CERCLA 108(b) Financial Responsibility Requirements for the Chemical Manufacturing Industry: Proposed Rule

February 2020

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 chemical manufacturing facilities and do not warrant financial responsibility requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 108(b). Therefore, EPA is proposing to not issue such requirements for these facilities. 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 the degree and duration of risk to the Superfund posed by the Chemical 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 stable financial position and able to pay off short-term obligations. Overall, financial ratios indicate healthy financial performance in the sector. 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.

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 or Superfund)	• The administration of CERCLA is protective and effective, and EPA's proposed finding for the chemical 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)	• RCRA, enacted in 1976, directed EPA to set up a comprehensive cradle-to-grave regulatory system designed to ensure proper management and disposal of hazardous waste, prevent releases of hazardous waste, and assure that past spills are cleaned up by facility owner/operators. The basic regulatory program was promulgated in 1980, and included financial assurance requirements for hazardous waste treatment, storage, and disposal facilities (TSDFs). The 1976 statute also established broad and effective enforcement tools that have been in place and used to abate conditions that may present an imminent and substantial endangerment to health or the environment, such as releases of hazardous wastes. • The 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA, adopted after the passage of CERCLA in 1980, resulted in numerous enhanced regulatory requirements and enforcement mechanisms, including requirements for facility-wide cleanup of hazardous waste releases and contamination from both permitted and interim-status hazardous waste management facilities. The 1984 amendments substantially expanded corrective action authorities and required facilities to provide financial assurance for corrective action, adding to pre-existing requirements for financial assurance for facility closure and post-closure. • The RCRA program, enhanced by the 1984 amendments, reduces the risks that facilities will have to be addressed under CERCLA. Specifically, the RCRA corrective action program is currently focused on ensuring owner/operators conduct cleanups at hazardous waste treatment, storage and disposal facilities.
Toxic Substances Control Act (TSCA)	• There are existing financial responsibility requirements applicable to commercial PCB waste facilities under TSCA. • TSCA and its amendments established specific programs for the management of certain chemicals—namely, PCBs, asbestos, radon, lead, mercury, and formaldehyde. • 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)	• Effluent Limitation Guidelines (ELGs) set standards for industrial wastewater discharge to surface water on an industry-specific basis, identifying key processes and materials to regulate within each industry. • EPA published industry-specific effluent guidelines for pesticides in 1978, for inorganic chemicals manufacturing in 1982, and for organic chemicals, plastics, and synthetic fibers in 1987. • CWA established the NPDES permit program, which controls point source discharges to surface water, and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which sets a blueprint for responding to oil spills and hazardous substance releases.
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 chemical manufacturing facilities include: ▪ Financial Responsibility for petrochemical manufacturing facilities, ▪ Financial Responsibility for phosphate fertilizer manufacturing facilities, ▪ Financial Responsibility for hazardous waste TSDFs, ▪ Financial Responsibility for underground injection of hazardous wastes, ▪ Financial Responsibility for PCB storage or disposal facilities, ▪ 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, and ▪ State regulations that are stricter than the Federal requirements that, for example, set stricter discharge or closure standards.

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

In August 2014, Sierra Club, Great Basin Resource Watch, Amigos Bravos, Idaho Conservation League, Earthworks, and Communities for a Better Environment filed a petition for writ of mandamus in the D.C. Circuit Court of Appeals seeking 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 a proposed rule and a final action. 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 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. On December 4, 2019, EPA proposed to not issue financial responsibility requirements for the petroleum and coal product manufacturing industry.

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 (volume 52 of the Federal Register starting on page 2923, dated 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 chemical 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 chemical 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.