, 2016, and publish notice of final action by Dec. 1, 2017.[22] Under the order, the EPA is also required to identify the other industries for which it would promulgate financial assurance regulations by Dec. 1, 2016.[23] After determining the environmental organizations had standing to bring the action, the court concluded the proposed consent order was reasonable, and granted the joint motion.[24]

The regulations are still on the drawing board. Recently, the EPA provided an update on its development of the regulations.[25] The agency made clear that the new regulations under Section 108(b) would complement, and not replace, its current cost recovery and enforcement procedures under CERCLA.[26] Moreover, the EPA explained that the financial assurance regulations under Section 108(b) are not intended to preempt state

financial assurance requirements,[27] such as the New Jersey financial assurance regulatory requirements discussed above.

The EPA is considering expanding the financial assurance requirements to include fixed amounts or percentages for health assessment costs and natural resource damages. Lastly, the EPA has also suggested that it intends to establish a baseline financial assurances amount for hard rock mining sites, which could then be reduced if certain engineering controls are employed.[28] These proposals from the EPA provide some insight into what the regulations might look like when they are finally issued.

In addition to the recent hints provided by the EPA, the guidance issued by the agency also provides some clues regarding the substance of the forthcoming financial assurance rules for the hard rock mining industry (and eventually the other identified industries). If the language of the guidance is any indication, it is possible, if not likely, that the proposed financial assurance regulations will incorporate a strong preference for dedicated funds and an aversion to self-guarantees. Responsible parties in that situation will be forced to put money into trust or incur the cost of another mechanism, such as a letter of credit, thus requiring them to tie up significant resources for the duration of the cleanup. Many more responsible parties stand to be impacted if the EPA follows suit with other industries.

Conclusion

While it is too early to tell exactly how the EPA will frame its first round of financial assurance regulations, the guidance strongly suggests the EPA will favor that dedicated funds be set aside for future remediation costs. Even in the absence of specific regulations, it appears the EPA's policy position favors trust funds and similar mechanisms segregating dedicated funds. That policy may start to be reflected in settlement agreements and UAOs in the near future. Still, it remains to be seen what the financial assurances regulations might look like, and whether presidential politics in the coming year will impact the EPA's efforts. In any event, responsible parties, especially those currently operating under self-guarantees pursuant to settlement agreements with the EPA, should monitor the agency's rulemaking closely, and start planning accordingly. ⚖

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ENDNOTES

1. Guidance of Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders, U.S. Envtl. Prot. Agency (April 6, 2015), https://www.epa.gov/sites/production/files/2015-04/documents/fa-guide-2015.pdf.
2. *See Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188,189 (D.C. Cir. 2004).
3. 42 U.S.C. 9607(a).
4. 42 U.S.C. 9606(a).
5. Guidance of Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders, *supra* at 7.
6. *Id.*
7. N.J.A.C. 7:26C-5.1, *et seq.*
8. 42 U.S.C. 9608(b)(1).
9. Guidance of Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders, *supra* note 4.
10. *Id.* at 1 n.3.
11. *Id.*
12. *Id.* at 7-8.
13. *Id.* at 9.
14. *Id.* at 4.
15. *See* 42 U.S.C. 9608(b)(1).
16. *Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 WL 482248, *1 (N.D. Cal. Feb. 25, 2009).
17. *Id.* at *10.
18. Identification of Priority Classes of Facilities for Development of CERCLA 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213 37,214 (July 28, 2009).
19. Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements under CERCLA Section 108(b), 75 Fed. Reg. 816, 816 (Jan. 6, 2010).
20. *In re: Idaho Conservation League*, No. 14-1149, 2016 WL 363297, *5 (D.C. Cir. Jan. 29, 2016).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at *14-16, 19-22.
25. *See* CERCLA Section 108(b) Financial Responsibility, U.S. Envtl. Prot. Agency (May 17, 2016), https://clu-in.org/conf/tio/108b/slides/CERCLA-108b-webinar.pdf.
26. *Id.* at 7.
27. *Id.* at 26.
28. *Id.* at 18.

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