

Prepublication Copy Notice:

The EPA Administrator signed the following *Federal Register* document on November 24, 2020:

Title: **Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry; the Petroleum and Coal Products Manufacturing Industry; and the Chemical Manufacturing Industry**

Action: **Final actions**

Docket No.: **EPA-HQ-OLEM-2019-0085, EPA-HQ-OLEM-2019-0086, EPA-HQ-OLEM-2019-0087**

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Once the official version of the document publishes in the *Federal Register*, the prepublication version of the document posted on the agency's internet will be replaced with a link to the document that appears in the *Federal Register* publication. At that time, you will also be able to access the on-line docket for this *Federal Register* document at <http://www.regulations.gov>.

For further information about the docket and, if applicable, instructions for commenting, please consult the ADDRESSES section in the front of the *Federal Register* document.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 320

[EPA-HQ-OLEM-2019-0085, EPA-HQ-OLEM-2019-0086, EPA-HQ-OLEM-2019-0087, FRL-10017-87-OLEM]

RIN 2050-AH03

Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry; the Petroleum and Coal Products Manufacturing Industry; and the Chemical Manufacturing Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final actions.

SUMMARY: EPA (or the Agency) is finalizing its proposed decisions to not impose financial responsibility requirements under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for facilities in three industry sectors: the electric power generation, transmission, and distribution industry, pursuant to EPA's proposal of July 29, 2019; the petroleum and coal products manufacturing industry, pursuant to EPA's proposal of December 23, 2019; and the chemical manufacturing industry, pursuant to EPA's proposal of February 21, 2020. Today's final rulemakings are based on the individual administrative records for each of the three proposed rulemakings, supported by additional analysis conducted in consideration of comments received in the public comment period for each proposed rule. In particular, after examining the existing environmental protections and regulations in place today and analyzing the Superfund program's experience cleaning up sites in each industry, the Agency concluded that facilities in these three industries operating under a modern regulatory framework do not present a level of risk that warrants financial responsibility requirements under CERCLA section 108(b). Today's final rulemakings are based on the record for these

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rulemakings, and do not affect EPA's authority to take a response or enforcement action under CERCLA with respect to any particular facility or industry, and do not affect the Agency's authorities that may apply to particular facilities under other environmental statutes. This combined final rulemaking comprises the Agency's final actions on each of the three proposed rules.

DATES: These final actions are effective on [insert date 30 days after date of publication in the *Federal Register*].

ADDRESSES: EPA has established a docket for these actions under Docket ID No. EPA-HQ-OLEM-2019-0085, EPA-HQ-OLEM-2019-0086, and EPA-HQ-OLEM-2019-0087. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For more information on this document, contact Charlotte Mooney, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, Mail Code 5303P, 1200 Pennsylvania Ave., NW., Washington, D.C. 20460; telephone (703) 308-7025 or (email) mooney.charlotte@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

A. Overview

B. Purpose of This Action

II. Authority

III. Background Information

A. Overview of Section 108(b) and other CERCLA Provisions

This is a prepublication version of a Federal Register document signed by EPA Administrator Andrew Wheeler on November 24, 2020. The document is pending publication in the Federal Register. Although EPA has taken steps to ensure the accuracy of this pre-publication version, it is not the official version.

B. History of Section 108(b) Rulemakings

1. 2009 Identification of Priority Classes of Facilities for Development of CERCLA section 108(b)

Financial Responsibility Requirements

2. Additional Classes 2010 Advance Notice of Proposed Rulemaking

3. 2014 Petition for Writ of Mandamus

4. Additional Classes 2017 Notice of Intent to Proceed with Rulemakings

5. The Hardrock Mining Proposal and Final Rulemaking

a. Proposed Rule

b. Decision to Not Impose Requirements

c. Litigation and D.C. Circuit Decision

IV. Statutory Interpretation

V. Electric Power Generation, Transmission and Distribution Industry

A. Proposed Rule

B. Summary of Key Comments Received and Agency Response

1. Comments in Support of the Proposal

2. Comments Opposed to the Proposal

C. Decision to Not Impose Requirements

VI. Petroleum and Coal Products Manufacturing Industry

A. Proposed Rule

B. Summary of Key Comments Received and Agency Response

1. Comments in Support of the Proposal

2. Comments Opposed to the Proposal

C. Decision to Not Impose Requirements

VII. Chemical Manufacturing Industry

A. Proposed Rule

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B. Summary of Key Comments Received and Agency Response

1. Comments in Support of the Proposal

2. Comments Opposed to the Proposal

C. Decision to Not Impose Requirements

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

C. Paperwork Reduction Act (PRA)

D. Regulatory Flexibility Act (RFA)

E. Unfunded Mandates Reform Act (UMRA)

F. Executive Order 13132: Federalism

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

J. National Technology Transfer and Advancement Act

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

L. Congressional Review Act

I. **Executive Summary**

A. *Overview*

Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 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. The statute further

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requires that the level of financial responsibility be established to protect against the level of risk that the President, in his/her discretion, believes is appropriate, based on factors including the payment experience of the Hazardous Substance Superfund (Fund). The President's authority under this section for non-transportation-related facilities has been delegated to the EPA Administrator.

On January 6, 2010, EPA published an Advance Notice of Proposed Rulemaking (ANPRM),¹ in which the Agency identified three industrial sectors, to follow the hardrock mining industry, for the development, as necessary, of proposed section 108(b) regulations. Those industries identified were the electric power generation, transmission, and distribution; petroleum and coal products manufacturing; and chemical manufacturing industries. In August 2014, the Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit, seeking a writ of mandamus requiring issuance of CERCLA section 108(b) financial responsibility rules for the hardrock mining industry, and for the three additional industries identified in the 2010 ANPRM. Following oral arguments, EPA and the petitioners submitted a joint motion for an order on consent, filed on August 31, 2015, which included a schedule for further administrative proceedings under CERCLA section 108(b). The court order granting the motion was issued on January 29, 2016.

In addition to requiring EPA to publish a proposed rule on hardrock mining financial responsibility requirements by December 1, 2016, the January 2016 order required EPA to sign for publication in the *Federal Register* a determination whether EPA will issue a notice of proposed rulemaking on financial responsibility requirements under section 108(b) in the electric power generation, transmission, and distribution industry; the petroleum and coal products manufacturing industry; and the chemical manufacturing industry by December 1, 2016. EPA signed the required determination on

¹ 75 FR 816 (Jan. 6, 2010).

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December 1, 2016; the notice was published on January 11, 2017² and announced EPA's intent to proceed with rulemakings for all three of the additional classes.

B. Purpose of This Action

The purpose of today's action, containing three final rulemakings, is to finalize the Agency's proposed rulemaking decisions that financial responsibility requirements under CERCLA section 108(b) are not warranted for facilities in the electric power generation, transmission, and distribution industry; the petroleum and coal products manufacturing industry; and the chemical manufacturing industry. EPA has reached these conclusions based on the analyses described in the proposed rules for (1) the electric power generation, transmission, and distribution industry proposal (84 FR 36535), (2) the petroleum and coal products manufacturing industry proposal (84 FR 74067), and (3) the chemical manufacturing industry proposal (85 FR 10128); consideration of comments on those proposed rules; and additional analyses based on those comments. The evidence examined in each of these analyses has led EPA to the finding that the degree and duration of risk posed by each of these three industries does not warrant financial responsibility requirements under CERCLA section 108(b).

EPA is publishing this notice, containing three final rulemakings, to comply with its obligations under CERCLA section 108(b) to determine whether requirements that classes of facilities establish and maintain evidence of financial responsibility are appropriate, and to satisfy the Agency's obligations under the Mandamus Order issued on January 29, 2016. *See In re: Idaho Conservation League, et al.*, No. 14-1149. A copy of the Mandamus Order can be found in the docket for this notice.

These final rulemakings are not applicable to and do not affect, limit, or restrict EPA's authority to take a response action or enforcement action under CERCLA at any facility in the electric power generation, transmission, and distribution industry; the petroleum and coal products manufacturing industry; or the chemical manufacturing industry, including any requirements for financial responsibility as part of such response action. The set of facts in the rulemaking record related to the individual facilities

² 82 FR 3512 (Jan. 11, 2017).

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discussed in the proposed and final rulemakings support the Agency's decision not to issue financial responsibility requirements under section 108(b) for these industries as a class. At the same time, a different set of facts could demonstrate a need for a CERCLA response action at an individual site. These rulemakings do not affect the Agency's authority under other authorities that may apply to individual facilities, such as the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Toxic Substances Control Act (TSCA).

This notice is structured to present the Agency's final rulemakings for the electric power generation, transmission, and distribution industry; the petroleum and coal products manufacturing industry; and the chemical manufacturing industry. As the three rulemakings contained in this notice share common features, such as statutory authority and regulatory history, background information which is consistent across the three industries and intended to be applied to all industries is presented first in a unified manner. Additionally, certain executive orders that relate or may relate to these rules are discussed in unison in the last section of this notice. Discussion of public comments received on the proposed rules for each industry and industry specific analyses, which were relied upon to reach unique final rulemaking decisions, is presented separately. The Agency's conclusions for each industry were reached based on the specific consideration of risk for each industry.

II. Authority

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

III. Background Information

A. Overview of Section 108(b) and other CERCLA Provisions

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), establishes a comprehensive environmental response and cleanup program. Generally, CERCLA

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authorizes EPA³ to undertake removal or remedial actions in response to any release or threatened release into the environment of “hazardous substances” or, in some circumstances, any other “pollutant or contaminant.” As defined in CERCLA section 101, removal actions include actions to “prevent, minimize, or mitigate damage to the public health or welfare or to the environment,” and remedial actions are “actions consistent with [a] permanent remedy[.]” Remedial and removal actions are jointly referred to as “response actions.” CERCLA section 111 authorizes the use of the Hazardous Substance Superfund (Fund) established under title 26, United States Code, to finance response actions undertaken by EPA. In addition, CERCLA section 106 gives EPA⁴ authority to compel action by liable parties in response to a release or threatened release of a hazardous substance that may pose an “imminent and substantial endangerment” to public health or welfare or the environment.

The authorities established by CERCLA work alongside other EPA statutes which created programs designed to control releases of contaminants, such as the CAA, the CWA, RCRA, and TSCA. Features of the RCRA program, in particular, complement objectives of CERCLA and help to prevent the types of releases that might become CERCLA sites. Pursuant to RCRA, as amended by HSWA (Hazardous and Solid Waste Amendments), statutory and regulatory requirements, RCRA established a system of cradle-to-grave management of hazardous wastes. Implemented by EPA and authorized state RCRA programs, RCRA permitting requirements for hazardous waste treatment, storage, and disposal (TSD) facilities detail technical standards, set reporting requirements, and include a requirement to establish financial assurance. Where releases do occur, the corrective action program established by RCRA provides a mechanism to clean up contamination as well as authority to require financial assurance. Under RCRA’s corrective action program, EPA requires owners and operators of TSDs to investigate and clean up releases of hazardous waste and hazardous constituents from any solid waste

³ Although Congress conferred the authority for administering CERCLA on the President, most of that authority has since been delegated to EPA. *See* Exec. Order No. 12580, 52 FR 2923 (Jan. 23, 1987). The executive order also delegates to other Federal agencies specified CERCLA response authorities at certain facilities under those agencies’ “jurisdiction, custody or control.”

⁴ CERCLA section 106 authority is also delegated to other Federal agencies in certain circumstances. *See* Exec. Order No. 13016, 61 FR 45871 (Aug. 28, 1996).

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management units, thus reducing the likelihood that these facilities would require cleanup under Superfund. RCRA's role was considered so relevant that financial assurance requirements established under RCRA Subtitle C (RCRA §§3001-3023) were referenced in Senate Report on legislation that was later enacted as CERCLA section 108(b). That language stated “[I]t is not the intention of the Committee that operators of facilities covered by section 3004(6) of that Act be subject to two financial responsibility requirements for the same dangers.”⁵

CERCLA section 107 imposes liability for response costs on a variety of parties, including certain past owners and operators, current owners and operators, and certain generators, arrangers, and transporters of hazardous substances. Such parties are liable for certain costs and damages, including all costs of removal or remedial action incurred by the Federal Government, so long as the costs incurred are “not inconsistent with the national contingency plan” (the National Oil and Hazardous Substances Pollution Contingency Plan or NCP).⁶ Section 107 also imposes liability for natural resource damages and health assessment costs.⁷

Section 108(b) establishes authority to require owners and operators of classes of facilities to establish and maintain evidence of financial responsibility. Section 108(b)(1) directs EPA to develop regulations requiring owners and operators of facilities to establish evidence of financial responsibility “consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.” In turn, section 108(b)(2) directs that the level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk that EPA in its discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction. Section 108(b)(2) does not, however, preclude EPA from considering other factors in addition to those specifically listed. The statute prohibited promulgation of such regulations before December 1985.

⁵ S. Rept. 96–848 (2d Sess, 96th Cong.), at 92.

⁶ CERCLA section 107(a)(4)(A).

⁷ CERCLA section 107(a)(4)(C) – (D).

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In addition, Section 108(b)(1) provides for publication within three years of the date of enactment of CERCLA a “priority notice” identifying the classes of facilities for which EPA would first develop financial responsibility requirements. It also directs that priority in the development of requirements shall be accorded to those classes of facilities, owners, and operators that present the highest level of risk of injury.

B. History of Section 108(b) Rulemakings

1. 2009 Identification of Priority Classes of Facilities for Development of CERCLA section 108(b) Financial Responsibility Requirements

On March 11, 2008, Sierra Club, Great Basin Resource Watch, Amigos Bravos, and Idaho Conservation League filed suit in the U.S. District Court for the Northern District of California against then EPA Administrator Stephen Johnson and then Secretary of the U.S. Department of Transportation Mary E. Peters. *Sierra Club, et al. v. Johnson*, No. 08-01409 (N. D. Cal.). On February 25, 2009, that court ordered EPA to publish the Priority Notice required by CERCLA section 108(b)(1) later that year. The 2009 Priority Notice and supporting documentation presented the Agency’s conclusion that hardrock mining facilities would be the first class of facilities for which EPA would issue CERCLA section 108(b) requirements.⁸ Additionally, the 2009 Priority Notice stated EPA’s view that classes of facilities outside of the hardrock mining industry may warrant the development of financial responsibility requirements.⁹ The Agency committed to gather and analyze data on additional classes of facilities and to consider them for possible regulation. The court later dismissed the remaining claims.

2. Additional Classes 2010 Advance Notice of Proposed Rulemaking

On January 6, 2010, EPA published an ANPRM,¹⁰ in which the Agency identified three additional industrial sectors for the development, as necessary, of proposed section 108(b) regulations. To develop the list of additional classes for the 2010 ANPRM, EPA used information from the CERCLA National

⁸ 74 FR 37214 (July 28, 2009).

⁹ *Id.* at 37218.

¹⁰ 75 FR 816 (Jan. 6, 2010).

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Priorities List (NPL) and analyzed data from the Resource Conservation and Recovery Act (RCRA)

Biennial Report and the Toxics Release Inventory created under the Emergency Planning and Community Right-to-Know Act (EPCRA).

3. 2014 Petition for Writ of Mandamus

In August 2014, the Idaho Conservation League, Earthworks, Sierra Club, Amigos Bravos, Great Basin Resource Watch, and Communities for a Better Environment filed a new lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit, seeking a writ of mandamus requiring issuance of CERCLA section 108(b) financial assurance rules for the hardrock mining industry and for three other industries: electric power generation, transmission, and distribution; petroleum and coal products manufacturing; and chemical manufacturing. Thirteen companies and organizations representing business interests in the hardrock mining and other sectors sought to intervene in the case.

Following oral argument, the court issued an order in May 2015 requiring the parties to submit, among other things, supplemental submissions addressing a schedule for further administrative proceedings under CERCLA section 108(b). Petitioners and EPA requested an order from the court with a schedule calling for the Agency to sign a proposed rule for the hardrock mining industry by December 1, 2016, and a final rulemaking by December 1, 2017. The joint motion also included a requested schedule for the additional industry classes, which called for EPA to sign by December 1, 2016, a determination on whether EPA would issue a notice of proposed rulemaking for classes of facilities in any or all of the other industries, and a schedule for proposed and final rulemakings for the additional industry classes as follows:

EPA will sign for publication in the **Federal Register** a notice of proposed rulemaking in the first additional industry by July 2, 2019, and sign for publication in the **Federal Register** a notice of its final action by December 2, 2020.

EPA will sign for publication in the **Federal Register** a notice of proposed rulemaking in the second additional industry by December 4, 2019, and sign for publication in the **Federal Register** a notice of its final action by December 1, 2021.

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EPA will sign for publication in the **Federal Register** a notice of proposed rulemaking in the third additional industry by December 1, 2022, and sign for publication in the **Federal Register** a notice of its final action by December 4, 2024.¹¹

While the joint motion identified the three additional industries as the chemical manufacturing industry, the petroleum and coal products manufacturing industry, and the electric power generation, transmission and distribution industry, and set a rulemaking schedule, the motion did not indicate which industry would be the first, second or third. The joint motion specified that it did not alter the Agency's discretion as provided by CERCLA and administrative law.¹²

On January 29, 2016, the court granted the joint motion and issued an order that mirrored the submitted schedule in substance. The order did not mandate any specific outcome of the rulemakings.¹³ The Agency has met the deadlines for all three proposed rulemakings, and today's notice meets the requirement for announcing final actions on all three additional industry classes.

4. Additional Classes 2017 Notice of Intent to Proceed with Rulemakings

Consistent with the January 2016 court order, EPA signed on December 1, 2016, a determination regarding rulemakings for the additional classes - a Notice of Intent to Proceed with Rulemakings for all three of the additional industry classes. The notice was published in the **Federal Register** on January 11, 2017.¹⁴

The notice formally announced EPA's intention to move forward with the regulatory process and to publish a notice of proposed rulemaking for classes of facilities within the three industries identified in the 2010 ANPRM. The announcement in the notice was not a determination that requirements were necessary for any or all of the classes of facilities within the three industries, or that EPA would propose such requirements. In addition, the notice gave an overview of some of the comments received on the

¹¹ *In re Idaho Conservation League*, No. 14-1149 (D.C. Cir. Jan. 29, 2016) (order granting joint motion).

¹² See Joint Motion at 6 ("Nothing in this Joint Motion should be construed to limit or modify the discretion accorded EPA by CERCLA or the general principles of administrative law.")

¹³ In granting the Joint Motion, the court expressly stated that its order "merely requires that EPA conduct a rulemaking and then decide whether to promulgate a new rule – the content of which is not in any way dictated by the [order]." *In re Idaho Conservation League*, at 17 (quoting *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324 (D.C. Cir. 2013)).

¹⁴ 82 FR 3512 (Jan. 11, 2017).

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2010 ANPRM and initial responses to those comments. The comments on the ANPRM which specifically addressed the need for CERCLA section 108(b) requirements for the three additional classes fell into four categories: (1) other laws with which the industry complies that obviate the need for CERCLA section 108(b) regulation; (2) the sources of data that EPA used to select the industries; (3) past versus current practices within each industry; and (4) the overall need for financial responsibility for each industry. In discussing the ANPRM comments in the 2017 notice, the Agency stated its intent to use other, more industry-specific and more current sources of data to identify risk; to consider site factors that reduce risks, including those that result from compliance with other regulatory requirements; and to develop a regulatory proposal for each rulemaking.

At the time of the 2017 notice, EPA had not identified sufficient evidence to determine that the rulemaking was not warranted, nor had EPA identified sufficient evidence to establish CERCLA section 108(b) requirements. The notice described a process to gather and analyze additional information to support the Agency's ultimate decision, including further evaluation of the classes of facilities within the three industry sectors. The notice stated that EPA would decide whether proposing requirements was necessary and, accordingly, that EPA would propose appropriate requirements or would propose not to impose requirements.

5. The Hardrock Mining Proposal and Final Rulemaking

a. Proposed Rule

On January 11, 2017, EPA proposed requirements in a new 40 CFR part 320 that owners and operators of hardrock mining facilities subject to the rule demonstrate and maintain financial responsibility as specified in the proposed rule. The proposed rule identified two goals for section 108(b) regulations—the goal of providing funds to address CERCLA liabilities at sites, and the goal of creating incentives for sound practices that will minimize the likelihood of need for a future CERCLA response. The proposed rule explained that first, 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.

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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. Second, the likelihood of a CERCLA response action being needed, as well as the costs of such a response action, are likely to be higher where protective management practices were not utilized during facility operations. The proposed rule discussed information assembled by EPA in the record for the action, which included information on legacy practices and legacy contamination, as well as information not related to risk. Based on that record, EPA had proposed to presume that hardrock mining facilities as a class present the type of risks that section 108(b) addresses. The proposed rule then proceeded to establish a methodology to determine a level of financial responsibility in accordance with a proposed formula. The formula then allowed adjustments to the level of those requirements if a facility could demonstrate site specific conditions that rebut the presumption that the hardrock mining facilities that would be regulated under the rule pose a risk. EPA proposed limiting the applicability of the rule to owners and operators of facilities that are authorized to operate or should be authorized to operate on the effective date of the rule (hereinafter referred to as “current hardrock mining operations”). The proposed rule relied, in part, on the grounds that these owners and operators are more likely to further the regulatory goals of section 108(b) requirements than are owners and operators of facilities that are closed or abandoned. EPA also proposed limiting the applicability of the rule to current hardrock mining operations because those facilities are readily identifiable and, since they are ongoing concerns, they are more likely to be able to obtain the kind of financial responsibility necessary under the regulation.¹⁵

b. Decision to Not Impose Requirements

On February 21, 2018, EPA issued its final section 108(b) rule for the hardrock mining industry, concluding that it was not appropriate to establish financial responsibility requirements on this class of facilities. The Agency stated that despite its focus on currently operating facilities, the proposed rule relied on a record of releases of hazardous substances from facilities and payments to respond to such

¹⁵ 82 FR 3388–3512 (January 11, 2017).

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releases that did not present the same risk profile as the facilities operating under modern conditions to which the rule would apply. These modern conditions, the Agency stated, include state and federal regulatory requirements and financial responsibility requirements that currently apply to operating facilities. As a result, EPA determined that the analysis of risk presented in the proposed rule was inconsistent with the scope of the proposed rule and EPA's intended approach under the statute. The final rulemaking did not seek to rely on historical practices, many of which would be illegal under current environmental laws and regulations, to identify the degree and duration of risk posed by the facilities that would be subject to financial responsibility requirements. Instead, in the final rulemaking EPA considered modern federal and state regulation of hazardous substance production, transportation, treatment, storage, or disposal at hardrock mining facilities. EPA concluded the record did not document significant risks associated with such facilities. Further, the final rulemaking did not rely on the cost of responding to historic mining activities and instead reflected the reduction in the risk of federally financed response actions at modern hardrock mining facilities that result from modern practices and modern regulation. EPA concluded that the record demonstrated that, with a few exceptions, EPA had made minimal Fund expenditures for modern hardrock mining operations. EPA also engaged in significant discussions with, and received significant comments from, commercial insurers and other financial instrument providers. These providers suggested that the availability of financial responsibility instruments in the form and amount proposed by EPA may be limited for regulated entities, should EPA require companies to obtain them. Thus, to the extent that risks remain at current hardrock mining operations, the information provided by commenters further convinced EPA that it was not appropriate to establish financial responsibility requirements on this class of facilities. EPA also concluded that issuing final financial responsibility requirements was not necessary to achieve the stated goals of the proposed section 108(b) rules for hardrock mining, namely, the goal to increase the likelihood that regulated entities will provide funds necessary to address CERCLA liabilities if and when they arise, and the goal to create an incentive for sound practices. EPA's economic analysis showing that the proposed rule would avoid governmental

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costs of only \$15–\$15.5 million a year supported that conclusion. Based on these estimates, commenters objected that the projected annualized costs to industry (\$111–\$171 million) were an order of magnitude higher than the avoided costs to the government (\$15–15.5 million) sought by the proposed rule. Further, given the fact that federal and state laws, including potential liability under CERCLA, already created incentives for sound practices, promulgating additional financial responsibility regulations for hardrock mining facilities under Section 108(b) also was not necessary to advance that goal.

c. Litigation and D.C. Circuit Decision

After publication of the final section 108(b) rule for hardrock mining facilities, Environmental groups timely filed a petition for review challenging the final rulemaking, asserting that: (1) EPA’s statutory interpretation was incorrect, (2) EPA’s decision was arbitrary and capricious, and (3) the promulgated final action was not a logical outgrowth of the proposal.¹⁶ On July 19, 2019, the D.C. Circuit upheld EPA’s regulatory action and denied the petition for review.¹⁷

With respect to EPA’s statutory interpretation of section 108(b), the court rejected the Petitioners’ argument that EPA had misinterpreted “risk” in 108(b) as limited to financial risk. The court explained that, typically, a word repeated in different parts of a single provision has the same meaning throughout that provision, but it can have different meanings if the relevant subject-matter or conditions are different. *See, Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996). The court noted that while the prioritization clause of Section 108(b)(1) refers to risk to human health and the environment, the scope of “risk” is ambiguous in the general mandate of section 108(b)(1) and the amount clause of section 108(b)(2). In light of the differences among the three clauses, the court held that EPA reasonably interpreted “risk” in the latter two clauses to relate only to financial risks.¹⁸

The court also disagreed with the Petitioners’ argument that the mandatory language of section 108(b) required EPA to set financial responsibility requirements for the hardrock mining industry. While

¹⁶ *Idaho Conservation League, et al. v. EPA*, No. 18-1141 (D.C. Cir., filed May 16, 2018).

¹⁷ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

¹⁸ *Id.* at 502-504.

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the court acknowledged that section 108(b) says that EPA “shall” set requirements for certain classes of facilities, the statute gives EPA discretion to determine which classes of facilities to regulate.¹⁹

Lastly, the court rejected the Petitioners’ argument that EPA had failed to account adequately for risks to health and the environment. The court dispensed with this claim, having decided earlier that EPA had reasonably interpreted “risk” in the two relevant clauses of section 108(b) to relate only to financial risk of Fund expenditures.²⁰

The court also rejected Petitioners’ argument that EPA ignored some financial risks and relied on faulty economic analysis. The court concluded that EPA had analyzed the appropriate financial considerations, and the court found no “serious flaw” in EPA’s economic analysis.²¹

IV. Statutory Interpretation

EPA’s statutory interpretation, upheld by the D.C. Circuit as described above, provided the basis for the analytic approach followed in the hardrock mining final rule and subsequently used in the proposals being finalized in this notice. EPA is reiterating the statutory interpretation presented in the CERCLA section 108(b) Hardrock Mining Final Rule, and does not intend to reopen this interpretation. The analyses relied upon in the rulemakings that are the subject of today’s notice were consistent with this statutory interpretation.

CERCLA section 108(b) provides general instructions on how to determine what financial responsibility requirements to impose for a particular class of facility. Section 108(b)(1) directs EPA to develop regulations requiring owners and operators of facilities to establish evidence of financial responsibility “consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances.” Section 108(b)(2) directs that the “level of financial responsibility shall be initially established and, when necessary, adjusted to protect against the level of risk” that EPA “believes is appropriate based on the payment experience of the Fund,

¹⁹ *Id.* at 504-505.

²⁰ *Id.* at 505.

²¹ *Id.* at 505-508.

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commercial insurers, courts settlements and judgments, and voluntary claims satisfaction.” EPA interprets the risk to be addressed by financial responsibility under section 108(b) as the risk of the need for taxpayer-financed response actions. Read together, the statutory language on determining the degree and duration of risk and on setting the level of financial responsibility confers a significant amount of discretion on EPA.

Section 108(b)(1) directs EPA to evaluate risk from a selected class of facilities, but it does not suggest that a precise calculation of risk is either necessary or feasible. Although the cost of response associated with a particular site can be ascertained only once a response action is required, any financial responsibility requirements imposed under section 108(b) would be imposed before any such response action was identified. The statute thus necessarily confers on EPA wide latitude to determine, in a section 108(b) rulemaking proceeding, what degree and duration of risk are presented by the identified class.

Section 108(b)(2) directs EPA to establish the level of financial responsibility that EPA in its discretion believes is appropriate to protect against the risk. This statutory direction does not specify a methodology for the evaluation. Rather, this decision is committed to the discretion of the EPA Administrator. While the statute provides a list of information sources on which EPA is to base its decision—the payment experience of the Superfund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction—the statute does not indicate that this list of factors is exclusive, nor does it specify how the information from these sources is to be used, such as by indicating how these categories are to be weighted relative to one another.

EPA believes that sections 108(b)(1) and (b)(2) are sufficiently interrelated that it is appropriate to evaluate the degree and duration of risk under subsection (b)(1) by considering the factors enumerated in subsection (b)(2). EPA therefore concludes that Congress intended the risk associated with a particular class of facilities to mean the risk of future Fund-financed cleanup actions in that industry. This reading is supported by the structure of the statute, as section 108(b) appears between two provisions, Sections 108(a) and 108(c), related to cost recovery. Section 108(a), concerning financial assurance requirements

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for certain vessels, refers specifically to cleanup costs. And section 108(c), concerning recovery of costs from guarantors who provide the financial responsibility instruments, refers specifically to liability for cleanup costs. EPA thus reads “risk” in the general mandate of section 108(b)(1) and in the amount clause of section 108(b)(2) consistent with its meaning in sections 108(a) and (c); that is, the risk of Fund-financed cleanup. EPA adopted this interpretation in assessing the need for financial responsibility requirements under CERCLA section 108(b) for facilities in the first class of facilities it evaluated: the hardrock mining industry.²² In its opinion deciding the challenge to the final action for the hardrock mining industry, the U.S. Court of Appeals for the District of Columbia Circuit held that EPA’s interpretation that the provisions of section 108(b) “relate only to ensuring against financial risks associated with cleanup costs,” is reasonable and entitled to deference.²³

For the additional industry classes, EPA has investigated the payment history of the Fund, and enforcement settlements and judgments, to evaluate, in the context of these CERCLA section 108(b) rulemakings, the risk of a Fund-financed response action at facilities that would be subject to CERCLA financial responsibility requirements. The statute also authorizes EPA to consider the existence of federal and state regulatory requirements, including any financial responsibility requirements. 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.” According to the 1980 Senate Report on legislation that was later enacted as CERCLA, Congress considered it appropriate for EPA to examine those additional requirements when evaluating the degree and duration of risk under the language that was later enacted as CERCLA section 108(b):

The bill requires also that facilities maintain evidence of financial responsibility consistent with the degree and duration of risks associated with the production, transportation, treatment, storage, and disposal of hazardous substances. These requirements are in addition to the financial responsibility requirements promulgated under the authority of Section 3004(6) of the Solid Waste Disposal Act. It is not the intention of the Committee that operators of facilities covered by

²² 83 FR 7556, 7561-62 (Feb. 21, 2018).

²³ *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 504 (D.C. Cir. July 19, 2019).

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Section 3004(6) of that Act be subject to two financial responsibility requirements for the same dangers.²⁴

While the Senate Report mentions RCRA Section 3004(6) specifically, it is consistent with congressional intent for EPA to consider other potentially duplicative federal financial responsibility requirements when examining the “degree and duration of risk” in the context of CERCLA Section 108(b) to determine whether and what financial responsibility requirements are appropriate. It is also consistent with congressional intent for EPA to consider state laws before imposing additional federal financial responsibility requirements.

Consideration of state laws *before* developing financial responsibility regulations is consistent with CERCLA Section 114(d), which prevents states from imposing financial responsibility requirements for liability for releases of the same hazardous substances *after* a facility is regulated under Section 108 of CERCLA. Just as Congress intended to prevent states from imposing duplicative financial assurance requirements after EPA had acted to impose such requirements under Section 108, it is reasonable to also conclude that Congress did not mean for EPA to disrupt existing state programs that are successfully regulating industrial operations to minimize risk, including the risk of taxpayer liability for response actions under CERCLA, and that specifically include appropriate financial assurance requirements under state law. Reviews of both state programs and other federal programs help to identify whether and at what level there is current risk that is appropriate to address under CERCLA Section 108.

EPA also believes that, when evaluating whether and at what level it is appropriate to require evidence of financial responsibility, EPA should examine information on facilities in the subject universes operating under modern conditions. In other words, EPA should assess the types of facilities to which any new financial responsibility regulations would apply. Financial responsibility requirements under Section 108(b) would not apply to legacy operations that are no longer operating. Rather, any

²⁴ S. Rept. 96–848 (2d Sess, 96th Cong.), at 92.

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requirements would apply to facilities that follow current industry practices and are subject to the modern regulatory framework (i.e., the regulations currently in place that apply to the industry). These modern conditions include federal and state regulatory requirements and financial responsibility requirements that currently apply to operating facilities. This reading of Section 108(b) is consistent with statements in the legislative history of the statute. The 1980 Senate Report states that the legislative language that became Section 108(b) “requires those engaged in businesses involving hazardous substances to maintain evidence of financial responsibility commensurate with the risk which they present.”²⁵ This approach is also consistent with the analysis that EPA undertook, in developing its Final Action on Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry.²⁶ As described above in section III.B.5.c, EPA’s approach was upheld by the U.S. Court of Appeals for the District of Columbia Circuit.²⁷

This statutory interpretation is also reflected in today’s final actions. Any financial responsibility requirements imposed under Section 108(b) would apply to currently operating facilities. EPA thus sought to examine the extent to which hazardous substance management at currently operating facilities, as three individual classes, continues to present risk. Moreover, the statutory direction to identify requirements consistent with identified risks guides EPA’s interpretation that imposition of financial responsibility requirements under Section 108(b) would not be necessary for currently operating facilities that present minimal current risk of a Fund-financed response action. The interpretation in this proposal does not extend to any site-specific determinations of risk made in the context of individual CERCLA site responses. Those decisions will continue to be made in accordance with preexisting procedures.

As the basis for EPA’s proposed and final rulemakings, EPA has examined records of releases of hazardous substances from facilities operating under a modern regulatory framework and data on the actions taken and expenditures incurred in response to such releases. The data collected do not reflect

²⁵ S. Rept. 96–848 (2d Sess, 96th Cong.), at 92.

²⁶ 83 FR 7556 (Feb. 21, 2018).

²⁷ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

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historical practices, many of which would be illegal under current environmental laws and regulations. Instead, EPA has considered current federal and state regulation of hazardous substance production, transportation, treatment, storage, or disposal applicable to facilities in the electric power generation, transmission and distribution industry; the petroleum and coal products manufacturing industry; and the chemical manufacturing industry.

V. Electric Power Generation, Transmission and Distribution Industry

A. Proposed Rule

On July 29, 2019, EPA published a notice of proposed rulemaking (NPRM) on the first of the three additional industries.²⁸ In that notice, the Agency proposed to not impose financial responsibility requirements for the electric power generation, transmission, and distribution industry and described the analyses and results that were used to reach that decision.²⁹ The Agency received 27 comments on this proposed rulemaking. Comments received on the proposal and the Agency's responses are laid out in the Response to Comments document found in the docket to this final rulemaking.³⁰

B. Summary of Key Comments Received and Agency Response

Of the 27 comments received on the July 19, 2019 NPRM, 12 were in support of the Agency's proposal to not impose financial responsibility requirements for the electric power generation, transmission, and distribution industry and 15 were opposed.

1. Comments in Support of the Proposal

Seven of the comments the Agency received that supported the proposed rule were from companies in the electric utility industry. In addition, supporting comments were received from the Utility Solid Waste Activities Group, the Superfund Settlements Project, the American Coal Council, the National Mining Association, and a multi-industry comment from the U.S. Chamber of Commerce.

²⁸ 84 FR 36535 (Jul. 29, 2019).

²⁹ 84 FR 36535 (July 29, 2019).

³⁰ *Response to Comments Document: Financial Responsibility Requirement Under CERCLA 108(b) for Classes of Facilities in the Electric Power Generation, Transmission, and Generation Industry, November, 2020.*

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Commenters commended EPA for its consistency in the application of its analysis and methodology from the hardrock mining final action to the electric power generation, transmission and distribution industry. Commenters expressed that EPA had appropriately evaluated the risk of the industry and agreed that modern voluntary industry practices and existing federal and state regulations provide an effective framework for risk minimization. Thus, they found the conclusion that additional financial responsibility requirements were not warranted to be reasonable and encouraged the Agency to finalize the decision.

2. Comments Opposed to the Proposal

Twelve of the comments the Agency received that were opposed to the proposed rule were from private citizens. The commenters were concerned that the electric power generation, transmission, and distribution industry should be held accountable for environmental damages that resulted from their actions. Several commenters mentioned wildfires that occurred in California in 2018. It should be noted that the Agency's decision to not impose financial responsibility requirements under Section 108(b) does not diminish liability under CERCLA, and the cost of cleanups will continue to be the responsibility of the PRPs, not the Fund. In addition, comments opposing the proposed rule were received from Earthjustice, the Human Rights Watch, and the Chickaloon Village Traditional Council. Earthjustice submitted comments on behalf of Sierra Club, Earthworks, Environmental Integrity Project, and Western Organization of Resource Councils.

Many of the comments received on the electric power generation, transmission and distribution industry proposal were critical of the Agency's interpretation of the statute and the analyses EPA conducted to conclude that no CERCLA Section 108(b) financial responsibility rules are appropriate. The statutory interpretation presented in the CERCLA Section 108(b) Hardrock Mining Final Rule (described in *Statutory Interpretation* section above) continues to be the view of the Agency, and that interpretation is not reopened here. After consideration of the critical comments, EPA still concludes that the analyses conducted and information considered were appropriate, consistent with CERCLA, and show that risk

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posed by the electric power generation, transmission and distribution industry does not warrant financial responsibility requirements under CERCLA Section 108(b).

As part of its electric power generation, transmission and distribution industry proposal, EPA systematically evaluated CERCLA NPL, Superfund Alternative Approach (SAA), and removal sites and Coal Combustion Residuals (CCR) damage cases in the industry where cleanup actions and releases occurred. Specifically, EPA developed an analytic approach that considered cleanup cases to identify risk at currently operating facilities and where taxpayer funds were expended for response action. See discussion in the proposed rule³¹ for a detailed description of the analysis conducted. EPA's review of the Superfund NPL, SAA, and removal sites associated with the industry, and CCR damage cases identified as part of the 2015 CCR rule, found that, overwhelmingly, the industry was operating responsibly within the current modern regulatory framework. In fact, EPA's analysis determined that only two facilities in the industry had releases under the modern regulatory framework that required a Fund-financed response action. As a matter of due diligence, EPA conducted additional research into instances of releases or accidents at facilities in the industry cited in comments on the proposal. This additional research did not identify any new examples of the Superfund program bearing the costs of a cleanup. In fact, most of the issues were legacy matters from the 1970s and 80s, which the owner or operator of the facility addressed. EPA believes that the small set of federally funded cleanup cases due to recent contamination does not warrant the imposition of financial responsibility requirements on the entire electric power generation, transmission and distribution industry under CERCLA Section 108(b).

Additionally, as part of its proposal, to understand the modern regulatory framework applicable to currently operating facilities within the electric power generation, transmission and distribution industry, EPA compiled applicable federal and state regulations.³² Specifically, EPA looked to regulations that

³¹ 84 FR 36535, 36543-36550 (July 29, 2019).

³² *Summary Report: Federal and State Environmental Regulations and Industry Voluntary Programs in Place to Address CERCLA Hazardous Substances at Facilities in the Electric Power Generation, Transmission and Distribution Industry, June 2019.*

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address the types of releases identified in the cleanup cases. This review also considered industry voluntary programs that could reduce risk of releases. Finally, EPA also identified financial responsibility regulations that apply to facilities in the electric power generation, transmission and distribution industry,³³ and compliance and enforcement history for the relevant regulations.³⁴ Based on this review, and after reviewing the comments received, EPA maintains its preliminary conclusion that the network of federal and state regulations applicable to the electric power generation, transmission, and distribution industry creates a comprehensive framework that applies to prevent releases that could result in a need for a Fund-financed response action.

As discussed in the July 29, 2019 proposed rule, EPA had developed an analytic approach to determine whether the current risk under a modern regulatory framework within the electric power generation, transmission and distribution industry rose to a level that warrants imposition of financial responsibility requirements under CERCLA Section 108(b).³⁵ Earthjustice commented that the term “modern” is not an objective standard, and that it “will change any time any new federal or state law is adopted. In effect, under this approach, if a new law is adopted tomorrow, EPA can use that law as a basis for ignoring all relevant evidence, without regard to whether the new law meaningfully addresses the risk of contamination.”³⁶ While the Agency agrees the term modern can be subjective, it is used in this case to distinguish the current regulatory landscape versus the one that existed at the time of the passage of the CERCLA statute. Acknowledgment of current federal and state laws that specifically address risks posed by this industry is appropriate to consider in determining whether there is risk of future Fund expenditures. In particular, in the proposal, EPA identified the prevalent sources of risk that were identified in the cleanup cases reviewed. EPA then evaluated the extent to which activities that contributed to the risk associated with the production, transportation, treatment, storage, or disposal of

³³ *Review of Existing Financial Responsibility Laws Potentially Applicable to Classes of Facilities in the Electric Power Generation, Transmission, and Distribution Industry, June 2019.*

³⁴ *Enforcement, Court Settlements and Judgments in the Electric Power Generation, Transmission and Distribution Industry, June 2019.*

³⁵ 84 FR 36535, 36540 (Jul. 29, 2019).

³⁶ EPA-HQ-OLEM-2019-0085-0412

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hazardous substances are now regulated. EPA recognized that substantial advances had been made in the development of manufacturing, pollution control, and waste management practices, as well as the implementation of federal and state regulatory programs to both prevent and address such releases at facilities in the electric power generation, transmission, and distribution industry. This analysis is consistent with the approach utilized in the Final Action for Facilities in the Hardrock Mining Industry and upheld by the D.C. Circuit.³⁷

Earthjustice also raised the point that the existence of federal and state regulations does not ensure prevention of releases, and that legacy contamination exists at currently operating facilities. EPA notes that financial responsibility requirements under Section 108(b) would not apply to legacy operations that are no longer operating. Rather, any Section 108(b) requirements would apply to facilities that follow current industry practices and are subject to the modern regulatory framework (i.e., the regulations currently in place that apply to the industry). These modern conditions include federal and state regulatory requirements and financial responsibility requirements that currently apply to operating facilities. In contrast to Earthjustice's point, EPA's analysis found that the efficacy of current regulations, as well as voluntary industry practices, while difficult to quantify, have had a demonstrably positive effect in reducing the number of cleanups that require taxpayer expenditures. This was borne out in the analyses conducted in the proposed rule, the results of which indicated that there was no need for further financial responsibility requirements on this industry. An example of an important risk reducing requirement, which targets both legacy and future releases, is the requirement for groundwater monitoring and for corrective action in the 2015 Coal Combustion Residuals rule, for which implementation is ongoing.³⁸ EPA's 2015 CCR Rule established a first-ever comprehensive set of minimum requirements for the management and disposal of coal ash in landfills and surface impoundments. Among the key requirements included in the rule were structural integrity criteria for CCR surface impoundments, such as

³⁷ *Idaho Conservation League v. Wheeler*, 930 F.3d 494, (D.C. Cir. 2019).

³⁸ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302, Apr. 17, 2015 ("2015 CCR Rule").

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periodic hazard potential classification assessments, development of an Emergency Action Plan, periodic structural stability assessments that must document whether the design, construction, operation and maintenance of the unit meets certain stability criteria; periodic safety factor assessments (that must be met or closure will be required); and routine inspections. The rule also required the installation of groundwater monitoring wells and an ongoing groundwater monitoring program designed to detect releases of critical constituents, as well as requirements to clean up any releases. The combination of these requirements and others in the rule have substantially mitigated the risks from these facilities.

The 2015 CCR Rule also established timelines and standards for closure and post-closure care. Specifically, the rule requires all CCR units to close in accordance with specified standards and to monitor and maintain the units for a period of time after closure, including the groundwater monitoring and corrective action programs. These criteria help ensure the long-term safety of closed CCR units.

Earthjustice and Human Rights Watch opposed the Agency's reliance on the *Disposal of Coal Combustion Residuals from Electric Utilities Final Rule* to evaluate risk posed by this industry for two reasons – first, commenters argued, because it has no proven track record, and secondly, the Agency has had to reconsider, on remand, portions of the 2015 rule as a result of the decision in *Utility Solid Waste Activities Group (USWAG) et al. v. EPA*.³⁹ In fact, the *USWAG* decision invalidated only a limited portion of the 2015 rule. Furthermore, the Water Infrastructure Improvements for the Nation Act (WIIN Act) of 2016 has enhanced the program by providing EPA additional authorities. Section 2301 of the WIIN Act amends Section 4005 of RCRA to provide for state CCR permit programs. As a consequence of the D.C. Circuit's decision in *USWAG*, unlined, including clay lined, surface impoundments must cease receipt of waste and initiate closure, which will further reduce risks to human health and the environment. To implement this decision, EPA recently promulgated regulations requiring that unlined surface impoundments and CCR units that fail the aquifer location restriction cease receiving waste and initiate closure by April 11, 2021, unless a facility qualifies for one of two narrow extensions. Further, EPA is

³⁹ *Utility Solid Waste Activities Group (USWAG) et al. v. EPA*, No. 15-1219 (D.C. Cir. Aug. 21, 2018).

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working on developing a permit program that will increase the oversight of these facilities. Finally, EPA is diligently working with many states to aid in the development of state CCR permitting programs that are at least as protective as the federal CCR regulations. Before the 2015 CCR Rule was promulgated, states were not required to adopt or implement the regulations or to develop a permit program. It also did not provide a mechanism for EPA to approve a state permit program to operate “in lieu of” the federal regulations. The WIIN Act provides EPA the authority to review and approve state CCR permit programs. The Act also allows EPA to develop permits for those units located on tribal lands and, if given specific appropriations, EPA will develop a permitting program for those units located in non-participating states. In addition, EPA must review State permit programs at least once every 12 years and in certain specific situations. The WIIN Act also expands the enforcement authorities available to EPA. EPA may use its information gathering and enforcement authorities under RCRA Sections 3007 and 3008 to enforce the 2015 CCR Rule or permit provisions. All of these actions will further ensure that CCR units are properly regulated to protect human health and the environment. Moreover, EPA notes that the Electric Power sector has generated very few Superfund sites even prior to the 2015 CCR rule.

Earthjustice disagreed with EPA’s screening out from its analyses sites where the response actions were funded by private parties as opposed to the government. Earthjustice suggested that it is contrary to CERCLA to focus only on financial risk. In addition, Earthjustice raised concerns about the magnitude and potential long duration of cleanups in the industry, in particular at coal ash facilities.

As a primary matter, EPA’s approach and the factors the Agency considered to determine whether or not financial responsibility requirement were appropriate for the electric power generation, transmission, and distribution industry is consistent with CERCLA (see *Statutory Interpretation* section above). A chief factor was the results of EPA’s cleanup case analysis which involved a systematic examination of Superfund sites (NPL, removal, SAA) and CCR damage cases. EPA’s analysis, described in detail in section VII of the proposed rule,⁴⁰ showed that facilities in the sector have not historically

⁴⁰ 84 FR 36535, 36543 (July 29, 2019).

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burdened the Fund. First, the Agency identified very few NPL sites with pollution associated with the electric power generation, transmission, and distribution industry. Of the only five NPL sites associated with the Electric Power industry identified, all were either the product of legacy contamination or had PRP leads conducting the cleanup. The Agency also reviewed 27 CCR damage cases and 24 Superfund removal sites associated with the industry and identified only two removal sites where addressing pollution from a modern operation required Superfund expenditures. This minimal historical fund burden is, in part, due to the fact that the potentially responsible parties (PRPs) led many of the cleanups identified. For example, all of the NPL sites associated with the industry were PRP-led as were all of the CCR damage cases for which cleanup lead information was available. Further supporting this finding is the fact that when a cleanup is required under Superfund or corrective action, financial assurance is typically required. Moreover, as discussed below, EPA conducted additional research into examples of releases at facilities in the electric power generation, transmission, and distribution industry identified by commenters. That additional research did not identify any new examples of the Superfund program bearing the costs of a cleanup. The limited number of actions within the sector, combined with its track record of funding cleanups weighs against the need for regulation under CERCLA Section 108(b).

The comment also intended to suggest that CERCLA Section 108(b) financial responsibility could promote rapid cleanup in instances of pollution. As a primary matter, this is not necessarily the case. EPA believes any CERCLA Section 108(b) financial responsibility required for any industry would complement existing Superfund processes by offering a financial backstop for CERCLA costs and damages (see the relevant language at 84 FR 3400 included in the hardrock mining proposal). The financial responsibility would not modify the existing Superfund enforcement authorities, including those to gather information, identify responsible parties, effect cleanup (especially through EPA's enforcement first policy), assess penalties, or provide for citizen suits. In instances where releases occurred that required a Superfund cleanup the same Superfund process would occur as does today.

Of note is that the Superfund program protects human health and the environment regardless of

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whether or not financial responsibility is in place. EPA can invoke its enforcement authorities to protect human health and the environment. For example, EPA can issue a Unilateral Administrative Order or conduct a removal action to mitigate potential risks posed by the site conditions. If the Agency has to use fund resources to conduct a cleanup, EPA can take an enforcement action to recover its CERCLA costs and replenish government resources. It is thus not accurate to suggest a lack of CERCLA Section 108(b) financial responsibility would result in delays of cleanup and therefore an increased risk to human health and the environment.

Earthjustice took issue with EPA's interpretation of the statute, stating that EPA's "interpretation of the statute to focus solely on the risk of a taxpayer bailout of insolvent companies is contrary to law, because this is not the purpose of CERCLA."⁴¹ Earthjustice contends that EPA ignored significant risks to human health and the environment. The primary example offered by the commenters was risk to human health and drinking water sources from coal ash. EPA believes that the site analysis for this rulemaking effectively considered human health and environmental risk in multiple steps. First, EPA examined through the Agency's industry practices and environmental characterization analysis the operational practices and environmental profile of the electric power generation, transmission, and distribution industry. This analysis included an examination of the potentially hazardous materials used in the industry, hazardous wastes generated by industry processes, the units used to manage wastes at these sites, how on-site management of these materials can potentially contribute to releases, and what contaminants might be released by the industry that could impact human health and the environment. Next, EPA investigated in what ways the industry is subject to a wide range of modern federal and state regulatory requirements and enforcement oversight imposed to address this potential human health and environment risk. In these analyses, EPA outlined the framework of modern federal and state regulatory programs to which the industry is subject,⁴² and also examined compliance and enforcement for the

⁴¹ EPA-HQ-OLEM-2019-0085-0412.

⁴² *Summary Report: Federal and State Environmental Regulations and Industry Voluntary Programs in Place to Address CERCLA Hazardous Substances at Facilities in the Electric Power Generation, Transmission and Distribution Sector*, June

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industry,⁴³ which collectively demonstrate how these components work to address potential risk for modern industry operations. Overall, EPA’s full analytic approach developed for the proposed rule examined sites with a variety of contaminants and contaminated media. In effect, the analysis considered the types of human health and environmental risk the Superfund program was designed to address, and that would be addressed by any CERCLA Section 108(b) financial responsibility. This analysis employed by the Agency is consistent with EPA’s interpretation of the statutory language and was upheld by the D.C. Circuit⁴⁴, which found that EPA’s focus on risk of taxpayer-funded response actions was reasonable. Specifically, the Court stated in its decision, “we defer to the EPA’s interpretation that it should set financial responsibility regulations based on financial risks, not risks to health and the environment.”⁴⁵ EPA’s analysis based on this interpretation showed that there is little evidence of the facilities operating under a modern regulatory framework burdening the Fund.

An additional related concern of Earthjustice was that EPA’s analysis of the economics of the industry identified risks in certain subsectors of the electric power generation, transmission, and distribution industry and thus, the commenter argues, those subsectors merit regulation under Section 108(b). To further assess these concerns related to the financial risks posed by the industry, EPA updated its analysis supporting the Economic Sector Profile originally conducted in support of the proposed rulemaking. This updated analysis finds the financial stability of the industry relatively unchanged from the original report, further suggesting that the economic conditions of the industry as a whole are not at undue risk.⁴⁶ Numerous commenters also provided further evidence in response to information presented in the proposed rule regarding the positive economic standing of the electric power generation, transmission, and distribution industry. Commenters attributed the positive economic standing to

2019.

⁴³ *Enforcement, Court Settlements and Judgments in the Electric Power Generation, Transmission and Distribution Industry*, June 2019.

⁴⁴ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

⁴⁵ *Id.* at 504.

⁴⁶ *Addendum Update to CERCLA 108(b) Economic Sector Profile: Electric Power Generation, Transmission, and Distribution Industry*, May 2020.

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attributes such as the industry's critical monopolistic commodity, inherent governmental nature and oversight, transparent corporate structures, public service goals, broad adherence to strict accounting standards set forth by the Governmental Accounting Standards Board (GASB), and lower relative costs of securing capital.

Some commenters also pointed more specifically to the market decline in coal-fired power generation as a source of particular concern. In both the original Economic Sector Profile and Updated Addendum, EPA acknowledges that this subsector is in a period of transition and on weaker standing compared to the industry overall. However, analyses by the U.S. Energy Information Agency (EIA) forecast that by 2025, the rate of coal plant retirements will stabilize, with steady coal-based generation thereafter over the longer term.⁴⁷ Furthermore, characteristics of diversity in terms of organizational structure, ownership type, and energy portfolios are expected to help further stabilize this subsector. Thus, while the subsector may experience a continued decline in capacity and generation levels in the near term, it is forecasted to stabilize and continue to play a material role in electricity generation for decades, even as renewable generation capacity increases significantly. As such, EPA believes that, as with the industry as a whole, the financial stability of this subsector similarly negates the need for regulation under CERCLA Section 108(b).

Also included in the comments were examples of recent accidents and releases at facilities in the electric power generation, transmission, and distribution industry, in particular facilities that manage CCRs. EPA appreciated the comments and undertook additional due diligence to examine some of these releases and accidents referenced by the commenter. While most accidents and releases do not lead to Superfund responses, Fund expenditures, or CERCLA liability claims, and the commenters provided no indication a Superfund response resulted from the incidents in question, EPA acknowledged the possibility that some of these releases and accidents may have required Superfund actions, which the Agency may have missed in the analysis conducted as part of the proposal. As such, EPA examined a

⁴⁷ Annual Energy Outlook 2020 (AEO 2020).

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selection of the cases referenced by the commenter to better understand the consequences of these incidents, to the extent possible.

In the case of the electric power generation, transmission, and distribution industry proposal, many of the referenced releases were legacy issues which the 2015 CCR rule was designed to address. EPA did not conduct further research into these examples. Likewise, EPA did not conduct further research into accidents and releases referenced by commenters that were already accounted for in the proposed rule. Only a small number of facilities with releases identified by commenters may have represented instances of pollution occurring under a modern regulatory framework resulting in a taxpayer funded Superfund action that were not already accounted for by the EPA proposal. EPA examined these few facilities in greater detail. In all cases, EPA determined that the contamination was a legacy issue stemming from the 1970s and 1980s. Moreover, the pollution was abated, and the owner or operator has or is addressing the issue in all of the cases. As such, EPA does not believe the incidents cited by commenters merit a change in direction from the original proposal. More information on the incidents cited by commenters and researched by EPA is provided in the docket in the spreadsheet titled *NAICS 2211 Incident research* containing the information gathered, information sources considered and summary findings.⁴⁸

C. Decision to Not Impose Requirements

Based on the analyses conducted for the July 29, 2019 proposed rule, described in detail in the background documents for that notice, as well as additional analyses conducted in response to comments received on that notice, the Agency is finalizing the decision that the degree and duration of risk posed by the electric power generation, transmission and distribution industry does not warrant financial responsibility requirements under CERCLA Section 108(b). As such, this rulemaking will not impose CERCLA Section 108(b) financial responsibility requirements for facilities in the electric power

⁴⁸ See spreadsheet, in docket for this action, titled "NAICS 2211_Incident research.xlsx".

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generation, transmission, and distribution industry. EPA did not receive evidence from any commenter that changed the Agency's determination from that proposed previously.

Central to this final rulemaking decision is EPA's position that the analyses conducted for the proposal are consistent with the statutory language of CERCLA Section 108(b), described in Section IV above (*Statutory Interpretation*). EPA is further assured of this position following the decision by the D.C. Circuit that upheld EPA's interpretation of the statutory language of CERCLA Section 108(b).⁴⁹ The analyses consistent with this interpretation showed that under the modern regulatory framework that applies to the electric power generation, transmission, and distribution industry, little evidence of burden to the Fund by facilities in this industry exists.

EPA believes that the evaluation of the electric power generation, transmission and distribution industry conclusively demonstrates, by the low occurrence of cleanup sites that significantly impact the Fund, low risk of a Fund-financed response action at current electric power generation, transmission and distribution operations. The reduction in risks, relative to when CERCLA was first established, attributable to the requirements of existing regulatory programs and voluntary practices combined with reduced costs to the taxpayer—demonstrated by EPA's cleanup case analysis, existing financial responsibility requirements, and enforcement actions—has reduced the need for federally-financed response action at facilities in the electric power generation, transmission and distribution industry.

VI. Petroleum and Coal Products Manufacturing Industry

A. Proposed Rule

On December 23, 2019, EPA published a notice of proposed rulemaking (NPRM) on the second of the three additional industries.⁵⁰ In that notice, the Agency proposed to not impose financial responsibility requirements for the petroleum and coal products manufacturing industry and described the analyses and results that were used to reach that decision. The Agency received 10,381 comments on this

⁴⁹ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

⁵⁰ 84 FR 70467 (Dec. 23, 2019).

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proposed rulemaking, of which 10,216 were from a mass mail campaign and 165 comments were unique. Comments received on the proposal and the Agency's responses are laid out in the Response to Comments document found in the docket to this final rulemaking.⁵¹

B. Summary of Key Comments Received and Agency Response

Of the 165 unique comments received on the December 23, 2019 NPRM, 6 were in support of the Agency's proposal to not impose financial responsibility requirements for the petroleum and coal products manufacturing industry and 159 were opposed, which includes 142 comments that were associated with the mass mail campaign and 17 other unique comments.

1. Comments in Support of the Proposal

The Agency received comments from the American Coke and Coal Chemicals Institute, the American Fuel and Petrochemical Manufacturers, the American Petroleum Institute (API), Sun Coke Energy, the Superfund Settlements Project, and a multi-industry comment from the U.S. Chamber of Commerce in support of the proposed rule.

Commenters in support of the proposal said that petroleum refineries are owned by very large and stable companies with superior economic resources, and that modern regulations adequately mitigate risks posed by the industry. One commenter stated that "of all the petroleum refineries that have closed since 1990, not a single facility has been added to the NPL that required the expenditure of public funds." Further, they added that "legacy sites that have been addressed through Superfund largely operated prior to the implementation of the modern regulatory system and are not representative of today's petroleum refinery operations."⁵²

In addition, commenters on the petroleum and coal products manufacturing industry proposal positively cited the July 19, 2019 opinion from the D.C. Circuit, as support for the Agency's final action

⁵¹ *Response to Comments Document: Financial Responsibility Requirement Under CERCLA 108(b) for Classes of Facilities in the Petroleum and Coal Products Manufacturing Industry, November, 2020.*

⁵² EPA-HQ-OLEM-2019-0087-0468.

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to not impose CERCLA Section 108(b) financial responsibility requirements for facilities in the petroleum and coal products manufacturing industry.⁵³

2. Comments Opposed to the Proposal

Of the 159 comments received that were opposed to the proposed rule, 158 were from private citizens, including 142 comments that were associated with the mass mail campaign and 16 other unique comments, and one was from Earthjustice. The comments from private citizens concerned holding petroleum and coal products manufacturers accountable for environmental damages as a result of their actions. Many commenters were under the belief that the Agency was “rolling back” existing regulations requiring industry accountability. In fact, this rulemaking does not revoke or reverse any existing regulations. As with the other industries, the Agency’s decision to not impose financial responsibility requirements under Section 108(b) does not diminish liability under CERCLA, and the cost of cleanups will continue to be the responsibility of the PRPs, not the Fund. Earthjustice submitted comments on behalf of Communities for a Better Environment, Center for Biological Diversity, Earthworks, Sierra Club, Idaho Conservation League, Amigos Bravos, Great Basin Resource Watch, and Public Citizen.

Many of the comments received on the petroleum and coal products manufacturing industry proposal were critical of the Agency’s interpretation of the statute and the analyses EPA conducted to conclude that no CERCLA Section 108(b) financial responsibility rules are necessary. The statutory interpretation presented in the CERCLA Section 108(b) Hardrock Mining Final Rule (described in *Statutory Interpretation* section above) continues to be the view of the Agency, and that interpretation is not reopened here. After consideration of the critical comments, EPA still concludes that the analyses conducted and information considered were appropriate, consistent with CERCLA, and show that risk posed by the petroleum and coal products manufacturing industry does not warrant financial responsibility requirements under CERCLA Section 108(b).

⁵³ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

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As part of its petroleum and coal products manufacturing industry proposal, EPA systematically evaluated CERCLA NPL, Superfund Alternative Approach (SAA), and removal sites in the industry where releases and cleanup actions occurred. Specifically, EPA developed an analytic approach that considered cleanup cases to identify risk at currently operating facilities and where taxpayer funds were expended for response action. See discussion in the proposed rule⁵⁴ for a detailed description of the analysis conducted. EPA's review of the Superfund NPL, SAA, and removal sites associated with the industry found that, overwhelmingly, the industry was practicing responsibly within the current regulatory framework, with just one site indicating a significant impact to the Fund while operating under the modern regulatory framework. EPA described this site in detail in the Removals Site Analysis background document to the proposal.⁵⁵ EPA believes that the small set of federally funded cleanup cases due to recent contamination does not warrant the imposition of costly financial responsibility requirements on the entire petroleum and coal products manufacturing industry under CERCLA Section 108(b).

Additionally, as part of its proposal, to understand the modern regulatory framework applicable to currently operating facilities within the petroleum and coal products manufacturing industry, EPA compiled applicable federal and state regulations.⁵⁶ Specifically, EPA looked to regulations that address the types of releases identified in the cleanup cases. This review also considered industry voluntary programs that could reduce risk of releases. Finally, EPA also identified financial responsibility regulations that apply to facilities in the petroleum and coal products manufacturing industry,⁵⁷ and compliance and enforcement history for the relevant regulations.⁵⁸ Based on this review, and after reviewing the comments received, EPA maintains its preliminary conclusion that the network of federal

⁵⁴84 FR 70475-70482.

⁵⁵ *Identification and Evaluation of CERCLA 108(b) Petroleum and Coal Products Manufacturing non-National Priorities List (NPL) Removal Sites.*

⁵⁶ *Summary Report: Federal and State Environmental Regulations and Industry Voluntary Programs in Place to Address CERCLA Hazardous Substances at Petroleum Refineries and Other Petroleum and Coal Products Manufacturing Facilities.*

⁵⁷ *Review of Existing Financial Responsibility Laws Potentially Applicable to Classes of Facilities in the Petroleum and Coal Products Manufacturing Industry.*

⁵⁸ *Enforcement, Court Settlements and Judgments in the Petroleum and Coal Products Manufacturing Industry.*

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and state regulations applicable to the petroleum and coal products manufacturing industry creates a comprehensive framework that applies to prevent releases that could result in a need for a Fund-financed response action.

As discussed in the December 23, 2019 proposed rule, EPA had developed an analytic approach to determine whether the current risk under a modern regulatory framework within the petroleum and coal products manufacturing industry rose to a level that warrants imposition of financial responsibility requirements under CERCLA Section 108(b).⁵⁹ Earthjustice commented that relying on the term “modern” is EPA’s “basis for ignoring significant evidence of risk.”⁶⁰ The Agency uses the term modern in this case to distinguish the current regulatory landscape versus the one that existed at the time of the passage of the CERCLA statute. Acknowledgment of current federal and state laws that specifically address risks posed by this industry is appropriate to consider in determining whether there is risk of future Fund expenditures. In particular, in the proposal, EPA identified the prevalent sources of risk that were identified in the cleanup cases reviewed. EPA then evaluated the extent to which activities that contributed to the risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances are now regulated. EPA recognized that substantial advances had been made in the development of manufacturing, pollution control, and waste management practices, as well as the implementation of federal and state regulatory programs to both prevent and address such releases at facilities in the petroleum and coal products manufacturing industry. This analysis is consistent with the approach utilized in the Final Action for Facilities in the Hardrock Mining Industry and upheld by the D.C. Circuit.⁶¹

Earthjustice also raised the point that the existence of federal and state regulations does not ensure prevention of releases, and that legacy contamination exists at currently operating facilities. EPA notes that financial responsibility requirements under Section 108(b) would not apply to legacy operations that

⁵⁹ 84 FR 36540 (Jul. 29, 2019).

⁶⁰ EPA-HQ-OLEM-2019-0087-0474

⁶¹ *Idaho Conservation League v. Wheeler*, 930 F.3d 494, (D.C. Cir. 2019).

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are no longer operating. Rather, any Section 108(b) requirements would apply to facilities that follow current industry practices and are subject to the modern regulatory framework (i.e., the regulations currently in place that apply to the industry). These modern conditions include federal and state regulatory requirements and financial responsibility requirements that currently apply to operating facilities. In contrast to Earthjustice's point, EPA's analysis found that the efficacy of current regulations, as well as voluntary industry practices, while difficult to quantify, have had a demonstrably positive effect in reducing the number of cleanups that require taxpayer expenditures. This was borne out in the analyses conducted in the proposed rule, the results of which indicated that there was no need for further financial responsibility requirements on this industry.

Earthjustice disagreed with EPA's screening out from its analyses sites where the response actions were funded by private parties as opposed to the government. Earthjustice suggested that it is contrary to CERCLA to focus only on financial risk. In addition, Earthjustice raised concerns about the magnitude and potential long duration of cleanups in the industry.

As a primary matter, EPA's approach and the factors the Agency considered to determine whether or not financial responsibility requirements were appropriate for the petroleum and coal products manufacturing industry is consistent with CERCLA (see *Statutory Interpretation* section above). A chief factor was the results of EPA's cleanup case analysis which involved a systematic examination of Superfund sites (NPL, removal, and SAA). EPA's analysis, described in detail in section VII of the proposed rule,⁶² showed that facilities in the sector have not historically burdened the Fund in that the Agency identified only one site where pollution from a modern operation required significant Superfund expenditures to address. None of the NPL sites burdened the Fund with pollution that occurred while operating under a modern regulatory framework. This is, in part, due to the fact that the potentially responsible parties (PRPs) led many of the cleanups identified. For example, 19 of the 34 NPL sites associated with the industry were PRP led. Further supporting this finding is the fact that when a cleanup

⁶² 84 FR 70467, 70475 (Dec. 23, 2019).

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is required under Superfund or corrective action or RCRA, financial assurance is typically required. Moreover, as discussed below, EPA conducted additional research into examples of releases at facilities in the petroleum and coal products manufacturing industry by commenters. That additional research identified only four new examples of the Superfund program bearing the costs of a cleanup. The limited number of actions within the sector, combined with its track record of funding cleanups weighs against the need for regulation under CERCLA Section 108(b).

The comment also intended to suggest that CERCLA Section 108(b) financial responsibility could promote rapid cleanup in instances of pollution. As a primary matter, this is not necessarily the case. EPA believes any CERCLA Section 108(b) financial responsibility required for any industry would complement existing Superfund processes by offering a financial backstop for CERCLA costs and damages (see the relevant language at 84 FR 3400 included in the hardrock mining proposal). The financial responsibility would not modify the existing Superfund enforcement authorities, including those to gather information, identify responsible parties, effect cleanup (especially through EPA's enforcement first policy), assess penalties, or provide for citizen suits. In instances where releases occurred that required a Superfund cleanup, the same Superfund process would occur as does today.

Of note is that the Superfund program protects human health and the environment regardless of whether or not financial responsibility is in place. EPA can invoke its enforcement authorities to protect human health and the environment. For example, EPA can issue a Unilateral Administrative Order or conduct a removal action to mitigate potential risks posed by the site conditions. If the Agency has to use fund resources to conduct a cleanup, EPA can take an enforcement action to recover its CERCLA costs and replenish government resources. It is thus not accurate to suggest a lack of CERCLA Section 108(b) financial responsibility would result in delays of cleanup and therefore an increased risk to human health and the environment.

Earthjustice took issue with EPA's interpretation of the statute, stating that EPA's "interpretation of the statute to focus solely on the risk of a taxpayer bailout of insolvent companies is contrary to law,

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because this is not the purpose of CERCLA.”⁶³ Earthjustice contends that EPA ignored significant risks to human health and the environment. Specifically, the comment stated the Agency ignored vast amounts of data that links large oil refineries to toxic pollutants contaminating drinking water. EPA believes that the site analysis for this rulemaking effectively considered human health and environmental risk in multiple steps. First, EPA examined through the Agency’s industry practices and environmental characterization analysis the operational practices and environmental profile of the petroleum and coal products manufacturing industry. This analysis included an examination of the potentially hazardous materials used in the industry, hazardous wastes generated by industry processes, the units used to manage wastes at these sites, how on-site management of these materials can potentially contribute to releases, and what contaminants might be released by the industry that could impact human health and the environment. Next, EPA investigated in what ways the industry is subject to a wide range of modern federal and state regulatory requirements and enforcement oversight imposed to address this potential human health and environment risk. In these analyses, EPA outlined the framework of modern federal and state regulatory programs to which the industry is subject,⁶⁴ and also examined compliance and enforcement for the industry,⁶⁵ which collectively demonstrate how these components work to address potential risk for modern industry operations. Overall, EPA’s full analytic approach developed for the proposed rule examined sites with a variety of contaminants and contaminated media. In effect, the analysis considered the types of human health and environmental risk the Superfund program was designed to address, and that would be addressed by any CERCLA Section 108(b) financial responsibility. This analysis employed by the Agency is consistent with EPA’s interpretation of the statutory language and was upheld by the D.C. Circuit⁶⁶, which found that EPA’s focus on risk of taxpayer-funded response actions was reasonable. Specifically, the Court stated in its decision, “we defer to the EPA’s interpretation that it should set

⁶³ Id.

⁶⁴ *Summary Report: Federal and State Environmental Regulations and Industry Voluntary Programs in Place to Address CERCLA Hazardous Substances at Petroleum Refineries and Other Petroleum and Coal Products Manufacturing Facilities.*

⁶⁵ *Enforcement, Court Settlements and Judgments in the Petroleum and Coal Products Manufacturing Industry.*

⁶⁶ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

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financial responsibility regulations based on financial risks, not risks to health and the environment.”

EPA’s analysis based on this interpretation showed that there is little evidence of the facilities operating under a modern regulatory framework burdening the Fund.

Many of the commenters asserted that, too often, companies file for bankruptcy and avoid financial responsibility for cleaning up harmful pollution. To further assess these concerns, EPA updated its analysis supporting the Economic Sector Profile originally conducted in support of the proposed rulemaking. This update was conducted with data available concurrent with the close of comment period for the proposed rule. This updated analysis finds the financial stability of the industry relatively unchanged from the original report, further suggesting that the economic conditions of the industry as a whole are not at undue risk.⁶⁷ In addition, no evidence was identified or provided by commenters that EPA could use to determine that companies in this industry were found to have avoided responsibility for cleanup costs that resulted in CERCLA funds being expended.

Also included in comments from Earthjustice were examples of recent accidents and releases at petroleum refineries.⁶⁸ EPA appreciated the comments and undertook additional due diligence to examine and analyze some of these releases and accidents referenced by the commenter. While most accidents and releases do not lead to Superfund responses, Fund expenditures, or CERCLA liability claims, and the commenters provided no indication a Superfund response resulted from the incidents in question, EPA acknowledged that it is possible some of these releases and accidents may have required Superfund actions which the Agency may have missed in the analysis conducted as part of the proposal. As such, EPA examined a selection of the cases referenced by Earthjustice to better understand the consequences of these incidents, to the extent possible.

In the case of the petroleum and coal products manufacturing industry proposal, the selection criteria were based on whether or not releases to land or water were indicated, whether or not data were

⁶⁷ *Addendum Update to CERCLA 108(b) Economic Sector Profile: NAICS 324 - Petroleum and Coal Products Manufacturing; May 2020.*

⁶⁸ EPA-HQ-OLEM-2019-0087-0474.

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available, and whether or not the facility was already in the Agency's record. Many of the referenced releases were in the form of data sets of compiled releases. In some cases, there was insufficient information for EPA to identify the underlying data sources or names of specific facilities and thus EPA was unable to conduct further research into those incidents. One specific site referenced, the Oklahoma Refining Company site, was already included in the NPL sites reviewed as part of the proposal and thus was not investigated further. In that case, the contamination at the site was the result of legacy practices that pre-dated RCRA and many other environmental protections. Finally, EPA did not conduct additional investigation into specific incidents of flaring identified by the commenter at refineries, as the practice is actually a common safety practice and highly unlikely to require a response action.

In addition to the facilities selected for research using the above criteria, EPA was able to conduct additional research on a sample of 20 sites provided in a data set from the California Office of Emergency Services referenced by the commenter. In total, EPA conducted research into 43 petroleum and coal products manufacturing facilities with releases or accidents identified by commenters that may have represented instances of pollution occurring under a modern regulatory framework resulting in a taxpayer funded Superfund action.

Generally, the incidents EPA researched fell into three categories: 1) catastrophic fires, explosions, or environmental releases that endangered worker and community safety and/or caused environmental harm; 2) Clean Water Act, Clean Air Act, and RCRA violations records; and 3) flaring and other minor refinery incidents that were reported to the California Office of Emergency Services. The majority of the information collected about those incidents as part of the supplementary research effort indicated that other primary responders and enforcing agencies (such as the Occupational Safety and Health Administration (OSHA), or state and county agencies) managed the situation, or that it was unclear or unlikely that environmental contamination had occurred as a result of the incident. In total, five of the incidents resulted in EPA response action and/or expenditure. Four of these were removal actions and one an enforcement action. Of these five, the information collected suggests that EPA was able to

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recover its response costs from the potentially responsible parties (PRPs) at one of the sites. In the remaining four, the EPA Superfund expenditures to date have been minimal. The sites (or incidents, identified by site) and the associated expenditures (listed in parentheses) are the Philadelphia Energy Solutions site in Philadelphia, PA (\$85,000), the Husky Refinery in Superior, WI (\$200,000), the Chevron Refinery Fire in Richmond, CA (\$16,250), and the Caribbean Petroleum Refining Tank Explosion and Fire in Bayamon, PR (\$178,295). Recovery of these minimal costs is possible in light of the viable owners and operators at the sites that plan to either redevelop the site or rebuild the facility. For example, at the Philadelphia Energy Solutions site, the current owner operator plans to permanently close the refinery and redevelop the property. A former owner operator is already conducting cleanup of pollution at the site that existed as of 2012 under a 2012 RCRA/CERCLA settlement that includes a financial assurance requirement.⁶⁹ Additionally, at two of the sites the owner or operator have agreed to conduct significant environmental work as part of settlements with EPA and other parties. Accordingly, EPA does not believe the incidents cited by commenters merit a change in direction from the proposal.

Moreover, these examples of releases indicated that the modern regulatory framework has robust response and coordination mechanisms in place to respond to such incidents. The major releases triggered responses from a variety of parties including state and federal environmental regulators and state and federal occupational safety responses that undertook appropriate actions (e.g., fines, orders). For example, at the 2007 Valero refinery fire in Sunray, TX, both EPA and the Texas Commission on Environmental Quality (TCEQ) responded to the incident. TCEQ conducted some initial air monitoring and sampling at the site. Valero conducted all other response activities: fire suppression, asbestos air sampling, wet removal of asbestos debris, air monitoring, neutralization of acid spill, assessment of leaking propane line, and assessment of all units for damage. EPA and TCEQ monitored progress at the facility, but departed the site three days after the fire on account of the situation being stable. More information on the incidents

⁶⁹ *In the matter of Philadelphia Energy Solutions LLC and Philadelphia Energy Solutions Refining and Marketing LLC: Settlement Agreement and Covenant not to Sue.* Docket number CERC/RCRA-03-2012-0224DC (August 17, 2012). Available in docket as PDF titled "Sunoco PPA Executed 8 17 12.pdf"

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cited by commenters and researched by EPA is provided in the docket in the spreadsheet titled *NAICS 324 Incident research* containing the information gathered, information sources considered and summary findings.⁷⁰

In addition to completing examination of the incidents cited in comments, EPA is also aware of some recent incidents of releases from refinery facilities, for example the ExxonMobil Fire in Baton Rouge, LA. This example exhibits coordinated response of local and federal services that demonstrate the expected performance of the modern regulatory framework. At the ExxonMobil refinery fire, which occurred on Feb 11, 2020, the Louisiana Department of Environmental Quality (LDEQ) and the Baton Rouge Fire Department (BRFD) Hazmat team responded to the incident and conducted offsite air monitoring. EPA also mobilized a Superfund Technical Assessment & Response Team contractor to the site.⁷¹ ExxonMobil conducted multiple rounds of air monitoring of the facility, and readings were found to be below the state's ambient air standards.⁷² At this site, the local authorities were able to respond quickly and in cooperation with the company to ensure that risk was promptly assessed and addressed.

Although this incident was not cited by commenters, and though releases to air as occurred in this example have not been identified as prevalent causes of inclusion of a site on the NPL, EPA offers that the prompt response that took place following this incident illustrates the protective function of the modern regulatory framework. Coordinated responses at petroleum and coal products manufacturing facilities when incidents do occur lessen the likelihood of these facilities becoming Superfund sites, which further weighs against the need for financial responsibility requirements for the petroleum and coal products manufacturing industry under CERCLA Section 108(b). Furthermore, this response demonstrates that authorities already in place to respond to incidents provide state and local entities the tools to take actions that address many of the risks that might result in a Superfund site.

⁷⁰ See spreadsheet, in docket for this action, titled "NAICS 324_Incident research.xlsx".

⁷¹ US EPA Emergency Operations Center Spot Report: Region 6, ExxonMobil Refinery Fire Baton Rouge, LA, NRC#1271029, February 12, 2020.

⁷² See *ExxonMobil Baton Rouge Refinery Fire Response – February 2020* <https://corporate.exxonmobil.com/-/media/Global/Files/locations/United-States-operations/Baton-Rouge/021120-Baton-Rouge-Refinery-information.pdf>.

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C. Decision to Not Impose Requirements

Based on the analyses conducted for the December 23, 2019 proposed rule, described in detail in the background documents for that notice, as well as additional analyses conducted in response to comments received on that notice, the Agency is finalizing the decision that the degree and duration of risk posed by the petroleum and coal products manufacturing industry does not warrant financial responsibility requirements under CERCLA Section 108(b). As such, this rulemaking will not impose CERCLA Section 108(b) financial responsibility requirements for facilities in the petroleum and coal products manufacturing industry. EPA did not receive evidence from any commenter that changed the Agency's determination from that proposed previously.

Central to this final rulemaking decision is EPA's position that the analyses conducted for the proposal are consistent with the statutory language of CERCLA Section 108(b), described in Section IV above (*Statutory Interpretation*). EPA is further assured of this position following the decision by the D.C. Circuit that upheld EPA's interpretation of the statutory language of CERCLA Section 108(b).⁷³ The analyses consistent with this interpretation showed that under the modern regulatory framework that applies to the petroleum and coal products manufacturing industry, little evidence of burden to the Fund by facilities in this industry exists.

EPA believes that the evaluation of the petroleum and coal products manufacturing industry conclusively demonstrates, by the low occurrence of cleanup sites that significantly impact the Fund, low risk of a Fund-financed response action at current petroleum and coal products manufacturing operations. The reduction in risks, relative to when CERCLA was first established, attributable to the requirements of existing federal and state regulatory programs and voluntary practices, combined with reduced costs to the taxpayer—demonstrated by EPA's cleanup case analysis, existing financial responsibility requirements, and enforcement actions—has reduced the need for federally-financed response action at facilities in the petroleum and coal products manufacturing industry.

⁷³ Idaho Conservation League v. *Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

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VII. Chemical Manufacturing Industry

A. Proposed Rule

On February 21, 2020, EPA published a notice of proposed rulemaking (NPRM) on the third of the three additional industries.⁷⁴ In that notice, the Agency proposed to not impose financial responsibility requirements for the chemical manufacturing industry and described the analyses and results that were used to reach that decision. Due to the COVID-19 pandemic, several commenters requested an extension to the comment period. EPA extended the comment period by two weeks in response to these requests.⁷⁵ The Agency received 16 comments on this proposed rulemaking. Comments received on the proposal and the Agency's responses are laid out in the Response to Comments document found in the docket to this final rulemaking.⁷⁶

B. Summary of Key Comments Received and Agency Response

Of the 16 comments received on the February 21, 2020 NPRM, 6 were in support of the Agency's proposal to not impose financial responsibility requirements for the chemical manufacturing industry and 10 were opposed.

1. Comments in Support of the Proposal

Of the six comments in support of the proposed rule, three were from the fertilizer industry; one comment from three associations (the American Fuel and Petrochemical Manufacturers, the American Chemistry Council, and the Society of Chemical Manufacturers and Affiliates (SOCMA)); one comment from the Superfund Settlements Project; and one multi-industry comment from the U.S. Chamber of Commerce.

⁷⁴ 85 FR 10128 (Feb. 21, 2020).

⁷⁵ 85 FR 21366 (Apr. 17, 2020).

⁷⁶ *Response to Comments Document: Financial Responsibility Requirement Under CERCLA 108(b) for Classes of Facilities in the Chemical Manufacturing Industry, November, 2020.*

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Commenters supporting the proposed rule cited the extensive federal and state requirements that are already in place and agreed that no additional requirements under CERCLA Section 108(b) are warranted for the chemical manufacturing industry. Commenters felt the February 21, 2020 proposal was fully consistent with EPA's final determination on the hardrock mining industry, which was upheld by the D.C. Circuit.⁷⁷

In addition, SOCMA, along with its sister associations, submitted a technical report which reviewed EPA's analysis. The report's conclusions validate EPA's findings, and concluded that "taxpayer-funded cleanups at chemical manufacturing facilities are even less likely than EPA estimated."⁷⁸

2. Comments Opposed to the Proposal

Six comments received were from private citizens opposed to the proposed rule. Most private citizen commenters opposed to the proposal stated a general belief that companies should be liable for their pollution, not taxpayers. It should be noted that the Agency's decision to not impose financial responsibility requirements under Section 108(b) does not diminish liability under CERCLA, and the cost of cleanups will continue to be the responsibility of the PRPs, not the Fund. The Agency also received comments from the Confederated Tribes of the Grand Ronde Community of Oregon, the Little Traverse Bay Bands of Odawa Indians, and Earthjustice. Earthjustice submitted comments on behalf of Communities for a Better Environment, Center for International Environmental Law, Public Citizen, Earthworks, Sierra Club, Idaho Conservation League, Center for Biological Diversity, Ohio Valley Environmental Coalition, and Great Basin Resource Watch.

Many of the comments received on the chemical manufacturing industry proposal were critical of the Agency's interpretation of the statute and the analyses EPA conducted to conclude that no CERCLA Section 108(b) financial responsibility rules are necessary. The statutory interpretation presented in the

⁷⁷ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

⁷⁸ EPA-HQ-OLEM-2019-0086-1036.

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CERCLA Section 108(b) Hardrock Mining Final Rule (described in *Statutory Interpretation* section above) continues to be the view of the Agency, and that interpretation is not reopened here. After consideration of the critical comments, EPA still concludes that the analyses conducted and information considered were appropriate, consistent with CERCLA, and show that risk posed by the chemical manufacturing industry does not warrant financial responsibility requirements under CERCLA Section 108(b).

As part of the chemical manufacturing industry proposal, EPA systematically evaluated CERCLA NPL, Superfund Alternative Approach (SAA), and removal sites in the industry where releases and cleanup actions occurred. Specifically, EPA developed an analytic approach that considered cleanup cases to identify instances of releases at currently operating facilities where taxpayer funds were expended for response action. See discussion in the proposed rule⁷⁹ for a detailed description of the analysis conducted. EPA's review of the Superfund NPL, SAA, and removal sites associated with the industry found that 34 sites indicated a potential for a significant impact to the Fund while operating under the modern regulatory framework. This is a relatively small number of cases in comparison to the approximately 13,480 establishments currently operating in the industry. As noted above, EPA's additional research into facilities referenced by a commenter in opposition to the proposal did not identify any additional Superfund sites in the industry that had burdened the Fund. EPA believes that the small set of federally funded cleanup cases due to recent contamination, in view of the size of the industry, does not warrant the imposition of costly financial responsibility requirements on the entire chemical manufacturing industry under CERCLA Section 108(b).

Additionally, as part of its proposal, to understand the modern regulatory framework applicable to currently operating facilities within the chemical manufacturing industry, EPA compiled applicable federal and state regulations.⁸⁰ Specifically, EPA looked to regulations that address the types of releases

⁷⁹ 85 FR 10128, 10135-10144 (Feb. 21, 2020) .

⁸⁰ *Summary Report: Federal and State Environmental Regulations and Industry Voluntary Programs in Place to Address CERCLA Hazardous Substances at Chemical Manufacturing Facilities.*

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identified in the cleanup cases. This review also considered industry voluntary programs that could reduce risk of releases. Finally, EPA also identified financial responsibility regulations that apply to facilities in the chemical manufacturing industry,⁸¹ and compliance and enforcement history for the relevant regulations.⁸² Regarding concerns expressed in the comments, EPA notes that RCRA corrective action is an example of a control that could apply broadly in the chemical manufacturing industry to facilities that operate as permitted or interim status RCRA treatment, storage, and disposal (TSD) facilities. Both current and former chemical manufacturing facilities are included in the universe of RCRA corrective action facilities. The corrective action program achieves risk reduction through two avenues, by providing a mechanism to clean up contamination as well as authority to require financial assurance. Pursuant to RCRA, as amended by HSWA (Hazardous and Solid Waste Amendments), statutory and regulatory requirements, EPA requires owners and operators of facilities that treat, store or dispose of hazardous waste to investigate and clean up releases of hazardous waste and hazardous constituents from any solid waste management units, thus reducing the likelihood that these facilities would require cleanup under Superfund. RCRA permits issued to TSD facilities must include provisions for both corrective action and financial assurance to cover the costs of implementing those cleanup measures. EPA also possesses additional authorities to order corrective action through enforcement orders, which are not contingent upon a facility's permit. EPA asserts that these features reduce the likelihood of burden to the Fund. Based on this review, and after reviewing the comments received, EPA maintains its preliminary conclusion that the network of federal and state regulations applicable to the chemical manufacturing industry creates a comprehensive framework that applies to prevent releases that could result in a need for a Fund-financed response action.

As discussed in the February 21, 2020 proposed rule, EPA had developed an analytic approach to determine whether the current risk under a modern regulatory framework within the chemical

⁸¹ *Review of Existing Financial Responsibility Laws Potentially Applicable to Classes of Facilities in the Chemical Manufacturing Industry.*

⁸² *Enforcement, Court Settlements and Judgments in the Chemical Manufacturing Industry.*

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manufacturing industry rose to a level that warrants imposition of financial responsibility requirements under CERCLA Section 108(b).⁸³ Earthjustice commented that relying on the term “modern” is EPA’s “basis for ignoring releases that occurred at facilities before 1980.”⁸⁴ The Agency uses the term modern in this case to distinguish the current regulatory landscape versus the one that existed at the time of the passage of the CERCLA statute. Acknowledgment of current federal and state laws that specifically address risks posed by this industry is appropriate to consider in determining whether there is risk of future Fund expenditures. In particular, in the proposal, EPA identified the prevalent sources of risk that were identified in the cleanup cases reviewed. EPA then evaluated the extent to which activities that contributed to the risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances are now regulated. EPA recognized that substantial advances had been made in the development of manufacturing, pollution control, and waste management practices, as well as the implementation of federal and state regulatory programs to both prevent and address such releases at facilities in the chemical manufacturing industry. This analysis is consistent with the approach utilized in the Final Action for Facilities in the Hardrock Mining Industry and upheld by the D.C. Circuit.⁸⁵

Earthjustice also raised the point that the existence of federal and state regulations does not ensure prevention of releases, and that legacy contamination exists at currently operating facilities. EPA notes that financial responsibility requirements under Section 108(b) would not apply to legacy operations that are no longer operating. Rather, any Section 108(b) requirements would apply to facilities that follow current industry practices and are subject to the modern regulatory framework (i.e., the regulations currently in place that apply to the industry). These modern conditions include federal and state regulatory requirements and financial responsibility requirements that currently apply to operating facilities. In contrast to Earthjustice’s point, EPA’s analysis found that the efficacy of current regulations, as well as voluntary industry practices, while difficult to quantify, have had a demonstrably positive effect in

⁸³ 84 FR 36540 (Jul. 29, 2019).

⁸⁴ EPA-HQ-OLEM-2019-0086-1036

⁸⁵ *Idaho Conservation League v. Wheeler*, 930 F.3d 494, (D.C. Cir. 2019).

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reducing the number of cleanups that require taxpayer expenditures. This was borne out in the analyses conducted in the proposed rule, the results of which indicated that there was no need for further financial responsibility requirements on this industry.

Earthjustice disagreed with EPA's screening out from its analyses sites where the response actions were funded by private parties as opposed to the government. Earthjustice suggested that it is contrary to CERCLA to focus only on financial risk. In addition, Earthjustice raised concerns about the magnitude and potential long duration of cleanups in the industry.

As a primary matter, EPA's approach and the factors the Agency considered to determine whether or not financial responsibility requirement were appropriate for the chemical manufacturing industry is consistent with CERCLA (see *Statutory Interpretation* section above). A chief factor of the Agency's determination was the results of EPA's cleanup case analysis which involved a systematic examination of Superfund sites (NPL, removal, and SAA). EPA's analysis, described in detail in section VII of the proposed rule,⁸⁶ showed that few facilities operating under modern conditions, in light of the size of the industry, have historically burdened the Fund. Specifically, there are relatively few NPL and removal sites with pollution that occurred under a modern regulatory framework associated with the chemical manufacturing industry that required significant Fund expenditures to address. This is, in part, due to the fact that the potentially responsible parties (PRPs) led approximately half of the cleanups identified. Further supporting this finding is the fact that when a cleanup is required under Superfund or corrective action or RCRA, financial assurance is typically required. Moreover, as discussed below, EPA conducted additional research into examples of releases at facilities in the chemical manufacturing industry identified by commenters. That additional research identified only one new example of the Superfund program bearing the costs of a cleanup associated with releases occurring under a modern regulatory framework. The limited number of actions within the sector, combined with its track record of funding cleanups weighs against the need for regulation under CERCLA Section 108(b).

⁸⁶ 85 FR 10128, 10135 (Feb. 21, 2020).

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This comment also intended to suggest that CERCLA Section 108(b) financial responsibility could promote rapid cleanup in instances of pollution. As a primary matter, this is not necessarily the case. EPA believes any CERCLA Section 108(b) financial responsibility required for any industry would complement existing Superfund processes by offering a financial backstop for CERCLA costs and damages (see the relevant language at 84 FR 3400 included in the hardrock mining proposal). The financial responsibility would not modify the existing Superfund enforcement authorities, including those to gather information, identify responsible parties, effect cleanup (especially through EPA's enforcement first policy), assess penalties, or provide for citizen suits. In instances where releases occurred that required a Superfund cleanup, the same Superfund process would occur as does today.

Of note is that the Superfund program protects human health and the environment regardless of whether or not financial responsibility is in place. EPA can invoke its enforcement authorities to protect human health and the environment. For example, EPA can issue a Unilateral Administrative Order or conduct a removal action to mitigate potential risks posed by the site conditions. If the Agency has to use fund resources to conduct a cleanup, EPA can take an enforcement action to recover its CERCLA costs and replenish government resources. It is thus not accurate to suggest a lack of CERCLA Section 108(b) financial responsibility would result in delays of cleanup and therefore an increased risk to human health and the environment.

Earthjustice took issue with EPA's interpretation of the statute, stating that EPA's "interpretation of the statute to focus solely on the risk of a taxpayer bailout of insolvent companies is contrary to law, because this is not the purpose of CERCLA."⁸⁷ Earthjustice contends that EPA ignored significant risks to human health and the environment. Earthjustice commented on the long and well-established history of contamination of the Nation's soil and water due to the chemical manufacturing industry, and cited examples of recent cleanups. Nevertheless, EPA believes that the site analysis for this rulemaking effectively considered human health and environmental risk in multiple steps. First, EPA examined

⁸⁷ Id.

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through the Agency's industry practices and environmental characterization analysis the operational practices and environmental profile of the chemical manufacturing industry. This analysis included an examination of the potentially hazardous materials used in the industry, hazardous wastes generated by industry processes, the units used to manage wastes at these sites, how on-site management of these materials can potentially contribute to releases, and what contaminants might be released by the industry that could impact human health and the environment. Next, EPA investigated in what ways the industry is subject to a wide range of modern federal and state regulatory requirements and enforcement oversight imposed to address this potential human health and environment risk. In these analyses, EPA outlined the framework of modern federal and state regulatory programs to which the industry is subject⁸⁸ and also examined compliance and enforcement for the industry,⁸⁹ which collectively demonstrate how these components work to address potential risk for modern industry operations. Overall, EPA's full analytic approach developed for the proposed rule examined sites with a variety of contaminants and contaminated media. In effect, the analysis considered the types of human health and environmental risk the Superfund program was designed to address, and that would be addressed by any CERCLA Section 108(b) financial responsibility. This analysis employed by the Agency is consistent with EPA's interpretation of the statutory language and was upheld by the D.C. Circuit⁹⁰, which found that EPA's focus on risk of taxpayer-funded response actions was reasonable. Specifically, the Court stated in its decision, "we defer to the EPA's interpretation that it should set financial responsibility regulations based on financial risks, not risks to health and the environment." EPA's analysis based on this interpretation showed that there is little evidence of the facilities operating under a modern regulatory framework burdening the Fund.

Commenters asserted that, too often, companies file for bankruptcy and avoid financial responsibility for cleaning up harmful pollution. To further assess these concerns, EPA updated its

⁸⁸ *Summary Report: Federal and State Environmental Regulations and Industry Voluntary Programs in Place to Address CERCLA Hazardous Substances at Chemical Manufacturing Facilities.*

⁸⁹ *Enforcement, Court Settlements and Judgments in the Chemical Manufacturing Industry.*

⁹⁰ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

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analysis supporting the Economic Sector Profile originally conducted in support of the proposed rulemaking. These analyses rely on industry-wide ratio measures of economic stability that are widely used as standard market metrics for such industry by industry comparisons. This update was conducted with the most recent prior year's worth of data available at the close of comment period for the proposed rule. This updated analysis finds the financial stability of the industry relatively unchanged from the original report, further suggesting that the economic conditions of the industry as a whole are not at undue risk.⁹¹ Added factors such as increased transparency from the application of generally accepted accounting practices, and added levels of bankruptcy protection against defaults on environmental liabilities, while not a guarantee, can reduce potential risks to the Fund even further.

EPA disagrees with Earthjustice's comment suggesting that enforcement activities are halted when there are disruptions caused by unforeseen circumstances, or that enforcement in general is a weakness of the modern regulatory framework structure. The commenter specifically referenced a global pandemic, presumably implying that the coronavirus (COVID-19) pandemic has halted enforcement at the federal and state level. While EPA made certain adjustments that were necessary to maintain public safety, EPA disagrees with the commenter's implicit claim that enforcement has halted, or that the level of enforcement undercuts existing environmental protections or EPA's analysis that considered the existing regulations in evaluating the need for CERCLA Section 108(b) financial responsibility.

In fact, EPA's enforcement program remained very active during the public health emergency. For example, from March 16-August 31, 2020, EPA opened 128 criminal enforcement cases, charged 36 defendants, initiated 603 civil enforcement actions, concluded 629 civil enforcement actions, secured \$80.4 million in Superfund response commitments, and obtained commitments from parties to clean up 1,032,832 cubic yards of contaminated soil and water. The COVID-19 pandemic has not meaningfully reduced the protectiveness of existing environmental laws and regulations.

⁹¹ *Addendum Update to CERCLA 108(b) Economic Sector Profile: NAICS 325 – Chemicals Manufacturing; May 2020.*

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Commenters also questioned the performance of the modern regulatory framework under the potential increased risk of release posed by climate change, seismic hazards and other natural disasters. While most accidents and releases do not lead to Superfund responses, Fund expenditures, or CERCLA liability claims, and the commenters provided no indication a Superfund response resulted from a natural disaster, EPA's analysis has shown that existing regulations in the modern regulatory framework address these concerns.

Several environmental laws authorize regulations requiring the development of response plans for a variety of emergencies, including various natural disasters, in order to reduce the effects of a release, and to notify local emergency response personnel and facilitate cooperation. For example, under 40 CFR part 264, Subpart B, facility standards for owner and operators of hazardous waste treatment, storage and disposal facilities must meet location standards, including consideration of seismic environment, floodplains, and salt dome formations. Under 40 CFR part 264, Subpart D, owners and operators of hazardous waste facilities must have a contingency plan designed to minimize hazards to human health or the environment from fires, explosions, or the release of hazardous waste or hazardous waste constituents. The contingency plans establish the actions personnel must take in response to fires, explosions, or the release of hazardous waste or hazardous waste constituents. Owners and operators may fulfill the requirements of this subpart by amending existing emergency contingency plans, including Spill Prevention, Control and Countermeasure plans.

In 1989, OSHA promulgated the Hazardous Waste Operations and Emergency Response standards (HAZWOPER). HAZWOPER addresses the health and safety risks to workers of unexpected releases or the threat of releases of hazardous substances that may accompany operational failures, natural disasters, or waste dumped in the environment. OSHA promulgated the standards to ensure the safe and effective management and cleanup of unexpected releases of hazardous substances. The regulations require employers to develop a written program for their employees to address hazards and provide for emergency response actions, including an organizational structure, comprehensive work plan, training

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programs, and medical surveillance program. In 2002, OSHA expanded its emergency response regulations through the implementation of Emergency Action Plans (EAPs). The regulations require that employers prepare a written EAP to create practices to follow during workplace emergencies at a given facility.

In addition, EPA implements the Chemical Accident Prevention Provisions of Section 112(r) of the Clean Air Act Amendments, which require certain facilities to generate Risk Management Plans to mitigate the effects of a chemical accident and to coordinate with local response personnel. EPA implements regulations under EPCRA that impose emergency planning, reporting, and notification requirements for hazardous and toxic chemicals.

EPA appreciated the comments offering examples of sites of concern and undertook additional due diligence to examine some of these releases and accidents referenced by the commenter. While most accidents and releases do not lead to Superfund responses, Fund expenditures, or CERCLA liability claims, EPA acknowledged that it is possible some of the releases and accidents may have required Superfund actions, which the Agency may have missed in the analysis conducted as part of the proposal. As such, EPA examined a selection of the cases referenced by Earthjustice to better understand the consequences of these incidents, to the extent possible. In the case of the chemicals manufacturing industry, most of the facilities referenced by the commenters were referenced by facility name. With the exception of two facilities already included in the Agency's analysis of NPL cleanup sites, EPA conducted additional research into all of the facilities referenced.

The examination of these facilities did not identify any new instances of a facility in the chemicals manufacturing industry burdening the Superfund, and only one example of a previously unidentified CERCLA action. In that one case, a CERCLA enforcement action related to the DuPont (now Chemours) plant in Belle, WV, DuPont paid a penalty and agreed to corrective actions designed to reduce the likelihood of release going forward. Notably, many of the incidents were addressed by existing state or federal authorities.

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EPA also examined a couple of geographical areas where the commenter alleged cumulative risks from many chemical manufacturing facilities presents some additional and unique risk. EPA conducted research into the Houston Ship Channel and an 85-mile stretch along the banks of the Mississippi River in Louisiana, nicknamed “Cancer Alley”, to identify instances of releases and responses in those areas associated with chemical manufacturing facilities. EPA identified 18 facilities in those geographical areas that appeared to have releases or responses worthy of investigation. However, many of the facilities had already been considered in the cleanup case analyses done in support of the proposal. Additionally, many either did not require CERCLA involvement or were addressed and/or funded by the PRP. In total, EPA only identified one additional site in those two areas with pollution that appeared to occur under a modern regulatory framework and where the Fund appeared to have been burdened. This site, the Cusol Company, Inc. site in Houston, TX, required an EPA removal action after the facility was abandoned in 2005. However, the cleanup activities were relatively minor at the site with the removal assessment work conducted within three months and the cleanup itself completed within a month. The identification of one additional site alone does not change EPA’s conclusion from the proposal that CERCLA Section 108(b) financial responsibility is not necessary for the industry. More information on the incidents cited by commenters and researched by EPA is provided in the spreadsheet titled *NAICS 325 Incident research* containing the information gathered, information sources considered and summary findings.⁹²

In addition to completing examination of the incidents cited in comments, EPA is also aware of some recent incidents of releases from chemical manufacturing facilities, for example, the Alchemix Chemical Fire in College Park, GA and Poly-America Fire in Grand Prairie, TX. Both examples exhibit coordinated response of local and federal services that demonstrate the expected performance of the modern regulatory framework. In the Alchemix Chemical Fire that occurred on July 17, 2020, the Fulton County Emergency Management Director and Georgia Environmental Protection Division (GAEPD) requested EPA’s assistance with air monitoring and response efforts. EPA mobilized an On-Scene

⁹² See spreadsheet, in docket for this action, titled “NAICS 325_Incident research.xlsx”.

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Coordinator (OSC) and Superfund Technical Assessment & Response Team (START) resources in response to the fire. The OSC arrived on site and worked with the fire chief, GAEPD and a representative of the responsible party. After the fire was extinguished by the local fire department and the responsible party hired an environmental contractor, EPA demobilized, and oversight of environmental clean-up was conducted by GAEPD under its state authorities.⁹³

The Poly-America Fire that occurred on August 18, 2020, was responded to by local fire departments as part of an Incident Management Team under unified command with the City of Grand Prairie and the Texas Commission on Environmental Quality (TCEQ). In addition, EPA lent specialized expertise in deploying support from EPA Consequence Management Advisory Division and START contractors to assist in air monitoring in the local area. EPA resources were demobilized after no detections at or near screening levels were found.⁹⁴

Although these incidents were not cited by commenters, and though releases to air as occurred in these examples have not been identified as prevalent causes of inclusion of a site on the NPL, EPA offers that the prompt responses that took place following these incidents illustrate the protective function of the modern regulatory framework. Coordinated responses at chemical manufacturing facilities when incidents do occur lessen the likelihood of these facilities becoming Superfund sites, which further weighs against the need for financial responsibility requirements for the chemical manufacturing industry under CERCLA Section 108(b). Furthermore, these example responses demonstrate that authorities already in place to respond to incidents provide state and local entities the tools to take actions that address many of the risks that might result in a Superfund site.

C. Decision to Not Impose Requirements

⁹³ US EPA. Emergency Operations Center Spot Report: Region 4, Alchemix Chemical Fire, College Park, GA, NRC#1282206, July 18, 2020.

⁹⁴ US EPA. Emergency Operations Center Spot Report: Region 6, Poly-America Fire, Grand Prairie, TX, NRC#1284921, August 19, 2020.

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Based on the analyses conducted for the February 21, 2020 proposed rule, described in detail in the background documents for that notice, as well as additional analyses conducted in response to comments received on that notice, the Agency is finalizing the decision that the degree and duration of risk posed by the chemical manufacturing industry does not warrant financial responsibility requirements under CERCLA Section 108(b). As such, this rulemaking will not impose CERCLA Section 108(b) financial responsibility requirements for facilities in the chemical manufacturing industry. EPA did not receive evidence from any commenter that changed the Agency's determination from that proposed previously.

Central to this final rulemaking decision is EPA's position that the analyses conducted for the proposal are consistent with the statutory language of CERCLA Section 108(b), described in Section IV above (*Statutory Interpretation*). EPA is further assured of this position following the decision by the D.C. Circuit that upheld EPA's interpretation of the statutory language of CERCLA Section 108(b).⁹⁵ The analyses consistent with this interpretation showed that under the modern regulatory framework that applies to the chemical manufacturing industry, little evidence of burden to the Fund by facilities in this industry exists.

EPA believes that the evaluation of the chemical manufacturing industry conclusively demonstrates, by the low occurrence of cleanup sites that significantly impact the Fund, low risk of a Fund-financed response action at current chemical manufacturing operations. The reduction in risks, relative to when CERCLA was first established, attributable to the requirements of existing federal and state regulatory programs and voluntary practices combined with reduced costs to the taxpayer—demonstrated by EPA's cleanup case analysis, existing financial responsibility requirements, and enforcement actions—has reduced the need for federally-financed response action at facilities in the chemical manufacturing industry.

⁹⁵ *Idaho Conservation League v. Wheeler*, 930 F.3d 494 (D.C. Cir. 2019).

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VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

These actions are significant regulatory actions that were submitted to the Office of Management and Budget (OMB) for review, because they may raise novel legal or policy issues [3(f)(4)]. Any changes made in response to OMB recommendations have been documented in the docket. EPA did not prepare an economic analysis for these final rulemakings because no regulatory provisions are being finalized.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This final rule is not subject to the requirements of EO 13771 (82 FR 9339, February 3, 2017) because this final rule does not alter any regulatory requirements.

C. Paperwork Reduction Act (PRA)

These actions do not impose an information collection burden under the PRA, because they do not impose any regulatory requirements.

D. Regulatory Flexibility Act (RFA)

I certify that these actions will not have a significant economic impact on a substantial number of small entities under the RFA. These actions will not impose any requirements on small entities.

E. Unfunded Mandates Reform Act (UMRA)

These actions do not contain any unfunded mandates as described in UMRA, 2 U.S.C. 1531-1538, and do not significantly or uniquely affect small governments, because they do not impose any regulatory requirements.

F. Executive Order 13132: Federalism

These actions do not have federalism implications. They will not have substantial direct effects on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government, since they impose no regulatory requirements.

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G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

These actions do not have tribal implications as specified in Executive Order 13175, because they impose no regulatory requirements. Thus, Executive Order 13175 does not apply to these actions. However, EPA offered consultation and coordination with federally recognized tribes as well as with Alaska Native Claims Settlement Act Corporations during the rulemaking process. EPA sent notification letters to all 574 federally recognized tribes and to the 12 Alaska Native Claims Settlement Act Regional Corporation Executive Directors for each of the three separate proposals. EPA also held public informational webinars for each of the proposed rules and tribes participated in all three webinars. EPA received one comment from a tribe on the Electric Power Generation, Transmission and Distribution industry proposal and two comments on the Chemical Manufacturing industry proposal. All three comments opposed the proposal to not impose financial responsibility requirements. These comments and EPA's responses are included in the Response to Comments documents, which are part of the dockets for these final actions.⁹⁶ For more information on the consultation and coordination for these rules, see the consultation summaries in the docket.

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

These actions are not subject to Executive Order 13045 because they are not economically significant as defined in Executive Order 12866 and they do not establish any new environmental health or safety standard.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

These actions are not a "significant energy action" because they are not likely to have a significant adverse effect on the supply, distribution, or use of energy, since they impose no regulatory requirements;

⁹⁶ *Response to Comments Document: Financial Responsibility Requirement Under CERCLA 108(b) for Classes of Facilities in the Electric Power Generation, Transmission, and Generation Industry, November, 2020.; Response to Comments Document: Financial Responsibility Requirement Under CERCLA 108(b) for Classes of Facilities in the Petroleum and Coal Products Manufacturing Industry, November, 2020.; Response to Comments Document: Financial Responsibility Requirement Under CERCLA 108(b) for Classes of Facilities in the Chemical Manufacturing Industry, November, 2020.*

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in addition, these actions have not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

J. National Technology Transfer and Advancement Act

These rulemakings do not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that these actions are not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because these actions establish that no federal CERCLA Section 108(b) financial responsibility requirements are necessary and do not establish any new environmental health or safety standard. Thus, no review of these final actions under Executive Order 12898 is necessary.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

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List of Subjects in 40 CFR Part 320

Environmental protection, Financial responsibility, Hazardous substances.

Andrew Wheeler,

Administrator.