

May 6, 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 Chemical Manufacturing Industry: Docket ID EPA-HQ-OLEM-2019-0086; FRL-10005-53-OLEM**

Dear Ms. Mooney:

The U.S. economy is powered by a diverse energy and manufacturing portfolio, unmatched by any other nation in the world. Through innovation, responsible development and use of all energy sources, American industry has established a strong record in environmental protection and fully supports the ongoing national effort to protect our environment and improve public health, even in the face of the current pandemic. We, the undersigned organizations, submit the following 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 Chemical Manufacturing Industry” (“Proposed Rule”).<sup>1</sup>

Our members have a substantial and direct interest in the outcome of this rulemaking. Some of our members own and operate chemical manufacturing facilities; others provide the equipment and materials needed to run those facilities; and many are consumers of products manufactured by this industry. As such, it is important that EPA does not impose burdensome and unnecessary financial responsibility requirements on this industrial sector. Our members also have a vested interest in EPA’s process for evaluating financial risks 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 “Section 108(b”).<sup>2</sup>

This proposal reflects the fourth rulemaking from the agency regarding financial assurance requirements under CERCLA Section 108(b). EPA’s prior decisions not to impose additional financial assurance requirements on the hardrock mining, electric utility, petroleum and coal products manufacturing industries all establish important precedents for this matter – as does the decision upholding the hardrock mining determination issued by the U.S. Court of Appeals for the District of Columbia (“D.C. Circuit”). Our members have a common interest in ensuring that EPA appropriately applies the same legally and technically defensible analytical approach in this rulemaking. Potential releases from manufacturing facilities in this sector are directly regulated through an almost uniquely comprehensive and stringent matrix of federal and state statutes and regulations. Voluntary efforts from this sector have further reduced the risks that the Fund may need to pay for response costs at facilities within the sector. Due to the industry’s longstanding financial stability and a low default risk, this industry does not have a history of failing to pay for cleanups. In sum, there is a limited financial risk to public funds under CERCLA.

The Agency has proposed not to impose additional financial assurance requirements on the chemical manufacturing sector, based on the Agency’s sound analysis of the current market structures for the sector, the applicable modern regulatory framework, current voluntary industry practices and the fact

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<sup>1</sup> Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry, 85 Fed. Reg. 10128 (February 21, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-02-21/pdf/2020-03401.pdf>.

<sup>2</sup> 42 U.S.C. § 9608(b).

that the sector poses a low risk of taxpayer funded cleanups. EPA's determination is well-supported and we endorse the agency's decision.

## I. Background

Congress enacted CERCLA in order to provide EPA the authority to respond directly to releases 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 associated with environmental remediation.

In addition to these authorities, Section 108(b) permits EPA, "in [its] discretion," to adopt or decline to adopt rules that require certain "classes of facilities [to] establish and maintain evidence of financial responsibility."<sup>3</sup> 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."<sup>4</sup> When determining the appropriate 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."<sup>5</sup>

Groups sued EPA in 2008 for its failure to promulgate final determinations under Section 108(b).<sup>6</sup> 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.<sup>7</sup> This priority notice concluded that hardrock mining facilities would be the first class of facilities for which EPA would evaluate the need for financial assurance requirements. Other specified classes of facilities, including those in the chemical manufacturing sector, would also be evaluated.<sup>8</sup> An advance notice of proposed rulemaking was issued for those additional classes in 2010.<sup>9</sup>

Groups again sued EPA in 2014 because the Agency had yet to propose financial assurance determinations for all four industries, and the resulting court order required EPA to publish a proposed rule on hardrock mining financial assurance requirements 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.<sup>10</sup> EPA signed that determination on December 1, 2016, and announced its intent to proceed with rulemakings for the other three classes of facilities.<sup>11</sup> Importantly, the order *did not* mandate a specific outcome for the rulemakings.<sup>12</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at § 9608(b)(1).

<sup>5</sup> *Id.* at § 9608(b)(2).

<sup>6</sup> See *Sierra Club, et al. v. Johnson*, No. 08-01409 (N.D. Cal.).

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

<sup>8</sup> *Id.* at 37,215-16. The three classes of facilities identified were for the chemical, petroleum and coal products manufacturing, and electric power industries.

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

<sup>10</sup> *In Re: Idaho Conservation League*, No. 14-1149 (D.C. Cir. Jan. 29, 2016).

<sup>11</sup> Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry, 85 Fed. Reg. 10128 (February 21, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-02-21/pdf/2020-03401.pdf>.

<sup>12</sup> See note 9 at 17 (the order "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule").

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

While the hardrock mining and chemical manufacturing industries are separate and distinct, EPA's methodology for determining whether to impose financial assurance requirements on the hardrock mining industry established important precedents for the Agency regarding future rulemakings on the imposition of financial assurance requirements on other classes of facilities.

EPA proposed financial assurance requirements under Section 108(b) for the hardrock mining industry on January 11, 2017.<sup>13</sup> Following the requisite notice-and-comment period, EPA published a final action announcing its decision not to impose any such requirements.<sup>14</sup> EPA's decision analyzed the risk of taxpayer-funded cleanups at hardrock mining facilities operating under modern management practices and modern environmental regulations.<sup>15</sup>

Petitioners challenged EPA's decision in the D.C. Circuit on the grounds that it was contrary to the Congressional intent behind CERCLA, arbitrary and capricious, and procedurally defective.<sup>16</sup> Specifically, they claimed 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 statute required EPA to develop financial assurance requirements for the hardrock mining industry.<sup>17</sup>

The court rejected those challenges and upheld EPA's decision not to issue new financial assurance requirements for the hardrock mining industry.<sup>18</sup> In so doing, the court issued three holdings that are particularly important for the current rulemaking:

- First, the court found that EPA appropriately interpreted the term "risk," in determining the level of risk for which financial assurance was appropriate, to mean *financial* risk; i.e., the risk that the taxpayers would be required to fund future cleanups.<sup>19</sup>
- Second, the court agreed with EPA that Section 108(b) is focused on risks posed by the industry operating under "modern mining regulatory schemes, rendering their 'legacy contamination' irrelevant in determining modern mining risks. . . ."<sup>20</sup>
- Third, the court noted that "the EPA found that only a small fraction of Superfund funds spent on response actions at hardrock mining sites went to address active spills at currently operating mines," and it "decline[d] to substitute [its] judgment for the EPA's on the question whether a handful of sites with likely minimal impact on the Superfund justifies industry-wide financial responsibility requirements."<sup>21</sup>

## III. EPA Correctly Applied the Hardrock Mining Precedents to the Chemical Manufacturing Industry.

In the current proposal, EPA's evaluation of the "risk" posed by the chemical manufacturing industry appropriately follows the analytical approach upheld by the D.C. Circuit in the hardrock mining rulemaking. The Agency conducted an in-depth risk analysis 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

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

<sup>14</sup> 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).

<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.*

<sup>18</sup> *See Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

<sup>19</sup> *Id.* at 502-504.

<sup>20</sup> *Id.* at 501.

<sup>21</sup> *Id.* at 507.

financial assurance regulations by evaluating “examples of pollution that occurred under a modern regulatory framework and that required a taxpayer-funded CERCLA cleanup.”<sup>22</sup>

EPA began by reviewing the universe of chemical manufacturing sites that have required Superfund responses to determine how many have required Fund-financed cleanups based on activities at the site that occurred since the advent of the modern environmental regulatory system. In that regard, the Agency erred on the side of precaution, looking back as far as 1980 to mark the beginning of the modern system – even though many of the most relevant requirements were not fully promulgated until much later (e.g., the land disposal restrictions, not fully issued until 1990). Out of the over 10,000 sites operating in the North American Industry Classification System (“NAICS”) Code 325, EPA found that only four National Priorities List (NPL) sites, and only 30 other non-NPL sites, could be said to have required Fund-financed cleanups for releases occurring under the modern system.

EPA then evaluated the protections provided by the Resource Conservation and Recovery Act and a wide range of other federal statutes such as the Clean Air Act, Clean Water Act, Toxic Substances Control Act (“TSCA”), and Emergency Planning and Community Right-to-Know Act. It concluded that these provide a sufficiently established regulatory foundation focused on protecting human health and the environment from releases of hazardous substances and other pollutants that financial responsibility requirements were not appropriate. It concluded that “EPA, the Occupational Safety and Health Administration, and the Pipeline and Hazardous Materials Safety Administration also implement regulations that address the storage and transportation of hazardous substances”.<sup>23</sup> Additionally, existing financial responsibility requirements are mandated by various federal programs under TSCA, RCRA and the Safe Drinking Water Act.

States can and do impose additional environmental requirements beyond these federal programs. The NPRM and its associated background document highlight that “these stricter or additional standards . . . can reduce risk at facilities that manage hazardous substances”.<sup>24</sup> For example, state regulations include requirements for sophisticated control technologies, monitoring, best management practices and other requirements to prevent and address risk of release, accounting for the unique circumstances of each state. The combination of federal and state statutes provides an extensive regulatory framework that strengthens hazardous substance management, incident prevention, emergency preparedness and further reduces risk at chemical manufacturing facilities.

Furthermore, EPA found that “industry voluntary programs can be effective at reducing both pollution and the frequency of government enforcement actions.”<sup>25</sup> It concluded that voluntary programs can be sponsored at the federal, state or local governmental levels, through industry associations or non-governmental organizations. Additionally, EPA found that “international nonprofit organizations and industry associations, such as the International Organization for Standardization, International Electrotechnical Commission and the Global Environmental Management Initiative also provide . . . procedures that facilities may follow.”<sup>26</sup> The myriad of voluntary programs in existence provide a platform for the development of environmental management, safety and emergency preparedness best practices, and award certifications, and can also serve as a forum to foster coordination and collaboration among companies.<sup>27</sup>

Ultimately, EPA concluded that, given (i) the relatively few chemical manufacturing sites that have required Fund expenditures for operations occurring during the modern regulatory system, (ii) the breadth of protections offered by federal and state authorities under that system, and (iii) the

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<sup>22</sup> *Id.* at 16.

<sup>23</sup> Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry, 85 Fed. Reg. 10128 (February 21, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-02-21/pdf/2020-03401.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

pervasiveness of voluntary industry programs, “the degree and duration of risk posed by the Chemical Manufacturing industry does not warrant financial responsibility requirements under CERCLA Section 108(b).”<sup>28</sup> EPA’s analytical approach correctly interprets the term “risk” under CERCLA Section 108(b) and applies it to the facts associated with chemical manufacturing facilities. The Agency’s robust evaluation demonstrates why additional financial assurance requirements are unwarranted for this sector. We urge EPA to finalize this decision as proposed.

#### **IV. Conclusion**

We appreciate the opportunity to comment on this important matter and support EPA’s conclusions that the chemical manufacturing sector is directly regulated through other federal and state statutes and regulations, along with many voluntary, industry-led efforts that have reduced risks to human health and the environment. Furthermore, 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. We believe that the Agency has appropriately considered the Court’s holding and existing regulatory framework in this instance and look forward to working with you as the regulatory process continues.

Sincerely,

American Chemistry Council  
American Coke and Coal Chemicals Institute  
National Association of Manufacturers  
National Mining Association  
Society of Chemical Manufacturers and Affiliates  
The Fertilizer Institute  
U.S. Chamber of Commerce

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<sup>28</sup> 85 Fed. Reg. 10144.