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Electric Power/Petroleum and Coal Products Manufacturing/Chemical Manufacturing: U.S. Environmental Protection Agency Declination to Issue CERCLA Financial Responsibility Requirements

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The United States Environmental Protection Agency (“EPA”) issued a Prepublication Notice on November 24th stating it would not issue final regulations for Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) or Superfund financial responsibility requirements for the following industries:

- Electric Power Generation, Transmission and Distribution
- Petroleum and Coal Products Manufacturing
- Chemical Manufacturing Industries

Section 108(b) requires EPA to promulgate regulations requiring:

... 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.

The statutory requirement has been in place since CERCLA or Superfund was originally enacted in 1980.

A number of environmental groups previously filed suit against EPA arguing that the agency’s failure to develop such regulations in reference to certain industries was a violation of CERCLA. The United States Court of Appeals for the District of Columbia had previously granted a motion by the environmental groups and EPA establishing a schedule for promulgation of CERCLA financial assurance regulations.

EPA states that it evaluated the risks to Superfund associated with the production, transportation, treatment, storage or disposal of hazardous substances in the referenced industries. Its determination was that the degree and duration of risk to the Superfund posed by these industries does not warrant financial responsibility requirements under Section 108(b) of CERCLA. This is stated to be based on what it describes as modern industry practices and existing federal and state regulations effectiveness at preventing risk.

The final rulemakings are noted to not:

. . . affect, limit, or restrict EPA's authority to take a response action or enforcement action under CERCLA if any facility in the electric power generation, transmission, and distribution industry; the petroleum and coal products manufacturing industry; or the chemical manufacturing industry, including any requirements for financial responsibility as part of such response action.

The federal agency also notes:

. . . At the same time, a different set of facts could demonstrate a need for a CERCLA response action at individual sites. These rulemakings do not affect the Agency's authority under other authorities that may be applicable to the facilities such as the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Toxic Substances Control Act (TSCA).

A copy of the final action can be downloaded [here](#).