

Environment - USA

Court Grants EPA Discretion in When to Issue Superfund Regulations

August 17 2009

Almost 30 years after Congress instructed the Environmental Protection Agency (EPA) to require facility owners and operators to set aside funds for the clean-up of property that may be contaminated by hazardous substances, a federal court in California has held that the EPA may take additional time to draft and issue the regulations. The court held that while Congress required the EPA to issue such regulations, it granted the EPA some discretion in when to do so. The EPA has stated that it intends to require financial assurance for hardrock mining facilities first, and will also assess the need to regulate hazardous waste generators, hazardous waste recyclers, metal finishers, wood treatment facilities and chemical manufacturers.

The regulations at issue are required under the Comprehensive Environmental Response, Compensation and Liability Act 1980 (commonly known as 'Superfund'). Superfund is commonly said to have been motivated by the notorious hazardous waste contamination discovered buried at Love Canal, New York.

Section 108 of Superfund requires the EPA to issue financial assurance requirements for certain types of facility based on the risk of injury from hazardous substances in operations at those facilities. Once issued, the regulations would require the operator of a covered facility to set aside funds or otherwise make funds available for a possible future clean-up of hazardous substances at the property. Without such funds, costly clean-ups may force potentially responsible parties into bankruptcy, leaving taxpayers with the bill, or lengthy litigation may ensue over the allocation of costs. The EPA was first required to publish a notice of those classes of facility which presented the highest level of risk of injury by December 11 1980.⁽¹⁾

The December 1980 deadline passed without the EPA publishing the required notice. The statutory requirement languished until in recent years it received renewed attention. The EPA was sued in federal court in 2008 on the theory that it had failed to perform a non-discretionary duty under Superfund. The suit was brought under Superfund's citizen suit provision, which allows a private litigant to force non-discretionary agency action. In February 2009 the Northern District of California held in *Sierra Club v Johnson*⁽²⁾ that the EPA had a mandatory duty to publish classes of facility which presented the greatest risk of injury. In July 2009 the EPA published a notice of these classes in the Federal Register, pursuant to the court's order.⁽³⁾ In its notice the agency determined that it would promulgate the first financial assurance requirements for hardrock mining facilities, based on the extent of contamination from such facilities and the high costs of clean-up.

The EPA did not limit its inquiry to hardrock mining; the notice also stated that the EPA will examine the need for financial assurance at the following types of facility: "hazardous waste generators, hazardous waste recyclers, metal finishers, wood treatment facilities, and chemical manufacturers."⁽⁴⁾

However, the Northern District of California held that the EPA is under no set deadline to issue the financial assurance requirements. Instead, the court held that:

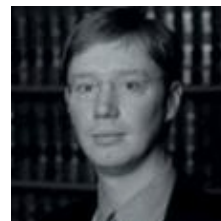
"although Section 108(b) requires EPA to promulgate financial responsibility regulations and incrementally impose such requirements, Section 108(b) provides EPA with discretion as to when to promulgate such regulations. Unlike the duty to publish notice of classes, Section 108(b) does not include a date-certain deadline for the promulgation of financial responsibility regulations."⁽⁵⁾

In so doing, the court rejected "a bright line rule that only duties with date-certain deadlines are non-discretionary for the purpose of citizen suits under [Superfund]" and instead looked to legislative history to help determine whether the EPA's duty to promulgate regulations by a particular date was non-discretionary.⁽⁶⁾

To maintain a claim that the EPA has "unreasonably delayed" its duties under

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Superfund, the court held that plaintiffs may continue to press their claims under the Administrative Procedure Act, but must do so in another court. The court stated that:

"plaintiffs may bring an [Administrative Procedure Act] claim in the Court of Appeals for the D.C. Circuit alleging EPA unreasonably delayed in promulgating the financial responsibility regulations required under Section 108(b)."⁽⁷⁾

Unless and until such a litigation is brought and decided, the timeline for financial assurance requirements under Superfund will remain unclear.

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Endnotes

(1) Comprehensive Environmental Response, Compensation and Liability Act § 108(b)(1).

(2) ND Cal No C 08-01409, online at <http://blog.sprlaw.com/wp-content/uploads/SierravJohnson.pdf>.

(3) Online at www.epa.gov/fedrgstr/EPA-WASTE/2009/July/Day-28/f16819.pdf.

(4) 74 Fed Reg 37,219.

(5) Order available online at <http://blog.sprlaw.com/wp-content/uploads/SierravJohnson2.pdf> at 4-5 (August 5 2009).

(6) *Id* at 5.

(7) *Id* at 6.

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