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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 320

[EPA-HQ-OLEM-2016-0212; FRL-9956-56-OLEM]

RIN 2050-AG56

Financial Responsibility Requirements for Facilities in the Chemical, Petroleum and Electric Power Industries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to proceed with rulemakings.

SUMMARY: Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establishes certain regulatory authorities concerning financial responsibility requirements. Specifically, the statutory language addresses the promulgation of 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. On January 6, 2010, the Environmental Protection Agency (EPA) published an Advance Notice of Proposed Rulemaking (ANPRM) that identified additional classes of facilities within three industry sectors that may warrant the development of financial responsibility requirements under CERCLA section 108(b) - the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211). This document formally announces EPA's intention to publish a notice for proposed rulemaking for classes of facilities within the three industries identified in the 2010 ANPRM, as well as gives an overview of some of the comments received on

the ANPRM and initial responses to those comments. The announcement in this action is not a determination that requirements are necessary for any or all of the classes of facilities within the three industries, or that EPA will propose such requirements – rather, it is an announcement that EPA intends to move forward with the regulatory process. After that process, EPA will determine whether proposal of requirements for any or all of the classes of facilities within the three industries is necessary.

DATES: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For more information on this action, contact Peggy Vyas, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, Mail Code 5303P, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone (703) 308-5477 or (email) vyas.peggy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. Docket. EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2016-0212. The 2010 Advance Notice of Proposed Rulemaking and its related documents, including background documents and public comments, are under Docket ID No. EPA-HQ-SFUND-2009-0834. All documents in the docket are listed in the http://www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in http://www.regulations.gov or in hard copy at EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460. This Docket Facility is

open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–0276. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

2. Electronic Access. You may access this Federal Register document electronically from the Government Printing Office under the "Federal Register" listings at FDSys (http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR).

II. Overview of CERCLA Section 108(b)

CERCLA section 108(b) generally requires that EPA develop requirements that classes of facilities 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."[1] CERCLA 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, courts settlements and judgments, and voluntary claims satisfaction.

CERCLA section 108(b) also discusses particular instruments for EPA to consider in its regulations. Specifically, paragraph (b)(2) states that financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. Paragraph (b)(2) further authorizes EPA to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable in establishing evidence of financial responsibility. Paragraph (b)(2) also requires EPA to cooperate

[1] Executive Order 12580 delegates the responsibility to develop these requirements to the Administrator of EPA for non-transportation related facilities. 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

with and seek the advice of the commercial insurance industry to the maximum extent practicable when developing financial responsibility requirements.[2] Paragraph (b)(4) provides direction on how the CERCLA section 108(b) instruments are to address multiple owners and operators at a single facility.[3]

CERCLA section 108(b)(3) requires that regulations promulgated under CERCLA section 108(b) incrementally impose financial responsibility requirements as quickly as can reasonably be achieved, but in no event more than four years after the date of promulgation.[4]

CERCLA section 108(c) also includes a "direct action" provision under which any claim authorized by CERCLA section 107 or 111 may be asserted directly against any guarantor providing evidence of financial responsibility under CERCLA section 108(b) if the person is liable under CERCLA section 107 and (1) is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or (2) is likely to be solvent at the time of judgment, but over whom jurisdiction in the Federal courts cannot be obtained with reasonable diligence.[5]

III. *In re Idaho Conservation League*

In August 2014, the groups 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, for a writ of mandamus requiring issuance of CERCLA section 108(b) financial responsibility rules

[2] 42 U.S.C. 9608(b)(2).
[3] 42 U.S.C. 9608(b)(4).
[4] 42 U.S.C. 9608(b)(3).
[5] 42 U.S.C. 9608(c)(2).

for the hardrock mining industry, and for the three additional industries identified by EPA in the ANPRM, that is, Chemical Manufacturing, Petroleum and Coal Products Manufacturing, and Electric Power Generation, Transmission, and Distribution.[6] Following oral arguments, EPA and the petitioners submitted 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. A copy of the order can be found in the docket for this action.

In addition to requiring EPA to publish a proposed rule on hardrock mining financial requirements by December 1, 2016, the January 2016 Order requires EPA to "sign for publication in the Federal Register a determination whether EPA will issue a action of proposed rulemaking on financial responsibility requirements under CERCLA § 108(b) in the (a) chemical manufacturing industry; (b) petroleum and coal products manufacturing industry; and (c) electric power generation, transmission, and distribution industry by **December 1, 2016**." The publication of this action satisfies that component of the January 2016 order. The order includes the following schedule for these rulemakings:

> "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**.
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> EPA will sign for publication in the Federal Register a notice of proposed rulemaking in the **second** additional industry by **December 4, 2019**, and

[6] See *In re: Idaho Conservation League*, No. 14-1149. For more information on the lawsuit please refer to the preamble of the "Financial Responsibility Requirements for the Hardrock Mining Industry" proposed rule, published elsewhere in this Federal Register.

sign for publication in the Federal Register a notice of its final action by **December 1, 2021**.

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**."[7]

While the January 2016 Order identifies the other industries as being the Chemical Manufacturing industry, the Petroleum and Coal Products Manufacturing industry, and the Electric Power Generation, Transmission and Distribution industry, and sets a rulemaking schedule, it does not specify which industry will be the first, second or third. EPA will decide that at a later date. Nor does the January 2016 Order mandate any specific outcome of the rulemakings.[8] The Joint Motion specified that it did not alter the Agency's discretion provided by CERCLA and administrative law.[9] In other words, the substance of any requirements arising out of CERCLA section 108(b) for the additional classes are not established in this action - any such requirements, if they are imposed, will not be established until EPA issues any final rules for these classes. Consequently, this document is not final agency action.

IV. Factors Identified by EPA for Consideration in the Decision to Develop a Proposed Rule for an Additional Industry Sector

On July 28, 2009, EPA published a Priority Notice in which we identified classes of facilities in the hardrock mining industry for development of CERCLA section 108(b) financial

[7] In *Re: Idaho Conservation League*, No. 14-1149 (D.C.Cir. Jan. 29, 2016)(order granting joint motion).

[8] 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).

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

responsibility requirements. In that action, EPA also announced its intention to consider additional industry sectors. EPA identified the following factors as among those it may consider in the decision whether to propose requirements for an industry sector: (1) The amounts of hazardous substances released to the environment; (2) the toxicity of these substances; (3) the existence and proximity of potential receptors; (4) contamination historically found from facilities; (5) whether the causes of this contamination still exist; (6) experiences from Federal cleanup programs; (7) projected costs of Federal clean-up programs; and (8) corporate structures and bankruptcy potential.[10] EPA also indicated that the Agency intends to consider whether financial responsibility requirements under CERCLA section 108(b) will effectively reduce these risks.[11]

Some of the factors reflect the basic elements of risk evaluation (i.e., the probability of release, exposure, and toxicity); others more closely relate to the severity of consequences that result when risks are realized, such as the releases' duration and the exposures that can result if releases are not prevented or quickly controlled (e.g. as a result of economic constraints).

V. Additional Classes Advance Notice of Proposed Rulemaking

On January 6, 2010, EPA published an ANPRM[12], in which the Agency identified three additional industrial sectors for the development, as necessary, of a proposed CERCLA section 108(b) regulation. To develop the list of additional classes for the 2010 ANPRM, EPA used information from the National Priorities List (NPL), as well as analyzed data from the Biennial Report (BR) and Toxics Release Inventory (TRI). As was discussed in the document, these sources were chosen because "they are well-established, reliable sources of information on facilities

[10] *See* 74 FR 37218.

[11] *See* 74 FR 37219.

[12] *See* 75 FR 816.

associated with hazardous substances, and were readily available to the Agency."[13] In addition to these sources, EPA further evaluated industry sectors by gathering additional information from natural resource damage cases. The result of this analysis is explained in the 2010 ANPRM in detail, with the conclusion that three industries – the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211) – should be considered for financial responsibility requirements under CERCLA section 108(b).

EPA specifically requested public comment in the 2010 ANPRM on whether to propose a regulation under CERCLA section 108(b) for any class or classes, or the industry as a whole, including information demonstrating why such financial responsibility requirements would not be appropriate for those particular classes. In addition, the Agency requested information related to the industry categories discussed in the action, including data on facility operations, information on past and expected future environmental responses, use of financial responsibility mechanisms by the industry categories, existing financial responsibility requirements, and other information the Agency might consider in setting financial responsibility levels. Finally, EPA requested information from the insurance and the financial sectors related to instrument implementation and availability, and potential instrument conditions.[14]

EPA received over sixty comments on the ANPRM, which can be found in the docket for that action (*see* Docket ID No. EPA-HQ-SFUND-2009-0834). Several comments offered valuable insight that will help to inform the Agency's approach to the additional classes ANPRM. While the Agency is not obligated to respond to comments received on the ANPRM, EPA has provided

[13] *See* 75 FR 819.

[14] *See* 75 FR 830-831.

general responses to those comments that relate specifically to this announcement that EPA will continue the regulatory process under CERCLA section 108(b).

VI. Comments Received on the 2010 ANPRM

Representatives for the electric utility industry submitted roughly one-third of the comments on the 2010 ANPRM. Representatives for the chemical manufacturing industry, the petroleum industry, the waste management industry, the hardrock mining industry, as well as other interested parties also submitted comments.

The comments on the 2010 ANPRM, which specifically addressed the need for CERCLA section 108(b) regulation for the additional classes, can be divided into four categories: (1) other laws that the industry complies with that obviate the need for CERCLA section 108(b) regulation; (2) the sources of data 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. EPA is broadly addressing these categories of comments in this action.

A. Other Laws

Many commenters cited existing laws that their industries are already complying with to ensure that there are no occurrences of non-permitted releases of hazardous substances. In particular, commenters pointed out that there are already financial responsibility requirements under the Resource Conservation and Recovery Act (RCRA). While EPA appreciates the concern, as was discussed above, CERCLA section 108(b) broadly directs the development of financial responsibility requirements consistent with the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances. These requirements, which are designed to help ensure that CERCLA liabilities are paid if CERCLA claims are made, are distinct from financial responsibility requirements for closure imposed under

other statutes, such as RCRA, which are more narrowly designed to assure compliance with those closure requirements.

At the same time, the Agency recognizes that compliance with regulatory requirements may reduce the risks at a facility. Thus, as EPA moves forward with developing proposed rules for additional classes of facilities, EPA expects to consider site factors that reduce risks, including those that result from compliance with other regulatory requirements. EPA has taken a similar approach in the CERCLA section 108(b) proposed rule applicable to hardrock mining, which is published elsewhere in this Federal Register.

B. Data Used in Developing the ANPRM

In the ANPRM, EPA used data from the Toxics Release Inventory (TRI), and RCRA's national Biennial Report (BR), among other sources, to identify and prioritize which classes of facilities present the highest risk of injury due to exposure, and thus to justify the need to prioritize financial responsibility requirements. The Chemical Manufacturing and Petroleum and Coal Products Manufacturing industries were the top two industries in a ranking of the quantity of hazardous waste generated in 2007. They were responsible for approximately 64 percent of all the hazardous waste reported to the 2007 Biennial Report cycle.[15] The Electric Power Generation, Transmission and Distribution industry was responsible for approximately 0.05 percent hazardous waste generated. This is not unexpected considering that coal combustion residuals (CCRs) are a "Bevill exempt"[16] waste under RCRA, and thus not subject to Biennial Reporting requirements.

[15] *See* 75 FR 820-821.

[16] The "Bevill" exemption is codified at 40 CFR 261.3(a)(2)(i) and (g)(4) and 261.4(b)(7).

Therefore, the amount of hazardous waste generated is not necessarily a valid representation of the hazardous substances produced by that industry.[17]

The Chemical Manufacturing and Electric Power Generation, Transmission and Distribution industries ranked high on the list of on-site releases reported to TRI in 2007, at number two and three respectively. The Petroleum and Coal Products Manufacturing industry ranked seventh on that list.[18]

Commenters expressed concern that releases reported to TRI are permitted releases, subject to various environmental laws. Commenters also expressed concern that BR data merely shows the quantity of hazardous substances generated and managed, and not any mismanagement of those substances. Neither of these, commenters felt, should be used as indicators of potential risk of exposure due to a release. EPA recognizes the limitations on the extent of information that can be gained from TRI and BR data, however, EPA believes these data do offer insight into the characteristics and management of hazardous substances for facilities in each industry, and that in conjunction with other information, can be used as to evaluate the relative degree of risk posed by a class of facilities and the priority need for financial responsibility regulation under CERCLA section 108(b). As with the hardrock mining rule, for each subsequent industry rule, EPA intends to use other, more industry-specific and more current sources of data to identify risk, and will propose financial responsibility requirements based on the record EPA will develop for each rulemaking. Where the Agency finds risk associated with management of hazardous substances for a class of facilities, it is obligated to promulgate financial responsibility requirements that are consistent with the degree and duration of that risk. None of the commenters submitted data to

[17]This notice does not revisit EPA's Regulatory Determination for CCR disposal units. See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 FR 21302, April 17, 2015.
[18] *See* 75 FR 821.

dissuade the Agency from the path of acquiring additional and more comprehensive information for these industries. The Agency considers quantity and toxicity of hazardous substances released to the environment are good indicators of risk.

C. Past versus Current Industry Practices

Another source of data for the ANPRM was the Superfund National Priorities List (NPL). The NPL is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants in the United States. The Agency assigned three-digit NAICS[19] codes that best identified the activities at each site, using available data and best professional judgment. The Chemical Manufacturing industry had a total of 181 sites on the NPL from 1981-2009, the Petroleum and Coal Products Manufacturing industry had 30 sites.[20]

Commenters whose industries had sites listed on the NPL pointed out that many of those sites either did not remain in production, or had practices that were improved based on environmental regulations issued after the initial contamination. Commenters felt that legacy contamination was not a valid indicator of current and future risk. Also at issue was EPA's analysis of the NPL data. Some commenters felt their industry was over-represented based on incorrect analysis of the NPL data.

EPA believes, notwithstanding the commenters' negative assessment of the Agency's analysis, that the NPL assessment is informative. Like the TRI and BR data, NPL data was used to indicate which industries pose potential risk that would warrant pursuing financial responsibility regulation under CERCLA section 108(b). The Agency did not receive evidence that risks do not continue at these sites. Where risk continues, EPA believes it is appropriate to consider site factors

[19] North American Industry Classification System (NAICS)—the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS codes are available at: *http://www.census.gov*.
[20] *See* 75 FR 820.

that reduce risks, such as current industry practices, in determining the level of financial responsibility required. Consideration will also be given to payment experience of the Fund, commercial insurers, court settlements and judgments, and voluntary claims satisfaction.

D. Need for Financial Responsibility

A common theme in the comments, across all three industries, was that there was no need for financial responsibility since facilities within these industries are not in danger of going bankrupt. Many commenters felt that rather than focus on a few examples of past bankruptcies, EPA should consider the financial health of all the companies in an industry as a group. EPA disagrees with commenters' suggestion that need for financial responsibility should be informed by the financial health of the overall industry. Financial responsibility is imposed on classes within an industry, but is assessed at the facility level, and not the industry as a whole. Economic solvency at an industry-wide level is not a substitute for insurance against the possibility of CERCLA liabilities remaining unsatisfied on a facility-specific basis. Furthermore, CERCLA section 108(b) funds could be used to address releases at currently-operating facilities. It should be noted that, as mentioned in the preamble to the *Financial Responsibility Requirements under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry* proposed rule, the financial responsibility formula developed for the hardrock mining industry is intended for that industry only, and is not intended for other industries. In future rulemakings under CERCLA section 108(b) for the additional classes, EPA will evaluate how to determine financial responsibility amounts for each particular industry, and will propose an appropriate methodology.

E. Comments that Support CERCLA Section 108(b) Requirements for Additional Classes

The Agency received two comments on the ANPRM that supported the need for CERCLA section 108(b) regulations for the additional classes. The first commenter provided an example of a

facility that required cleanup and where, in the commenter's opinion, had the facility been subject to financial responsibility requirements, remediation would have been achieved much earlier as financial resources would have been available from the outset to carry out the remediation and there would have been less incentive for the responsible party to delay cleanup.

The second commenter supporting the need for financial responsibility requirements for the additional classes cited a 2005 GAO report that the number of sites on the NPL continues to expand, with EPA adding an average of 28 sites to the NPL each year from 1983 to 2003, and the 1995 expiration of CERCLA authority to collect taxes for the Superfund as reasons for EPA to move forward with regulations "to ensure that facilities generating and handling hazardous substances will remain financially able to clean-up improperly disposed substances that could pose threats to public health and the environment."

VII. Conclusion

Since the issuance of the 2010 ANPRM, EPA has not received evidence that would demonstrate that regulation under CERCLA section108(b) is not necessary for the Chemical Manufacturing industry (NAICS 325), the Petroleum and Coal Products Manufacturing industry (NAICS 324), and the Electric Power Generation, Transmission, and Distribution industry (NAICS 2211).

EPA has not, at this time, identified sufficient evidence to determine that initiating the rulemaking process is not warranted, nor has EPA identified sufficient evidence to establish the necessary CERCLA section 108(b) requirements, if any. To make a final decision regarding the need for CERCLA section 108(b) requirements, the Agency must gather additional information, and must further evaluate the classes of facilities within the three industry sectors.

Therefore, in response to the January 29, 2016 Court Order, EPA is announcing its intent to proceed with rulemakings according to the schedule stipulated in the order. This announcement does not indicate that EPA has determined that requirements are necessary for any or all of the classes of facilities within the three industries, or that EPA will propose such requirements – rather, this announcement indicates that EPA intends to move forward with the regulatory process. That process will include gathering and analyzing additional information to support the Agency's ultimate decision. At that time, EPA will decide whether proposal of requirements for any or all of the classes of facilities within each industry sector is necessary and, if they are, will propose appropriate requirements. If, however, after a careful evaluation of the information for each industry sector, EPA were to determine that requirements under CERCLA section 108(b) are not necessary, EPA would propose not to impose requirements. In other words, this document does not constitute a rulemaking. It merely indicates the initiation of the rulemaking process rather than being the culmination of such a process.

Dated: December 1, 2016.

Gina McCarthy,
Administrator.
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