CERCLA 108(b) Financial Responsibility Requirements for the Petroleum and Coal Product Manufacturing Industry: Proposed Rule

December 2019

After careful analysis, EPA has concluded that the existing regulatory programs and current industry practices that have been put in place over the last four decades already address the financial risk of the government having to fund cleanups from operating petroleum and coal products manufacturing facilities and do not warrant financial responsibility requirements under CERCLA Section 108(b). Therefore, EPA is proposing to not issue such requirements for these facilities, which transform crude petroleum and coal into usable products. This proposed action would not drop existing environmental requirements and does not affect EPA's authority to take appropriate action under various other environmental regulations that may apply to individual facilities.

EPA's Analysis of the Data

EPA's analysis of the history of cleanups under Superfund, modern industry practices, applicable federal and state regulations, and the risk of taxpayer funded cleanups showed that that the degree and duration of risk to the Superfund posed by the Petroleum and Coal Products Manufacturing Industry is already addressed and does not warrant potentially duplicative, burdensome requirements. Consistent with EPA's interpretation of the statute, which was unanimously upheld by the D.C. Circuit Court of Appeals in litigation challenging the Agency's hardrock mining final action,[1] EPA evaluated the financial risk to the federal Superfund associated with the production, transportation, treatment, storage, or disposal of hazardous substances in the industry.

EPA also examined the industry's economic trends and the financial health of the sector and found the industry to be in a relatively stable financial position with low default risk. The Agency found that the vast majority of firms in the petroleum and coal products manufacturing industry maintain healthy credit scores and reasonable levels of debt relative to assets. Moreover, in bankruptcy, firms generally remain liable for environmental compliance obligations.

Further, the Agency reviewed Superfund cleanup sites associated with the industry (including sites with owners or operators that had filed for bankruptcy) and found limited impact to the taxpayer from facilities under the current regulatory framework. EPA's analysis of the data clearly showed that the existing regulatory programs and modern industry practices reduce the need for federally financed response actions at facilities in the industry and do not warrant financial responsibility requirements.

[1] *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

Existing Authorities are Unaffected

EPA's proposed action would not drop existing environmental requirements, rather it is a proposal to not impose new requirements. In the 39 years since the enactment of CERCLA, a comprehensive regulatory framework has been developed and the Agency's enforcement authorities have expanded.

This proposed rulemaking does not affect EPA's authority to take appropriate action under various other environmental statutes, such as those under the Resource Conservation and Recovery Act, Toxic Substances Control Act, Clean Air Act, Clean Water Act, and the Emergency Planning and Community Right to Know Act:

Act	Description
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	• The administration of CERCLA is protective and effective, and EPA's proposed finding for the petroleum and coal products manufacturing industry does not affect, limit, or restrict the Agency's authority to take a response action or enforcement action under CERCLA at any facility in the industry, or to include requirements for financial responsibility as part of such response action. A different set of facts could demonstrate a need for a CERCLA response action at an individual site.
Resource Conservation and Recovery Act (RCRA)	• The comprehensive regulations for the management and disposal of hazardous waste under RCRA were designed to prevent releases and assure that past spills are cleaned up by facility owners and operators. • EPA issued regulations under RCRA Subtitle C that were specific to the Petroleum and Coal Products Manufacturing industry in 1980, 1990, and 1998. • There are existing financial responsibility requirements under RCRA Subtitle C for hazardous waste treatment, storage, and disposal facilities (TSDFs). • The passage of the Hazardous and Solid Waste Amendments (HSWA) in 1984 resulted in many regulatory changes and enhanced enforcement mechanisms. Specifically, HSWA substantially expanded corrective action authorities, requiring RCRA permitted facilities to address the release of hazardous wastes and demonstrate financial responsibility for completing the required corrective actions, further reducing the risks that sites would have to be addressed under CERCLA. Additionally, HSWA created the land disposal restrictions (LDR) program, which prohibits the land disposal of untreated hazardous wastes.
Toxic Substances Control Act (TSCA)	• There are existing financial responsibility requirements applicable to commercial PCB waste facilities under TSCA. • There are programs that regulate the manufacture and sale of chemicals under TSCA.
Clean Air Act (CAA)	• Section 112(r) of the CAA Amendments require certain facilities to generate Risk Management Plans (RMP) to mitigate the effects of a chemical accident and coordinate with local response personnel. • Significant chemical accidents have declined more than 50% since the original RMP requirements became effective in 1999.

Clean Water Act (CWA)	• The 1990 Oil Pollution Act amended the CWA and authorized regulations requiring facility owners or operators to prepare response plans for worst-case scenario oil discharges. • The Oil Pollution Prevention Regulations require facilities that store or use certain amounts of oil and oil products to develop Spill Prevention, Control, and Countermeasure Plans to prevent the discharge of oil to navigable waters in case of a spill. • EPA finalized the full suite of amendments to the Oil Pollution Prevention Regulation in 2002.
Safe Drinking Water Act (SDWA)	• There are existing financial responsibility requirements applicable to Underground Injection Control wells.
Emergency Planning and Community Right-to-Know Act (EPCRA)	• EPCRA imposes emergency planning, reporting, and notification requirements for hazardous and toxic chemicals.
State Programs	• Examples of state programs that may be applicable to petroleum and coal product manufacturing facilities include: ▪ Financial responsibility for used oil processing and re-refining facilities, ▪ Financial responsibility for hazardous waste TSDFs, ▪ Financial responsibility for underground injection of hazardous wastes, ▪ Corrective action financial responsibility to address hazardous waste or hazardous constituents, ▪ Facility remediation financial responsibility associated with transfer in ownership or facility closure, ▪ Financial responsibility for storage tanks containing hazardous substances. ▪ State regulations applicable to facilities that store or use oil and oil-related materials, including petroleum refineries and petroleum and coal product manufacturing facilities.

These existing monitoring and operation standards have consistently worked over time to decrease risks in the industry and continue to apply, including requiring proper closure of units and corrective action for releases of hazardous materials under CERCLA or RCRA.

History

Twenty eight years after CERCLA was enacted, in March 2008, the Sierra Club, Great Basin Resource Watch, Amigos Bravos, and Idaho Conservation League filed a suit in federal district court seeking to require the EPA administrator to develop regulations under CERCLA section 108(b).[2] On February 25, 2009, the court ordered EPA to publish the *Federal Register* notice required by CERCLA section 108(b)(1) later that year, which the EPA issued on July 28, 2009.

[2] *Sierra Club, et al. v. Johnson*, No. 08-01409 (N. D. Cal.).

In August 2014, those same groups, joined by Earthworks and Communities for a Better Environment, filed a new lawsuit in the D.C. Circuit Court of Appeals petitioning for a writ of mandamus requiring issuance of CERCLA section 108(b) financial responsibility rules. The petitioners and EPA entered into settlement discussions and reached an agreement, which included, among other requirements, a schedule calling for EPA to sign the *Federal Register* notice for a proposed rule for the hardrock mining industry by December 1, 2016, and for EPA to take final action for that industry by December 1, 2017.

EPA met these deadlines, publishing proposed rules and final actions. The final action determined that financial responsibility requirements were not necessary for the hardrock mining industry. On July 19, 2019, the D.C. Circuit Court of Appeals unanimously upheld the approach EPA undertook in developing its Final Action to impose no financial responsibility requirements for the hardrock mining industry, which is consistent with the proposed approach here.

EPA is working to meet the court-ordered deadlines for three additional industries that EPA identified for rulemaking in a 2010 Advanced Notice of Proposed Rulemaking (75 FR 816, Jan. 6, 2010).

Industry	Sign proposed rule:	Sign final action:
Industry 1 (identified by EPA as Electric Power Industry)	July 2, 2019	December 2, 2020
Industry 2 (identified by EPA as Petroleum and Coal Products Manufacturing Industry)	December 4, 2019	December 1, 2021
Industry 3 (identified by EPA as Chemical Manufacturing Industry)	December 1, 2022	December 4, 2024

On July 2, 2019, EPA proposed to not issue financial responsibility requirements for the electric power industry. EPA anticipates proposing an action for the Chemical Manufacturing sector soon.

Authority for and Purpose of the Proposal

EPA is issuing the proposal under the authority of Sections 101, 104, 108 and 115 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, 42 U.S.C 9601, 9604, 9608 and 9615, and Executive Order 12580 (52 FR 2923, January 29, 1987).

Section 108(b) of CERCLA, also known as Superfund, directs EPA to develop regulations that require 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.

When releases of hazardous substances occur, or when a threat of release of hazardous substances must be averted, a Superfund response action may be necessary. Since the Superfund tax has expired, EPA's Superfund appropriation is increasingly funded by general revenues. Therefore, the costs of such response actions can fall to the taxpayer if parties responsible for the release or potential release of hazardous substances are unable to assume the costs.

As required by CERCLA Section 108(b), EPA analyzed the need for financial responsibility requirements for the petroleum and coal products manufacturing industry. EPA's evaluations showed that the existing regulatory programs and voluntary practices reduces the need for federally financed response actions at facilities in the petroleum and coal products manufacturing industry. Therefore, the Agency concluded that the level of risk of taxpayer-funded response actions does not warrant imposing financial assurance requirements for the industry. This reflects EPA's evaluation of the record developed for the proposed rule.

For more information, including on how to submit public comments on this proposal, visit: https://www.epa.gov/superfund/superfund-financial-responsibility.