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May 20, 2011

Jim Berlow, Director
Program Implementation and Information Division
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Berlow,

On behalf of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), I would like to thank you for the time you and your staff have invested in considering our concerns on EPA's upcoming proposal for regulations promulgated under §108(b) of CERCLA. We really appreciate the many updates, meetings, and conference calls where you have provided useful information and listened to our concerns and the concerns of State hardrock mining regulators. We will seek to continue these cooperative efforts as EPA develops the first rule under CERCLA §108(b) to address hardrock mining sites.

As you know, ASTSWMO's members, State and Territory (State) agencies, implement solid and hazardous waste regulatory programs, CERCLA (Superfund) remediation projects, and underground storage tank programs. Both the solid waste and hazardous waste programs include long-standing financial assurance requirements derived from both State and federal law which are implemented by the States. The purpose of financial assurance requirements in these program areas is generally to ensure that funds will be available for protective closure and post-closure care of waste management facilities should the facilities be unable or unwilling to accomplish these activities.

State financial assurance requirements in these programs may not always cover all risks addressed by EPA's broader CERCLA §108(b) mandate. However, we believe State financial assurance programs implemented by ASTSWMO's members are completely adequate for their intended purposes. EPA should not, and need not, duplicate these existing State financial assurance requirements through the CERCLA 108(b) rulemaking process.

We hope this letter can provide timely input on several parts of EPA's CERCLA 108(b) draft rule preparation. Our remarks in this letter are applicable to EPA's overall effort and to the hardrock mining sector, but are aimed more to the later sectors that include

many more entities regulated by our members. We encourage EPA to continue its productive communication with State mining programs on the upcoming hard rock mining rule.

CERCLA §108(b)

ASTSWMO believes that the parenthetical phrase in CERCLA §108(b)(1), highlighted below, allows EPA to promulgate financial assurance requirements for entities that also comply with SWDA/RCRA Subtitle C and other Federal laws, and prevents the preemption that could occur as a result of CERCLA 114 (d). CERCLA §108(b)(1) states in part:

“Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements **(for facilities in addition to those under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] and other Federal law)** 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.” *(emphasis added)*

This parenthetical phrase indicates that for facilities that are already required to provide SWDA/RCRA Subtitle C financial assurance or financial assurance under other federal laws, EPA may promulgate additional requirements, but should not promulgate duplicative requirements. This language indicates that Congress was well aware of the SWDA/RCRA Subtitle C financial assurance requirements and the requirements in other Federal laws, deemed these requirements important to environmental regulation, and protected them from preemption.

Further, ASTSWMO believes that the phrase “other Federal law” applies to all financial assurance programs required in a Federal law and for which States have been authorized, approved, or deemed adequate by EPA. This would be the case for the solid waste programs in states and territories where EPA has made an “adequacy” determination or other program approval determination. With the breadth and complexity of EPA’s CERCLA 108(b) mandate, there is no reason to duplicate state programs that have been deemed adequate by EPA.

CERCLA §114

CERCLA §114, titled “Relationship to Other Law,” generally prohibits preemption by CERCLA of other state and federal liability schemes. CERCLA §114(d) allows only one type of preemption:

“Except as provided in this title, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this

title shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility **in connection with liability for the release of a hazardous substance from such vessel or facility.** (emphasis added)

CERCLA § 114(d) concerns us because the potential preemption of non-Subtitle C non-authorized financial assurance requirements could upset regulatory programs implemented by the States. We believe EPA can avoid the preemption concern by limiting CERCLA 108(b) rules to those that cover only an owner's or operator's (o/o's) liability for a future unplanned release – that is to say, the o/o's ability to pay for response costs associated with a future release.

For simplicity and implementability, we believe that EPA should not duplicate financial assurance related to closure, post-closure care, and corrective action (cleanup) of known releases because these activities already cover “liability for the (known) release of a hazardous substance.” Closure, post-closure, and corrective action are planned activities designed to mitigate the risk from operating units and known releases through actions that physically remove, isolate, or remediate remaining wastes and contamination. What is not covered by closure, post-closure and corrective action is the future unplanned release of a hazardous substance from other activities at a facility.

Avoiding Financial Assurance Duplication

ASTSWMO believes any CERCLA 108(b) rule should be limited to liability for release of hazardous substances to the environment. EPA can comply with its Congressional mandate, and can avoid costly implementation and preemption litigation by aligning its §108(b) rulemaking with §114(d). Such rules would supplement (and thus avoid duplication of) existing programs that require financial assurance for normal operations and known corrective action issues and appropriately focus efforts on the current potential lack of financial assurance for future unplanned releases.

Operations at a facility that fall outside of reclamation, closure, post-closure, and on-going corrective action could release hazardous substances without being covered under a financial assurance mechanism. This leaves some types of risks, including manufacturing and product storage, not covered by existing financial assurance requirements. These risks represent generally low-probability events that could involve significant expense. This is an area that EPA can appropriately emphasize through the CERCLA 108(b) effort.

ASTSWMO believes the simplest way to avoid duplicating and possibly preempting functional State requirements is for EPA to:

- 1) Develop categories of activities or events that financial assurance must cover in each sector – categories like closure, post-closure, clean-up of existing releases, clean-up of future releases, reclamation, etc.

2) Require financial assurance for all of these categories, but provide specific rule language allowing:

- a) Authorized or approved State programs to automatically stand in lieu of the federal requirement, and
- b) Other State programs to stand in lieu of the federal requirement on the basis of a category-specific checklist-driven equivalency review that is more expeditious and efficient than current EPA equivalency reviews.

This approach provides a simple and efficient method avoiding duplication and possible preemption, but clearly defines for EPA, the States, and the regulated sector which federal and which state financial assurance requirements apply.

Implementation Resources

From the beginning, ASTSWMO has been very concerned about the program resources needed to implement rules under CERCLA §108(b). As you are aware, State resources are limited and currently dedicated to implementing the core programs. If new CERCLA §108(b) financial assurance rules require significant new obligations on the part of States without the provision of additional resources, then many may have no option but to return those responsibilities back to EPA. EPA is also dealing with dwindling resources and is not in any better shape to handle new workload from these rules. It is imperative, therefore, that EPA develop rules that are easy, efficient, and inexpensive to implement at a large number of facilities. This will require simplicity and standardization. EPA must take the long view, noting there are many, many more facilities in the industrial categories following hard rock mining.

Recommendations

Given the above discussion, ASTSWMO makes the following recommendations for EPA to consider in developing the financial assurance rules for the hardrock mining sector and future sectors:

1. Utilize the high-quality State programs that already exist:
 - Recognize that Congress has already determined the adequacy of the SWDA/RCRA Subtitle C hazardous waste financial assurance requirements for their stated purposes and avoid duplication of these requirements and the possibility of preemption in the new CERCLA §108(b) rules.
 - Recognize the adequacy of the State financial assurance requirements for their stated purposes in the other waste management programs that are based on Federal laws and avoid duplication of these requirements and the possibility of preemption in the new CERCLA §108(b) rules.
 - Explicitly limit applicability of the new CERCLA §108(b) rules to facility operations that are not covered by authorized, approved, or equivalent State programs and that present a risk for the future release of hazardous substances to the environment.

2. Adopt an approach that is simple and efficient:
 - If equivalency determinations are needed for existing State financial assurance programs, make the equivalency evaluation very quick and easy.
 - Avoid approaches that depend on facility-specific case-by-case evaluations for a) the amount of financial assurance required at a facility or b) an amount to add to or subtract from some base amount of financial assurance. These approaches are simply too resource intensive.

Thank you again for allowing us to have input into this process.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen A. Cobb". The signature is fluid and cursive, with the first name "Stephen" being the most prominent.

Stephen A. Cobb, P.E.
ASTSWMO President

cc: NAAG
ECOS
NGA
IMCC
ASTSWMO HW Subcommittee