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VIA ELECTRONIC FILING

Feb. 21, 2020

Ms. Charlotte Mooney
Office of Resources Conservation and Recovery
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Petroleum and Coal Products Manufacturing Industry (Dec. 23, 2019, 84 FR 70467)

Dear Ms. Mooney:

The American Fuel and Petrochemical Manufacturers Association ("AFPM") is pleased to submit these comments to the U.S. Environmental Protection Agency ("EPA" or "Agency") in support of the proposed rule, Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Petroleum and Coal Products Manufacturing Industry" (Dec. 23, 2019, 84 FR 70467). AFPM is a national trade association whose members comprise nearly 90 percent of U.S. refining and petrochemical manufacturing capacity. AFPM members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible.

Our members have a substantial and direct interest in the outcome of this rulemaking, and believe it is important that EPA does not impose unnecessary financial responsibility requirements on this sector. Our members own and operate facilities in the petroleum products manufacturing industry and have a vested concern in EPA's process for evaluating risk when deciding whether to promulgate regulations under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA," "Superfund," or "Fund").[1] However, it should be noted that the economic conditions underlying the petroleum products manufacturing industry are very different than the coal products industry and AFPM would recommend that EPA view these two separate manufacturing industries in a distinct manner.

[1] 42 U.S.C. § 9608(b).

As further detailed below, EPA's recent decision not to impose additional financial assurance requirements on the hard rock mining industry, which was upheld by the D.C. Circuit, establishes important precedent for this matter. Our members have a common interest in ensuring that EPA appropriately applies the same analytical approach in all CERCLA Section 108(b) rulemakings. AFPM supports EPA's proposed finding that, in the context of CERCLA Section 108(b), the degree and duration of risk associated with the modern production, transportation, treatment, storage, or disposal of hazardous substances by the Petroleum Products Manufacturing Industry does not present a level of risk of taxpayer funded response actions that warrant imposition of financial responsibility requirements for this sector.

Petroleum refining is one of the most highly regulated industries in the United States. Potential releases from petroleum product manufacturing industry facilities are directly regulated through several federal and state statutes and regulations, and voluntary efforts from this industrial sector have reduced the risks to human health and the environment. As EPA's research has proven, the petroleum product manufacturing industry does not have a history of abandoning facilities or failing to pay for cleanups. In sum, the petroleum products manufacturing industry poses a very limited financial risk to public funds under CERCLA.

I. Background

Congress enacted CERCLA to provide EPA the authority to respond directly to releases or a threatened release of hazardous substances that may endanger public health or the environment. CERCLA provides for a mechanism that allows EPA to hold certain parties liable for the costs or damages associated with environmental remediation.

Above and beyond these authorities, Section 108(b) permits EPA the discretion to adopt or decline to adopt rules that require certain "classes of facilities [to] establish and maintain evidence of financial responsibility."[2] These regulations must not be more than what is required to be "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances."[3] When determining the level of financial assurances necessary in light of the level of risk, EPA must consider a number of factors, including "the payment experience of the [Hazardous Substances Superfund], commercial insurers, courts settlements and judgments, and voluntary claims satisfaction."[4]

Multiple groups sued EPA in 2008 for failure to promulgate regulations requiring appropriate financial assurance.[5] A resulting court order required EPA to publish a "priority notice" identifying the classes of facilities for which EPA would first develop these regulations, which the Agency released in 2009.[6] This priority notice concluded that hard rock mining facilities would be the first class of facilities for which EPA would issue financial assurance requirements, although other classes of facilities, including those in the electric power generation, transmission, and distribution industry, may warrant

[2] Id.
[3] Id. at § 9608(b)(1).
[4] Id. at § 9608(b)(2).
[5] *See* Sierra Club, et al. v. Johnson, No. 08-01409 (N.D. Cal.).
[6] Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213 (July 28, 2009).

them as well.[7] An advance notice of proposed rulemaking was issued for those additional classes in 2010.[8]

Groups again sued EPA in 2014 as the Agency had yet to propose financial assurance requirements for all four industries, and the resulting court order required EPA to publish a proposed rule on hard rock mining financial requirements by December 1, 2016, and "sign for publication in the *Federal Register* a determination whether EPA will issue a notice of proposed rulemaking on financial assurance requirements under Section 108(b)" for the other three industries by the same date.[9] EPA signed that determination on December 1, 2016, and announced its intent to proceed with rulemakings for the other three classes of facilities.[10] Notably, the order did not mandate a specific outcome for the rulemakings.[11]

II. EPA's CERCLA 108(b) Rulemaking for the Hardrock Mining Industry and Subsequent Litigation Establish Important Precedent

While separate and distinct industries, EPA's methodology for determining whether to impose financial assurance requirements on the hard rock mining industry is an important precedent for the Agency regarding future rulemakings on other classes of facilities. EPA proposed financial assurance requirements under CERCLA Section 108(b) for the hard rock mining industry on January 11, 2017.[12] Following the requisite notice-and-comment period, EPA published a final action announcing its decision not to impose additional financial assurance requirements on the hard rock mining industry under Section 108(b) of CERCLA.[13] EPA's decision analyzed the risk of taxpayer funded cleanups at hard rock mining facilities operating under modern management practices and modern environmental regulations.[14]

A number of organizations challenged EPA's decision in the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") on the grounds that it was contrary to the Congressional intent behind CERCLA, arbitrary and capricious, and procedurally defective.[15] Specifically, they argued that the term "risk" in Section 108(b) was not limited to the risk of taxpayer-funded response actions, and

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[7] *Id*. at 37,215-16. The three classes of facilities identified were for the chemical, petroleum and electric power industries.
[8] Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b), 75 Fed. Reg. 816 (Jan. 6, 2010).
[9] *In Re: Idaho Conservation League*, No. 14-1149 (D.C. Cir. Jan. 29, 2016).
[10] *See* Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries, 82 Fed. Reg. 3,512 (Jan. 11, 2017).
[11] *See* note 9 at 17 (the order "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule").
[12] Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3,388 (Jan. 11, 2017).
[13] Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, 83 Fed. Reg. 7,556 (Feb. 21, 2018).
[14] *Id*.
[15] *Idaho Conservation League, et al v. Andrew Wheeler, et al*, case no. 18-1141 (D.C. Cir. May 16, 2018).

that, regardless of the meaning of risk, the statutes required EPA to develop at least some financial assurance requirements for the hard rock mining industry.[16]

The court rejected these challenges and upheld EPA's decision not to issue new financial assurance requirements for the hard rock mining industry.[17] The court found that EPA's interpretation of the term "risk" in CERCLA Section 108(b) was reasonable and that the Agency's financial risk analysis and economic analysis were neither arbitrary nor capricious.[18] The court also found that EPA's decision not to adopt financial assurance requirements for the hard rock mining industry *was* a logical outgrowth of the Agency's proposal.[19]

In the current proposal, EPA's evaluation of the "risk" posed by the petroleum products manufacturing industry follows the analytical approach upheld by the D.C. Circuit in the hard rock mining rulemaking. The Agency prepared an in-depth risk analysis with hundreds of pages of technical support that properly highlights the potential risks posed by *currently* operating facilities, evaluates the existing state and federal regulatory and financial assurance requirements that reduce the risk of hazardous substance releases, and reviews the need for financial assurance regulations by evaluating "examples of pollution that occurred under a modern regulatory framework and that required a taxpayer-funded CERCLA cleanup."[20]

Once again, EPA's analytical approach correctly interprets the term "risk" under CERCLA Section 108(b) and applies it to the facts associated with the industry. The Agency's robust evaluation demonstrates that any additional financial assurance requirements are truly unwarranted for the petroleum products manufacturing industry. Based on the Agency's analysis and evaluation, AFPM urges EPA to finalize this decision.

III. Proposal Conclusions

AFPM is pleased that EPA conducted a properly thorough investigation of the payment history of petroleum industry with the Fund. This included evaluating enforcement settlements and judgments in the context of this CERCLA Section 108(b) rulemaking, and the risk of future Fund-financed cleanup actions in the industry. The statute also authorizes EPA to consider the existence of Federal and state regulatory requirements, including any financial responsibility requirements. AFPM strongly contends that EPA should not impose financial responsibility requirements on facilities that are already subject to other federal laws that require other types of financial or remediation assurance. Section 108(b)(1) directs EPA to promulgate financial responsibility requirements "in addition to those under subtitle C of the Solid Waste Disposal Act and other Federal law." AFPM is pleased that as part of scoping the Petroleum Products Manufacturing industry for this proposal, EPA sought to understand general characteristics of the industry that may be relevant to financial responsibility under Section 108(b). To do this, EPA

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[16] *Id*.
[17] *See Idaho Conservation League v. Wheeler,* No. 18-1141 (D.C. Cir. 2019).
[18] *Id*. at 11, 14.
[19] *Id*. at 20.
[20] *See* Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Petroleum and Coal Products Manufacturing Industry, 84 FR 70,467 at 70475 (December 23, 2019).

compiled industry features, including the types of activities undertaken and wastes handled or produced. Additionally, EPA looked at the financial condition of the industry to assess the ability of facilities in this class to pay for any environmental obligations they may incur.

AFPM has consistently advocated that EPA should concentrate on modern waste management practices and not legacy contamination. AFPM previous expressed concern that EPA relied too much on Toxic Release Inventory ("TRI") data and Resource Conservation and Recovery Act Biennial Report ("RCRA BR") data in determining financial responsibility, because these data sources are not designed nor intended to provide accurate risk-based information.[21] However, AFPM is satisfied that in the analysis conducted to assess risk in the Petroleum Products Manufacturing industry for this action, EPA chose not to rely on TRI and RCRA BR data.

EPA also evaluated federal and state regulations that address the potential for release of hazardous substances to the range of environmental media that may be affected by a release from a facility in the Petroleum Products Manufacturing industry. EPA found that federal statutes such as the Clean Air Act ("CAA"), Clean Water Act ("CWA"), Toxic Substances Control Act ("TSCA"), RCRA, and the Emergency Planning and Community Right-to-Know Act (EPCRA) are applicable across the entire industry and lay the foundation for this regulatory framework. Standards for the petroleum refining industry, including standards for process equipment maintenance, equipment leakage, and breakage have all contributed to reducing financial assurance risk. Additionally, some states impose additional requirements on the Petroleum Products Manufacturing industry. These potentially stricter or additional state standards for emissions, spill prevention, emergency preparedness, and hazardous substance management on facilities that handle toxic or hazardous chemicals can further reduce risk of environmental contamination at these facilities.

EPA also researched state environmental regulations relevant to the Petroleum Products Manufacturing industry for a representative sample of states. States with significant oil and gas refining and manufacturing industries have implemented state regulations applicable to facilities that store or use oil and oil-related materials, including petroleum refineries and petroleum and coal product manufacturing facilities. For example, Alaska has established requirements for owners or operators of petroleum production facilities to prevent the discharge of oil; these regulations include financial responsibility provisions for oil terminal facilities.

In the proposal, EPA states that the Agency reviewed the potential universe of regulated entities and found the sector to be in a relatively stable financial position with low default risk. Companies in the industry maintain healthy credit scores and reasonable levels of debt relative to assets. The report also notes that companies generally remain liable for environmental compliance obligations under Chapter 11 debt restructuring.

IV. Existing Financial Assurance Programs

In the proposal, EPA reviewed existing financial responsibility requirements in the following

[21] *See* Comments on behalf of the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Iron & Steel Institute, et al. on Proposed Rule, Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 FR 3388 (January 11, 2017).

federal programs: (1) RCRA Subtitle C; (2) TSCA commercial polychlorinated biphenyl ("PCB") waste facilities; and (3) EPA Safe Drinking Water Act ("SDWA") Underground Injection Control wells. AFPM member sites are subject to these regulations and, as such, are financially responsible for hazardous waste treatment, storage and disposal; underground injection of hazardous wastes and storage; and various corrective actions and remediation of hazardous wastes at their sites. EPA's review determined that these Federal statutes provide and extensive regulatory framework that strengthens hazardous substance management, incident prevention, emergency preparedness, and further reduces risk at petroleum product manufacturing facilities.

It should be noted that in the proposal, based on EPA's research, only one site had significant releases or threatened releases of hazardous substances under the modern regulatory framework that required more than minimal taxpayer-funded cleanups. Furthermore, in the Agency's research, none of the at least 20 refineries that have closed since 2000, under the modern regulatory framework, had residual contamination that burdened the Fund.

V. Conclusion

AFPM appreciates the opportunity to comment on this important matter. The D.C. Circuit's opinion in *Idaho Conservation League* represents an important precedent that must be considered when determining whether to impose financial assurance requirements on a specific industry. We agree that the Agency has appropriately considered the Court's holding in this instance and has done thorough research illustrating that the degree and duration of risk posed by this industry does not warrant further financial assurance.

Sincerely,

Jeff Gunnulfsen
Senior Director, Security and Risk Management