September 27, 2019

VIA ELECTRONIC FILING

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 Electric Power Generation, Transmission, and Distribution Industry, 84 Fed. Reg. 36,535 (July 29, 2019)

Dear Ms. Mooney:

We, the undersigned organizations, 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 Electric Power Generation, Transmission, and Distribution Industry."[1]

Our members have a substantial and direct interest in the outcome of this rulemaking. Some of our members own and operate facilities in the electric power generation, transmission and distribution industry; others provide the fuel, equipment, and materials needed to run those facilities; and many other members are consumers of the electricity produced. As such, it is important that EPA does not impose duplicative and unnecessary financial responsibility requirements on this industry sector. Our members also have a vested interest in EPA's process for evaluating risk when deciding whether to promulgate regulations for any industry sector under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund").[2]

As further detailed below, EPA's recent decision not to impose additional financial assurance requirements on the hardrock 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.

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[1] Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry; 84 Fed. Reg. 36,535 (July 29, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-07-29/pdf/2019-15094.pdf.

[2] 42 U.S.C. § 9608(b).

The U.S. economy is powered by a diverse energy portfolio, and we support many of the specific perspectives raised by companies operating throughout the electric power industry and the organizations that represent them. Potential releases from electric power facilities are directly regulated through other federal and state statutes and regulations, and voluntary efforts from this industrial sector have reduced the risks to human health and the environment. The electric power industry does not have a history of abandoning facilities or failing to pay for cleanups. In sum, the electric power industry poses a limited financial risk to public funds under CERCLA.

This proposal reflects the first rulemaking from the Agency regarding financial assurance requirements under CERCLA section 108(b) for a class of facilities outside of the hardrock mining industry. We support EPA's proposal not to impose additional financial assurance requirements on the electric power industry, as well as the Agency's sound analysis of the current market structures for the industry, the applicable modern regulatory framework, current voluntary industry practices, and the fact that the industry poses a low risk to taxpayer funds.

I. Background

Congress enacted CERCLA in order to provide EPA the authority to respond directly to releases or 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."[3] 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."[4] 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."[5]

Multiple groups sued EPA in 2008 for failure to promulgate regulations requiring the appropriate financial assurance.[6] 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

[3] *Id.*

[4] *Id.* at § 9608(b)(1).

[5] *Id.* at § 9608(b)(2).

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

Agency released in 2009.[7] This priority notice concluded that hardrock 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 them as well.[8] An advance notice of proposed rulemaking was issued for those additional classes in 2010.[9]

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 hardrock 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.[10] EPA signed that determination on December 1, 2016, and announced its intent to proceed with rulemakings for the other three classes of facilities.[11] Notably, the order *did not* mandate a specific outcome for the rulemakings.[12]

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 hardrock mining industry is an important precedent for the Agency regarding future rulemakings regarding the imposition of financial assurance requirements on other classes of facilities.

EPA proposed financial assurance requirements under CERCLA section 108(b) for the hardrock mining industry on January 11, 2017.[13] Following the requisite notice-and-comment period, EPA published a final action announcing its decision not to impose additional financial assurance

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[7] Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213 (July 28, 2009).

[8] *Id.* at 37,215-16. The three classes of facilities identified were for the chemical, petroleum and electric power industries.

[9] Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b), 75 Fed. Reg. 816 (Jan. 6, 2010).

[10] *In Re: Idaho Conservation League*, No. 14-1149 (D.C. Cir. Jan. 29, 2016).

[11] *See* Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries, 82 Fed. Reg. 3,512 (Jan. 11, 2017).

[12] *See* note 9 at 17 (the order "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule").

[13] Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3,388 (Jan. 11, 2017).

requirements on the hardrock mining industry under section 108(b) of CERCLA.[14] EPA's decision analyzed the risk of taxpayer funded cleanups at hardrock mining facilities operating under modern management practices and modern environmental regulations.[15]

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.[16] Specifically, they argued that the term "risk" in section 108(b) was not limited to the risk of taxpayer-funded response actions, and that, regardless of the meaning of risk, the statutes required EPA to develop at least some financial assurance requirements for the hardrock mining industry.[17]

The court rejected these challenges through a number of findings, upholding EPA's decision not to issue new financial assurance requirements for the hardrock mining industry.[18] 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.[19] The court also found that EPA's decision not to adopt financial assurance requirements for the hardrock mining industry *was* a logical outgrowth of the Agency's proposal.[20]

In the current proposal, EPA's evaluation of the "risk" posed by the electric power, generation, and transmission, and distribution industry follows the analytical approach upheld by the D.C. Circuit in the hardrock mining rulemaking. The Agency prepared an in-depth risk analysis with over four hundred 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."[21]

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

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[14] 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).

[15] *Id.*

[16] *Idaho Conservation League, et al v. Andrew Wheeler, et al*, case no. 18-1141 (D.C. Cir. May 16, 2018).

[17] *Id.*

[18] *See Idaho Conservation League v. Wheeler,* No. 18-1141 (D.C. Cir. 2019).

[19] *Id.* at 11, 14.

[20] *Id.* at 20.

[21] *Id.* at 16.

evaluation demonstrates why additional financial assurance requirements are unwarranted for the electric power generation, transmission, and distribution industry. We urge EPA to finalize this decision.

III. Conclusion

We appreciate the opportunity to comment on this important matter. The D.C. Circuit's opinion in *Idaho Conservation League* represents an important precedent that must considered when determining whether to impose financial assurance requirements on a specific industry. We find that the Agency has appropriately considered the Court's holding in this instance and look forward to working with you as the regulatory process continues.

Sincerely,

U.S. Chamber of Commerce
American Chemistry Council
American Fuel & Petrochemical Manufacturers
American Iron and Steel Institute
National Association of Manufacturers
National Mining Association